

# **Thomas Hobbes's Theory of Crime and Punishment**

Signy Thora Gutnick Allen

Submitted in partial fulfilment of the requirements of the Degree of Doctor of  
Philosophy

School of History, Queen Mary University of London  
2016

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## **Abstract**

This thesis argues that over the course of his political writings Thomas Hobbes developed a complex yet coherent theory of crime and punishment. His account was designed not only as an element of his theory of the state, but also in response to a set of early modern debates concerning the nature of punishment in contractarian political thought. This argument challenges the claims, frequently advanced in the critical literature, that Hobbes was uninterested in the problem of crime, that his account fails to provide his sovereign with a right to punish at all, or that he considered punishment to be a non-civil activity located in a version of the state of nature. I claim by contrast that Hobbes's accounts of the origins and location of the right to punish, of the purpose of punishment and of the nature of crime demonstrate that Hobbesian punishment is characterised by retained citizenship, due process and legal rights. Hobbes's theory of political obligation draws a clear distinction between the punishment of criminals within the state, and the treatment of rebels and enemies outside it. As a result Hobbes is able to reconcile his commitment to subjects' inalienable right to self-defence with a sovereign right to punish criminals. In addition to providing an account of this foundational aspect of Hobbes's political theory, the thesis uses Hobbes's discussion of crime to shed light on a number of related aspects of his work. In particular it argues that, once we have properly understood his criminology, we have strong reasons to reject any suggestion that he defends a right of rebellion.

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## Acknowledgements

It is a pleasure to thank the many people who have encouraged and supported me over the course of writing this thesis.

In my first weeks as an undergraduate I attended a talk by Quentin Skinner about the frontispiece of *Leviathan*. I could not have asked for a better or more inspiring introduction to the history of political thought, and it has been both an honour and a joy to have had Professor Skinner as my supervisor on this project.

As a PhD student I have benefited enormously from being part of the School of History and the Centre for the Study of the History of Political Thought at Queen Mary University of London. Richard Bourke generously provided comments on the thesis as a whole, and Georgios Varouxakis also offered guidance and mentorship.

For their comments, challenges and suggestions I should also like to thank Alan Cromartie, A.P. Martinich and the members of the European Hobbes Society, in particular Adrian Blau, Johan Olsthoorn, Robin Douglass, Eleanor Curran and Arash Abizadeh. Jason Peacey supervised the MA thesis which laid the foundations for my arguments about Hobbes on treason. I would also like to thank my examiners, Hannah Dawson and Eric Nelson, for their probing and detailed responses to my project, and for all of their immensely helpful questions and comments.

My doctoral studies were funded by a three-year Principal's Studentship awarded by the School of History, without which I would not have had the chance to engage in this research. The School also provided generous funding to attend and present at conferences, for which I am grateful. As a result of this support I was able to present work in progress at the 2013 Berkeley Graduate Conference in the History of Political Thought, the 2013 QMUL- University of Freiburg Graduate Exchange and

the 2014 American Philosophical Association Eastern Division Meeting. An award from the Association for Political Thought enabled me to attend and give a paper at the 2015 Political Thought Conference at St. Catherine's College, Oxford. The Newberry Library provided a Renaissance Consortium Grant in 2015 which allowed me to present material from the thesis at their annual graduate conference. My thanks go to all concerned.

I have been lucky to have been able to turn to Julia Nicholls, Joanne Paul, Giorgio Lizzul, Alexandra Chadwick, Lisa Renkin and Ella Harris for advice and friendship.

Finally, thank you to my parents, Tomas and Reva, my brother, Stefan, and my partner, Matthew, for their unfailing love and support.

## Conventions

### *Spelling*

Where modern critical editions are available, I have quoted directly from these. When quoting from sixteenth and seventeenth century publications, I have not modernised the spelling or grammar.

### *Gender*

In line with the authors of the works I cite, I have used 'he' and 'man' throughout. I have also, for simplicity, opted to refer to the Hobbesian sovereign as a single, male, individual. Hobbes was of course aware that sovereigns could be female, and according to his theory they could also consist of a council rather than an individual. However these possibilities do not impact the structure of his argument, and I have therefore set them aside.

### *Bibliographies*

I have included all cited primary and secondary sources in the bibliography. Where sources are anonymous, I have listed them alphabetically according to title. Where works are pseudonymous and their authorship has not been definitively proven, I refer to the pseudonym in the notes and bibliography. I therefore refer to the 'author' of the *Vindiciae, Contra Tyrannos* in the text, and to Stephanus Junius Brutus in the notes and bibliography. Where authorship of such texts has been demonstrated, as in the case of Henry Parker's *Observations*, I have referred to the known author in the text, bibliography and notes. I have attributed the *Horae Subsecivae* to Hobbes in the bibliography and notes, but draw attention to its undecided status in the text itself. Where texts have been re-issued, I have referred in my notes to the edition used. Original publication dates are given in square brackets in the bibliography. Original titles and publication dates of primary sources are provided in the body of the text where relevant, with English titles in square brackets.

### *Names*

In the bibliography and notes I refer to authors' names, rather than noble titles. In the text itself names and titles are used interchangeably. Thus Edward Hyde, Earl of Clarendon is referred to as Edward Hyde in the notes and bibliography, and as Clarendon in the body of the text. Titles such as 'Sir', 'Saint' and 'Reverend' have been dropped.



## Introduction

Thomas Hobbes's political theory is perhaps best known for his grounding of civil obligation in the consent of those who institute the state. The commonwealth, in this account, is the result of man's realisation that life without authority is unsustainable. He thus provides his readers with a profoundly voluntaristic story about the origins of human society. But Hobbes did not believe that this self-imposed curtailment of natural liberty would be enough to ensure law-abiding behaviour. Throughout his works he consistently emphasised the importance of punishments and rewards in encouraging good citizenship. We read that 'for the common peace, it is *necessary* that some *right* of using the *Sword* for punishment, be transferred to *some Man or Counsell*.'<sup>1</sup> Elsewhere we find that it is not simply a right, but also a duty of the sovereign to 'make a right application of Punishments, and Rewards',<sup>2</sup> for the 'Artificiall Chains, called *Civill Lawes*...[are] in their own nature but weak, [and must] be made to hold, by the danger...of breaking them.'<sup>3</sup> Indeed, a commonwealth without punishment would be no commonwealth at all; without such coercive power, men cannot be expected to uphold their covenants, and life in the state would not represent a true departure from the state of nature.<sup>4</sup>

Despite the foundational element that punishment plays in the Hobbesian commonwealth, Hobbes's theory of crime and punishment has been neglected in comparison with other aspects of his thought. When this element of his work is examined, it is rarely treated as a coherent whole; features of the theory, such as the origins of the practice or its purpose, are examined in isolation from each other,

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<sup>1</sup> Hobbes 1983, p. 94.

<sup>2</sup> Hobbes 2012, pp. 542, 276.

<sup>3</sup> Hobbes 2012, p. 328.

<sup>4</sup> Hobbes 2012, p. 220.

resulting in the impression that Hobbes's concerns in this area are incidental to his thinking. We find readers arguing that Hobbes was largely unconcerned with the problem of crime,<sup>5</sup> while others have characterised his account of the punishment right as 'perplexing' and 'evasive', possibly indicative of an unfinished draft.<sup>6</sup> It is frequently asserted that Hobbes fails to provide his sovereign with a true right to punish at all, with the consequence that his commonwealth falters from the moment of its establishment.<sup>7</sup> Others have suggested that elements of his theory, such as his focus on deterrence, are most interesting for their supposed anticipation of later criminological theory.<sup>8</sup> Above all, numerous readers have found it difficult to reconcile the account of the sovereign right to punish with the theory's emphasis on the inalienable right to individual self-preservation. As a result, the status of punishment as a civil institution is frequently called into question, with readers insisting that this practice, which Hobbes so consistently associates with the state, in fact takes place in the state of nature.<sup>9</sup> Hobbes's accounts of punishment and of the representative nature of the sovereign, it is implied, are inconsistent. As a result the punishing sovereign and the punished individual must be locked in a battle which is, to all intents and purposes, the same as the natural war of all against all. Crime, on this reading, becomes a means of exiting the state, with any breach of the civil laws understood as a repudiation of the covenant itself.<sup>10</sup>

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<sup>5</sup> Hoekstra 1997, p. 624; Lloyd 2009, p. 295.

<sup>6</sup> Ristroph 2009, p. 615; Norrie 1984, p. 302; Hünig 2007, p. 232.

<sup>7</sup> Norrie 1984, p. 308; Schrock 1991, p. 854; Hyde 1995, p. 265.

<sup>8</sup> Cattaneo 1965; Norrie 1984; Norrie 1991.

<sup>9</sup> Kaplan 1956; Cattaneo 1965; Gauthier 1969; Ackerman 1976; Tuck 1979; Sanderson 1989; Watkins 1989; Heyd 1991; Lloyd 1992; Bobbio 1993; Cohen 1998; Sorell 2001; Brettschneider 2007; Ristroph 2009; Ribeiro 2011.

<sup>10</sup> Kaplan 1956, pp. 391-2; Gauthier 1969, p. 148; Sanderson 1989, p. 101; Finkelstein 2001, p. 357; Kahn 2004, p. 3; Ristroph 2013, p. 202.

It is the contention of this thesis that Hobbes did develop a full and coherent theory of crime and punishment. He addresses not merely the purpose of punishment, but provides a clear account of its origins. Furthermore, he relates both of these accounts to his analysis of human motivation and the purpose men have in joining together to create the state. I argue that this theory of punishment consistently emphasises its civil qualities: it is grounded in the rule of law and due process, and hence on the preserved political relationship between the punishing sovereign and the punished subject. As such, it can helpfully be contrasted with Hobbes's account of hostility, both in the pre-political state of nature and also, more importantly, in the international sphere.

While a proper understanding of this theory is crucial given its role in underpinning the Hobbesian commonwealth, examining his discussion of crime and punishment also yields insights into a number of related areas of his political philosophy. Once we take Hobbes at his word that punishment is meted out to *citizens*, we can better understand his presentation of those individual rights which are retained despite the institution of the commonwealth. The nature of these true liberties of subjects has been frequently misunderstood and mischaracterised. They are not, I argue, the basis of a political right to rebel against the sovereign. But nor are they politically irrelevant liberty rights which can be taken as entirely distinct from the covenant authorising the sovereign. Instead, they are best understood as instances of inalienable self-representation. They demonstrate that while Hobbes's commonwealth is grounded in political representation, he did not believe that it was a necessary component of every aspect of civil life.

In addition to a theory of punishment, Hobbes also provides a detailed account of the nature and origins of criminality. Furthermore, his discussion of the errors of

reasoning which might lead individuals to commit crime is also instructive in relation to his theory of human motivation more broadly: in analysing his explanation of the elements of criminal dispositions, we find that the problem of providing subjects with reasons to obey the law is embedded within his civil project at the deepest level. His primary categorisation of men, according to their internalisation of the principle of justice, is not exclusively related to the problem of obligation and sedition. It also serves as an explanatory key to the problem of law-breaking within society.

The questions Hobbes addressed through his account of crime and punishment thus go to the heart of his work. In designing his penology Hobbes needed to present his readers with an institution consistent with his explanation of a state created through the wills of men aware of their own vulnerability. His account, therefore, is complex precisely because the problem of how to balance the existence of a harm-inflicting practice such as punishment with a theory of the state as designed to protect individual security is itself a difficult one. With the increasing appeal of social contract theory in the seventeenth century, it is unsurprising that the problem of explaining and justifying state punishment was one that generated debate among theorists of the state. Hobbes's solution to the problems raised by these debates, I suggest, were unique, and his focus on the topic indicates that already from the origins of modern state theory the problems associated with crime and punishment were understood as some of the key questions any voluntaristic theory of the state had to answer.

To assess Hobbes's argument and the debates to which he was responding, I have adopted an approach which is both textual and contextual. My primary focus is on Hobbes's political writings: *The Elements of Law* (1640), *De Cive* (1642) and

*Leviathan* (1651).<sup>11</sup> *Leviathan*, as we shall see, contains the richest exposition of Hobbes's thoughts on crime. It is also the text that, due to the introduction of the concept of the authorised sovereign, most clearly demonstrates the way in which Hobbes's theory of punishment was formed by his theory of the state. I therefore devote most space to Hobbes's final iteration of his political theory. Nonetheless, one of the aims of this thesis is to demonstrate that these questions were inherent in Hobbes's thinking about politics and human community from the start. Wherever possible, I compare his treatment across the texts, mapping the development of his thought.

It is important to add that Hobbes's discussion of crime and punishment is not confined to these texts. There are important insights to be gained from his accounts of representation, deliberation and the will in *Of Liberty and Necessity*, *Thomas White's De Mundo Examined*, *An Answer to Bishop Bramhall's Book, called 'The Catching of the Leviathan* and *De Homine*.<sup>12</sup> Finally, Hobbes's legal treatise *A Dialogue Between a Philosopher and a Student, of the Common Laws of England* and his history of the

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<sup>11</sup> All English quotations from *De Cive* are taken from the unauthorised 1650/1 translation made by Charles Cotton and published under the title *The Philosophical Rudiments*. This translation includes the additional explanatory notes Hobbes provided in the 1647 edition of *De Cive*. I have largely relied on the English *Leviathan* (1651), with occasional discussions of the phrasing in Hobbes's Latin translation (1668) where this represents a relevant departure from, or addition to, the original. On Cotton's translation see Malcolm 2002, pp. 234-58.

<sup>12</sup> While composed in 1645 as part of a debate with Bishop John Bramhall, *Of Liberty and Necessity* was only published in 1654. For a discussion of this debate and of the work's publication history see Chapter 7 of Jackson 2007. *Thomas White's De Mundo Examined*, also known as *De Loco, Motu et Tempore*, was composed in 1642-3 as a response to the *De Mundo Dialogi Tres* (1642) by Catholic priest Thomas White. It remained unpublished until 1973. On these two texts see Chapter 4 of Edwards 2013. On Hobbes's relationship with White see Peacey 1998, pp. 250-1 and Collins 2002, p. 312. *An Answer to Bishop Bramhall's Book, called 'The Catching of the Leviathan*, while composed in 1668 in response to Bramhall's 1658 critique, was only published in 1682. On the political context which may have prompted Hobbes's 'remarkable burst of productivity' in the late 1660s see Parkin 2007, pp. 240-2. While elements of *De Homine*, intended as the second section of the trilogy *The Elements of Philosophy*, were composed in 1645, the work itself was only published in 1658. Martinich 2005, pp. 13-5.

civil wars, *Behemoth*, or *The Long Parliament* restate a number of his principles and contrast them with contemporary political and legal practice.<sup>13</sup>

As an interpretive principle, I have attempted to explain developments in Hobbes's thought primarily by reference to other elements of his theory; this approach has been particularly useful in explaining his shifting accounts of the relationship between self-preservation rights and the origin of sovereign rights, and between deliberation, responsibility and crimes arising from 'sudden passion.' However, where contradictions have arisen within individual texts, I have opted for the interpretation which best preserves the coherence of the theory as a whole, rather than one which requires that Hobbes was entirely consistent in his use of language. This commitment is particularly important when we come to the discussion of the operation of subjects' true liberties in a commonwealth founded upon an authorisation covenant.

In addition to analysing Hobbes's works, I also aim to contextualise his comments by outlining the range of approaches to punishment available to early modern social contract theorists. I am particularly interested in how early modern thinkers attempted to justify punishment as a human institution in the context of political authority generated through agreement. I therefore do not explore divine right or patriarchal theories about the origin of the right to punish; such theories do not address the crucial questions motivating Hobbes's exploration of the topic and therefore do not shed light on what he felt was at stake.<sup>14</sup> As I suggest in Chapters 2

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<sup>13</sup> It is unknown when Hobbes composed the *Dialogue*; Alan Cromartie suggests that the main part of the text was written between 1668 and 1673. The full work was not printed until 1681, though an unauthorised manuscript of 'A Dialogue betwixt a Student in the Common laws of *England*, and a Philosopher' was in circulation by 1673. Cromartie 2005, pp. xv-xvii. Paul Seward argues that *Behemoth* was also written in or around 1668. Hobbes was unable to acquire a licence for print publication and the work was only printed posthumously in 1682, though a manuscript of the text was available through his publisher, William Crooke, from 1673. Seward 2010, pp. 6-16.

<sup>14</sup> It is also for this reason that I do not fully explore and contextualise Hobbes's discussions of divine punishment. As Hobbes makes clear in *Leviathan*, God derives his authority not from a covenant, but as a consequence of his overwhelming power. His right to punish sin, therefore,

and 6, contractarian thinkers were deeply aware of the ways in which punishment rights could be used to justify resistance to the state. In rendering punishment a purely civil institution, therefore, Hobbes was engaged not only in designing the elements of a functional commonwealth, but also in a specifically political intervention which delegitimised any link between punishment, war and political resistance.

Chapter 1 discusses Hobbes's definitions of crime and punishment; these contain within them the key features of the theory which he then outlines over the course of his works. Notably, crime and punishment are both defined in relation to a legal sphere distinct from the sovereign's political power as the authorised representative of the commonwealth. Hobbes sets out a number of situations in which ordinarily criminal behaviour is excused, as when a starving individual is forced to steal to survive. Excuse, in Hobbes's theory, is not associated with mercy, but rather with a correct understanding of the nature of the commonwealth-instituting covenant; men cannot alienate their right to self-preservation, and so the law and sovereign have no jurisdiction in times of genuine necessity.

This link between the purpose of the state and its jurisdictional limitations is also a feature of the second chapter, which explores the origins of the right to punish. Here I argue that punishment is a unique example of a non-authorised sovereign right. Indeed, it is better defined as a practice, rather than a specific new right arising from the creation of the commonwealth. It is grounded in the right to all things retained by the sovereign, but to be understood as punishment it must be applied according to the strictures of natural law. While punishment is not an instance of authorised sovereign behaviour, nor is it a practice which takes place in a version of the state of nature. As

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comes from the same source, and as a result the nature of divine punishment is significantly different from that which is found in the human commonwealth. Hobbes 2012, p. 558. At the same time, Hobbes did occasionally draw parallels between human and divine punishment, instances which I note at various points in the thesis.

a result, both the individual right to self-preservation and the legal processes which limit the scope of sovereign action are maintained. Subjects are neither expected to authorise their own punishment, nor to undergo any and all suffering as a result of breaking the law. This is a situation which arises, I argue, from the nature of the authorising covenant; subjects are specifically disallowed from authorising actions which will directly harm them, and it is a result of this caveat that they retain a right to resist punishment.

Chapter 3 considers Hobbes's account of the origins of crime. Criminals, I argue, can be characterised by their disregard for the law and its coercive powers. In acting upon this disregard they demonstrate their rejection of civil equality, according to which all subjects are equal before the sovereign's laws. Both criminals and those who avoid crime primarily out of fear of punishment thus show themselves to be 'foolish unjust men' because they act according to personal determinations of good and evil rather than common civil standards of justice.

The question of human motivation also arises in the fourth chapter, which investigates Hobbes's theory of deterrence. Punishment, according to Hobbes, is only capable of rendering certain actions, such as crime, less appealing to individuals. It cannot be used to assuage the feelings of anger experienced by crime's victims. Nor can it act as a vehicle for demonstrating community disapproval. As a result, Hobbes, in contrast to his contemporaries, is committed to a purely forward-looking theory of punishment which makes no reference to standards of justice beyond those determined by the sovereign. However, Hobbes also recognised that a deterrent model of punishment is unable to provide reasons for obeying the law in general, rather than individual laws. Therefore it must be supplemented by a system of public instruction



which will teach the people that it is in their best interest to maintain the commonwealth through consistently just behaviour.

Finally, I suggest that, while both crime and punishment should be understood as taking place within the state, Hobbes does have an account of when and why individuals can be expelled from the commonwealth. Therefore the fifth chapter explores Hobbes's account of treason. In conflating the legal categories of enmity and treason, Hobbes provided a theory of obligation in direct contrast with that espoused by both the English common law and by jurists of international law. Moreover, his denial of the existence of the *ius gentium*, a separate sphere of law governing war and the treatment of foreigners, allows him to draw a strong distinction between the commonwealth as a site of legal protection and security, and the international sphere as marked by potentially dangerous hostility. He thus emphasises that while crime can be accommodated within the state, once an individual rejects the civil project altogether they are stripped of any legal protections and enter into a state of war with their former sovereign.

Once we have understood the nature of rebellion in Hobbes's theory, we are better equipped to understand why it is impossible to construct a right to rebel against the sovereign from his list of the true liberties of the subject. In Chapter 6 I provide an account of the ways in which Hobbes's theory of state personality was designed specifically to meet the challenges posed by sixteenth and seventeenth century theories of popular sovereignty. I then provide an analysis of his true liberties of the subject which demonstrates that it is precisely because of the criminal/enemy distinction that a right to rebel cannot be constructed from them.

It is a consistent theme of social histories of early modern crime and punishment in England that the application of punishments was often at odds with the

directions laid down by the law.<sup>15</sup> Theory and practice, therefore, need to be examined as related but distinct aspects of the early modern experience. In providing a full discussion of one early modern political theory of crime and punishment, I suggest that understanding early modern attitudes also requires an awareness of how these were considered at an abstract level. Hobbes's account of crime and punishment demonstrates that, with the influence of theories of natural rights and the social contract, the nature of these concepts was subject to radical re-categorisation in this period.

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<sup>15</sup> Lenman and Parker 1980; Sharpe 1980; Beattie 1986; Herrup 1987; Sharpe 1987; Walker 2003.

# Chapter 1: Hobbes's Definitions of Crime and Punishment

## Introduction: The Necessity of Definition

Among the many criticisms of Edward Coke offered in the *Dialogue*, one of them in particular cuts to the heart of the penal enterprise. Coke, according to Hobbes, 'no where defineth a Crime, that we may know what it is.'<sup>16</sup> Furthermore, he suggests that this conceptual imprecision means that, in Coke's understanding of the law, an 'odius name sufficeth...to make a Crime of any thing.'<sup>17</sup> The implication is that the term 'crime' is not properly treated by common law thinkers as an interpretative legal category that can be used to explain why an action is wrong. Instead, it is used as something closer to a moral descriptor; crimes are bad actions, rather than actions being bad because they are crimes. Hobbes's rejection of this indeterminacy was part of a larger project, in which he aimed to offer clear definitions of those terms which refer to positive law. This was an endeavour upon which he placed increasing emphasis over the course of his works. The critique of Coke in the *Dialogue*, a text which took aim at the claim by common lawyers to have unique access to legal reason, is thus particularly well placed. By the time he came to write it Hobbes had already set out an alternative theory in which crime was, rather than simply another term for 'odius' action, defined in terms of the law-making power of the sovereign. Both crime and punishment are, according to Hobbes, primarily civil categories; they should

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<sup>16</sup> Hobbes 2005, p. 111.

<sup>17</sup> Ibid. Hobbes is correct to note that while Coke refers to 'crimes', as when he indicates that the *Third Part of the Institutes* will discuss 'Criminall Causes', and 'felonies and other crimes', he nowhere provides a definition of the term itself. In his assertion that Coke considers crimes 'odius', Hobbes may be referring to a passage at the end of the Preface to the *Third Part of the Institutes*, where Coke writes that 'We shal first treat of the highest, and most heinous crime of *High Treason*...and of the rest of them in order, as they are greater and more odious then others' or to Coke's discussion of bail, where he refers to 'odious and heynous crime'. Coke 2003, pp. 949, 950, 951, 842.

therefore be understood in relation to subjects' obligations derived from the commonwealth institution, and to the sovereign's rights gained thereby.

Coke was not peculiar in not employing 'crime' as a distinct category of action. As G. R. Elton has pointed out, the term, while in use in the early modern period, had no specific legal meaning, with actions against the criminal law instead classified as either felonies, on the one hand, or as trespasses and misdemeanours on the other.<sup>18</sup> The dictionaries of the period, such as Henry Cockeram's *The English dictionarie*, did not place the term in a legal context; the 1642 edition, for instance, defines 'Crime' as 'a fault or an offence committed' and 'Criminall' as 'faulty'.<sup>19</sup> Michael Dalton's handbook *The Coutry Iustice* (1618) contains no entry for crime as such, while John Cowell's legal dictionary *The Interpreter* (1607) also lacks an entry for the term. The same is true of Thomas Blount's *Nomo-lexicon, a law-dictionarie* (1670) and of John Rastell's *Les terms de la ley* (1642).<sup>20</sup> Elton, therefore, appears to be correct in suggesting that modern historians, when they compile and analyse statistics relating to crime rates in the early modern period, are 'studying...something like an artificial construct' and applying terminology which would not have been recognised by the period's judges and jurists.

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<sup>18</sup> Elton 1977, p. 2. This basic division was one which reflected both the presumed mental state of the accused, with 'felony' indicating a malicious intent, and the penalties assigned, with those who had committed felonies subject to capital punishment. Herrup 1987, pp. xi, 3; Forster 1654, p. 4. Regarding the difficulty of defining early modern crime, see also Herrup 1987, p. 1 and Sharpe 1984, p. 4.

<sup>19</sup> Cockeram 1642. Cockeram's dictionary was popular, with twelve editions appearing between 1623 and 1670. See Considine 2010, p. 24.

<sup>20</sup> Dalton 1618; Cowell 1607; Blount 1670; Rastell 1642. Hobbes had access to such legal handbooks. The Chatsworth 'Old Catalogue' contains an entry for the 1618 edition of Dalton's *The Coutry Iustice*. In addition, it cites *A profitable booke of Maister John Perkins felowe of the inner temple treating of the lawes of England* (1560), Anthony Fitzherbert's *The newe booke of iustices of peas* (1541) and William Lambarde's *Eirenarcha: or the Office of the Justices of the Peace* (1581). In line with contemporary usage, none of these works employ the terminology of 'crime'. Talaska 2013, pp. 79, 102, 83, 94.

Hobbes's own strong insistence on the term's usefulness, and his critique of the common law's failure to employ 'crime' as a means of describing illegal action, is therefore a part of his broader critique of the legal thought and procedure of his age. His focus on clear definitions is of a piece with his larger project of rendering criminal justice in his own commonwealth both comprehensible and predictable through a singular emphasis on sovereign right and power.<sup>21</sup> Punishment could thus be as strong a deterrent as possible, but the legal system would also ensure that citizens were given every chance to demonstrate that their actions were not only in line with the natural law but also, and more importantly, consistent with the will of the sovereign. The legal system, in failing to systematically define its terms, becomes an unpredictable tool in the hands of civil authority, an error which Hobbes was keen to rectify in his own theory.

### **Hobbes's Definition of Crime**

While Hobbes occasionally refers to 'crime' in the *Elements*,<sup>22</sup> his first systematic definition of such acts is to be found in *De Cive*. Here he writes that illegal action, or 'fault', 'is that, which a man do's, omits, says, or wills, against the reason of *the City*, that is, contrary to the Lawes.'<sup>23</sup> Already, therefore, we see Hobbes collapsing the traditional categories of felony and trespass in favour of an all-encompassing division between actions in accordance with the law, and those which are against it. In this

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<sup>21</sup> See McBride 2007, p. 50 for a reading of *Leviathan* which frames it as a response to the Book of Job; Hobbes's political theory, according to this interpretation, aims to to 'create a political order that is based upon awesome power yet not opaque to human reason.'

<sup>22</sup> These mentions are cursory and assume understanding on the part of the reader. Thus we read that true mathematicians are 'absolved of the crime of breeding controversy', that because citizens' property is to be made available to the sovereign 'the land of one man may be transferred to another, without crime of him from whom it was taken' and that while the expression of signs of hatred and contempt towards accused criminals is common, it is, properly speaking, 'no part of the punishment for their crime'. Hobbes 1969, pp. 67, 140, 86.

<sup>23</sup> Hobbes 1983, p. 178.

account Hobbes himself declines to use the specific term ‘crime’; throughout his explanation he employs the terms ‘fault’ [*culpa*] and ‘sin’ [*peccatum*], defining an ever narrower category of sins in order to provide a definition of actions against the sovereign’s laws.<sup>24</sup> Thus we read that ‘*Sinne*, in its largest signification, comprehends every *deed*, *word*, and *thought*, against right reason’ but that ‘when we speak of *the Lawes*, the word *Sinne* is taken in a more strict sense.’ This sense, or condition, is whether an action is ‘*blameable*’, a standard which in turn requires the determination of whose reason, regarding that blame, will be taken as authoritative.<sup>25</sup> Sin as illegal action, therefore, requires a universal standard of right reason, and thus the presence of a sovereign capable of setting down law.<sup>26</sup>

By the time Hobbes came to write *Leviathan* he was ready to employ the terminology of crime more consistently, although the categorisation of crime as a specific type of sin remained. Thus we read in Chapter 27 that ‘A CRIME, is a sinne, consisting in the Committing (by Deed, or Word) of that which the Law forbiddeth, or the Omission of what it hath commanded. So that every Crime is a sinne; but not every sinne a Crime.’<sup>27</sup> He provides a similar definition in the *Dialogue*, where we again read that ‘All Crimes are indeed Sins, but not all Sins Crimes... a Crime is such a Sin as consists in an Action against the Law.’<sup>28</sup> This shift in vocabulary is reflected in his Latin terminology; the Latin *Leviathan* (1668) discusses *crimen* as a type of

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<sup>24</sup> Hobbes 1984, p. 213.

<sup>25</sup> Hobbes 1983, pp. 177-8.

<sup>26</sup> At various points in the text Hobbes does use the term ‘crime’, as when he refers to the ‘*crimen laesae maiestatis*’ and in his explanation for the necessity of punishing crimes with adequate severity. Hobbes 1983, pp. 190, 204.

<sup>27</sup> Hobbes 2012, p. 452. *Leviathan* contains numerous uses of the term ‘crime’; in addition to the title of Chapter 27, ‘Of CRIMES, EXCUSES, and EXTENUATIONS’, the text contains over 40 examples.

<sup>28</sup> Hobbes 2005, p. 42.

*peccatum*, rather than simply indicating, as we saw in *De Cive*, that the same term, *peccatum*, can mean different things in different contexts.<sup>29</sup>

Alongside this increasing use of the term ‘crime’, we also see an increased emphasis on such acts being, necessarily, sins of action due to the limitations of human knowledge. Thus we read that to ‘intend to steale, or kill, is a sinne, though it never appeare in Word, or Fact: for God that seeth the thoughts of man, can lay it to his charge: but till it appear by some thing done, or said, by which the intention may be argued by a humane Judge, it hath not the name of Crime.’<sup>30</sup> The same emphasis on action, rather than intention, is present in the *Dialogue*’s statement that a definitional element of crime is that those who commit it can be ‘Accused, and Tryed by a Judge, and be Convinced, or Cleared by Witnesses.’<sup>31</sup> By the time we come to the later texts, therefore, crimes are not merely actions against the law, but also actions which can be determined to be so according to judicial processes.

This is not merely a consequence of the distinction between having intentions and acting upon them. As a result of this understanding of crime, certain instances of ‘wickedness’ are not to be classified as crimes at all, as they cannot consist of recognisable acts. In the *Dialogue*, for instance, Hobbes argues that it is impossible to comprehend the ‘nature’ of the crimes of those accused of witchcraft,<sup>32</sup> a position in

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<sup>29</sup> Hobbes 2012, p. 453.

<sup>30</sup> Hobbes 2012, pp. 452-4. We see the same division between crime as the subject of human punishment and sin as subject to divine punishment in the work of Hugo Grotius. Grotius 2005, p. 995.

<sup>31</sup> Hobbes 2005, p. 42. Hünig 2007, p. 217 argues that limiting the definition of crime to ‘outward acts’ demonstrates Hobbes’s ‘systematic distinction between divine and earthly justice’ which was ‘fundamental for the secularization of penal law.’ This was not a particularly original position for Hobbes to take, however. As Annabel Brett has pointed out, in the early modern Thomist tradition there was a ‘common insistence that the obligation of the law covers only...the ‘external acts’ of the human being’, a position bolstered by Aquinas’s insistence that, in contrast with the divine, human judgment was incompetent with regards to interior acts. Brett 2011, pp. 144, 148. See also Maus 1991 on Renaissance discussions of the inaccessibility of other minds, and Tuckness and Parrish 2014, pp. 154, 100 which notes that Hobbes’s definition of crime as outward action was ‘largely in line with the post-Augustinian Christian political tradition’ for precisely this reason.

<sup>32</sup> Hobbes 2005, p. 91

line with his statement in *Leviathan* that witches have no ‘reall power.’ Witchcraft, being the result of ‘false believe’, cannot be considered a crime. While those claiming such power are ‘justly punished’, this is only the case when such individuals show a demonstrable ‘purpose’ to do ‘mischiefe’, and it is for this mischief that they are subject to penal procedures.<sup>33</sup> We see Hobbes making the same argument with regards to heresy. In the Appendix to the Latin *Leviathan* he argues that it is ‘inequitable’ to punish a heretic unless he has specifically ‘contradict[ed] the words of the Creed’; ‘false reasoning’ or potential ‘implications’ alone are not punishable acts.<sup>34</sup> Perhaps most importantly, the law is unable to punish those breaches of the natural law which do not result in actions; in Chapter 3 we shall explore the possibility that men can be both unjust, according to the natural law, and yet consistently law-abiding. The sovereign has no recourse through the criminal law against such forms of injustice. The Hobbesian commonwealth thus requires a robust legal system aimed at the determination of the legality of actions, and in which judges have good reasons to convict the accused.<sup>35</sup>

It is this emphasis on crime as an actual, provable breach of the laws, rather than humanitarian concerns, that lies behind some of Hobbes’s advice regarding investigative procedures.<sup>36</sup> In Chapter 14 of *Leviathan* he writes that a man is not to be required by the state to provide evidence against those ‘by whose Condemnation’

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<sup>33</sup> Hobbes 2012, p. 34.

<sup>34</sup> Hobbes 2012, p. 1214. On this point see Lloyd 1997, pp. 49-50.

<sup>35</sup> Related to this emphasis on action is Hobbes’s definition of sin as the formed intention of breaking the law, rather than merely the contemplation of sinful acts. See Kow 2005 and Hanin 2012, p. 81. As Hobbes notes in *Leviathan*, to ‘be delighted in the Imagination onely, of being possessed of another mans goods, servants, or wife, without any intention to take them by force or fraud’ is no breach of the natural law. Hobbes 2012, p. 452. See also Hobbes 2012, p. 108 on the blamelessness of mere thoughts, and Hobbes’s denunciation of the inquisition on the grounds that ‘it is an error to extend the power of the law, which is the rule of actions onely, to the very thoughts, and consciences of men, by examination... notwithstanding the conformity of their speech and actions.’ Hobbes 2012, p. 1096.

<sup>36</sup> See Cattaneo 1965, p. 296 and Hünig 2007, p. 228.



he ‘falls into misery, as of a Father, Wife, or Benefactor.’ This is not to prevent the suffering of those pressed in this way; rather, ‘the testimony of such an Accuser, if it be not willingly given, is praesumed to be corrupted by Nature’ and hence cannot be trusted as an accurate description of the actions of the accused. For the same reason, ‘Accusations upon Torture, are not to be reputed as Testimonies’. Hobbes notes that any response in such cases ‘tendeth to the ease of him that is Tortured; not to the informing of the Torturers: and therefore ought not to have the credit of a sufficient Testimony.’<sup>37</sup> Hobbes’s insistence upon the neutrality of arbitrators is derived from the same concern; he argues that ‘in a controversie of *Fact*’ the judge should ‘give no more credit to one [witness], than to the other.’<sup>38</sup>

### **Excuses and the Jurisdiction of the Law**

While Hobbes’s account of the difference between sin and crime might suggest that we can understand crime as simply the breach of the laws, his description of possible extenuations and excuses for acts normally considered criminal indicates that the motivations of the accused criminal are also relevant. Because crime is a civil category, possible only upon the introduction of civil law, its definition is in turn governed by the initial covenant creating the commonwealth. It is therefore to be understood in the context of the the built-in protections and exceptions contained therein. Crime is a breach of the law which subjects have themselves, through the

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<sup>37</sup> Hobbes 2012, p. 214. As Langbein 2006, p. 73 points out, it was in fact common for English jurists to condemn the use of investigative torture, and a point of pride that it did not feature in the common law. He notes, for instance, that according to Sir Thomas Smith it was commonly held in England that the use of torture was ‘servile’. However, such concerns did not necessarily emerge out of concern regarding the truth of coerced confessions, and Langbein points out that between 1540 and 1640 there were over 80 instances of either the Privy Council or the monarch ordering the use of torture for investigative purposes. On the investigative uses of torture in civil law procedures, see Cohen 2010, pp. 42-3, 65.

<sup>38</sup> Hobbes 2012, p. 238.

authorisation of the sovereign, willed into existence. As such, all crime can be considered both a form of injury, in that it is the breach of a contract, and absurdity, in that it contradicts one's previous, and authoritative, will.<sup>39</sup> Crucially, criminal behaviour motivated by absolute physical necessity is not only excused, but is placed outside the classification of crime altogether. Hobbes's definition of a crime as an act against the law, therefore, must be understood as operating within his already circumscribed definition of what the law is able to address.

There are two means by which intention, or other contextual information, can bear on the legal process: excuse and extenuation. In the case of the former, the act is 'is proved to be [no crime] at all' while the latter applies when 'the Crime, that seemed great, is made lesse.'<sup>40</sup> For an act to be excused, or re-classified as entirely non-criminal, it must be determined that the law has no jurisdiction: '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 the fact committed once against the Law, if he that omitted it be obligated to the Law, can be no other than a Crime.'<sup>41</sup> By framing excuses in this way Hobbes is able to continue to define crime in relation to the law, while nonetheless allowing a range of legal, though ordinarily criminal, behaviour.

The most striking case of this principle is the description of those actions which are permitted in order to preserve one's life. Hobbes repeatedly argues that 'no Law can oblige a man to abandon his own preservation.'<sup>42</sup> Thus it is unsurprising that if a 'Man is assaulted, and fears present death' any action he takes to protect himself,

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<sup>39</sup> On this point see Taylor 1938, p. 409.

<sup>40</sup> Hobbes 2012, p. 466.

<sup>41</sup> Hobbes 2012, p. 468.

<sup>42</sup> Ibid.

including ‘wounding him that assaulteth him...to death’, is ‘no Crime.’<sup>43</sup> However, not only is the state to excuse direct self-defence against an assailant, but it should also tolerate any actions undertaken when compelled ‘by the terrour of present death’ or when a man is ‘captive, or in the power of the enemy.’<sup>44</sup> Thus being ‘destitute of food, or other thing necessary for...life’ is enough to excuse any action, provided that all other means of self-preservation, including charity, have been exhausted.<sup>45</sup> In such cases the fact of having committed theft, for instance, cannot alone categorise an individual as a criminal.<sup>46</sup>

As a result, crimes must, by definition, be not only acts against the law, but also actions undertaken by those whose bodily protection and basic existence are assured by the state. Hobbes was not unique among early modern natural law theorists in permitting a degree of illegal action for reasons of self-preservation. As John Salter has noted, we see a similar form of excuse in the work of Hugo Grotius. However, as Salter points out, Grotius’s position is based on a two-fold argument. While in cases of dire need a common right to the earth’s resources is reinstated at the individual level, rendering legal the theft of others’ *surplus* goods, the more common basis for excuse is that the criminal justice system contains within it the possibility of mercy dependent upon circumstance.<sup>47</sup> Hobbes’s account, in which actions normally considered theft are rendered legal due to a revocation of the law’s jurisdiction, is therefore a departure from this approach. Instead, it is grounded in Hobbes’s theory of

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<sup>43</sup> Hobbes 2012, p. 464.

<sup>44</sup> Hobbes 2012, p. 468.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Salter 1999, p. 211. As Salter emphasises, according to Grotius theft in dire circumstances generally remains theft; the question is whether such injustice, given the circumstances, should be punished.

the purpose of the state, and is intimately linked to his wider project of creating an adaptive relationship between subjects' rights and their security.<sup>48</sup>

Actions are also only to be classified as criminal if individuals have the capability to be aware of the law and the punishments for its transgression. Hobbes argues that 'the Law whereof a man has no means to enforme himself is not obligatory,'<sup>49</sup> but it is important to stress that, in such cases, the defect must be found in the sovereign's actions, or lack of them, and not in those of the subject. As Hobbes notes regarding ignorance as an excuse, 'the want of diligence to enquire, shall not be considered as a want of means' to know the law's content and the consequences for law-breaking.<sup>50</sup> Beyond cases in which the sovereign has failed to make the law known, Hobbes essentially restricts the excuse of ignorance to children and madmen; such individuals, Hobbes notes, lack 'reason enough for the Government of [their] own affairs' and thereby demonstrate that they also lack the reason to understand the natural law.<sup>51</sup> As a consequence they cannot be expected to understand the civil law and its punishments.<sup>52</sup>

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<sup>48</sup> It is important to stress that even though the acts of subjects under genuine threat are placed, in this model, outside the law, this does not have an equivalent impact on their political status more broadly. See Chapters 2 and 6 for a fuller discussion of the true liberties of the subject, and the ways in which the Hobbesian state is able to accommodate both them and subjects' citizenship.

<sup>49</sup> Hobbes 2012, p. 468.

<sup>50</sup> *Ibid.*

<sup>51</sup> Hobbes 2012, p. 468.

<sup>52</sup> The case of the sovereign who is negligent in informing his subjects of the law, and that of the individual whose actions are excused due to their necessity, suggest that the absence of legal obligation is a temporary or contingent condition. But Hobbes's comments about children and madmen indicate that it can also be a permanent one. This treatment of their otherwise criminal behaviour is consistent with their relationship to the commonwealth more broadly:

Over natural fooles, children, or mad-men there is no Law, no more than over brute beasts; nor are they capable of the title of just, or unjust; because they had never power to make any covenant, or to understand the consequences threof; and consequently never took upon them to authorise the actions of any Sovereign, as they must do that make to themselves a Common-wealth. And as those from whom Nature, or Accident hath taken away the notice of all Lawes in generall; so also every man, from whom any accident, not proceeding from his own default, hath taken away the means to take notice of any particular Law, is excused, if he observe it not; And to speak properly, that Law is no Law to him. Hobbes 2012, p. 422

We must also draw a distinction between those acts which Hobbes classifies as crimes, and those which are acts of treason or rebellion.<sup>53</sup> As we shall see in Chapter 3, in some cases there appears to be some affinity between the ideas or dispositions which prompt crime, and those which are found among the treasonous. However Hobbes consistently notes that the positive law of the state has no jurisdiction over those who have rejected sovereign authority, and hence actions which make this rejection clear are not crimes in the ordinary sense of the term.

Finally, there is one further case in which ordinarily criminal behaviour is to be excused: when it is committed by the sovereign. This is an absolute and foundational element of Hobbes's theory, and it is worth examining Hobbes's reasons for this blanket exemption. This is based on an opposition between law and power which is fundamental to any understanding of his account of crime. As we saw, to commit a crime is to break the law of the commonwealth. This 'Civill Law' has for its author the '*Persona Civitatis*, the Person of the Common-wealth'<sup>54</sup> Later in the same text Hobbes repeats, in the course of criticising common law principles, that 'it is not that *Juris prudentia*, or wisdom of subordinate Judges; but the Reason of this our Artificiall Man the Common-wealth, and his Command, that maketh Law.'<sup>55</sup>

What is immediately notable is that laws are attributed to the sovereign only indirectly: he has the power to make laws, but because he undertakes this act through

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<sup>53</sup> See Chapter 5 for a fuller discussion of the legal status of rebels and traitors.

<sup>54</sup> Hobbes 2012, p. 414

<sup>55</sup> Hobbes 2012, p. 422. In the *Dialogue* Hobbes omits this distinction, writing that 'A Law is the Command of him, or them that have the Sovereign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, and what they must forbear to do.' This seems to be part of a larger project in this text of conflating the sovereign's two possible grounds for action, law and power, as the Philosopher goes on to claim that 'whereas they sometimes say the King is bound, not only to cause his Laws to be observ'd, but also to observe them himself; I think the King causing them to be observ'd is the same thing as observing them himself: For I never heard it taken for good Law, that the King may be Indicted, or Appealed, or served with a Writ, till the long Parliament practised the contrary upon the good King *Charles*.' Hobbes 2005, pp. 31, 38-9.

his representative function, these laws are not his commands as such, but are rather attributed to the person of the commonwealth. The ability of the sovereign to avoid accusations of law-breaking is attributed to this power to make law as the commonwealth's representative, rather than to a personal claim of extra-legal status in everything he does. This distinction means that, in some cases, the person of the sovereign can indeed be accused of acting against his own commands. As Hobbes explains in Chapter 21

If a Subject have a controversie with his Soveraigne, of debt, or of right of possession of lands or goods, or concerning any service required at his hands, or concerning any penalty, corporall, 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 Soveraign.<sup>56</sup>

However, Hobbes notes that the accusation that the sovereign has acted against his own law is only possible when the 'Soveraign demandeth [something illegal] by force of a former Law, and not by vertue of his Power' and 'declareth thereby, that he requireth no more, than shall appear to be due by that Law.' If, on the other hand, the sovereign acts on the basis of his 'Power', then there is 'no action of Law: for all that is done by him in Vertue of his Power, is done by the Authority of every Subject, and consequently, he that brings an action against the Soveraign, brings it against himselfe.'<sup>57</sup> It is this power which is again referenced in Chapter 27 in order to argue that the sovereign can never be accused of crime: the sovereign, 'having power to make, and repeale Lawes...may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he

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<sup>56</sup> Hobbes 2012, p. 342. If we take the complainant in such cases to be the individual in question rather than the state, is possible that such suits are not to be understood as *criminal*. However, the vague nature of Hobbes's comments leaves open the possibility of interpreting the sovereign's failure to punish according to the laws of the commonwealth as a criminal act.

<sup>57</sup> Hobbes 2012, p. 342.

was free before.<sup>58</sup> Thus the sovereign's immunity comes not from some specific grant associated with his position, but rather from his ability to choose to act according to a parallel source of authority, his authorisation, and from his associated political power to change the laws.<sup>59</sup>

In framing the power of the sovereign in this way, Hobbes provides an autonomous legal sphere which is, at least theoretically, distinct from the political. With the category of crime defined according to the standard of the former, rather than according to the more nebulous criteria of the sovereign's individual wishes, we see a number of constraints placed on the definition of crime. These constraints come about not only through the mechanism of limiting the law's jurisdiction, but also according to legal process itself.<sup>60</sup> Hobbes writes that 'No Law, made after a Fact, can make it a Crime...a Positive Law cannot be taken notice of, before it be made; and therefore cannot be Obligatory.'<sup>61</sup> While the sovereign's authorised power to change law may protect him from punishment, it cannot serve as a justification for the illegitimate charging of subjects. The requirement that crime be defined according to legal jurisdiction is thus protected from direct sovereign interference.<sup>62</sup>

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<sup>58</sup> Hobbes 2012, p. 416.

<sup>59</sup> Hobbes elsewhere emphasises authorisation as a reason why the sovereign cannot be punished, arguing in Chapter 18 that 'no man that hath Sovereigne power can iustly be put to death, or otherwise in any manner by his Subjects punished. For seeing every Subject is Author of the actions of his Sovereigne; he punisheth another, for the actions committed by himselfe.' Hobbes 2012, p. 270. See also Goldsmith 1996, p. 284 which distinguishes between sovereign acts 'within' the law and those, such as legislating, which are political acts outside the legal sphere.

<sup>60</sup> In making this claim, I am not endorsing the opinion, put forward by Dyzenhaus 2001, Vinx 2012 and Fox-Decent 2012 that the sovereign's legitimacy is predicated on his acting according to the natural laws, but rather suggesting that certain types of sovereign activity can only be understood in relation to these laws.

<sup>61</sup> Hobbes 2012, p. 458. See Bacon 1853, p. 398, which states that 'A law...ought to give warning before it strikes'.

<sup>62</sup> The sovereign, of course, has recourse to the laws of nature if he wishes to legitimately charge an individual according to unwritten law. Hobbes consistently emphasises the point that the laws of nature do not need to be explicitly set out by the sovereign for them to be binding in the commonwealth, as crimes against nature are *mala in se*. As he notes in Hobbes 1983, pp. 176-7, 'the naturall Law although it be disinguisht from the civill...yet so farre forth as it relates to our actions is civill.' As a result, the civil law 'punisheth those who knowingly and willingly doe actually transgresse the *lawes of nature*.' The sovereign is not entirely free to act as he wishes,

Hobbes's definition of crime, as acts against the law where the law has full jurisdiction, suggests that the category of individuals capable of committing crimes is itself governed by the same principle. We have already seen this with regard to children and madmen unable to join the commonwealth; their actions are not crimes because they never agreed to be governed by the state's laws. However, in a very different context the question of who was subject to the law was also a live topic in the early modern period. Francisco Suárez notes that because 'law is made for general application within a given territory' it is therefore 'binding, for the period of their residence, on all persons actually living therein.'<sup>63</sup> According to this model, in which legal obligation is determined territorially, the possibility that one's actions are to be understood as criminal is based on residency, rather than on political or legal status within the commonwealth. In contrast, according to Hobbes's theory legal obligation arises not simply from residency, but from the voluntary subjection of individuals to the state. Thus Hobbes defines civil laws as the 'Lawes, that men are therefore bound to observe, because they are Members, not of this, or that Common-wealth in particular, but of a Common-wealth.'<sup>64</sup> Obedience to civil law becomes a precept of natural law only through the act of covenanting: 'every subject in a Common-wealth,

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however. Punishments for breaches of the natural law are to be based upon 'the *law of naturall equity*', and once a given crime against natural law is punished, this equity demands that future crimes be treated in the same manner. A body of written law concerning the natural laws will thus grow over the course of a sovereign's rule, providing guidance to subjects and binding future legal decisions. On the role of equity in ensuring consistency in punishment see Lobban 2012, p. 60. See also Hobbes 1969, pp. 189-90 and Hobbes 2005, p. 116. Hünig 2007, p. 220 argues that Hobbes's position is that 'apart from the positive law there is no action *per se* that has the character of crime.' It is important to stress, therefore, that actions against the natural law are indeed crimes, but only following the establishment of the commonwealth and only according to the sovereign's definition of breaches of the natural law. Murder is always a crime, for instance, but only according to the definition the sovereign provides; killing as such is not necessarily criminal. See Hobbes 1983, p. 101.

<sup>63</sup> Suárez 1944, p. 403. Gentili 1933, pp. 48-49 makes the same point regarding domicile and legal jurisdiction. However, see Grotius 2006, p. 137 for the argument that state law does not bind foreigners (though, as we shall see in Chapter 2, this does not mean that they are not liable to punishment).

<sup>64</sup> Hobbes 2012, p. 414.



hath covenanted to obey the Civill Law...and therefore Obedience to the Civill Law is part also of the Law of Nature.’<sup>65</sup>

This account of legal obligation would appear to restrict the duty to obey the laws, and hence the possibility of committing crime, to citizens rather than mere residents. However, Hobbes elsewhere endorses something similar to Suárez’s account. In a discussion of exile he argues both that ‘If the Sovereign Banish his Subject; during Banishment, he is not a Subject’ and that ‘whosoever entreteth into anothers dominion, is Subject to all the Laws thereof; unless he have a privilege by the amity of the Sovereigns, or by special licence.’<sup>66</sup> While residency alone might not be enough to require obedience, in many cases it can be taken as an implicit covenant of the type forming the Hobbesian commonwealth by acquisition.<sup>67</sup> This in turn suggests that in most cases residents of a state will experience legal obligation, and will be understood to be committing crimes should they fail to act according to the laws. The law’s jurisdiction, therefore, applies territorially, but Hobbes achieves this by linking territory to authority: men accept to be bound by the laws of the commonwealth in which they reside, and in doing so, they can be understood to be subjects.

### **Hobbes’s Definition of Civil Punishment**

As with crime, Hobbes’s definition of punishment receives its fullest treatment in *Leviathan*, and it is again through the essential premises of the term that we find Hobbes elaborating his standards of criminal justice. In Chapter 28 punishment is defined as follows

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<sup>65</sup> Hobbes 2012, p. 418.

<sup>66</sup> Hobbes 2012, p. 346.

<sup>67</sup> Hobbes 2012, p. 306.

*An Evill inflicted by publique 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.*<sup>68</sup>

Within his definition, Hobbes already points to the elements of a full theory of punishment: the location of the right ('publique Authority'); whom it is directed towards (men who have committed a 'Transgression of the Law'); and its purpose (to render men 'disposed to obedience'). These conditions will be further explored in Chapters 2, 3 and 4, which will address the origins and location of the right to punish, Hobbes's explanation of the origins of crime, and his argument for a deterrent practice. However, before these aspects of his theory can be fully explored, it is necessary to outline the ways in which this definition limits the acts which can be performed under the title of 'punishment.'

Civil punishment, in Hobbes's account, can be performed only by one who has political authority over the punished individual, and thus who the individual in question himself recognises as authoritative.<sup>69</sup> As a result, punishment can only take place in the context of an instituted commonwealth, and can be found neither in the state of nature, nor in a pre-political human community. This is a departure from the two major contractarian traditions of punishment which will be discussed in Chapter 2: the Thomist theory of community rights, and the Grotian model of individual rights. Punishment, in these theories, can be carried out outside of the state, at the level of both state and non-state actors. According to the latter, the right to punish is naturally inherent in all men and therefore political authority is not required for punishment to take place; all that is necessary is that it be inflicted upon the guilty by the innocent.<sup>70</sup>

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<sup>68</sup> Hobbes 2012, p. 482.

<sup>69</sup> See Hobbes 2012, pp. 484, 486 for two consequences of this requirement: suffering inflicted by an usurper is not to be understood as punishment; nor is hostility undertaken against the sovereign.

<sup>70</sup> Grotius 2005, p. 955.

In the case of the former, punishment is identified with the natural right to self-defence; it can therefore be carried out against those who do not recognise a given community's will as authoritative.<sup>71</sup> Thus a major implication of Hobbes's definition is that punishment must be a civil practice; the relationship between punisher and punished is that between a subject and sovereign.

Linked to this civil relationship is the requirement that punishment can only follow a judgement which all citizens take as authoritative and legitimate precisely because of their political status. Hobbes expands on this requirement elsewhere in Chapter 28, noting that 'the evill inflicted by publique Authority, without precedent publique condemnation, is not to be stiled by the name of Punishment; but of hostile act; because the fact for which a man is Punished, ought first to be Judged...to be a transgression of the Law.'<sup>72</sup> As we saw above, for a crime to have taken place, the law labelling it as such must have already been in existence at the time of the supposedly criminal act. This requirement is carried over into the discussion of punishment, with the stricture that 'Harme inflicted for a Fact done before there was a Law that forbad it, is not Punishment...for before the Law, there is no transgression of the Law [and] Punishment supposeth a fact judged, to have been a transgression.'<sup>73</sup> Moreover, the punishment inflicted upon an individual must itself conform to this judgement: if 'a Punishment be determined and prescribed in the Law it selfe, and after the crime committed, there be a greater Punishment inflicted, the excesse is not Punishment.'<sup>74</sup> Punishment is thus presented as being governed by the autonomous legal sphere noted above; to be understood as such, it must be regulated according to a series of promulgated laws setting out the rules men should obey, the procedures leading to

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<sup>71</sup> Aquinas 1972a, pp. 83-5.

<sup>72</sup> Hobbes 2012, p. 484.

<sup>73</sup> Hobbes 2012, p. 486.

<sup>74</sup> Ibid.

conviction, and the nature of the harm to be inflicted. Actions against those who have not been determined to be guilty, therefore, are by definition not punishment.

Finally, Hobbes insists that punishment must consist in the infliction of suffering upon the punished individual. The examples Hobbes provides of possible punishments, and those which he argues cannot be considered as such, might initially suggest that Hobbes envisages two distinct means of inflicting ‘evill’: the infliction of suffering, as in some forms of corporeal punishment, and the deprivation of a good, as when the punished individual is deprived of liberty, money or lands. However, we will see, not all deprivations of liberty or goods are to be understood as punishment. Even deprivation, therefore, must require some active suffering if it is to be considered punishment.<sup>75</sup>

Hobbes sets out two major types of punishment, covering a number of practices. Corporal punishment consists of that which is ‘inflicted on the body directly.’ This is a wide category, including capital punishment as well as those acts which are not themselves intended to cause death, including ‘Stripes, Wounds, Chains, and any other corporall Paine.’<sup>76</sup> The deprivation of physical liberty inherent in imprisonment, when the latter is intended as punishment rather than as ‘the safe custody of a man accused’, also falls under the corporal label.<sup>77</sup> Hobbes envisages such deprivation of liberty as encompassing an array of activities, reflecting the full

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<sup>75</sup> As Hünig 2007, p. 222 points out, the definition of punishment as the infliction of harm was standard at the time, and would remain so throughout the Enlightenment. See for example Grotius’s definition of punishment as ‘*the Evil that we suffer for the Evil that we do*’. Grotius 2005, p. 949. Hobbes does not include a standard Thomist element of the definition of punishment, that it be suffering inflicted contrary to the will of the condemned. See Calvert 1992, p. 263 and Koritanksy 2012, p. 105 for discussion of this element of the Thomist definition. However, given his distinction between punishments and privileges, discussed below, it seems clear that this is an implicit element of his theory, at least in its later iterations.

<sup>76</sup> Hobbes 2012, p. 488.

<sup>77</sup> Hobbes 2012, p. 490. The case of imprisonment indicates the importance of sovereign intention in distinguishing punishment not only from hostility, but also from protective actions. While imprisonment might feel like punishment, it is not necessarily to be understood as such.

gamut of early modern punishment practices. He notes that sites of imprisonment can include ‘a House, which is called by the general name of Prison; or an Iland, as when men are said to be confined to it; or a place where men are set to worke, as in old time men have been condemned to Quarries, and in these times to Gallies; or be it a Chaine, or any other such impediment.’<sup>78</sup>

However, not all deprivations of corporeal liberty are to be understood as punishment. Drawing on Cicero’s argument in *Pro Caecina* that ‘exile is not a punishment, but a refuge and safe harbour from [it],’ Hobbes argues that a simple change of location, or ‘air’ is, itself, not to be termed an evil.<sup>79</sup> However, through the infliction of what Hobbes considers to be quantifiable loss, exile can become punishment. Exile itself is described as a change of spatial and legal status, rather than the punishment of one who remains a subject. But when it is combined with pecuniary punishment, such as the simultaneous confiscation of lands, it is the latter element

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<sup>78</sup> Hobbes 2012, p. 490. Punitive incarceration had not, by this period, reached the levels it would in the eighteenth century. However Griffiths 2004, pp. 23-4 notes the increasing use, from the mid-sixteenth century onwards, of Bridewells, or houses of correction, as a means of discipline for petty offenders. Between 1576 and 1610 such institutions were opened across England, and typically employed both religious instruction and physical labour. For discussion of punitive imprisonment prior to the establishment of houses of correction, see Carrel 2009, pp. 312-4. Hobbes nowhere cites transportation to colonies as a form of punishment. While this might be expected, with transportation only becoming common in 1718 following the passage of the 1717 Transportation Act, it was already being discussed by the early seventeenth century as a potential means of reforming convicts. William Crashaw, for instance, gave a sermon to this effect before the Virginia Company in London in 1610. While Hobbes was only a member of the Company from 1622, it is possible that he was aware of such discussions. Beattie 1986, pp. 619, 472; Malcolm 2002, p. 54. On English debates over transportation prior to the 1717 Act, see also Herrup 2004. See Hobbes 2012, p. 540 where he recommends that the ‘poor, and yet strong’ are, if unable to find employment in the commonwealth, ‘to be transplanted into Countries not sufficiently inhabited.’ It is important to emphasise, however, that this is not to be seen as a form of suffering, and nor does Hobbes place this transplantation in the context of a legal process or conviction.

<sup>79</sup> Hobbes 2012, p. 492. In this passage Hobbes provides one further reason why banishment is not to be considered punishment. Writing that ‘a Banished man, is a lawfull enemy of the Commonwealth that banished him; as being no more a Member of the same’ Hobbes argues that this change in legal and political status is precisely what prevents pure exile from being considered an example of what is a fundamentally civil practice. See Chapter 5 for a discussion of the different legal status of subjects and enemies, and the difference in treatment that results. On the definition of punishment as a civil practice precluding banishment being understood as punishment see Loxley 2010, pp. 140-1. Cicero 1927, pp. 199-201 argues that ‘Exile is not a punishment’, and notes that as soon as the exile takes on a different political allegiance he loses his Roman citizenship.

which is to be considered punishment. This parcelling out of elements of civil sanction is, it seems, the only way to reconcile Hobbes's more comprehensive stance on exile with his earlier inclusion of '*Exile*' among the categories of punishment.<sup>80</sup> We see the same concern that punishment be felt as an evil, and the danger of this element of punishment being neglected, in Hobbes's second major category of punishment, that which concerned financial penalties.

### **Punishments as Permissions: Hobbes's Warning to Sovereigns**

Alongside these corporal punishments, Hobbes lays out the possibilities for pecuniary punishment consisting of fines or the deprivation of other goods such as lands. Just as he contrasted the penal loss of liberty from that caused by a need for safety, we also see Hobbes distinguishing the disciplinary loss of goods from that which is carried out by the state for other purposes. One obvious case is taxation.<sup>81</sup> However, there is a more ambiguous case and one which, Hobbes suggests, can lead to a sovereign inadvertently undermining his own authority. Hobbes writes that 'in case the Law, that ordaineth such a punishment, be made with design to gather mony, from such as shall transgresse the same, it is not properly a Punishment, but the Price of priviledge, and exemption from the Law'; such practices, he writes, indicate that the given action is one which the law does 'not absolutely forbid...but only to those that are not able to pay the money.'<sup>82</sup> Clearly in such cases the aim is not deterrence, as is required by the definition of punishment, cited above. Defining the activity which requires such

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<sup>80</sup> Hobbes 2012, p. 488. Hyde 1995, p. 267 challenges this categorisation, arguing that as banishment constitutes a restriction on liberty, it should itself be considered a punishment.

<sup>81</sup> Hobbes 1969, p. 140; Hobbes 1983, p. 101; Hobbes 2012, pp. 536-8.

<sup>82</sup> Hobbes 2012, p. 488.

purchasing of privileges as a crime is not enough to render the subsequent cost a punishment.

Hobbes here draws a contrast with cases where ‘a Law exacteth a Pecuniary mulct, of them that take the name of God in vaine’; in such cases, ‘the payment of the mulct is not the price of a dispensation to sweare, but the Punishment of the transgression of a Law undispensable.’<sup>83</sup> However, while in the case of natural or divine law it should be apparent that the payment required is to be understood as punishment rather than the price of a privilege, in the case of the positive law it is incumbent upon the sovereign to ensure that the distinction is clear. To achieve this Hobbes recommends various strategies; most importantly, if ‘the harm inflicted be lesse than the benefit, or contentment that naturally followeth the crime committed, that harm is not within the definition [of punishment]; and is rather the Price, or Redemption’ of committing a crime.<sup>84</sup> Hobbes is not condemning those rulers who choose to sell such privileges; rather, he is indicating that sovereigns should be clear in differentiating such sales from punishment in order to avoid undermining their own commands.

This is a notable departure from Hobbes’s position in *De Cive*. In the earlier text, he writes that whether fines and other pecuniary measures are to be understood as punishments or simply as the cost of impunity is at the discretion of the sovereign. He notes that ‘there are some who think that those acts which are done against the Law, when the punishment is determined by the Law it selfe, are expiated, if the punished willingly undergoe the punishment.’ A consequence of this mind-set is the perception that ‘by the Law, the fact were not prohibited, but a punishment were set

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<sup>83</sup> Ibid.

<sup>84</sup> Hobbes 2012, p. 484.

instead of a price, whereby a licence might be bought of doing what the Law forbids.’ Such an attitude, Hobbes suggests, breeds the opinion that ‘no transgression of the Law were a sin, but that every man might enjoy the liberty which he hath bought by his own peril.’ While we can read this account as a warning to sovereigns or as broadly condemnatory of those who frame the law in such terms, Hobbes argues that in fact

the words of the Law may be understood in a twofold sense, the one as containing two parts...namely that of absolutely prohibiting, as, *Thou shalt not doe this*; and revenging, as, *he that doe this, shall be punished*; The other, as containing a condition, for example, *Thou shalt not doe this thing, unless thou wilt suffer punishment*; and thus, the Law forbids not simply, but conditionally. If it be understood in the first sense, he that doth it, sins, because he doth what the Law forbids to be done; if in the second, he sins not, because he cannot be said to doe what is forbidden him, that performs the condition; For in the first sense, all men are forbidden to doe it; in the second, they only who keep themselves from punishment.<sup>85</sup>

Most strikingly, Hobbes concludes that ‘what sense the Law is to be taken, depends on the will of him who hath the Sovereignty.’<sup>86</sup>

Hobbes’s thinking on punishment thus appears to harden between *De Cive* and *Leviathan*, with punishment much more clearly distinguished from permissions in the later text. As Chapter 3 will explore, Hobbes was, by the time of writing *Leviathan*, increasingly concerned with the potential for civil disruption posed by the powerful and wealthy. His rejection of the possibility of a legal system which separated crime from sin and conflated punishment with the cost of a privilege may have been part of this larger project.

Indeed, it is also in the later text that Hobbes introduces a further example of the ways in which the sovereign might undermine his own authority by misunderstanding the nature of punishment; it is unsurprising that again the example

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<sup>85</sup> Hobbes 1983, p. 182.

<sup>86</sup> *Ibid.*



is one which particularly applies to the upper classes. Hobbes here appears to take seriously the risk, suggested in *De Cive*, that under some circumstances subjects might come to feel that, for the wealthy and powerful, ‘no transgression of the Law were a sin.’ The case of the duel is, when read in the context of Hobbes’s increasing concern over the importance of clear definitions and their application, a powerful illustration of Hobbes’s understanding that criminal behaviour can be the result of negligence on the part of civil institutions regarding the true nature and function of punishment in the commonwealth.

For Hobbes it was a general principle that the sovereign, if not consistent in the punishing of crimes, was to be seen as partially to blame for future instances of the same act.<sup>87</sup> Such a principle could, theoretically, apply to any criminal act. The example Hobbes gives to illustrate this principle, however, is a distinctly aristocratic one. He notes that, following logically from the previous argument about hope from impunity, ‘those facts which the Law expressly condemneth, but the Lawmaker by other manifest signes of his will tacitly approveth, are lesse Crimes, than the same facts, condemned both by the Law, and the Lawmaker.’<sup>88</sup> In setting out this principle, Hobbes is simply noting what must be the consequences of his earlier statements about the lawmaker as having both legal and personal, or authorised, authority; such confusion cannot be good for either the citizen or for the state. Hobbes notes in such a case the Sovereign is ‘in part a cause of the transgression.’<sup>89</sup>

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<sup>87</sup> Hobbes 2012, p. 472.

<sup>88</sup> Hobbes 2012, p. 474.

<sup>89</sup> *Ibid.* Compare with Cognet 1586, p. 126 which states that ‘A Prince which may punish a fault, and will not, is as much culpable thereof, as if hee had committed it him selfe.’ Cognet, however, appears to view this obligation in terms of the demands of justice, rather than of effective deterrence. Talaska 2013, p. 75 notes that this work is listed in the Chatsworth ‘Old Catalogue’, and would therefore have been available to Hobbes.

In particular, Hobbes notes, ‘the Law condemneth Duells; the punishment is made capitall.’ However, because ‘he that refuseth Duell, is subject to contempt and scorne...and sometimes by the Sovereign himselfe thought unworthy to have any charge, or preferment in Warre’ engaging in this illegal activity is, in such cases, encouraged by the sovereign himself.<sup>90</sup> Hobbes notes that the case of the duel suggests that men should understand that they ought to follow the law rather than the example of their sovereign. He nonetheless raises the real danger that princes, having been raised according to an aristocratic moral code which at times comes into conflict with the civil law, will occasionally act in ways which encourages the enactment of this code at the law’s expense. Sovereigns should thus beware, Hobbes warns in *Leviathan*, of treating punishments as debts, or as less serious than the ‘scorne’ of the person of the ruler; in both cases, the purpose of punishment as a deterrent is set aside, encouraging law-breaking and potentially undermining the institution of punishment itself.

### **Natural and Divine Punishment**

While the definition Hobbes provides of punishment emphasises its civil nature, throughout his works he also uses the term to refer to two further distinct types of punishment: natural, and divine. While these differ from civil punishment in their causes and application, they share some features with the form of punishment outlined in Chapter 28 and it therefore important to briefly consider his use of these terms.

Hobbes is eager throughout his use of the term punishment never to stray too far from the basic features which characterise its civil application. Thus we read,

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<sup>90</sup> Hobbes 2012, pp. 474-6. See Chapter 2 of Peltonen 2003 on attempts to limit duelling in the first half of the seventeenth century.

regarding the punishment of servants by their masters, that the servant ‘holdeth his life of his Master, by the covenant of obedience; that is, of owning and authorising whatsoever the Master shall do.’ It is this agreement which creates the master-servant relationship, and through which the servant experiences the bond of obedience. As a result when the Master shall ‘kill him, or cast him into bonds’ if the servant refuses an order, such acts have the name of punishment.<sup>91</sup> Thus while the punishment of a servant does not conform to the qualification that punishment be carried out by *public* authority, there is nonetheless a relationship of authority between punisher and punished.

Similarly, Hobbes distinguishes between divine/natural and civil punishment on the basis of the authority of the punisher, noting that

whereas to certain actions, there be annexed to Nature, divers hurtfull consequences; as when a man in assaulting another, is himselfe slain, or wounded; or when he falleth into sicknesse by the doing of some unlawfull act; such hurt, though in respect of God, who is the author of Nature, it may be said to be inflicted, and therefore Punishment divine; yet it is not contained in the name of Punishment in respect of men, because it is not inflicted by the Authority of man.<sup>92</sup>

To present such negative consequences of human activity as punishment, Hobbes needs to locate an authority with respect to man to whom punishment can be attributed. It is in Chapter 31 that natural punishment is most fully explored, and we learn that ‘seeing Punishments are consequent to the breach of Lawes; Naturall Punishments must be naturally consequent to the breach of the Lawes of Nature; and therefore follow them as their naturall, not arbitrary effects.’<sup>93</sup> Natural punishment, then, is not

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<sup>91</sup> Hobbes 2012, p. 314.

<sup>92</sup> Hobbes 2012, p. 484.

<sup>93</sup> Hobbes 2012, p. 572. Note that this should be distinguished from the civil punishment of actions against the natural law; Hobbes here appears to be largely thinking of sins which the civil law either has no jurisdiction to punish, as in the case of negligent sovereigns, or has no desire to, as in the case of intemperance. In such cases, the nature of the natural laws as counsel, rather than command, is prioritised.

only practised by a figure who has authority over man, God, but it is directed against those who break the law of nature. Thus we read that ‘Intemperance, is naturally punished with Diseases; Rashnesse, with Mischances; Injustice, with the Violence of Enemies; Pride, with Ruine; Cowardise, with Oppression; Negligent government of Princes, with Rebellion; and Rebellion, with Slaughter.’<sup>94</sup> Indeed, non-criminal crimes by subjects, mentioned above, may themselves be a case of the natural punishment of sovereign negligence. Chapter 30 of *Leviathan* notes that ‘whereas many men, by accident unevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes of the Common-wealth.’<sup>95</sup> If the sovereign fails to provide such charity, he may be ‘punished’ by subjects employing their natural right to self-preservation by theft; a breach of the natural laws is thus punished by natural right, all within the framework of the state.

However, there is one element of natural punishment which distinguishes it strongly from its civil counterpart: while the punishment of crimes by the sovereign is recommended as a crucial element of good governance, it is not, strictly speaking, required. Punishment only follows from the creation of a system of positive law within the commonwealth, and its application is determined by the representative of the state according to the principle of deterrence. As will be explored in Chapter 4, it is this aim of punishment which provides the impetus for the practice; while it can only, by

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<sup>94</sup> Hobbes 2012, p. 572. Holmes 2010, p. 382 suggests that the concept of natural punishment can help us to make sense of Hobbes’s assertion that political systems should be designed to avoid not only ‘too great Liberty’ but also ‘too much Authority.’ Hobbes 2012, p. 4. As Holmes notes, ‘Authority can be excessive...if it artless and manages to alienate [against the sovereign] potential sources of support and cooperation’. One of the annotations to the 1647 edition of *De Cive* makes a similar point, noting that ‘Princes sometimes forbear the exercise of their Right, and prudently remit somewhat of the act, but nothing of their Right.’ Hobbes 1983, p. 99. Emphasis mine. The relationship between punishment and prudence will be explored in Chapter 4.

<sup>95</sup> Hobbes 2012, p. 538.

definition, be directed towards the guilty, it is not this status alone which provokes their punishment. Moreover, punishment only follows a legal conviction; it is not, therefore, necessarily linked to actual guilt, but rather to its public judgement. This is a very different strategy from the one pursued by Hobbes in his account of natural punishment, in which he argues as follows:

There is no action of man in this life, that is not the beginning of so long a chain of Consequences...[in] this Chain, there are linked together both pleasing and displeasing events; in such a manner, as he that will do anything for his pleasure, must engage himselfe to suffer all the pains annexed to it; and these pains, are the Naturall Punishments of those actions, which are the beginning of more Harme than Good.<sup>96</sup>

This model of punishment is thus subtly distinct from the model of civil punishment elaborated most fully in *Leviathan*: it is both closer to the privileges and permissions model presented in *De Cive*, and to a retributive model of punishment in which only the guilt of the individual is relevant to punishment practice.<sup>97</sup>

Hobbes's second model of punishment which has God rather than man for its author is the divine punishment which follows death.<sup>98</sup> Again, we see multiple occasions in which explicit parallels are drawn between civil and divine punishment: divine punishment is intended as a deterrent,<sup>99</sup> and it is consequent to the breaking of divine law. Unlike natural punishment, and similar to its civil counterpart, the enactment of punishment is presented as strictly dependent upon the will of the punishing authority. We again see the rejection of a model in which punishment is

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<sup>96</sup> Ibid.

<sup>97</sup> Hobbes 1976, pp. 460-1 challenges the notion that natural punishments and rewards are inconsistent: 'even in this life the good fare better than the bad, and there is no art of outstripping others in the gaining of wealth or honours (or anything else in life which may be more delightful than these) more effective than honesty.' The reason people are reluctant to admit this is because men are unwilling to admit their 'own depravity', and hence acknowledge their natural punishments as entirely deserved.

<sup>98</sup> Hobbes's description of divine punishment, according to which sinners experience a second death rather than eternal torment, is famously idiosyncratic. See Hobbes 2012, p. 718. I will not explore this account here. On Hobbes's beliefs about hell, and on other Restoration departures from orthodox views on the subject see Almond 1994, pp. 47-8, 145-54.

<sup>99</sup> Hobbes 1983, p. 80; Hobbes 2012, p. 710.

likened to debt. Thus we read in Chapter 38 that, with regards to salvation, ‘sin cannot be taken away by recompence; for that were to make the liberty to sin, a thing vendible’.<sup>100</sup>

However, despite these similarities, there is one major question regarding civil punishment which simply does not arise when we consider that allotted by God. This is the question of the grounds of the authority of the punisher, and hence of the punished individual’s relationship to his own treatment. As we shall see in Chapter 2, the need to reconcile punishment with a commonwealth-instituting covenant which included an authorisation element led Hobbes to design a complex theory of the origin of the right to punish. In the case of divine punishment, Hobbes is able to forgo this entirely. He writes that ‘The Right of Nature, whereby God reigneth over man, and punisheth those that break his Lawes, is to be derived, not from his Creating them, as if he required obedience, as of Gratitude for his benefits; from from his *Irresistible Power*’.<sup>101</sup> The divine right to punish is purely natural, and is thus both easy to locate and impossible to challenge. As we shall see, neither of these elements is characteristic of civil punishment. While Hobbes designated his Leviathan a ‘Mortall God’, in his definitions of crime and punishment, this mortality was at least as important as any claim to overwhelming power.

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<sup>100</sup> Hobbes 2012, p. 728.

<sup>101</sup> Hobbes 2012, p. 558.

## Chapter 2: Hobbes's Account of the Right to Punish

### Introduction: The Paradoxical Origins of Punishment

When Hobbes sought to explain or clarify an aspect of his political theory which his audience might find counterintuitive, it was not uncommon for him to turn to the example of punishment to illustrate his point. When explaining the consequences of sovereign authorisation in Chapter 18 of *Leviathan*, for instance, he notes that because subjects are 'bound, every man to every man, to Own and be reputed Author of all, that he that... is their Sovereigne, shall do', any man who attempts to overthrow this sovereign is in fact the 'author of his own punishment.'<sup>102</sup> Similarly, when in Chapter 14 Hobbes wants to emphasise that, despite this authorisation, 'no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment' because of the inalienability of the right to self-defence, he offers as proof the fact that in all societies penal authorities 'lead Criminals to Execution, and Prison, with armed men, notwithstanding that such Criminals have consented to the Law, by which they are condemned.'<sup>103</sup>

However, these examples have caused some difficulty for those interested in examining what such statements mean for Hobbes's theory of punishment itself. In particular, questions about the relationship between authorisation and punishment have led to accusations of an incoherence at the heart of the theory, with David Gauthier, for example, suggesting that it constitutes a 'major weakness...which may lead us to suppose that sovereignty cannot be sufficiently founded on authorization.'<sup>104</sup>

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<sup>102</sup> Hobbes 2012, pp. 264-6.

<sup>103</sup> Hobbes 2012, p. 214.

<sup>104</sup> Gauthier 1969, p. 148. Gauthier proposes a modification of the theory, in which all subjects authorise not their own punishment but that of every other citizen, a suggestion which he claims 'preserves the essential character of Hobbes's thought.' In putting forward this modification he argues that this is not a precise reflection of what Hobbes actually wrote, and thus, according to

Thomas Schrock similarly argues that Hobbes's account of punishment and justified resistance results in a situation where, paradoxically, 'The political philosopher of law and order justifies the lawless outrages of the Medellin Cartel.'<sup>105</sup> As the examples above suggest, there are two related aspects of Hobbes's theory of punishment which in particular have suggested that a flaw may be found. One is the origin of the sovereign's right to punish in the context of, in *Leviathan*, the introduction of a new kind of social contract based on authorisation. The other is the right to resist punishment, retained by all subjects despite this authorisation. Both Hobbes's contemporaries and more recent readers have argued that the right to resist punishment crucially undermines the sovereign's ability to punish on both theoretical and practical grounds: to be the 'author', through the authorisation of the sovereign power, of one's own punishment *and* to justly resist such punishment appears to place the punished criminal in a position of psychological absurdity, as well as potentially undermining both the sovereign right and ability to successfully enact punishment.

The situation appears to be further complicated by Hobbes's own statement regarding the origin of the right in Chapter 28 of *Leviathan*, that it 'is not grounded on

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Gauthier, on Hobbes's own terms the explanation provided in the text 'failed.' Gauthier's modification to the theory does not, however, reflect Hobbes's thought as much as he believes. Hobbes is clear in Chapter 28 that 'every man giveth away the right to defend another' *and* agrees to 'assist the Sovereign, in doing hurt to another.' In other words, all men *do* grant the sovereign the right to use either their power or their non-interference to punish others. Thus the punishment right does depend on a common identification of the sovereign as a unique individual with rights attached to his station. However, because the very foundation of the commonwealth is a mutual agreement to each undertake the same initial covenant with regards to the sovereign, this grant cannot be the source of the right to punish as such; to authorise another's punishment is not to authorise one's own. For this element of the authorising covenant see Hobbes 2012, p. 200. Ristroph 2013, p. 191 appears to assume that Hobbes already has in place the type of agreement envisaged by Gauthier, in which one authorises the punishment of others, but not of oneself.

<sup>105</sup> Schrock 1991, p. 856. See also Copp 1980, pp. 588-9 for the accusation that the failure of subjects to authorise punishment indicates that the 'sovereign cannot be said to be authorized by each subject to do whatever is necessary for peace' and Hünig 2007, p. 232 on the alleged 'weakness of Hobbes's rationale for the right to punish.'



any concession, or gift of the Subjects.’<sup>106</sup> This is despite his frequent use of the language of authorisation when referring to the practice, explored below, and despite the presentation throughout his works of punishment as the ultimate sovereign right. In *De Cive* he notes that ‘he that by Right punisheth at his own discretion, by Right compels all men to all things which he himselfe wills... a greater command cannot be imagined’<sup>107</sup>; he frequently argues for the central role in successful governance played by the sovereign’s right and ability to punish law-breakers.<sup>108</sup> A flaw in Hobbes’s theory of punishment, then, would appear to undermine his entire civil project. Moreover, it appears to be a flaw to which Hobbes himself draws our attention with his comments at the beginning of Chapter 28 where he notes that the question ‘by what door the Right, or Authority of Punishing... came in’ is one of ‘much importance.’<sup>109</sup> This question, according to numerous readers of *Leviathan*, has not been satisfactorily answered.

This chapter aims to provide an analysis of the origin of the right to punish in *Leviathan* which is both faithful to the text and nonetheless demonstrates that there is no ‘major weakness’ in the account. It will suggest that to do so requires a fuller understanding of how Hobbes employs the related concepts of transfer of right,

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<sup>106</sup> Hobbes 2012, p. 482. The language of gifting is, in *Leviathan*, specifically linked to the process of authorisation; as will be examined below, the authorisation contract consists in the pledge ‘I Authorise and give up my right of governing my selfe’ to the newly-instituted sovereign.

<sup>107</sup> Hobbes 1983, p. 94.

<sup>108</sup> See Hobbes’s argument in *Leviathan* that ‘before the names of Just, and Unjust can have place, there must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant’; he makes a similar statement in Chapter 21 when he notes that the ‘Artificiall Chains, called *Civill Lawes*... are in their own nature but weak’ but ‘may nevertheless be made to hold, by the danger, though not by the difficulty of breaking them.’ It is in order to ensure that these chains bind that one of the rights of the sovereign cited in Chapter 18 is the right of ‘Punishing with corporall, or pecuniary punishment’ with the aim of deterring individuals from ‘doing dis-service’ to the Common-wealth. In Chapter 30 this right is also shown to be a duty, with Hobbes explaining that it ‘belongeth also to the Office of the Sovereign, to make a right application of Punishments and Rewards.’ Hobbes 2012, pp. 220, 328, 276, 542.

<sup>109</sup> Hobbes 2012, p. 482.

representation, and authorisation, a set of relationships which will be explored here. The chapter uses a close reading of Hobbes's texts and an overview of contemporary accounts of the civil right to punish to demonstrate that the explanation we find in *Leviathan*, in particular, is designed to avoid both internal contradictions within the theory and any appeal to the concept of popular sovereignty.

In putting forward this analysis I will argue against what will be termed the 'Authorisation Hypothesis' and what will be labelled the 'State of Nature Hypothesis.' The first suggests that the right to punish is no different from all other sovereign rights in being authorised by future subjects and wielded by sovereigns in their capacity as civil agents.<sup>110</sup> It encourages us to take at face value statements such as the one opening this chapter, in which criminals are understood to be the authors of their own punishment. While this thesis has gained some support among modern readers, such a reading would force us to understand Hobbes as sacrificing a fundamental feature of his later theory, the inalienable right to self-defence. The chapter will argue that accounts of Hobbesian punishment which argue that authorised punishment is consistent with the right to self-defence have misunderstood the nature of the antinomy

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<sup>110</sup> This remains a minority position in the literature, but is forcefully stated in Yates 2014. Orwin 1975, p. 31 also argues that subjects have authorised their own punishment, reconciling this with the true liberties by arguing that authorisation does not, itself, create obligations with regards to sovereign commands. See also Hood 1964, p. 157 and Sheridan 2011, p. 151 which suggest that subjects are logically able to both authorise the infliction of punishment against themselves and others, and yet resist such punishment when it comes. Pitkin 1964, p. 905 argues that punished individuals, when resisting their sovereign, both authorise their punishment and will their resistance; their exercise of the true liberties of the subject is thus a paradigmatic example of 'disobedience.' The point is repeated at Pitkin 1975, p. 46. This argument appears to entirely ignore the fact that subjects do not merely will to resist punishment but do so, Hobbes repeatedly emphasises, with right. Norrie, 1984, p. 305 makes the ambiguous claim that 'the Sovereign's right to punish...is derived from the prior consent of the individual *via* the social contract.' Norrie does not elaborate on whether this is, as I argue, because punishment is a necessarily civil activity requiring the existence of the commonwealth, or because he believes the punishment right is authorised. See also Norrie 1991, pp. 24, 32 which argues that both punishment as an authorised activity, and punishment as the infliction of a natural right are problematic for Hobbes's political theory.

between these two elements, framing it as a clash of rights when in reality it is a clash of representation.

While I will argue that the case of punishment is a unique instance of non-authorised sovereign action, this should not be taken as an endorsement of the second hypothesis, which posits that as a result of the fundamental incompatibility between punishment and self-defence, punishment is best understood as taking place in a version of the state of nature. This state of nature hypothesis, often found in the literature,<sup>111</sup> takes as its starting point the claim that any civil relationship whatsoever between punished subject and punishing sovereign is impossible because it inevitably results in the kind of absurdity outlined above. Secondly, it suggests that the origin of the right to punish as it is outlined in Chapter 28 means that the right to punish is no different from the sovereign's natural right to violence. As a result of these two elements, the hypothesis asserts, the punishment of subjects triggers a situation in which the subject in question leaves the commonwealth. The punished individual's rightful resistance, therefore, is seen as a manifestation of his regaining the natural rights which were laid down at the sovereign institution. Through challenging the idea that punishment takes place in a version of the state of nature, the chapter demonstrates that while the origin of the right to punish is not directly found in the authorisation of the sovereign, the introduction of a theory of authorisation in *Leviathan* does not stand in the way of a Hobbesian model of punishment that is consistently based on citizenship, due process and legal rights even during the act of punishment itself.

In putting forward this analysis, this chapter makes a further and perhaps bolder claim which has implications not only for our understanding of Hobbesian

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<sup>111</sup> The details of the hypothesis and its various permutations will be discussed in more detail below; major proponents of the state of nature hypothesis include Kaplan 1956; Cattaneo 1965; Gauthier 1969; Ackerman 1976; Tuck 1979; Sanderson 1989; Watkins 1989; Heyd 1991; Lloyd 1992; Bobbio 1993; Cohen 1998; Sorell 2001; Brettschneider 2007; Ristroph 2009; Ribeiro 2011.

punishment, but for his broader political theory as well. In the case of punishment, it suggests, Hobbesian citizenship transcends the obligation/protection relationship upon which it is usually based. Understanding the origins of the right to punish, therefore, can also help us to understand the nature and limits of Hobbesian citizenship.

### **Alternative Models of Punishment: Pre-Social and Pre-Political Accounts**

The question of how to explain the civil sovereign's legitimate right to punish was the subject of much debate among early modern political theorists, both as part of a wider exploration into the origins of sovereignty and its associated rights, and due to an increasing concern with the limits of political obligation. As will be argued below, Hobbes designed a model of punishment which grounded it in a pre-political natural right, but which nonetheless asserted that it could not be found before the creation of the commonwealth. In doing so, he was both rejecting and appropriating from a range of alternative early modern accounts of the origin of the right to punish, a strategy which allowed him to avoid any appeal to a popular right of this nature.

Prior to the publication of *Leviathan*, the assertion that the right to punish was not automatically located in sovereigns, but rather required a form of sovereign empowerment, was put forward by a range of political theorists arguing for various forms of social contract. While Hobbes's account would therefore appear to fit into a well-established tradition, it is important to recognise that for many of these theorists this empowerment did not create a new right, or establish new conditions under which a broad natural right could be expressed and understood in a new way. Rather, they argued for the transfer of a specific punishment-right from individuals or groups to a newly-instituted ruler. Hobbes's assertion in Chapter 28 that punishment must be inflicted by a *public* authority, rather than simply by one who has some authority over

another (a situation possible in the state of nature) is therefore a departure from this well-trodden theoretical path. We can see the contrast by setting Hobbes's theory alongside those presented by Jacques Almain, Francisco Suárez, Hugo Grotius and John Milton. These thinkers, all influential theorists of both natural right and of the origins of sovereign power, reflect the range of schools of thought, from Scholastic to Republican, which appealed to a model based on pre-political right. Hobbes's rejection of this account, therefore, marks a major divergence in the treatment of punishment by the early modern social contract tradition.

In Hugo Grotius's *De Iure Praedae Commentarius* [*Commentary on the Law of Prize and Booty*] (1603) we read that 'the power to punish' is one which does not 'essentially...pertain to the state.' Rather, Grotius argues that because all rights held by the civil magistrate have their origin in the state, and all state rights must in turn come from individuals, 'it is evident that the right of chastisement was held by private persons before it was held by the state.'<sup>112</sup> It is only by recognising the right as natural, Grotius asserts, that we can make sense of the right which states have to punish foreigners. Punishment therefore does not require an established political relationship between punisher and punished. Moreover, he argues that the case of the punished foreigner is evidence that even in the punishment of subjects by their sovereign, the practice's legitimacy does not rely upon the consent of the punished.<sup>113</sup> Tuck suggests that in *De Indis* [*On the Indies*] (composed 1604/5) Grotius develops the right to punish from the universal right to self-preservation. However, by *De Iure Praedae Commentarius* it is clear that punishment is envisaged as a right distinct from that to

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<sup>112</sup> Grotius 2006, pp. 136-7.

<sup>113</sup> Grotius 2006, p. 137. See Grotius 2005, p. 966 for the assertion that this right, when employed by 'private' individuals according to the 'bare Law of Nature' is 'not unlawful' provided that is it employed to punish breaches of the law. On the Grotian account of the the origin of the right to punish, and some of its classical predecessors, see van Nifterik 2009.

self-defence, and one which can be employed by any innocent individual against any wrong-doer, even if the latter does not pose a direct risk to the former.<sup>114</sup>

We see a largely similar argument made by John Milton in his argument, in the *Tenure of Kings and Magistrates* (1649), that the setting up of ‘some authoritie, that might restraine by force and punishment’ was achieved through committing to a chosen magistrate that ‘authoritie and power of self-defence and preservation’ which was ‘originally and naturally’ in every individual. Milton’s explanation of the need for a sovereign authority is to an extent similar to that of Hobbes, as we see in his account of the dangers of each man acting as his ‘owne partial judge.’ However, in taking this natural judgment seriously by emphasizing that prior to the newly-instituted ruler’s jurisdiction each man had the right to ‘execute...justice...by the bond of nature’ the account provided by *Tenure* makes clear that there is a pre-political right to punish.<sup>115</sup> Both Grotius and Milton suggest that the civil authority to punish is of the same type, and not merely a modification or development of, a natural right held by all men, either to punish according to the natural laws or to self-defence. This right is, according to both men, simply alienated through the setting up of organized human community. The common agreement to create a commonwealth sets limits on who may employ their natural right, and in which circumstances, but is not the origin of the right as such.

The case put forward by Grotius and Milton, in which the civil right is grounded in a simple transfer by individuals, is itself a variation of an earlier account found in Scholastic philosophy. Jacques Almain, in his *Tractatus de auctoritate ecclesiae* [*Book Concerning the Authority of the Church*] (1512), writes that, just as

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<sup>114</sup> Tuck 1993, p. 173. On this point see Rigstad 2004, p. 185 and van Nifterik 2009, p. 402.

<sup>115</sup> Milton 1649, pp. 8-9.

an individual has the right to commit those actions which are necessary for his self-preservation, so too does a community have the right to self-defence. In the case of the authority to punish threats to this community, however, the sovereign has not been empowered by each individual on the basis of his or her natural rights, but rather by the community as a whole. While we can already identify elements taken up in Grotius, such as the requirement that a right be located before its transfer to the sovereign, Almain's statement that 'the community confers on the prince the authority to kill those whose life leads to harm to the commonwealth; therefore, that authority is in the community first of all, since no one gives another what he does not have' emphasises that while we might understand this right to be pre-political, it is in no way pre-social. In order for a common defence to be permitted, there must be some commonality to defend.<sup>116</sup>

Francisco Suárez also presents the right to punish as a natural and necessary development of the 'power to govern' a 'perfect community'. The right is understood as an element of the broader power to legislate, a power which Suárez explicitly analyses to determine whether it is to be originally located 'in individual men' or 'in the whole body of mankind, collectively regarded.' While Suárez affirms the latter, it is important to recognise that this only applies to those communities which have consciously come together 'through one bond of fellowship and for the purpose of aiding one another in the attainment of a single political end'; rights are located in unities, rather than in humanity universally understood. Because unities require governance, those rights and powers which enable governance, such as legislation and, therefore, punishment, emerge through the process of community formation itself. Prior to the community's existence, this power is merely a potentiality, which can only

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<sup>116</sup> Almain 1997, pp. 135-6.

be realised within the civil condition. In explaining this somewhat mysterious process, Suárez specifically cites the right to punish as one of ‘several acts which appear to transcend human authority as it exists in individual men.’ In turn, this right can be transferred by the community as a whole to an individual, or group of individuals.<sup>117</sup>

While all of these accounts differ from Hobbes’s, in that the right to punish is, in each, at some point located in a figure other than the sovereign, we can nonetheless draw out some elements of these models which Hobbes may have found appealing. From Almain and Suárez we find the crucial fact that punishment as such cannot exist before a unitary community exists; while the existence of a pre-sovereign unity or community was precisely what Hobbes found himself arguing against throughout his works, the crucial element here is that for punishment to exist, certain social or political conditions must be established. Punishment by definition, for all three men, is the defence of a group, rather than singular self-defence. It must be therefore be carried out in the interest of the group, rather than of particular individuals. While in each case there is an analogy drawn between individual self-defence and punishment, the rights cannot be conflated. Moreover, for both Hobbes and the Scholastics, punishment cannot take place in the state of nature; as a community right, it cannot be enacted outside the bounds of a formally constituted community. However, this is not to say that Hobbes’s theory has no parallels with the model presented by Grotius and Milton. While Hobbes is clear that there can be no punishment before the establishment of the state, he nonetheless grounds the sovereign’s right in a natural right rather than in a newly-created right, a model whose transcendental overtones places it at odds with Hobbes’s own self-proclaimed scientific approach.

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<sup>117</sup> Suárez 1944, pp. 365-78. On the distinction between the natural, individual right to self-defence and the civic, community right to punish in Suárez’s thought see Reichberg 2013, pp. 189-91.



Despite employing elements of each of these models, Hobbes was clear that the right to punish could not be employed either against the civil sovereign himself or without his express authority. Both the pre-political and the pre-social models discussed above were explicitly linked to these possibilities: the Grotian (and, later Lockean) model allows for the punishment of others on an individual's own authority, while the Scholastic and Miltonian models deliberately maintained a right for the community to act in its own defence against a tyrant if required. Hobbes's account of punishment, then, seems designed to defang the more political elements of early modern theories of punishment, a move which required considerable finesse once we take into account his theory's pre-existing commitments.

In designing his account of the right to punish, Hobbes was both concerned with protecting individual true liberties, and hence with maintaining the right to self-defence even in the case of legitimate punishment, and with precluding the possibility of any non-sovereign individual or group holding the same right.<sup>118</sup> It was this former requirement which particularly troubled Hobbes's fellow royalists. Edward Hyde, Earl of Clarendon, for instance, rejected the very foundations of the Hobbesian sovereign's right to punish, arguing in *A Survey of Mr. Hobbes His Leviathan* (1676) that the right is 'indubitably inherent in the office of being Sovereign, and inseparably annexed to

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<sup>118</sup> Aside from the general point that there can be no punishment, and hence no right to punish, prior to the establishment of the commonwealth, Hobbes also took aim specifically at the argument that an individual right to punish, the *ius zelotarum*, was found among the people of Israel. In the Review and Conclusion of *Leviathan* Hobbes writes that because 'amongst the Israelites it was a Positive Law of God their Sovereign, that he that was convicted of a capitall Crime, should be stoned to death by the People' such executions were not the result of 'Private Zeale' but of 'Publique Condemnation'. He concludes by insisting that 'there is nothing...in any...part of the Bible, to countenance Executions by Private Zeal.' Hobbes 2012, pp. 1136-8. On anti-monarchical discussions of the use of private zeal in precisely this period, see Dzelainis 2002. See for example Anthony Ascham, who claimed in his 1649 work *Of the Confusions and Revolutions of Governments* [sic] that 'such a totall resignation of all right and reason as Mr. Hobbes supposes, is one of our morall impossibilities, and directly opposite to that antient *Ius zelotorum* among the Jewes.' Ascham 1649, p. 121.

it by God himself.’<sup>119</sup> He nonetheless suggests that the theory would have been improved on its own terms if Hobbes had, ‘when he had the draught of the whole Contracts and Covenants’, inserted one ‘by which every man should transfer from himself the right he had to defend himself against public Justice, tho not against private violence.’<sup>120</sup> This was a common position among the members of the Great Tew circle with whom Hobbes associated in the early 1640s, and was put forward by, among others, Dudley Digges in *The unlawfulness of subjects taking up arms* (1643).<sup>121</sup> However, as Richard Tuck has emphasised, this transfer of right was, while being the source of the obligation not to resist punishment, not the origin of the right itself. Along Grotian lines, these men considered the right to be an individually-held natural one.<sup>122</sup> As we shall see, Hobbes would, over the course of his works also take up and then abandon elements of this royalist position.

### **Punishment and Resistance Before Authorisation: The Accounts in the *Elements of Law* and *De Cive***

*Leviathan* contains the most detailed account of the origin of the right to punish, the definition of punishment, and the retained rights of subjects, including the right to resist punishment. However both the *Elements* and *De Cive* also provide explanations of the origins of the sovereign’s rights as being grounded in the mutual agreement of subjects. In these two earlier texts, this agreement consists in a simple transfer of rights

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<sup>119</sup> Hyde 1995, pp. 265-6.

<sup>120</sup> Ibid. In the suggestion that Hobbes should have required subjects to give up the right to resist in order to properly empower the sovereign, we see the assumption that the rights to punish and resist punishment are necessarily contradictory. See Hyde 1995, p. 234, and Filmer 1995, p. 10.

<sup>121</sup> Digges 1643, pp. 4-5.

<sup>122</sup> On this point see Chapter 5 of Tuck 1979.

from subjects to the sovereign.<sup>123</sup> Thus in the *Elements* we read that political union comes about when ‘every man by covenant [to all other men] oblige himself to some one and the same man... to do those actions, which the said man...shall command them to do; and to do no action which he or they shall forbid, or command them not to do.’<sup>124</sup> As a result of this covenant, ‘he that is to command may by the use of all their means and strength, be able by the terror thereof, to frame the will of them all to unity and concord amongst themselves.’<sup>125</sup> Because the aim of this union is security, Hobbes notes that whatever is necessary for this end is to be transferred to the sovereign; because ‘the wills of most men are governed only by fear’ the erecting of a power of coercion is crucial.<sup>126</sup> The creation of this power ‘consisteth in the transferring of every man’s right of resistance against him to whom he hath transferred the power of coercion.’ As a result, ‘no man in any commonwealth whatsoever hath right to resist him, or them, on whom they have conferred this power coercive...supposing the not-resistance possible.’<sup>127</sup>

Hobbes does not at this point elaborate upon what the limits of this possibility might be; an earlier statement in the text about the nature of contracts more broadly, in which we read that ‘a covenantee [is not] to understand the covenanter to promise impossibles’,<sup>128</sup> is the closest Hobbes comes in the *Elements* to defining a right to

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<sup>123</sup> In the *Elements* Hobbes distinguishes between relinquishing and transferring rights by noting that to relinquish a right is simply to declare that one will ‘no more do that action, which of right [one] might have done before’ while to transfer a right is specifically not to resist or hinder the individual to whom one has transferred the right in their enjoyment of it. Thus to relinquish a right to enter a building is simply never to enter it again; to transfer the right is much stronger, as one must not only never enter it, but not prevent the entry of the person to whom you have transferred your right. Hobbes 1969, p. 75.

<sup>124</sup> Hobbes 1969, p. 103.

<sup>125</sup> Hobbes 1969, p. 104.

<sup>126</sup> Hobbes 1969, p. 111.

<sup>127</sup> Ibid.

<sup>128</sup> Hobbes 1969, p. 81.

resist the sovereign's commands on the basis of self-defence.<sup>129</sup> We might of course read 'impossibles' as indicating the impossibility of quietly acquiescing to punishment, but Hobbes does not emphasise the point; if there is a right to resist harm carried out by the sovereign, it is not an explicit one.<sup>130</sup> In *Elements*, therefore, there does not appear to be the same problem we supposedly encounter in the later work, in which a resisting subject is taken to will two contradictory actions, punishment and resistance. The sovereign in this account is granted the right specifically because the subject has given up the right to resist.

The account of the origins of the commonwealth provided in *De Cive* is in many ways similar to that in the *Elements*; we read that the '*submission of the wils of all those men to the will of one man...is then made, when each of them obligeth himself by contract to every one of the rest, not to resist the will of that one man...to which he hath submitted himself*' and that '*he who submits his will to the will of another, conveighs to that other the Right of his strength, and faculties.*'<sup>131</sup> Despite the same basic components, through which all subjects' wills are framed by their new sovereign through mutual compact and by which subjects are obliged not only not to resist but to aid their sovereign through their remaining power, there is one major change, either of content or of emphasis, in the version presented in *De Cive*. It is in

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<sup>129</sup>Chapter 17 of the *Elements* does state that 'As it was necessary that a man should not retain this right to everything, so also was it, that he should retain his right to some things: to his own body (for example) the right of defending, whereof he could not transfer; to the use of fire, water, free air, and place to live in, and to all things necessary for life.' This appears to directly contradict Hobbes's account, in the same text, of the origin of the right to punish; it may be that Hobbes was still working out the extent to which a right to punish and a right to self-defence could co-exist in the same text, with the modified contract presented in *De Cive* his solution to this problem. Hobbes 1969, p. 88.

<sup>130</sup> Tuck, defending a reading of the *Elements* in which subjects have fully transferred their rights of resistance, notes that 'the section referred to [i.e. the comment about oaths only covering the possible] which justifies this modification of his stated position, was added to the circulated copied of the *Elements* later by Hobbes, and is found in only two of the manuscripts...there is a strong implication that Hobbes's original draft did not include the provision about the possibility of non-resistance.' Tuck 1979, p. 122.

<sup>131</sup> Hobbes 1983, p. 89.

this text that we first read the unambiguous statement that the subject, despite this mutual agreement, ‘is supposed still to Retain a Right of defending himselfe against violence.’<sup>132</sup> This caveat, from Chapter 5, echoes a much stronger elaboration of this right found in Chapter 2 of the text, on the laws of nature concerning contracts. In this chapter we discover that ‘No man is oblig’d by any *Contracts* whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his Body.’<sup>133</sup> Hobbes grounds his claim in a psychological argument, noting that ‘When a man is arriv’d to this degree of fear, we cannot expect but he will provide for himselfe either by flight, or fight.’ To expect otherwise would be to demand ‘*impossibilities*’ (an echo, perhaps, of the *Elements*), and this psychological reality is transformed into a right when Hobbes notes that as a result, men are not ‘obliged’ to bear either ‘*death*, (which is the greatest evill to nature) or wounds, or some bodily hurts.’<sup>134</sup> This right is explicitly tied to punishment when, in language foreshadowing one of the quotations from *Leviathan* which opened this chapter, Hobbes writes that ‘they who are brought to punishment, either Capitall, or more gentle, are fettered, or strongly guarded, which is a most certain signe that they seem’d not sufficiently bound from non resistance by their *Contracts*.’<sup>135</sup>

In addition to providing this more comprehensive account of resistance rights, *De Cive* also introduces a more complex presentation of the origin of right to punish; this is found in Chapters 2 and 6. In Chapter 2 we read:

Its one thing if I promise thus: If I doe it not at the day appointed, kill me. Another thing if thus: If I doe it not, through you should offer to kill me, I will not resist: All men, if need be, contract the first way; but there is need sometimes. The second way, none, neither is it ever needful...in a Civill State, where the Right of life, and death, and of all corporall punishment is with the Supreme...the Supreame himselfe

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<sup>132</sup> Hobbes 1983, pp. 88-9.

<sup>133</sup> Hobbes 1983, p. 58.

<sup>134</sup> Hobbes 1983, pp. 58-9.

<sup>135</sup> Hobbes 1983, p. 59.

[need not] contract with any man patiently to yeeld to his punishment, but onely this, that no man offer to defend others from him.<sup>136</sup>

In contrast to the account provided in the *Elements*, here the right of punishment is accorded to the sovereign through subjects giving up their right to hinder his punishment of others, rather than through their giving up their right to resist the sovereign's acts against themselves. It is worth noting that the right of the 'Supreame himselfe' to punish does not emerge from the first type of contract, in which individuals make an agreement directly with him who will punish them ('If I doe it not at the day appointed, kill me'); it is not even suggested that this type of agreement is universally entered into by all men ('there is need sometimes'). Rather, the principle which it illustrates—that men cannot agree not to resist punishment—is framed as a reason undermining its use for this purpose, leading to the third type of contract, in which men simply agree not to resist the sovereign's punishment of others.<sup>137</sup>

This outline of a hypothetical contract is supplemented in Chapter 6 with a description of the specific transfer of rights which results precisely in the right to punish: 'the right of punishing is then understood to be given to any one, when every man Contracts not to assist him who is to be punished...these kind of contracts men observe well enough, for the most part, till either themselves, or their near friends are to suffer.'<sup>138</sup> Thus, in the case of punishment, the agreement made is not to agree to endure any and all ill treatment by the sovereign, as we might interpret the account in the *Elements*, but rather to not prevent the sovereign from punishing anyone else. Subjects always have the right to resist their own punishment. This account, in which the inalienable rights of subjects limit the kinds of valid agreement they can make

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<sup>136</sup> Ibid.

<sup>137</sup> See Schrock 1991, p. 860, Ristroph 2013, pp. 201-2 and Yates 2014, pp. 241-2 for the argument that these are indeed examples of authorising covenants.

<sup>138</sup> Hobbes 1983, pp. 93-94.

regarding their bodily safety, indicates that already by *De Cive* Hobbes was aware that there might appear to be a theoretical, and not merely practical, conflict between punishment and resistance. At the same time, however, it indicates that he did not see this conflict as undermining his sovereign's right to punish as such. As we read in *De Cive*, he does not see a 'need' for the sovereign to contract with his subjects that the latter will not resist his violence in order to gain either the right or the ability to punish. As we shall see, this is the same account that he provided both in the English *Leviathan* of 1651 and the Latin *Leviathan* of 1668. While the following account will rely on the English *Leviathan*, it is worth underlining at the outset that there are no differences between it and the Latin text which contradict the analysis provided here.

### **The Account of the Right to Punish in *Leviathan***

Hobbes's presentation of the foundations of the commonwealth, and the legitimacy of the latter's actions, changes drastically between his earlier works and the publication of *Leviathan* with the introduction, in the 1651 text, of a theory of sovereign authorisation as the source of the sovereign's rights. Despite this, his discussion of punishment is explicitly excluded from this shift.<sup>139</sup> Instead, the account of the right to punish is much more similar to that found in the two texts discussed above; it consists in a transfer of rights, rather than the authorisation of the sovereign. In Chapter 28 Hobbes tells us that the question of 'by what door the Right, or Authority of Punishing...came in' is one of 'much importance.'<sup>140</sup> It is clear from what follows that

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<sup>139</sup> See Skinner 2007 for a more detailed discussion on how the process of authorisation creates the person of the commonwealth, and for reasons why Hobbes may have felt compelled to alter his political theory in this way. For an account of how Hobbes may have developed his version of authorisation specifically to undermine parliamentary claims about representation and political legitimacy, see Chapter 6.

<sup>140</sup> Hobbes 2012, p. 482. This is a strikingly Grotian way of introducing the subject; Book II, Chapter 20 of *De Jure Belli ac Pacis* [*The Rights of War and Peace*] (1625) begins 'We come now

Hobbes is concerned that readers might assume that this right has come about through the process of authorisation which instituted the commonwealth in the first place. This act of institution is described in Chapter 18 of the same work, which opens as follows:

A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, every one with every one, that to whatsoever Man, or Assembly of Men, shall be given by the major part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that Voted for it, as he that voted against it, shall Authorise all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own.<sup>141</sup>

The implications of this initial authorisation are wide-ranging, with one major consequence being that any act in which a subject contradicts the wishes or acts of the sovereign is in fact an example of self-contradiction, or absurdity. This is due to every subject having agreed that the sovereign has the right to act for him in all matters, and accepting the sovereign's actions as if they were an accurate expression of his own will. Hanna Pitkin has pointed out that the kind of representation described in this chapter must be understood as requiring active participation by subjects to enact the will of the sovereign, their wills now directly corresponding to the commands of the individual or assembly holding sovereign power.<sup>142</sup> The institution has thus placed a potentially heavy burden on subjects. They are now forced not only to act according to the common good, as determined by the sovereign, but to do so out of a recognition that even if in a specific instance a different course of action might initially appear to

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to... Punishment; which we shall the more accurately discuss, for as much as its Origine and Nature being misunderstood has given Occasion to many Mistakes.' Grotius 2005, p. 949.

<sup>141</sup> Hobbes 2012, p. 264.

<sup>142</sup> Pitkin 1964, pp. 911-3. For an alternative interpretation of the nature of the authorising covenant, according to which all that representation and the requirement of non-contradiction obliges is that no subject *prevent* the sovereign from carrying out his purpose, see Warrender 1957, p. 106. This interpretation of authorisation seems to me to be, in most cases, weaker not only than that which is intended by authorisation, but also what is required by the transfer of rights described in the *Elements* and *De Cive*. As the passages quoted above indicate, this transfer requires not only that the subject not hinder the sovereign in his projects, but also means that the sovereign has the right to the means and faculties of subjects in achieving his ends. This right, of course, is limited in *De Cive* by the subject's retained rights, but on the whole the duties of subjects appear to be much broader than Warrender here suggests.



be more personally beneficial, their own will, and hence their own acts, are already spoken for.<sup>143</sup>

It is in the same chapter that Hobbes informs his readers that it is through ‘this Institution of a Common-wealth’ that are derived ‘all the Rights, and Facultyes of him, or them, on whom the Sovereigne Power is conferred by the consent of the People assembled.’<sup>144</sup> It might be expected, therefore, that the reader turning from such statements to the definition of punishment offered in Chapter 28 would assume that this ‘Right, or Authority’ also has its roots in the authorisation of the sovereign’s acts by the members of the multitude. Moreover, Hobbes repeatedly appears to refer to authorisation as the root of the sovereign’s right to punish: the definition Hobbes offers of punishment is that it is ‘an Evill inflicted by publique 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.’<sup>145</sup> Hobbes emphasizes the fact that punishment must be imposed by ‘publique Authority’ and that this authority is the same which has all rights of judgment with regards to legal and illegal behaviour. It therefore appears logical to assume that just as the right of judgment is a result of the sovereign institution,<sup>146</sup> so too is the right to punish. Furthermore, the aim of punishment cited in this definition, encouraging widespread future obedience, is consistent with the ‘end’ for which the initial authorisation was granted: to allow individuals to ‘live peaceably amongst themselves, and be protected against other men.’<sup>147</sup>

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<sup>143</sup> Brett 2003, pp. 220-33 suggests that we can, for this reason, best understand Hobbes’s subjects as existing in a state of post-deliberation.

<sup>144</sup> Hobbes 2012, p. 264.

<sup>145</sup> Hobbes 2012, p. 482.

<sup>146</sup> For Hobbes’s discussion of the sovereign’s right of judgement, see comments in *Leviathan* on the rights of propriety, or rule-giving, and of judicature. Hobbes 2012, p. 274.

<sup>147</sup> Hobbes 2012, p. 264.

Finally, even if Hobbes might be able to dismiss any parallels in language between the rights which emerge through authorisation and the right of punishing as mere coincidence, the language of authorisation is overtly used with reference to punishment in Chapter 18 when, as we saw above, Hobbes tells us that ‘if he that attempteth to depose his Sovereign, be killed, or punished by him for such attempt, he is the author of his own punishment, as being by the Institution, Author of all his Sovereign shall do.’<sup>148</sup> From this phrasing, it initially seems clear that, just as the sovereign has the right to interfere with subjects’ lives in whatever way he wishes without accusation of injury, so too can the sovereign appeal to subjects’ initial authorisation when it comes to punishment. Given the previous discussion of the necessity of non-contradiction, this punishment of an attempted tyrannicide must be the will of the punished as well as that of the punishing sovereign. The punished individual must own the act of punishment while the sovereign, due to the process of authorisation, is nothing but the punished individual’s agent.

It may come as a surprise, then, that Hobbes is unequivocal when answering the question of where the sovereign’s right to punish comes from, and that it does not emerge from the institution of the commonwealth in the manner of all other sovereign rights. However, a closer look at the problem of the resisting punished criminal will demonstrate why this must be the case for punishment to remain coherent not only in relation to Hobbes’s political theory, but to his psychology. In Chapter 14 of *Leviathan* we are told that the only motive an individual can have for joining society, with all the potential inconveniences that this entails, is that it is the best possible guarantee for ‘the security of a mans person, in his life, and in the means of so preserving life, as

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<sup>148</sup> Hobbes 2012, pp. 264-6.

not to be weary of it.’<sup>149</sup> As a result subjects, when engaged in the transfer of rights and ownership of the sovereign’s actions which constitute the sovereign institution, can never be understood to have transferred their rights unequivocally. Such a move would potentially undermine the very purpose of the move into society in the first place; the parallel with Hobbes’s comments in *De Cive* is clear.

This is such a foundational element of the theory that even if ‘a man by words, or other signes, seems to despoyle himselfe’ of the right to self-defence, ‘he is not to be understood as if he meant it, or that it was his will.’<sup>150</sup> As a result, any covenant which precludes a covenanter’s right to defend him or herself by force is automatically void, and so even ‘the promise of not resisting force, in no Covenant transferreth any right; nor is it obliging.’<sup>151</sup> While a covenant may take the form of an individual agreeing with another ‘Unlesse I do so, or so, kill me’ this cannot be understood to mean that the maker of the agreement, when his fellow comes to act upon it, has given up the right to resist the attack, ‘for man by nature chooseth the lesser evill, which is danger of death in resisting; rather than the greater, which is certain and present death in not resisting.’<sup>152</sup> Nor does this principle apply only to capital cases, where the risk of non-resistance is certain death. Hobbes also states, in his initial discussion of the subject’s inability to lay down his right to resist those who ‘assault him by force, to take away his life’,<sup>153</sup> that just as an individual cannot be expected to recognize any personal good in death, ‘the same may be sayd of Wounds, and Chayns, and Imprisonment; both because there is no benefit consequence to such patience...as also

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<sup>149</sup> Hobbes 2012, p. 202.

<sup>150</sup> Ibid.

<sup>151</sup> Hobbes 2012, p. 214.

<sup>152</sup> Ibid. It is worth noting the similarity of this passage with that cited above, from *De Cive*; in both cases, as there is no direct covenant between subject and sovereign, an agreement of this type cannot be the origin of the sovereign’s right to punish. The agreement is simply framed in this manner in order to show the principle underlying the limits to contracts of any type.

<sup>153</sup> Hobbes 2012, p. 202.

because a man cannot tell, when he seeth men proceed against him by violence, whether they intend his death or not.’<sup>154</sup>

This question of resistance brings us back to the case of the individual who has seemingly authorised ‘his own punishment.’<sup>155</sup> If the right of punishing is directly the result of the sovereign authorisation, as the language used in this passage suggests, then the individual will have apparently forfeited the right to resist this punishment. This very act, which would amount to frustrating the sovereign in the pursuit of his ends, would be a case of self-contradiction. In other words, we should expect, according to Hobbes’s account of the impossibility of non-resistance, that any punished subject would be the author of two distinct and contradictory actions, punishment and resistance. In fact, Hobbes has deftly sidestepped the question of self-contradiction entirely by constructing his authorisation covenant in such a way that at the point of punishment, the specific act which harms the individual has not, as such, been authorised by the punished subject.

As the original covenant which authorises the sovereign must, for the reasons cited above, include the unwritten caveat that the subject does not transfer the right to inflict unimpeded physical harm, imprisonment or death upon him, the authorisation covenant as explained above cannot itself provide the right to punish. There is therefore no logical or psychological contradiction between the sovereign’s punishment and the subject’s resistance. This is crucial: while cases of self-contradiction through covenant breaking, or law-breaking, are possible in the state, such cases of contradiction are precisely those that are without right. A criminal’s actions contrary to the law are illegitimate, whereas the subject resisting punishment

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<sup>154</sup> Ibid.

<sup>155</sup> Hobbes 2012, p. 266.

is, despite acting against the sovereign, acting with right, and therefore without contradiction. However, this does mean that, if the punishing sovereign is to be understood as acting with equal right, Hobbes must provide that right from some other source. We are therefore left with two questions: how can an authorisation covenant be constructed to allow for resistance, and, relatedly, where has the right to punish come from?

It might be objected at this point that framing the sovereign's right to punish and the subject's right to resist as contradictory is to fundamentally misunderstand Hobbes's account of rights. We see this approach in Arthur Yates's claim that 'subjects' retention of the right to resist violence of all kinds does not pose an obstacle to prospective subjects granting the sovereign the right to punish.'<sup>156</sup> This account, in favour of an authorised sovereign right to punish, echoes those interpreters who emphasise that Hobbesian rights are akin to Hohfeldian liberties, rather than claim rights.<sup>157</sup> A clash of two rights, on this reading, does not undermine either right as such, as rights do not create obligations on others; rights may contradict each other without there being any limitation to the rights of either party. To make this claim regarding the rights to punish and resist punishment, however, is to misunderstand what it means to possess an inalienable right to self-defence. To understand why this is the case, we must turn to Hobbes's account of representation, personation and authorisation. As I will argue below, the right to self-defence can be seen as a proxy for a right to represent oneself, and while contradictory rights may not be a problem for Hobbes, contradictory representation is. It is for this reason that we can understand

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<sup>156</sup> Yates 2014, p. 242. See also Sheridan 2011, pp. 150-1.

<sup>157</sup> Hohfeld 1923, pp. 38-50. Examples of modern readers framing Hobbesian rights in this way include Hampton 1986, Carmichael 1990 and Finkelstein 2001. Warrender 1957, p. 196 presents a similar analysis, though without reference to Hohfeld. According to Warrender the lack of immediate reciprocity between rights and duties is the result of a 'hierarchical' system of rights and obligations.

the authorisation contract as purposefully leaving a gap of both right and representation, as this is the only means by which such a right could be allowed for in Hobbes's system.

### **Representation, Punishment and Resistance**

Chapter 16 of *Leviathan*, 'Of PERSONS, AUTHORS, and things Personated', defines persons as those whose words and actions are to be considered either as their own, or as representing those of another. Thus the crucial thing to understand about Hobbesian persons, according to David Runciman, is to know to whom their actions are to be attributed.<sup>158</sup> Those who act on their own behalf are labelled 'natural persons' while those who represent another are 'artificial.' Personhood, then, can be understood as a role; a lawyer may be an artificial person when representing a client in court, while being a natural person when billing the same client later in the day. Sovereigns, too, can be understood as engaging in these two roles; when representing the commonwealth, they are artificial persons, while in those actions which they do not undertake according to public authority they are natural ones.

The relevance of representation to punishment becomes clear when we recall that while in his account of the institution of the commonwealth Hobbes specifically notes that the sovereign represents the body of the people, in doing so the sovereign *also* represents each and every member of it.<sup>159</sup> In order to understand the mechanics of Hobbes's move here, it is worth returning to the full original covenant. He writes that

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<sup>158</sup> Runciman 2000, p. 269.

<sup>159</sup> On subjects as the authors of, and hence represented by, their sovereign's acts see Brito Vieira 2009, pp. 172-9. See Runciman 1997, pp. 13-7 for the view that Hobbes does not use 'representation' to characterise the relationship between the sovereign and his subjects.

*A Commonwealth* is said to be *Instituted*, when a *Multitude* of men so Agree, and *Covenant, every one, with every one*, that to whatsoever *Man, or Assembly of Men* shall be given by the major part, the *Right to Present* the Person of them all, (that is to say, to be their *Representative*;) every one, as well he that *Voted for it*, as he that *Voted against it*, shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.<sup>160</sup>

At first, the relationship between authorisation and representation in this passage is somewhat ambiguous. As Quentin Skinner in particular has argued, this agreement creates a new person who did not exist prior to the covenant. The ‘Person of them all’, or Commonwealth, is generated through a unity of representation, and this new person is represented by the sovereign when he acts in his artificial capacity. Despite this, however, it is not simply this new Person who owns, or is reputed author, of the representative actions of the sovereign; this role is also played by each individual member.

The commonwealth is a person of a different type to those which we have encountered above; it is neither natural nor artificial but is rather a person ‘by fiction.’

In Chapter 16 Hobbes notes that

there are few things, that are incapable of being represented by Fiction. Inanimate things, as a Church, an Hospital, a Bridge, may be personated by a Rector, Master, or Overseer. But things Inanimate, cannot be Authors, nor therefore give Authority to their Actors: Yet the Actors may have Authority to procure their maintenance given them by those that are Owners, or Governours of those things.<sup>161</sup>

Subsequent to this general account, Hobbes provides a list of different things, and people, who can be understood to be represented and act in this way. Importantly for our topic, the list concludes with the statement that ‘A multitude of men, are made

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<sup>160</sup> Hobbes 2012, p. 264.

<sup>161</sup> Hobbes 2012, p. 246.

*One Person, when they are by one man, or one Person, Represented...and it is the Representer that beareth the Person, and but one Person.*<sup>162</sup> The commonwealth, therefore, seems to be a person by fiction in the same way as a bridge, or church. However, this category of course forces us to ask who, in the case of the commonwealth, has authorised the latter's representation; Hobbes is clear that persons by fiction cannot authorise their own representation, but this is not to say that authorisation does not take place at all in such arrangements. Instead, actors gain their authority from the owners or governors of this person. In the case of the commonwealth, this role is played by each member of the multitude, with the consequence that there are 'many Authors, of every thing their Representative saith, or doth.'<sup>163</sup>

In making this claim, Hobbes is able to argue that the sovereign's acts are owned by individuals while circumventing any direct agreement between the sovereign and each particular individual that he represents, a move which disallows the possibility that the sovereign might ever commit an injury against a subject.<sup>164</sup> This transfer by future subjects to the sovereign of their capacity to represent themselves forces us to consider, however, what happens to subjects' position as natural persons. Clearly, in the vast majority of cases subjects, when they act, should have their words

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<sup>162</sup> Hobbes 2012, p. 248.

<sup>163</sup> Hobbes 2012, p. 250. The assumption that in the case of the representation of the commonwealth the members of the multitude act like the owners of a bridge or the governors of a child in authorising the person by fiction's representative raises the question of whether in all cases of representation by fiction the authorising agent is in fact being represented themselves. In making this case, then, we might best approach the problem via the question of interests; the owner of the bridge may own the acts committed by the bridge's representative simply because of the mechanics of representation, but it is the interests of specifically the bridge which a given actor has been appointed to pursue. On the other hand, we might take the representation of the commonwealth to be a particular case, as the members of the multitude are both makers and matter of the commonwealth; they are represented not in their authorising capacity, but simply as the constitutive parts of the person who is represented, a reading supported by the apparent direction of causality indicated in the original covenant.

<sup>164</sup> Further polemical uses of the sovereign's representative capacity will be explored in Chapter 6, below.



and actions taken as their own. Nonetheless, the liberty to self-govern in various situations is one which bounded by the acts of their representative; as Hobbes notes in Chapter 21, ‘The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Sovereign hath pretermitted.’<sup>165</sup> In most areas of their lives, therefore, subjects only represent themselves conditionally; once the law prescribes or bans given behaviour, to act on the basis of a contrary will is forbidden, as this would be a case of contradiction. While such undetermined areas are to be understood as sites of civil liberty, they are only free because the sovereign has not determined that there is any contradiction between his public will and the private wills of citizens; we might question, therefore, the extent to which subjects’ actions in this case are best understood as simply their own.

This relationship between liberty and representation is made explicit in Hobbes’s discussion of the true liberties of subjects. In introducing this distinct category of liberties, Hobbes defines them as ‘the things, which though commanded by the Sovereign, [the subject] may neverthelesse, without Injustice, refuse to do.’<sup>166</sup> In other words, subjects break no contract in engaging in their liberties of this type. Defining the relationship between representation, authorisation and the liberties of the subject, therefore, is crucial in understanding the nature of the original commonwealth-instituting covenant.

The grounds of this special category of liberty are, according to Hobbes, a proper appreciation of both ‘what Rights we pass away, when we make a Commonwealth’ and ‘what Liberty we deny ourselves, by owning all the Actions (without exception) of the Man, or Assembly we make our Sovereign.’<sup>167</sup> Thus to own the

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<sup>165</sup> Hobbes 2012, p. 328.

<sup>166</sup> Hobbes 2012, p. 336.

<sup>167</sup> Ibid.

actions of another whom we agree has the right to represent us is precisely to limit our own liberty to act as we will; we cannot represent ourselves in ways which are contradictory to those actions undertaken by our representative. It is therefore in the concepts of authorisation and representation that we can locate the crucial difference between true liberties of subjects and those which, while still liberties, are alienable: in the case of common liberties of subjects, the sovereign retains the right or capacity to represent subjects as he or she sees fit, through the creation of laws. Such liberties only exist in the silence of the laws, and are therefore conditional upon this silence. Subjects technically remain represented by the sovereign in such matters at all times, but because sovereigns may not choose to exercise this ability, in cases where they do not subjects are entitled to represent themselves as they see fit. In the case of the true liberties of subjects, on the other hand, there is precisely no obligation because in this case, subjects have not consented to take the sovereign's will for their own. They have not authorised actions which contradict their true liberties, because to do so would be to limit their right to self-presentation in precisely the way in which all ordinary liberties are limited.

It is true that Hobbes himself largely frames his discussion of the true liberties of subjects as one which concerns contradictory rights, rather than contradictory representations. Thus we read that 'It is manifest, that every Subject has Liberty in all those things, the right whereof cannot by Covenant be transferred' and it this inability to transfer rights that provides the justification for the claim that 'Covenants, not to defend a mans own body, are voyd' and that if 'the Sovereign commands a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing,

without which he cannot live; yet hath that man the Liberty to disobey.’<sup>168</sup> Nonetheless, it is crucial to recognise that this liberty to disobey consists precisely in the liberty to represent oneself in cases where the requirements of representation by the sovereign would result in harm. Individuals therefore fail to authorise their own punishment because of the covenant’s inability to demand the transfer of rights which in this case would create a relationship of representation.<sup>169</sup>

This analysis relies on the argument that a single natural person cannot be represented, in a given act or situation, by more than one representative. While a natural person can of course be represented by numerous actors in discrete spheres, this cannot logically result in overlapping, and hence contradictory, representations. Hobbes is clear that this is true of persons by fiction: he writes that ‘where there is already erected a Sovereign Power, there can be no other Representative of the same people... For that were to erect two Sovereigns.’ In the same paragraph Hobbes draws the parallel with individual natural persons, noting that for a ‘man to have his person represented by two Actors,’ would, when ‘they... oppos[ed] one another... divide that Power, which ...is indivisible.’<sup>170</sup> In this context we may usefully consider the

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<sup>168</sup> Hobbes 2012, p. 336.

<sup>169</sup> Zarka 2001, p. 79 argues that the reason why the right to punish cannot come about through any gift of subjects to sovereign is that individuals, in the state of nature, do not have a natural right to punish, and hence cannot transfer that which they never possessed. See also Schrock 1991, p. 871, Yates 2014, pp. 249-50 for a similar critique and Lawson 1995, p. 89 for a much earlier assertion of this point. However, this absence of a natural right to punish is not necessarily a problem for Hobbes’s theory, and hence is not the reason why Hobbes felt the need to modify his account of sovereign rights in this case. There are numerous rights, such as the right to taxation or to control the militia, which can only be employed in a civil context; the authorised right to all things could, in the absence of the problem of representation outlined above, also form the basis of a right to punish.

<sup>170</sup> Hobbes 2012, p. 286. In *De Homine* Hobbes does write that ‘Not only can a single man bear the person of a single man, but one man can also bear the person of many, and many, one.’ However this second case, in which many men may bear the person of a single man, is not the case of plural, and potentially contradictory, representation it may initially seem to be; the rest of the passage clarifies that all that is being referenced here is the representation of an individual by an assembly, a possibility already raised in every version of Hobbes’s political theory. Hobbes 1998, pp. 84-5.

sovereign's role not only as a representative, but also as a figure capable of being represented. In his dispute with Bishop Bramhall on this point, Hobbes responds to the argument that his account of representation entails that 'every king hath as many *persons*, as there be justices of peace and petty constables in his kingdom' with the admission that it is indeed true that 'there be as many persons of a king, as there be petty constables in his kingdom' and that were the situation otherwise 'he cannot be obeyed'.<sup>171</sup> However, crucially, in such cases figures such as constables have been authorised by the sovereign power purely to carry out his specific commands; in any case of contradiction, it is clear whose will should be taken to be authoritative, in contrast to the case of the true liberties of subjects clashing with the authorised acts of a sovereign.<sup>172</sup>

It is for this reason that what I have labelled the authorisation hypothesis cannot adequately explain the right to punish maintained by the sovereign. While such an account would seem to resolve the problem of Hobbes's use of the language of authorisation with regard to the punished individual, it raises the much more intractable problem of how Hobbes's account of personation and representation is to be maintained alongside the true liberties of subjects. This in turn suggests that as readers and interpreters we may be forced to make a choice between a reading which produces an internally coherent theory, and a reading which assumes that Hobbes was consistent and accurate in his use of language throughout the text.<sup>173</sup> If we return to the case, cited above, in which the language of authorisation is explicitly related to punishment, we find that Hobbes uses this terminology in order to claim that punished

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<sup>171</sup> Hobbes 1840, pp. 315-6.

<sup>172</sup> It is precisely the danger of over-empowering the sovereign's representatives which renders Hobbes suspicious of the common law, a system which, he argues, will result in law made by judges and not by the sovereign.

<sup>173</sup> Hobbes's inconsistencies on this point were noted by his contemporaries. See for example Ross 1653, p. 24.

subjects cannot claim that their punishment is an injury towards themselves.<sup>174</sup> As this is already the case simply through the lack of a contract between subjects and sovereigns, a feature of the political theory pre-dating the introduction of authorisation, Hobbes's use of this later feature seems ultimately to be confusing and redundant, supporting my jettisoning of such language rather than of key features of the theory as a whole.<sup>175</sup> It is true that taking authorisation and representation seriously appears to produce a striking result: there are whole areas of civil activity—the exercise of true liberties—in which subjects do not appear to be represented by their sovereign, a possibility which appears to be enabled by the circumscribed nature of the original contract. While perhaps surprising, this result does not in itself undermine the logical construction of Hobbes's theory, and indeed seems to have resulted in his modifying areas of his account, such as the explanation of the origin of punishment, to accommodate it.

This limitation upon the instituting covenant's ability to provide the sovereign with all necessary rights explains why the account in Chapter 28, in direct contrast with the sovereign authorisation model of the origins of rights, tells us that 'it is manifest therefore that the Right which the Common-wealth (that is, he, or they that represent it) hath to Punish, is not grounded on any concession, or gift of the Subjects.'<sup>176</sup> Instead, this comes about because, while subjects have laid down their

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<sup>174</sup> Hobbes 2012, p. 266.

<sup>175</sup> This passage in particular is problematic for reasons beyond this. As explored in Chapter 5, punishment is, according to Hobbes, a practice which can only ever apply to citizens, and not to enemies. In *Leviathan* we find an account of treason in which it is assumed that treasonous subjects relegate themselves to enemy status at the moment when they commit a treasonous act, rather than following a trial and conviction. In the case of the criminal who is the 'author of his own punishment', it is therefore somewhat odd that Hobbes would use this term to refer to the treatment of an individual who 'attempteth to depose his Sovereign' as in this instance the entire civil relationship between subject and sovereign including that of authorisation, would be automatically terminated in any case.

<sup>176</sup> Hobbes 2012, p. 482.

natural right to everything, which included the right of every individual to ‘do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto,’ the sovereign has not, and in laying down their natural rights the subjects have ‘strengthened him to use his own...so that it was not given, but left to him, and to him onely.’<sup>177</sup> This account directly parallels that which is provided in *De Cive* in which the sovereign’s acquisition of this right only requires that no others will interfere with his use of his natural right to enact violence upon others.

Thus a version of the sovereign right to punish is able to slip through the cracks of the sovereign authorisation: while subjects cannot authorise punishment, they can nonetheless simultaneously agree to a different type of contract supplementing authorisation, one which does not require that they ‘own’ the actions which result and which therefore allows for the kind of psychological distinction between the wills of the sovereign and the subject which authorisation does not.

### **The Role of Authorisation in *Leviathan*’s Account of Punishment**

While the nature of the sovereign authorisation means that it cannot be the origin of the right to punish and instead must be supplemented by a secondary contract resembling that found in *De Cive*, it nonetheless has an important role to play in defining both the nature of punishment itself and the legal relationship between the punishing sovereign and punished subject. Hobbes’s grounding of the sovereign’s right to punish in his natural ‘right to every thing’ has led to the tendency among some readers of *Leviathan* to assume that punishment therefore must take place in a version of the state of nature. In order to correct this assumption, it is necessary to turn back

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<sup>177</sup> Ibid.

to authorisation to demonstrate that it and the agreement which results in the right to punish are, rather than being at odds with each other, complementary and mutually reinforcing.

Before presenting this analysis, however, it is necessary to quickly examine a few examples of the state of nature hypothesis, which demonstrate both the widespread nature of the basic argument, and the different ways it can function. In one of the most explicit cases, Corey Brettschneider writes that ‘Hobbes...thought of criminals as having violated the social contract and hence as ‘enemies’ of the polity.’ Brettschneider takes his point to its logical conclusion and states that ‘the state exists in a type of rights-based relationship...with individual criminals—the same relationship that exists among persons in the State of Nature.’<sup>178</sup> Brettschneider’s argument is somewhat unclear, and allows for two distinct possibilities: that it is the criminal who, upon breaking the law, leaves the commonwealth, or that this alienation only takes place once the individual in question has been convicted, resulting in, on the part of the subject, the loss of safety and hence obligation to the sovereign.

Others have argued for one or the other of these two possibilities. John Sanderson suggests that according to Hobbes ‘it was treasonous to disobey a law, for this involved a renunciation of the contract’ which instituted the commonwealth.<sup>179</sup> Morton Kaplan uses a different strategy to argue for the same position, positing that for subjects, ‘the obligation to obey fails to bind as soon as the positive law of the sovereign is broken’ and explaining his reasoning by arguing that ‘in his discussion of the second law of nature Hobbes states that one is obliged to avoid injury; a penalty is an injury. Thus the obligation to obey is broken merely by disobedience.’<sup>180</sup> It is

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<sup>178</sup> Brettschneider 2007, p. 180.

<sup>179</sup> Sanderson 1989, p. 101. See Ackerman 1976, p. 424 and Sorell 2001, p. 230 for similar claims.

<sup>180</sup> Kaplan 1956, pp. 391-2.

important to stress that in this reading, we are not simply speaking about a lack of obligation to the sovereign in the particular instance when subjects resist; for Kaplan, the argument is the broader one that ‘the obligation to obey the law exists only so long as the law is obeyed.’<sup>181</sup> Gauthier’s understanding of punishment is similar; he argues 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 with respect to the other members of civil society, as represented in the person of the sovereign’, that therefore ‘the sovereign is no longer acting as the representative of the person punished’ and thus that ‘he is placing himself in the position of an enemy in the state of nature with regards to that person.’<sup>182</sup>

Andrew Cohen comes down on the opposite side, though with the same result, when he writes that ‘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. (Perhaps the sovereign no longer counts as a sovereign to that person).’<sup>183</sup> Importantly Cohen introduces a third means by which the punishment process reverts to a state of nature, and it is the one which most clearly addresses the problem of self-contradiction. For Cohen it is not the simple risk of violence by the sovereign which removes one’s obligation; while individuals as subjects retain the ‘liberties of resistance’, when these are employed their use amounts to a renunciation of what Cohen terms ‘subject status’, resulting in the former subject having to ‘confront the sovereign in a state of war.’<sup>184</sup>

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<sup>181</sup> Ibid.

<sup>182</sup> Gauthier 1969, p. 148.

<sup>183</sup> Cohen 1998, p. 40.

<sup>184</sup> Ibid. See also Cattaneo 1965, p. 282 who argues that at the point of execution, the condemned criminal and sovereign are in a state of nature and Bobbio 1993, p. 141 for the same comparison. Heyd 1991, pp. 122-3 suggests that punishment takes place in the state of nature and that it is therefore a practice characterised by the infliction of ‘raw force.’ Watkins 1989, pp. 97-8 asserts that ‘the relation between the sovereign and a subject whom he has condemned to death reverts to



Thus, it can be the subject's, rather than the sovereign's choice to return to a state of nature, but only by engaging in very specific acts of resistance, rather than the committing of crimes more generally. S. A. Lloyd makes a similar argument when she states that when subjects are 'exempted from obedience to commands...that they kill themselves, or not resist those who attempt to kill them' it is because in such situations 'subjects cease to be members of the commonwealth, and resume all of their natural liberty, until such time as they again receive protection.'<sup>185</sup>

Alice Ristroph's analysis of Hobbesian punishment is more nuanced than those outlined above in that she is largely concerned with how a natural right to all things, held by the person of the sovereign, can be transformed into a political right to punish, linked to the artificial person of the commonwealth. Despite this, in making her argument, in which she suggests that the existence of resistance rights depends on the state of nature hypothesis, she falls into the same trap. Ristroph writes that 'once a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other.' This is because the 'sovereign, a uniquely political and artificial construct, now exists in a version of the state of nature, and he possesses the broad right of mortal beings to do whatever seems necessary to preserve himself from imminent or future threats.' As a consequence of this account, Ristroph concludes that 'if this is all punishment is—a conflict between two mere mortals in the state of nature—then both the sovereign and the criminal will have equal rights of self-

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that between two antagonists in a state of nature, except that, now, one of them is much more powerful than the other.' Tuck 1979 p. 125 argues that in both *De Cive* and *Leviathan* the 'right of domestic punishment' is 'the same kind of thing as the right to wage foreign war'.

<sup>185</sup> Lloyd 1992, p. 75. See Ribeiro 2011, p. 46 for similar comments regarding the repossession of liberties against the sovereign during punishment, a process which she links to a termination of the representative relationship between the subject and the sovereign.

preservation, and the criminal has as much right to resist punishment as the sovereign has to impose it.<sup>186</sup>

While the idea that the punished criminal exists in a state of nature with regard to the state is a tempting one, especially given the analysis presented above regarding the failure of the authorisation hypothesis, this cannot be the case. Ristroph's explanation of the state of nature hypothesis succinctly illustrates many of its problems. The point about inflicting punishment upon a subject is that this process is more than simply 'a conflict between two mere mortals' in which anything goes. The sovereign and criminal's rights are indeed balanced when it comes to imposing and resisting punishment, but whereas the subject is not limited in what he can do to directly resist, the sovereign, by the very fact that he is imposing punishment, rather than displaying hostility, is not permitted to 'do whatever seems necessary to preserve himself.' The sovereign's acts, in other words, are bound by the limitations upon punishment properly conceived.

It is by understanding these limitations that we can best perceive why this apparent asymmetry exists. The strategy Hobbes employs in granting his sovereign the right to punish, in which, as explained above, it is the result of the sovereign being left with an empowered natural right, led to consternation among some of Hobbes's seventeenth century readers. Archbishop Bramhall, for instance, argued that such a justification meant that the sovereign may 'lawfully kill any of his subjects...as freely as a man may pluck up a weed.'<sup>187</sup> Bramhall's thought seems to be that punishment in the commonwealth is a direct correlate of the right to all things in the state of nature;

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<sup>186</sup> Ristroph 2009, p. 615. See also Ristroph 2013, p. 199 and Ristroph 2012, p. 114.

<sup>187</sup> Bramhall 1995, pp. 150-1. We see a similar concern with the natural origins of the right, though with an emphasis on its potential weakness rather than the strength, in Hyde's comment that the right left to the sovereign is not 'much greater...than what, it seems, is tacitly reserv'd to every man, who notwithstanding all transferring, hath still the right to resist the Sword of Justice in his own defence, and for ought appears, to kill him that carries it.' Hyde 1995, p. 265.

his use of the term ‘lawfully’ suggests that he believes that this natural right has been transformed into penal law without significant modification or limitation. This reading initially seems to be supported by Hobbes’s explanation that ‘before the Institution of the Common-wealth, every man had a right to every thing, 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 Common-wealth.’<sup>188</sup> Moreover, this retained right is to be used, Hobbes goes on, by the sovereign ‘as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against his neighbour.’<sup>189</sup>

While it would be difficult to argue that the practical consequences of a Hobbesian state would never lead to a situation in which innocent subjects are easily ‘plucked’, this chapter is concerned with what rights subjects and sovereigns have in relation to each other, regardless of whether these are respected by specific regimes or those who live under them. From this perspective, the lawful killing of subjects is more complicated than Bramhall describes. Hobbes’s definition of punishment leads him to spend most of Chapter 28 setting out what does and does not fall under this label. Any punishment that has neither the intention nor the possibility of ‘disposing the Delinquent, or (by his example) other men, to obey the Lawes’<sup>190</sup> cannot be termed punishment; nor can any ‘evill’ inflicted upon a condemned criminal which is in excess of the punishment cited in the law. An individual cannot be punished for ‘a Fact done before there was a Law that forbad it,’<sup>191</sup> cannot be punished without

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<sup>188</sup> Hobbes 2012, p. 482.

<sup>189</sup> Ibid.

<sup>190</sup> Hobbes 2012, p. 484.

<sup>191</sup> Hobbes 2012, p. 486.

‘precedent publique condemnation,’<sup>192</sup> and in no circumstances can any innocent individual be punished.<sup>193</sup> As we can see, while the sovereign may retain a right to engage in any activity which he or she feels is necessary for self-preservation, this right is not directly analogous to that of punishing individuals within the commonwealth. Rather, punishment can be understood as a sub-set of the sovereign’s much more general retained right: punishment is a certain type of bounded hostility, rather than a specific or new right emerging alongside the commonwealth.<sup>194</sup>

Thus while the right to all things is, as Hobbes states, clearly the foundation of the right to punish, the sovereign, if he is to engage in this right, must adhere to certain conditions.<sup>195</sup> The gaining of the right, therefore, involves both the transfer of rights and the use of a retained right for a specific purpose. Hobbes explains these limitations upon the definition of punishment by turning to the natural laws he has already set out earlier in the text. In understanding these limitations, we can better appreciate the extent to which, in *Leviathan*, the establishment of the right to punish depends directly upon the institution of the commonwealth, and hence upon authorisation.

It would therefore appear that, while the institution of the state is not the source of the sovereign’s right to pursue certain actions, it is the source of the definition of punishment which the sovereign must adhere to if he wishes these actions to be understood as such. Importantly, an examination of these limits demonstrates that, in contrast to Hobbes’s discussion of other rights which the sovereign gains through his

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<sup>192</sup> Hobbes 2012, p. 484.

<sup>193</sup> Hobbes 2012, p. 492.

<sup>194</sup> See Ryan 1996, p. 238 which emphasises that what ‘distinguishes punishment from hostility is the regular, predicable, lawful, and public nature of the harm so inflicted.’

<sup>195</sup> Zarka 2001, p. 87 argues that for this reason punishment should be understood as having no *a priori* foundation in the natural rights of the sovereign, as it ‘finds the justification for its existence in the modalities of its execution.’ While I agree with Zarka’s emphasis on the ways in which the practice of punishment is defined by natural law limitations, his analysis does not acknowledge a crucial element of punishment, that it be carried out by a ‘publique’ authority, as it disallows any relationship between the authorising covenant and the right.

representative role, the label of punishment is limited by a mixture of natural laws and constraints originating in the original purpose of the commonwealth's foundation. While natural laws play a role in the duties of the sovereign more generally, it is only in the case of punishment that they actually help to form the definition of the right itself. This definitional use of the natural laws is only possible because the right to punish is an instance of the sovereign's natural right; by placing the emphasis on the sovereign's natural person and his own need to ensure self-preservation, Hobbes was able to use the commonwealth's institution as a pre-condition for the following of the natural laws by the sovereign. As a result, while the right of punishing is constrained by the natural laws alone, if the sovereign follows these (in other words, if he engages in actual punishment, rather than simply in purely hostile acts) punishment will also be used 'for the preservation of them all'<sup>196</sup> in alignment with the initial covenant instituting the commonwealth.

The stricture against punishing innocent subjects is one of the clearest examples of this principle in action. Hobbes tells us that such an act would be a violation of no less than three natural laws, and it is only through the natural laws that he forbids such a practice. To punish an innocent, we learn, is against the natural law that 'forbiddeth all men, in their Revenges, to look at any thing but some future good,' for the punishing of the innocent can bring no good to the commonwealth. Secondly, for the sovereign to punish an innocent subject breaks the natural law requiring gratitude; such an act would render 'Evill for Good,' as the sovereign was given his power by the consent of each subject, and these could in no way have intended for the sovereign to use this power to attack law-abiding individuals. Finally, it is in contradiction with the natural law which commands equity, or the 'equall distribution

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<sup>196</sup> Hobbes 2012, p. 482.

of Justice,' a principle with which the punishment of the innocent is clearly at odds.<sup>197</sup> While the punishment of the innocent is the most obvious case in which the natural laws are marshalled to limit what the sovereign may do under the heading of punishment, it is far from the only one. Both the purpose and the degree of punishment have, Hobbes states explicitly, at their roots one of the natural laws already cited with regards to the punishing of innocents, that which commands that all revenge aim at some future good. It is this natural law which underpins the very concept of punishment as it is described in Chapter 28. Hobbes was principally concerned that punishment aim at deterring future crime, and it is through this lens that we can see his version of due criminal process. As stated above, punishment can only take place following 'publique condemnation' in which the accused's action is 'Judged by publique Authority, to be a transgression of the Law.'

The role played by this particular natural law is even clearer when we look at Hobbes's instructions that punishment be limited to those consequences already listed in the law, and in his description of the purpose of punishment. In Chapter 15 of *Leviathan* we are told that the seventh natural law is 'That in Revenges (that is, retribution of Evil for Evil,) Men look not at the greatnesse of the evill past, but the greatnesse of the good to follow.' As a result of this law, 'we are forbidden to inflict punishment with any other designe, than for correction of the offender, or direction of others.' Any other action is simply an example of 'glorying in the hurt of another' which has no logical purpose, and is therefore against reason.<sup>198</sup>

As the right to punish is a right inherent in the sovereign's natural person, this comes as no surprise. The natural laws are intended to govern individual action; as we

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<sup>197</sup> Hobbes 2012, p. 492.

<sup>198</sup> Hobbes 2012, p. 232.

read in *Leviathan* ‘A Law of Nature...is a Precept, or generall Rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.’<sup>199</sup> We see similar sentiments in *De Cive* when Hobbes states that ‘The Law of Nature, that I may define it, is the Dictate of right Reason, conversant about those things which are either done, or omitted for the constant preservation of Life, and Members, as much as in us lyes’<sup>200</sup> while in the *Elements* we are told that there ‘can...be no other law of nature than reason, nor no other precepts of Natural Law, than those which declare unto us the ways of peace, where the same may be obtained, and of defence where it may not.’<sup>201</sup> However, it is important to remember that while the laws of nature are a ‘means of the conservation of men in multitudes’<sup>202</sup> and are therefore examples of behaviour which will reinforce the means of the commonwealth to achieve the ends for which it was set up, Hobbes acknowledges that men living in the state of nature should not be expected to follow the laws of nature, as their lives are governed by uncertainty to the extent that following these may in fact endanger them.<sup>203</sup> Thus the institution of the commonwealth has created a situation in

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<sup>199</sup> Hobbes 2012, p. 198.

<sup>200</sup> Hobbes 1983, p. 52.

<sup>201</sup> Hobbes 1969, p. 75.

<sup>202</sup> Hobbes 2012, p. 238.

<sup>203</sup> In *Leviathan*, Chapter 14, readers are told that members of the multitude need not lay down their right to all things, as required by the law of nature, unless they are certain that the same action will be performed by the rest, for to do otherwise were to ‘expose [themselves] to Prey.’ Hobbes 2012, p. 200. In Chapter 15, wherein further laws of nature are detailed, it is made clear that these are conditional upon the first natural law having been fulfilled. Hobbes 2012, p. 220. See Warrender for a detailed discussion of what he calls the ‘sufficient security’ condition’ which must be guaranteed before the laws of nature can be said to apply *in foro externo*. Moreover, Warrender notes that because in the state of nature all individuals have retained full rights of judgement regarding what is necessary for their own self-preservation, a sincere belief by all parties that they are following the laws of nature may look to an outside observer like a lawless situation. Bobbio agrees, writing that the features of the state of nature ‘clearly indicate that in that condition no one can be certain that others will comply with the laws of nature’ and that therefore ‘the laws of nature exist...but they are not effective.’ Zagorin emphasises that while the laws of nature do require ‘a constant and sincere desire and endeavour to fulfil its precepts’ this is almost impossible to ask of those in the natural state, for ‘these laws set a standard very difficult to follow

which the right to all things retained by the sovereign can reasonably be tempered by the very laws of nature which, as we have seen, provide punishment with key elements of its definition. The existence of the commonwealth has in this way modified the sovereign's natural rights because, as a natural person, his safety is much better protected in the commonwealth; sheer hostility can no longer be justified, and is thus morally, if not necessarily practically, limited. The right left to him is therefore limited by the natural law, and it is the intersection of natural right with natural law which creates a right to a specific set of actions.

These parameters stand in stark contrast with the actions a sovereign may, according to natural law, take against those outside the commonwealth, a label which applies both to rebels who have, through words or actions, declared their wish to leave the state as well as to those who were never subjects in the first place. The rights a sovereign has with regard to such individuals are explicitly set against those he has over subjects. Immediately after presenting the reasoning behind the prohibition of the punishment of innocent subjects, Hobbes tells us that 'the Infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature.'<sup>204</sup> Again, this is due to the original right of nature retained by the sovereign; we are told that 'against Enemies, whom the Common-wealth judgeth capable to do them hurt, it is lawfull by the originall Right of Nature to make warre.'<sup>205</sup> In the case of rebellious former subjects, this 'warre' is extended 'not onely to the Fathers, but also to the third and fourth generation not yet in being, and consequently

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while men remain in a state of unceasing war and insecurity.' Warrender 1957, pp. 52-76; Bobbio 1993, p. 46; Zagorin 2009, pp. 41-4.

<sup>204</sup> Hobbes 2012, p. 494.

<sup>205</sup> Ibid.



innocent of the fact, for which they are afflicted.’<sup>206</sup> It is worth noting that this description of the rights of the sovereign contravenes the parameters for punishment in a number of ways. Not only is hostility against living innocents permissible, but the purpose of this action, while still guided by the overall good to the commonwealth, is described in terms which Hobbes does not apply to punishment proper (Hobbes terms actions taken against rebels ‘vengeance’).<sup>207</sup> The extension of hostility towards the descendants of rebels highlights the previous point regarding the treatment of innocents outside the commonwealth.

As we can see, both of these sets of activities—those directed at punished subjects and those directed at enemies—are consequences of the sovereign’s retained natural right, but only one, that constituting punishment, has the limitations described above. These limitations, and hence the practice which they define, only ever apply to actions taken against subjects. The protections inherent in Hobbes’s definition mean that the distinction between punishment and hostility has very real implications for subjects, even after they have been convicted of a crime and are subject to punishment. It is precisely because those who are members of the sovereign community have made agreements which allow for the widespread application of the natural laws that they in turn qualify for treatment according to the standards of punishment, rather than those of hostility.

Hobbes, then, appears to want to very clearly distinguish between the legal relationship between the punished subject and the sovereign, and that between the latter and an enemy in the state of nature, and it is here that the sovereign authorisation demonstrates the second way in which it complements the sovereign’s right to punish.

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<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

This is clear if we return to the case of the resisting subject. Importantly, according to Hobbes's theory of authorisation the subject need not leave the state, and their subject status, in order to employ his or her resistance rights, as is suggested by, among others, Lloyd and Cohen and implied by Ristroph. As was discussed above, the caveat to the sovereign institution previously mentioned, that it is impossible to covenant not to resist violence upon oneself, results in a situation where a covenant lacking this caveat is void, as the right to self-preservation is inalienable. On the other hand, those covenants which do contain this caveat, either explicitly or implicitly (and hence leave a gap for resistance) stand, even in a situation in which the sovereign's authority is challenged.<sup>208</sup> The covenant instituting the sovereign is, as was argued above, a valid covenant of this second kind, and therefore there is no need to leave the state to gain the right to resist, as it was never given up in the first place. Acting on one legitimate aspect of the covenant does not, according to Hobbes's description of the commonwealth institution, require leaving it. Indeed it is unclear why the non-existence of obligation in one area of one's life would impact areas of actual obligation, and so the rights of resistance which Hobbes allows subjects are not means by which one leaves the commonwealth, provided that they are used only when necessary.

As a result, the criminal is, assuming he or she has not also been designated a traitor, still a citizen while undergoing punishment, just one who is not expected to agree to, or own, certain actions by the state. Hobbes is explicit on this point: in Chapter 28, he writes that 'the Punishments set down in the Law, are to Subjects, not to Enemies.'<sup>209</sup> As a result, unlike enemies, citizens are not expected to legitimately

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<sup>208</sup> See Hobbes 2012, pp. 202, 214. See also Carmichael 1990, which argues that actions based on the liberties of subjects must be excused by the sovereign, as they cannot qualify as either crimes or more comprehensive challenges to his authority.

<sup>209</sup> Hobbes 2012, p. 486.

undergo any and all hardships decreed by the sovereign. This is true even if we take the case of capital punishment, raised by Brettschneider; while death is arguably the worst possible outcome for a Hobbesian individual, the strictures in Chapter 28 forbidding excessive punishment still apply. As a result, if the punishment for a given crime were simple hanging, the individual (or rather, his descendants) would have recourse against the state if this hanging were preceded by torture. Hobbes addresses this point clearly. As we saw in Chapter 1, in Chapter 21 he notes that ‘If a subject have a controversie with his Sovereigne...concerning any penalty, corporall, or pecuniary, grounded on a precedent Law; he hath the same Liberty to sue for his right, as if it were against a Subject.’<sup>210</sup> This is only true because the punished individual remains a citizen throughout the process; that is, because the relationship between criminal and state is precisely *not* the same as that between two individuals in the state of nature. It is only the continued artificial, rather than natural, nature of the sovereign which protects the criminal from treatment which really would be permissible towards an enemy of the commonwealth: ‘all infliction of evill.’<sup>211</sup>

The clear importance of the sovereign institution in explaining why punishment takes the form that it does, as regards both what it may consist of and who can be subject to it, helps to explain the language of authorisation which, as was pointed out above, occasionally characterizes Hobbes’s discussion of punishment.

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<sup>210</sup> Hobbes 2012, p. 242.

<sup>211</sup> Hobbes 2012, p. 486. For an example of an early social contract which does link punishment and expulsion from the state, see *Du contrat social ou Principes du droit politique* [*Of the Social Contract, or Principles of Political Right*] (1762). In it, Jean-Jacques Rousseau writes of the punished criminal that ‘when the guilty party is put to death, it is less as a citizen than as an enemy.’ Rousseau envisages crime as precisely the kind of broad repudiation of state authority which advocates of the state of nature hypothesis attribute to Hobbes. We read that ‘the legal proceeding and the judgement are the proofs and the declaration that [the criminal] has broken the social treaty, and consequently that he is no longer a member of the state.’ His exile or death is to be understood as that of a ‘public enemy’, and punishment is analogous to the ‘right of war’ over the ‘vanquished.’ Rousseau 1988, pp. 159-60.

Punishment can only be undertaken by ‘publique authority’ not because the right comes about through authorisation, but because of the complementary nature of the two types of contracts discussed in this chapter; both, in their own way, empower the sovereign. Thus while the sovereign may not be acting as the representative of the punished subject in the act of punishing, the maintenance of a civil relationship through the continuation of authorisation means that he is nonetheless to be understood as a public authority, and as the only individual empowered to punish not because of authorisation, but through subjects laying down their right to defend others from his judgements.

While those who argue for the state of nature hypothesis appear to be mistaken, they do remind us of an important point: that in the case of punishment, the obligation/protection nexus upon which Hobbesian citizenship is based, is, on the surface, broken. If we leave aside the legal protections offered to punished subjects, it is difficult to avoid the conclusion that in many ways the punishing sovereign and the resisting subject are not acting like sovereigns and subjects at all. The former is, rather than protecting, attempting to harm, and the subject is doing everything possible to avoid conforming his actions to the will of the sovereign. However, as the discussion of the sovereign institution suggested, Hobbesian citizenship cannot be reduced to this precise relationship or exchange persisting moment by moment. This is explicitly indicated by Hobbes himself when, in the Review and Conclusion to *Leviathan* he added a further law of nature. Hobbes declared that ‘every man is bound by Nature, as much as in him lieth, to protect in Warre, the Authority, by which he is himself protected in time of Peace.’<sup>212</sup> He provides little detail, but the point stands: even when the sovereign cannot actively protect the citizen, the citizen owes obligation due to

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<sup>212</sup> Hobbes 2012, p. 1133.

past protection. Similarly, I would argue, the case of punishment suggests that even in cases where the citizen does not offer obligation—indeed, the opposite—the sovereign must provide some degree of protection, based on past obligation. Both this pattern of past obligation, and the protection it engenders, fall under the label of ‘citizenship.’

## Chapter 3: The Hobbesian Criminal

### Introduction: Locating the Hobbesian Criminal

In Chapter 27 of *Leviathan*, Hobbes provides three reasons why an individual might commit a crime. These consist, he states, in ‘some defect of the Understanding’, ‘some error in Reasoning’, or ‘some sudden force of the Passions.’<sup>213</sup> While Hobbes’s analysis differentiates between these, they share a common result: all cause individuals to disregard the law’s authority, and hence to dismiss civil equality before it. In considering the Hobbesian criminal, we are primarily concerned with the kinds of mental or moral defects which might occur, and be understood as defects, in civil subjects. Hobbes does, in the descriptions he provides of the state of nature, note that different men will have inclinations towards more or less peaceable actions, and an analysis of Hobbes’s account of motivation suggests that we can draw some important parallels between those whose behaviour is to be ‘condemn’d’<sup>214</sup> in the state of nature and those who commit crimes in the state. Nevertheless, it is important to emphasise the extent to which individual dispositions, and in particular those linked to criminality, cannot be divorced from their civil surroundings.

An attempt to locate and explain the Hobbesian criminal, then, is not simply a matter of examining the account Hobbes provides for the roots of conflict in the state of nature, or the motivations men might have to reject civil authority altogether. The problem of crime is a civil one which must be understood and managed in the context of sovereign rule. Noel Malcolm and Gabriella Slomp have both recently drawn attention to the extent to which *Leviathan* in particular can be read in the context of Renaissance mirror for princes literature; the text is intended to provide guidance to

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<sup>213</sup> Hobbes 2012, p. 454. This echoes Thomas Wright’s assertion, regarding sins, that ‘some are of passion, others proceede from ignorance, others from malice and wilfulnesse’ Wright 1601, p. 3.

<sup>214</sup> Hobbes 1983, p. 46.

the sovereign of the commonwealth.<sup>215</sup> Part of this guidance, for Hobbes, consists in helping his reader to understand not only why certain individuals might display specific manners or passions, and the kinds of actions that these might in turn provoke, but also the ways in which these passions interfere with the proper deliberation of the *citizen*.

In setting out the basis for his analysis of man's need for the state, Hobbes tells us that there is a 'genrall inclination' in all mankind, 'a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death.' The root cause of this aspiration is man's need to ensure 'the means to live well.'<sup>216</sup> However, once this basic need is met, constantly active and striving man will find that he has other desires, which in turn require power to satisfy. It is here that man differentiates himself from his fellows. In the state of nature there is a degree of necessitated conformity in men's actions, as all men either compete for resources, or act in the knowledge that others may do so.<sup>217</sup> After the institution of the sovereign, however, men's actions are driven by their particular psychologies and desires, as the constant struggle which characterizes the state of nature has been brought to an end and they are free to engage in other pursuits. These different desires will determine the extent to which individuals will conform to the established political order and hence behave, on the whole, as law-abiding citizens.

Therefore, while in the state of nature there are three main causes of war which have their bases in human nature—the passions of competition, diffidence and glory, and the individual dispositions which are governed by these<sup>218</sup>—we cannot simply

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<sup>215</sup> Malcolm 2012, pp. 56-7. Slomp 2015, p. 41. See Vaughan 2001, p. 470 for the argument that Hobbes wrote *Leviathan* for a number of audiences, including but not limited to 'governors of whole nations'. See, however, Strong 1993, p. 159 for the argument that 'the sovereign is not to use *Leviathan* as a handbook, in the manner of the 'Mirror for Princes' literature'.

<sup>216</sup> Hobbes 2012, p. 150.

<sup>217</sup> Hobbes 2012, p. 190.

<sup>218</sup> Hobbes 1969, p. 71; Hobbes 1983, p. 46; Hobbes 2012, p. 192.

turn to these impulses to explain criminal action within the commonwealth, as both the causes and consequences of these passions have changed with the introduction of the state. This transformation can be illustrated by the case of diffidence. We are told that in the state of nature, men who ‘use Violence’ for this reason do so primarily to defend their ‘persons, wives, children, and cattell’ from those whose major motivation is competition.<sup>219</sup> As such, diffidence is an entirely reasonable and expected response to a situation in which a(n unknown) number of men have a ‘known disposition’ to war. Hobbes even suggests that, while in the state of nature there is no ‘Propriety, no Dominion, no *Mine* and *Thine* distinct’<sup>220</sup> and that therefore all acts are, despite their motivation, done with right, the diffident individual is particularly justified in his actions, as he acts in response to a concrete threat.

Once the sovereign has been instituted, on the other hand, we see a change in both the causes of, and the right to act on, diffidence. Hobbes does not insist that men recklessly leave themselves vulnerable to crime; he notes that his reader ‘when taking a journey...armes himselfe, and seeks to go well accompanied; when going to sleep, he lockes his doores; when even in his house he locks his chests.’<sup>221</sup> Such acts betray what ‘opinion’ most men have of their ‘fellow subjects.’ They are not in themselves, however, dangerous to the peace of the commonwealth and therefore are acceptable responses to potential risk.<sup>222</sup> However, the more extreme consequences of diffidence are, in the state, crimes; in Chapter 27 we read that while to kill in immediate self-defence is ‘no Crime’, to ‘kill a man, because from his actions, or his threatenings, I may argue he will kill me when he can...is a Crime’ precisely because the

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<sup>219</sup> Hobbes 2012, p. 192.

<sup>220</sup> Hobbes 2012, p. 196.

<sup>221</sup> Hobbes 2012, p. 194. See also Hobbes 1983, p. 45.

<sup>222</sup> Hobbes 2012, p. 194.



circumstances have changed.<sup>223</sup> What would in the state of nature qualify as justified diffidence is, in the state, a form of criminally-motivating passion. In cases where the threatened individual has ‘time, and means to demand protection, from the Sovereign Power’<sup>224</sup> the degree of diffidence experienced by the individual in question is inappropriate for the situation in which he finds himself. The passion of diffidence has shifted from a necessary precaution to a passion which has real potential to unsettle the peace, and the individual who is thus primarily motivated has changed from the most laudable individual in the state of nature to a suspicious, potentially dangerous member of the commonwealth. The presence of the coercive power of the state has decreased the potential number of men whose diffident dispositions are a reasonable response to the outside world, and, in doing so, has changed how we should see such men.

In drawing up our picture of the Hobbesian criminal, then, there are certain factors which we must take into account. Criminals are those who already live in a society in which the sword of justice is in effect; they are subject to punishment for breaking laws, and they are, in the majority of cases, aware of this fact. Therefore, the reasons to commit crimes can also be understood, conversely, as reasons to ignore the threat of punishment. Hobbes, in *Leviathan*, tells us that ‘those things which we neither Desire nor Hate, we are said to Contemne.’<sup>225</sup> Criminals are those who demonstrate contempt for the law’s coercive power; their actions are not finally determined by the threat of punishment. The question of the extent to which the threat of punishment acts as a systematic deterrent will be dealt with below in more detail through an analysis of Hobbes’s treatment of the categories of ‘just’ and ‘unjust’ men. However, it is worth

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<sup>223</sup> Hobbes 2012, p. 464.

<sup>224</sup> Ibid.

<sup>225</sup> Hobbes 2012, p. 80

noting at this stage that throughout his works, Hobbes suggests that this threat is the key reason for consistent law abidingness.<sup>226</sup> It is therefore of primary importance to Hobbes to consider what could possibly cause some men to ignore it. Hobbesian subjects commit crimes for a range of reasons. However, a study of the reasons highlighted in his works brings us closer to understanding certain types of motivation which Hobbes saw as socially disruptive, and yet which nonetheless could be, unlike those which led to rebellion, accommodated and addressed within the state.

### **The Roots of Criminality: Passions and Deliberation**

While the passions are the third and final explanation Hobbes provides for criminal action, the role he gives to them in explaining all action, whether criminal or law abiding, means that any discussion of human motivation and character must begin with a discussion of his model of passion and the will. Hobbes defines passion as conceptions, or the ‘motion and agitation of the brain’, which have subsequently proceeded to the heart and which thus become inclinations to act or not act in a given situation.<sup>227</sup> They are the expression of an individual’s appetite or aversion towards an external object, and are therefore inevitably based on subjective individual judgement.<sup>228</sup> We see as good that which we have an appetite for and evil that for

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<sup>226</sup> See Chapter 4 for a detailed discussion of Hobbes’s theory of deterrence.

<sup>227</sup> Hobbes 1969, p. 31. Hobbes’s presentation of the passions was in direct opposition to the much more common Scholastic Aristotelian account, according to which reason, the will and the passions are distinct faculties of the soul. According to this tradition, as well as to increasingly influential neo-Stoic philosophy, the passions were figured as disruptions preventing reasoned action, and it was therefore man’s duty to learn to control his passions rather than be guided by them. On this tradition, see Chapter 3 of James 1997; Chapter 2 of Dixon 2003; Miner 2009 and Sharpe 2011.

<sup>228</sup> While Hobbes’s account of the passions as the source of all actions was anomalous for his period, his division of the passions into appetite and aversion did have something in common with the work of his Aristotelian contemporaries. See for example Wright’s assertion that ‘Aristotle reduceth all passions to pleasure and paine... Some other moderne Philosophers ayning (almost as the same marke) distinguish in genrall, all Passions into two members, that is, some consist in prosecuting, procuring, or getting of some good thing profitable vnto them: others, in flying, or eschewing some ill thing that might annoy them.’ Wright 1601, p. 44.

which we hold an aversion. The various passions included in Hobbes's taxonomy are in turn different manifestations or constructions of these aversions and appetites; thus hope is defined in *Leviathan* as 'Appetite with an opinion of attaining' while fear is explained as 'aversion, with opinion of Hurt from that object.'<sup>229</sup>

The passions, then, reflect personal beliefs about how a given individual believes that a specific situation will affect him; we may generalise about the kinds of situations which will provoke fear or hope in most men, a project which Hobbes does not shy away from, but ultimately they relate to the experience and imagination of the individual. As such, they play an important role in man's decision making. This process, labelled 'deliberation' by Hobbes, consists in the 'advantages and disadvantages' of a given act 'show[ing] themselves this way and that, so appetite and aversion will alternate, until the thing demands that a decision be made.' The 'last appetite (either of doing or omitting), the one that leads immediately to action or omission, is properly called the *will*.'<sup>230</sup>

According to Hobbes, we cannot control the specific passions that will arise in our deliberation. We can, however, consider the likely means to and consequences of the action which we are considering, which will in turn affect our deliberation and the likelihood of our will being, in the end, to act in a certain way. This type of deliberation depends, largely, on memory. Hobbes notes that from 'Desire, ariseth the Thought of some means we have seen produce the like of that which we ayme at; and from the thought of that, the thought of means to that mean; and so continually, till we come to

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<sup>229</sup> Hobbes 2012, p. 84.

<sup>230</sup> Hobbes 1998, p. 46. We can contrast this with the definition of deliberation provided, for instance, by Bishop Bramhall, for whom deliberation is 'an inquiry made by *reason*, whether this or that... be a good fit and means, or... what are good fit and means to be chosen for attaining some wished end.' Bramhall 1999, p. 59. Emphasis mine. See James 1997, p. 272 on the ways in which Hobbes's model of deliberation, which she labels an 'oscillation', departs from this Aristotelian account of deliberation as conflict.

some beginning within our own power.<sup>231</sup> Importantly, this process of remembrance does not simply consist in determining how to obtain that which initially provoked our desire. In some cases, this directed thought will consist of prudence, or in the determining of ‘the event of an action.’<sup>232</sup> In such cases, an individual ‘thinketh of some like actions past, and the actions thereof one after another; supposing like events will follow like actions.’<sup>233</sup> A key illustration used to demonstrate this process is that of punishment. In his discussion of prudence and imagination in *Leviathan* Hobbes notes that a man may have, when considering ‘what wil become of a Criminal...this order of thoughts, The Crime, the Officer, the Prison, the Judge, and the Gallows.’<sup>234</sup>

When such a train of thought is integrated into deliberation, then, we can expect the passion of fear to result in an aversion towards crime, despite the initial desire to obtain a particular good. Thus deliberation can be a complicated process, involving memory and prediction as well as an instinctive reaction to an external stimulus. However, in all cases it results in the will to do or not to do; in the case of the prudent man who reasons correctly, the fear of punishment will generally lead to law abiding behaviour.

The last, crucial feature of Hobbes’s theory of deliberation which we must take into account before exploring his discussion of the causes of crime is that the final passion, or will, can be determined from the action itself. If a man acts we must assume that this act reflects his will and is the result of a process of deliberation. Importantly, the will is not to be understood as the only passion which was experienced during the process of deliberation; Hobbes notes that an individual may, until the act is committed, go through a number of different inclinations, any number of which may

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<sup>231</sup> Hobbes 2012, p. 40.

<sup>232</sup> Hobbes 2012, p. 42.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

be quite powerful.<sup>235</sup> This model of deliberation means that in order to understand certain types of activity, such as criminal behaviour, it is important to begin with the passions which would, in some individuals, play a stronger role in deliberation than the fear of punishment. Moreover, Hobbes suggests that some passions, when they are habitually experienced and acted upon, can tell us something about not only a specific deliberative process experienced by an individual, but also about their repeated deliberative habits. It therefore becomes important for Hobbes's sovereign to not only understand, but mitigate against, both certain habitual passions which prevent deliberative processes from following the prudent course outlined above, and against the social and political circumstances which would encourage such passions.

### **Dispositions and the Criminal Passions**

We are told in *Leviathan* that 'in the nature of man, we find three principall causes of quarrell.'<sup>236</sup> The three main passions which are both constitutive of, and fostered within, the state of nature are competition, diffidence, and a desire for glory. Men living precariously are driven to act by, and in reaction to, these three central motivations behind violence and domination. Thus we read that competition 'maketh men invade for Gain...to make themselves Masters of other men's persons, wives, children, and cattell', while diffidence causes the same, but for 'Safety...to defend them'. Glory-seekers, on the other hand, invade for 'Reputation' and will resort to violence to gain 'trifles, as a word [or] a smile.'<sup>237</sup> The analysis Hobbes offers of these motivations makes it clear that he is speaking of types or patterns of behaviour

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<sup>235</sup> Hobbes writes that 'when someone deliberates, none of the above acts is a mixture of appetite and revulsion, but is appetite or revulsion pure and simple.' Earlier 'acts' can be called 'inclination' or 'propensity', but never 'the will.' Hobbes 1976, p. 448.

<sup>236</sup> Hobbes 2012, p. 192.

<sup>237</sup> Ibid.

demonstrated by men, rather than of passions which individuals in the state of nature alternate between.

This model of motivation in the state of nature undergoes some modification over the course of his writing on the subject. In the *Elements*, for example, we read that ‘some are vainly glorious, and hope for precedency and superiority above their fellows’; in response ‘those men who are moderate, and look for no more but equality of nature’ will attempt to subdue these vain glorious troublemakers.<sup>238</sup> As a result of this inevitable conflict ‘shall proceed a general diffidence in mankind, and a mutual fear one of another.’<sup>239</sup> Here, then, we see that diffidence, or fear, is not a motivation which indicates a third disposition among men. The passion is rather a ‘general state’ which affects the vain glorious and the moderate equally, operating alongside their main motivating passion. In *De Cive*, we see a similar division as that presented in the *Elements*. Hobbes notes that ‘all men in the State of nature have a desire, and will to hurt, but not proceeding from the same cause, neither equally to be condemn’d.’<sup>240</sup> He goes on to make a simple division between the man who ‘practices naturall equality’ and is therefore ‘temperate’ and he who ‘will have a License to doe what he lists’, showing his actions to be derived from ‘Vain glory’ and his character to be aggressive.<sup>241</sup> In sum, the conflict in the state of nature is the result of these two competing motivations. By *Leviathan*, the moderate man of the *Elements* and *De Cive* has become diffident, while the vainglorious man has been carved into two distinct characters, the acquisitive or competitive, and the glory-seeking.

Hobbes’s various discussions of the state of nature suggest that even outside of the state, men have a tendency to form dispositions. Moreover, these dispositions

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<sup>238</sup> Hobbes 1969, p. 71.

<sup>239</sup> Ibid.

<sup>240</sup> Hobbes 1983, p. 46.

<sup>241</sup> Ibid.

are, ultimately, reflections of individuals' ability to recognise the natural equality of man. This is most explicit in *De Cive*, with Hobbes's note about culpability, and in the *Elements*; in both texts we read that the moderate man is primarily motivated by the 'equality of nature.'<sup>242</sup> In *Leviathan*, the diffident man is not thus described. However, Hobbes nonetheless suggests that while all men in the state of nature, despite their motivations, attempt to invade others and gain dominion over them, we can distinguish between those who take 'pleasure in contemplating their own power in acts of conquest, which they pursue farther than their security requires' and those who 'would otherwise be at ease within modest bounds.'<sup>243</sup> The actions of these men, who are acquisitive and violent due to their fear, are nonetheless limited by a recognition of natural equality, as indicated by their desire to acquire goods prudentially rather than for their own sake. As we shall see this model, in which troublesome behaviour is the result of passions linked to a rejection of natural equality, finds a parallel in the state, as some men attempt to overcome the civil equality found among citizens.<sup>244</sup>

In Chapter 11 of *Leviathan* Hobbes identifies a number of types of behaviour or character, which he terms 'manners.' These correspond to men who are largely ruled by particular passions and modes of thought.<sup>245</sup> While he notes that 'the

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<sup>242</sup> Hobbes 1969, p. 71; Hobbes 1983, p. 46.

<sup>243</sup> Hobbes 2012, p. 190.

<sup>244</sup> On the civil importance of accepting equality see Mathie 1976, p. 461 which argues that 'Claims to dominion for the sake of vainglory are necessarily inconsistent with that acknowledgment of natural equality which is a necessary condition for the institution and safeguarding of civil society.' See also Hoekstra 2013, pp. 99-108 which notes that for Hobbes, peace requires men's mutual acknowledgement of equality.

<sup>245</sup> In suggesting that individuals were driven by specific passions, and that they could therefore be classified according to these patterns in their motivations, Hobbes was following a common trope of early modern taxonomies. Joseph Hall, in his discussion of the vices, conflated these with the individuals displaying them, frequently referring to different types of 'disposition'. His text is accordingly organised into sections on the *characters* of, among others, the hypocrite, the busie-bodie, the superstitious, the profane, the male-content and the envious. Hall 1608. Wright makes the same assumption, arguing that 'you shall haue no man, but hee is inclined more to one passion than another...for cholericke men be subject to anger, melancholy men to sadnesse, sanguine to pleasure'. Wright 1601, pp. 113-4. On this topic see also Wright 1601, pp. 44-5, 120. Wright's work on the passions was particularly popular, with new editions appearing in 1604, 1620 and

voluntary actions, and inclinations of *all* men, tend, not only to the procuring, but also to the assuring of a contented life' both the understanding individuals have of what constitutes this 'contented life' and the means by which it can be achieved will differ according to which passions are dominant in an individual's psychology.<sup>246</sup> *Leviathan* is the first time Hobbes introduces this explicit classification of manners into his political theory, and the means by which they are created is not fully explained in this text. However, this process, by which passions are transformed into habitual manners, is elaborated upon in *De Homine*, where Hobbes notes that dispositions, when they become ingrained by habit and thus 'beget their actions with ease and with reason unresisting', can be termed 'manners.'<sup>247</sup>

Importantly, these manners act as a form of deliberation, but it is deliberation which circumvents an extended consideration of advantage and disadvantage. As a result, certain passions which might be helpful in a given situation are not given due weight, as reason has become 'unresisting'. The power of habit means that errors in judgement may be repeated in the future, including errors which concern an individual's own best interest in a given situation. To develop a particular manner, then, is to limit one's own scope for acting. A manner which has as its primary motivation fear of punishment would limit the likelihood of an individual committing a crime. A manner which is primarily vainglorious, on the other hand, may in fact increase this same likelihood by limiting the extent to which an individual's deliberation will take seriously the risk of consequences for his actions.

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1630. The 'Old Catalogue' at Chatsworth contains entries for both of these texts, and Hobbes was likely aware of the ways in which his own account of the passions agreed and differed from them. Talaska 2013, pp. 88, 116.

<sup>246</sup> Hobbes 2012, p. 150. Emphasis mine.

<sup>247</sup> Hobbes 1998, pp. 68-9.



In the same text, Hobbes argues that discussions of manners in this sense can only take place in relation to the state, with manners being judged according to the extent to which they help or hinder the state's purpose. This should not be taken to mean that Hobbes does not believe that dispositions as such only exist in the state, merely that in discussing the consequences of the passions and the habits which are thereby formed, his concern will be the standard of civil obligation. As he notes in *De Homine*, 'I say that good dispositions are those which are suitable for entering into civil society; and good manners (that is, moral virtues) are those whereby what was entered upon can best be preserved.'<sup>248</sup> It is in this context that the question of dispositions and the passions will be approached.<sup>249</sup>

Hobbes's treatment of manners in *Leviathan* is also principally concerned with the extent to which they are 'qualities of man-kind, that concern their living together in Peace and Unity.'<sup>250</sup> He thus expands upon the discussion of passions which he outlined in Chapter 6, but here adds in the likely consequences of one's actions being largely determined by one passion or another. The discussion, therefore, has moved beyond an account of the passions as motivations to action and has instead become a question of the types of action which can be expected from individuals whose deliberative processes have become primarily defined by these passions. Through the

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<sup>248</sup> Hobbes 1998, pp. 69-70. Compare this with Edward Reynolds's assertion that '*Passions* may be the subject of a three-fold discourse; *Naturall*, *Morall*, and *Civill*.' According to Reynolds, '*Morall* consideration' will take into account 'how the *indifferencie* of them is altered into Good or Evill, by vertue of the Dominion of right Reason, or of the violence of their owne motions' while in 'their *Civill* respects, we should also observe how [the passions] may be severally wrought upon and impressed; and how, and on what occasions, it is fit to gather and fortifie, or to slack and remit them; how to discover, or suppress, or nourish, to alter, or mix them, as may be most advantageous' and 'how to advance and promote our just ends, upon the observation of the Character and dispositions of these, whom we are to deale withall.' Reynolds 1640, pp. 41-2. Hobbes's account, by contrast, treats these moral and civil considerations as two elements of the same project.

<sup>249</sup> See Abizadeh 2011, p. 300 which differentiates between conflict provoked by disagreement, and conflict as the result of objectively problematic dispositions. I suggest that the latter is even more important in the state than it was in the state of nature.

<sup>250</sup> Hobbes 2012, p. 150.

introduction of manners, Hobbes justifies the type of explanation he provides in this and earlier works for both the violence found in the state of nature, and, as will be examined below, his version of the individual whose disposition is fundamentally just.<sup>251</sup>

Before turning to the just man, however, it is necessary to examine Hobbes's presentation of manners in Chapter 11. In some cases, these correspond to types we have seen outlined in the state of nature, but others can only emerge upon the institution of the state. Just as competition was a source of discord in the state of nature, so it continues to be in the state: 'Competition of Riches, Honour, Command, or other power' in the commonwealth results in 'Contention, Enmity, and War.' Such individuals are likely to keep behaving as if the state were never instituted. They will 'kill, subdue, supplant or repell' their adversaries, as their primary disposition-forming passion will not allow for a proper consideration of both the general danger to society of indulging in personal revenges, or of the risk of punishment inherent in engaging in such criminal actions.<sup>252</sup> On the other hand, there are manners and patterns of action which, because dangerous in the state of nature, only really emerge as practical motivations in the state. Thus we read that 'Desire of Ease' and 'Desire of Knowledge' are both manners which incline individuals to not only desire the creation of the state, but to, once it exists 'obey a common power.'<sup>253</sup> Fear, which in the state of nature was a motivation for violence even among those whose disposition inclined to the equality of all men can become, in the state, a motivation for law-abiding behaviour.

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<sup>251</sup> In framing just and unjust men as possessing particular dispositions I depart from the analysis in Rudolph 1991, which argues that prior to 1650 Hobbes does not make use of the concepts of dispositions and manners and only views the passions as immediate responses to external stimuli. While it is true that Hobbes's discussions of habits and dispositions are only found in the later works, his account of these two foundational types of man is presented all of his works of political theory.

<sup>252</sup> Hobbes 2012, p. 152.

<sup>253</sup> Ibid.

However, it is important not to overstate the importance of this particular discussion of manners in helping us to identify the Hobbesian criminal. The chapter can be read in two ways; it is a discussion of the kinds of manners which will tend towards obedience within the commonwealth, but it is also a description of the dispositions which will incline individuals to wish to live in a commonwealth at all. In some cases, this can be taken as a proxy for attitudes towards the authority of the law. For instance, men whose dispositions are guided primarily by fear of death, love of ease or desire for knowledge are likely to support the existence of the state more broadly. They are unlikely to attempt to overthrow the state, or even to display a habitual criminal disposition, as they specifically value the presence of civil institutions. The discussion of manners in both *Leviathan* and *De Homine* can therefore help us to recognise Hobbes's framework for classifying individuals and their likely behaviour. However, it cannot be our principle source for understanding the potentially negative consequences of certain dispositions; dispositions which do not necessarily incline to the creation of the state may or may not result in criminality within it.

In order to discover the passionate roots of crime, therefore, we need to apply the analysis of habit formation found in Chapter 11 and *De Homine* to the specific passions discussed in Chapter 27. Of course, all crimes, like all actions, are the result of passion. Furthermore, if we take into account comments Hobbes makes elsewhere, this list of passions most likely to result in criminal behaviour is not exhaustive. In particular, there is a further type of disposition not mentioned in Chapter 27, that of the unjust man. This figure, I will argue, can act as something of an explanatory key encompassing the various criminal dispositions Hobbes enumerates. However, before

these points can be elaborated upon, it is necessary to examine the passions about which he was, in this context, particularly concerned.

Hobbes cites vain-glory, anger, hate, lust, ambition and covetousnesse as being the passions which are ‘most frequently the causes of Crime.’<sup>254</sup> Hobbes’s treatment of the latter five passions is cursory. He writes that ‘there are few Crimes that may not be produced by Anger’; as for ‘the Passions, of Hate, Lust, Ambition, and Covetousnesse’, the ‘Crimes they are apt to produce, is...obvious to every mans experience and understanding.’<sup>255</sup> It is precisely this universality which renders these last four passions so dangerous. Because these passions ‘are so annexed to [man’s] nature...that their effects cannot be hindered, but by *extraordinary* use of Reason, or a *constant severity* in punishing them’ the crimes thus provoked are especially difficult to both predict and to prevent.<sup>256</sup> Hobbes explains these passions as outweighing any other considerations, such as the danger of punishment or concern for other citizens. Explaining the risk posed by hatred, he notes that ‘For in those things men hate, they find a continuall, and unavoydable, molestation.’<sup>257</sup> As a result of this molestation, ‘either a mans patience must be everlasting, or he must be eased by removing the power of that which molesteth him: The former is difficult; the later is many times impossible, without some violation of the Law.’<sup>258</sup> Similarly, the passions of ambition and covetousness are defined by their perpetual nature. These are, as Hobbes notes, ‘perpetually incumbent, and pressing’ and therefore reason, which ‘is not perpetually present’ has difficulty resisting them. Importantly, the consequence of this lack of

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<sup>254</sup> Hobbes 2012, pp. 460-2.

<sup>255</sup> Hobbes 2012, p. 462.

<sup>256</sup> Ibid. Emphasis mine.

<sup>257</sup> Ibid. See Reynolds’s definition of hatred as ‘a kinde of habituall detestation.’ Reynolds 1640, p. 129.

<sup>258</sup> Ibid. Again, we see a similar treatment by Reynolds, who suggests that while ‘Anger would onely *Punish* and *Retaliate*...Hatred would *Destroy*... it seeketh the *not being* of what it Hates.’ Reynolds 1640, p. 140.

reason is that ‘whensoever the hope of impunity appears, their effects proceed.’<sup>259</sup> Finally, in the case of lust, because ‘what it wants in the lasting, it hath in the vehemence’ it ‘sufficeth to weigh down the apprehension of all easie, or uncertain punishments.’<sup>260</sup> In each of these cases, the passion overrides either fear of punishment, or an awareness of moral obligation to the laws. In the cases of hatred and lust, the law and the consequences of breaking it are entirely disregarded. Crimes motivated by ambition and covetousness, on the other hand, occur because when an individual’s deliberation turns to punishment, it does not consider the aversion thus provoked to be relevant; instead, acts are committed at times when the individual sincerely believes that there is ‘hope of impunity.’

It is this latter feature of ambition and covetousness which links them most closely to the case of vain-glory, the passion or manner to which Hobbes devotes the most space in Chapter 27. Here, the consequences of a vainglorious disposition are quite different to those presented earlier in Chapter 11. In that discussion we see that there are primarily two types of vainglorious men: those who, because fully aware of their limitations, are ‘enclined onely to ostentation; but not to attempt’, and others whose self-confidence means that they are ‘enclined to rash engaging.’<sup>261</sup> This latter type of vain-glorious man, however, is no more likely to meet success than the first; because they value their lives over their reputation, upon the first sign of serious danger they ‘retire if they can.’<sup>262</sup> Maurice Goldsmith has suggested that that vain-glory is a passion which results primarily in a lack of action; based on a reading of this

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Hobbes 2012, pp. 154-6. In the *Elements*, these two types of vain-glory are distinguished, with Hobbes defining False Glory as the passion which arises from ‘fame and trust of others’, rather than from a genuine understanding of one’s limitations, and which thus often leads to ‘ill-success’. Vain Glory, on the other hand, is a passion which consists purely in imagination and ‘begetteth no appetite nor endeavour.’ Hobbes 1969, p. 37.

<sup>262</sup> Hobbes 2012, p. 156.

passage, he appears to be right.<sup>263</sup> Such men are perhaps troublesome to the state, and not to be relied upon, but they do not appear to be fundamentally dangerous. Indeed, both versions of the vain-glorious man, in this chapter, appear to be versions of the fearful man; the final will and actions of both are primarily driven by fear of death, despite their precedent ‘ostentation’, a pattern of behaviour which might suggest that in the state men of this disposition are likely to be largely law-abiding out of a fear of punishment.

In Chapter 27, on the other hand, we learn why, in the state, the passion of vain-glory can be particularly troublesome. Rather than acting as either an obstacle to action, or a spur to aborted engaging, we see that vain-glory can instead be a motivating passion. While Hobbes clearly disapproves of vain-glory it is only in the discussion in Chapter 27 that we read why the passion is likely to provoke true injustice in society, rather than merely inconvenience. He argues that those who exhibit such a ‘foolish over-rating of their own worth’ are more likely than others to form a ‘Presumption that the punishments ordained by the Lawes, and extended generally to all Subjects, ought not to be inflicted on them, with the same rigour they are inflicted on poore, obscure, and simple men.’<sup>264</sup> Vain-glory can take a number of forms, Hobbes suggests, and each is dangerous in its own way.

Those whose false estimation is prompted by great wealth ‘adventure on Crimes, upon hope of escaping punishment, by corrupting publique Justice, or obtaining Pardon by Mony, or other rewards’<sup>265</sup> while those who ‘have multitude of Potent Kindred’ and those who are ‘popular men that have gained reputation amongst the Multitude’ also break laws, but in their case their willingness comes ‘from a hope

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<sup>263</sup> Goldsmith 1966, p. 74.

<sup>264</sup> Hobbes 2012, p. 460.

<sup>265</sup> Ibid.

of oppressing Power, to whome it belongeth to put them in execution.<sup>266</sup> The third category of vain-glorious men Hobbes highlights as dangerous are those who ‘have a great, and false opinion of their own Wisdome.’ These men are especially dangerous, for this overestimation causes them not only to believe they will be able to escape punishment, but also to question the judgements and actions of their rulers. As a result, they ‘unsettle the Lawes with their publique discourse’, and suggest that ‘nothing shall be a Crime, but what their own designs require should be so.’<sup>267</sup> While these cases of vain-glory are distinct, in each case the logic underpinning the criminal action is the same; through a mis-judgement of their own abilities, such individuals assume that they will be able to avoid punishment. Thus, the capacity of such individuals to correctly reason regarding the likely consequences of their actions, if they live in a state where crime is regularly punished, is compromised.

One of the defining components of vain-glory is that individuals experiencing this passion are mistaken about the true nature of their role in the world and their capacity to assert dominance in a given situation. Hobbes repeatedly notes that men in general have a tendency to overestimate their own cunning; as he writes in Chapter 13 of *Leviathan*, men ‘see their own wit at hand, and other mens at a distance’<sup>268</sup> and as a result are apt to overestimate their own skill or power. We can read the vainglorious as falling into precisely this type of mental defect. Indeed, Hobbes’s assumption appears to be that criminal wills which have been shaped by vain-glory can be addressed by sovereign demonstration of the flaws in their deliberation. It becomes imperative, then, to design a system of punishment which does not distinguish between the wealthy, popular and wise on the one hand and the poor, obscure and simple on

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<sup>266</sup> Ibid.

<sup>267</sup> Hobbes 2012, p. 462.

<sup>268</sup> Hobbes 2012, p. 188.

the other.<sup>269</sup> The discussion of vain-glory and its role as a motivating factor for crime also suggests that certain tendencies among the rich and powerful might be exacerbated by the practice of the sovereign if the latter does not take care to institute such a system. Hobbes suggests that in some cases, the rich and powerful who believe that it is precisely these traits which will grant them impunity are, in fact, correct.

*Leviathan* was not the only text in which Hobbes displayed concern over the ability of the rich and powerful to avoid the consequences of their actions. In *De Homine* he noted that ‘Riches, if immense...are useful’ because they ‘are almost certain protection.’<sup>270</sup> Hobbes does not here suggest that this is specifically protection from justice or punishment, but given his earlier comments about the vainglorious wealthy, we can perhaps assume this is one thing which he had in mind. We also read, in an argument that to some extent echoes the cases of the popular criminals and those with potent kindred that ‘Moderate wealth, to those willing to use it for protection, is also useful; for it acquires friendships; friendships, moreover, are protection.’<sup>271</sup>

These passages suggest that Hobbes was actively worried about sovereigns instituting a model of justice in which social role or other advantages could be used to insulate their holders from the consequences of their actions. He also emphasises that certain dispositions which lead to criminal behaviour on this basis arise from the

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<sup>269</sup> Indeed, this is precisely what Hobbes suggests in Chapter 30, in which the duties of the sovereign are outlined: ‘The safety of the People, requireth further, from him...that Justice be equally administered to all degrees of People: that is, as well the rich, and mighty, as poor and obscure persons...so as the great, may have no greater hope of impunity, when they doe violence, dishonour, or any Injury to the meaner sort...For in this consisteth Equity.’ Hobbes 2012, p. 534. The sovereign has not only moral, but also prudential, reasons for designing such a system. See Chapter 4 for a discussion of the natural punishments that can befall a sovereign seen to be abdicating his duty in this area. It is worth noting that such a system of justice would not, on its own, correct the actual defect of manners displayed by the vainglorious; these would continue to believe themselves able to skirt the law in certain circumstances, but a properly-designed system of justice would reduce their perceived opportunities. On the limited ability of punishment to correct or change deliberative habits, see Chapter 4.

<sup>270</sup> Hobbes 1998, p. 49.

<sup>271</sup> *Ibid.*



experience of living in the commonwealth. While, as we saw, a reluctance to act according to natural equality was a type of disposition already present in the state of nature, personal attributes such as nobility and civil power, which can lead to the kinds of vainglorious criminal actions described above, exist only in the state. Later in the same text Hobbes writes that ‘dispositions are frequently made more proud by riches and civil power.’<sup>272</sup> This occurs because ‘those who can do more demand that they be allowed more, that is, they are more inclined to cause injuries, and they are more unsuited for entering into a society of equitable laws with those who can do less.’<sup>273</sup> This is not to say that Hobbes advocated the abolition of the aristocracy; in the same passage he notes that such disruptive behaviours are particularly common among new members of the nobility, while those who make up the ‘Ancient Aristocracy’ are far less likely to act according to these types of vain-glory. But he is worried that such behaviour might be encouraged. This version of nobility is characterised by a reluctance to act according to civil laws rather than according to individual desires; the sovereign, then, must take particular care that such men do not in fact become criminals, and that the description of the consequences of wealth and powerful friendships, cited above, is not one which is applicable in his state.

The final passion which Hobbes suggests can lead to crime is fear. While fear is most frequently the means by which men are encouraged to keep the law, fear which is not justified by a direct threat to one’s life may nonetheless provoke criminal action. Thus to the case of the threatened individual who nonetheless has the opportunity to seek sovereign protection, outlined above, Hobbes adds those of men who fear for their reputation and are thus inclined to seek private revenge, and of men who ‘stand

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<sup>272</sup> Hobbes 1998, pp. 65-6.

<sup>273</sup> Ibid.

in fear of Spirits, either through his own superstition, or through too much credit given to other men.<sup>274</sup> These three types of crime-provoking fear in turn correspond to different manners of men which Hobbes has previously listed in Chapter 11. The individual whose diffidence leads him to unwarranted aggression is one type, as we saw above. The man who fears for his honour has some similarity with the competitive man for whom honour and reputation are chief concerns, while superstitious men can also be classified as ignorant of ‘naturall causes’ and thus prone to ‘suppose, and feign unto themselves, severall kinds of Powers Invisible.’<sup>275</sup> Fearful action can therefore be understood as a mode of behaviour prompted by other passions which are more clearly dangerous.

These three types of fear are the consequences of manners as contradictory as diffidence and competition. But they are nonetheless linked in a way which distinguishes them from the prudent fear which the sovereign aims to cultivate in citizens. All three consist in the refusal to accept the claims of the sovereign power, trusting instead one’s personal experience and opinion. Thus, the diffident man implicitly rejects the commonwealth’s promise of protection, the competitive man ignores the lawmaker’s judgement that injuries against honour are not to be punished as crimes, and the superstitious man either ignores or has not sought out accurate accounts of natural science which might assuage his fears.

Finally, there are passions which Hobbes discusses elsewhere in his texts which mirror the pattern of law-breaking but which are not explicitly listed as passions which are likely to lead to criminal activity. Cruelty plays a minor role in Hobbes’s psychology; it does not appear in his discussion of the passions in the *Elements*, and

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<sup>274</sup> Hobbes 2012, pp. 464-6.

<sup>275</sup> Hobbes 2012, p. 162.

in *De Cive* it is simply defined as the violation of the natural law stipulating that revenges consider future good rather than past evil.<sup>276</sup> It is only in *Leviathan* that Hobbes comes to consider it a passion proper; here it is defined as ‘little sense of the calamity of others...proceeding from Security of their own fortune.’ However, while cruelty is described as a reason to ignore the suffering caused by, for instance, one’s crime, Hobbes was sceptical about its capacity to provoke actions as such. He did ‘not conceive it possible’ that ‘any man should take pleasure in other men’s great harmes, without other end of his own.’<sup>277</sup> Cruelty would therefore appear to be a passion which, when combined with others such as fear, anger or covetousness, might incline an individual to crime, though not provoke it on its own.

The passion of courage, on the other hand, is one which Hobbes considers extensively in his work, and it is one which, I will argue, he sees as potentially dangerous to the state despite its not being included among those passions which provoke crime. Before discussing Hobbes’s treatment of courage as such, it is important to note that the passion does appear, obliquely, in Chapter 27. Anger throughout Hobbes’s works is defined as ‘sudden courage’, and, as mentioned above, anger was certainly a passion capable of provoking crime.<sup>278</sup> However, it is not only *sudden* courage which is problematic to the state; just as criminal ambition and covetousness are defined by their longstanding presence, so too is lasting courage a dangerous passion.

Hobbes’s description of this particular passion is equivocal. When Hobbes defines it in the *Elements* he tells us that it is simply ‘the absence of fear in the presence

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<sup>276</sup> Hobbes 1983, p. 67.

<sup>277</sup> Hobbes 2012, p. 90. In 1656 Hobbes was challenged on this point by his correspondent François du Verdus, who noted the example of a man who ‘took particular delight in shooting men working on roofs...in order to laugh at their expressions of terror when they fell off.’ Hobbes 1994b, p. 362.

<sup>278</sup> Hobbes 1998, p 52; Hobbes 2012, p. 84.

of any evil whatsoever; but in a stricter and more common meaning, it is contempt of wounds and death, when they oppose a man in the way to his end.<sup>279</sup> The question, then, turns on what ‘end’ the courageous man has set himself. The Review and Conclusion to *Leviathan* tells us explicitly that ‘amongst the passions, *Courage*...enclineth men to private revenges, and sometimes to endeavour the unsettling of the Publique Peace.’<sup>280</sup> As we have seen, fear is the primary means by which the prudent man is encouraged to not only enter the commonwealth, but to also ensure that his behaviour is consistently law-abiding in order to avoid precisely the ‘wounds and death’ which constitute punishment. While Hobbes does admit at the very end of *Leviathan* that there is not necessarily a contradiction between ‘Courage for the Warre, and a Fear for the Laws’<sup>281</sup> he is clearly interested in the ways in which this absence of fear can be turned to negative ends.

This theme is one to which he repeatedly turns in *Behemoth*. He notes that while fortitude is ‘necessary in such private men as shall be soldiers’ for most men ‘the lesse they dare, the better it is, both for the Common wealth and for themselves.’<sup>282</sup> Elsewhere he states that courage, even among those for whom it is a necessary trait, poses a risk over time. The means by which this can happen, through the potential interplay between courage and ambition, is highlighted in Hobbes’s

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<sup>279</sup> Hobbes 1969, p. 38. See also Hobbes 2012, p. 84, and Hall’s description of the ‘Valient Man’ who ‘contemne[s]’ death. Hall 1608, p. 33.

<sup>280</sup> Hobbes 2012, p. 1132. Contrast this ambivalence with the attitudes of proponents of the classical aristocratic virtues such as Henry Peacham, who writes that the qualities which are most useful to the ‘Weale publique’ include ‘Valor [and] Greatnesse of Spirit’. Peacham 1622, p. 3. It is important to remember, however, that despite such ‘advice books’, Hobbes’s equivocal stance on courage was not unique; nor was his association between courage, popularity, and potential sedition. Francis Bacon, for instance, wrote that ‘Popular men are hated, as standing in the light of kings, and drawing the eyes of the multitude upon themselves. Men of courage are generally esteemed turbulent and too enterprising.’ Bacon 1853, p. 353. Thomas 1965, p. 198 points out that according to Walter Raleigh valour was ‘a disposition, taken by itself, not much to be admired’. Such statements form what Thomas calls a ‘reaction against the chivalric glorification of war...initiated by the Tudor humanists and was derived from Stoic sources.’

<sup>281</sup> Hobbes 2012, p. 1133.

<sup>282</sup> Hobbes 2010, p. 165.

discussion of the potent subject, an echo of the warning about vainglorious men with potent kindred. In Chapter 29 of *Leviathan* Hobbes argues that ‘the Popularity of a potent Subject, (unlesse the Common-wealth have very good caution of his fidelity,) is a dangerous Disease.’<sup>283</sup> One of the key elements which can contribute to such popularity is ‘Military reputation’, which is described as one of the traits which ‘disposeth men to adhaere, and subject themselves to those men that have them.’<sup>284</sup> Displays of courage, therefore, may well lead to popularity. As a result of these risks, Hobbes is clear that the sovereign should do all he can to punish any individual who attempts to, ‘by reprehension of public actions, affect popularity and applause amongst the multitude.’<sup>285</sup>

As we can see, therefore, there are a number of different passions which Hobbes believed were especially likely to lead to crime. We can nonetheless draw parallels between those which he highlights, either in Chapter 27 or elsewhere in his writing, in order to suggest a root cause of why some passions incline to criminal, though not rebellious, behaviour. In other words, we are here concerned with those passions which might incline one to break the original commonwealth-instituting covenant, while nonetheless not repudiating it. As we saw with the three forms of criminal vain-glory and with the various types of fear which lead to crime, criminal passions are those which encourage an individual to put trust in their own opinion of either the likely consequences of a crime, or the necessity of the crime, above the

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<sup>283</sup> Hobbes 2012, p. 516.

<sup>284</sup> Hobbes 2012, p. 156. Hall comes to a similar conclusion, suggesting that a man, ‘if bountifull, he bindes ouer his Clients to a faction’ and ‘if succesfull in war, hee is dangerous in peace...if powerfull, nothing wants but opportunities of rebellion.’ Among such ambitious men, ‘submission is...hypocrisie.’ Hall 1608, p. 471. Edward Reynolds is also concerned, writing that ‘there are no more pestilent and pernicious disturbers of the Publique Good, than those who are best qualified for service and imployment; if once they grow turbulent and mutinous, neglecting the common end, for their owne private respects, and desirous to rayse themselves upon publique Ruines.’ Reynolds 1640, p. 46.

<sup>285</sup> Hobbes 1969, p. 183.

sovereign's own pronounced judgement. In the cases of ambition, covetousness, hatred and lust, we again see a similar pattern; ambition and covetousness can lead to the criminal refusal to acquire goods or status according to the means allowed by the commonwealth, while hatred and lust cause the criminal to ignore the possibility of legal punishment entirely.

The case of courage is slightly different. Here, similarly to cruelty, we can see it as a passion which aids and abets the more obvious criminal passions. All crime begins with desire, but the criminal passions explicitly listed by Hobbes suggest to the individual that they need not fear punishment, while cruelty and courage remove additional obstacles to crime from deliberation, such as consideration of the costs to other citizens (cruelty) or fear of consequences (courage). Ultimately, these passions all consist in a rejection of equality among citizens in the state, as all indicate a belief that either the law does not merit consideration at all, or that the consequences of law-breaking will not be applied. Thus while we need not present a single, unified version of the passionate Hobbesian criminal, in all cases we find an individual who believes that the strength and authority of the law is relative to the individual in question, and that in particular the law does not apply to them. The criminal, in this reading, places himself above other citizens in his mind during deliberation, an attitude which becomes clear in the act itself.

### **Defects of Reasoning and Understanding**

In addition to these particular passions, Hobbes also notes that there are two further sources of criminal motivation. These are defects in the understanding, or ignorance; and errors in reasoning, or the holding of false opinions.<sup>286</sup> While Hobbes separates

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<sup>286</sup> Hobbes 2012, p. 454.

these two causes, the distinction between them is not as straightforward as his presentation indicates. In fact, the errors of reasoning which are most likely to result in crime have their roots in ignorance; both of these factors, in turn, reflect the same rejection of civil equality which we found at the heart of the criminal passions.

Ignorance of the law may be a common source of crime, but this type of ignorance is not a particularly promising route if we are interested in identifying criminal types and preventing their actions. The means, on the part of the sovereign, to prevent crimes stemming from ignorance (as opposed to originating in *claims* of ignorance) are fairly undemanding and while ignorance about the source of law and the penalties for breaking it might speak to a certain carelessness about one's duties as a citizen, it does not suggest malicious intent towards the law or particularly problematic deliberative processes. However, if we return to the discussion of manners in *Leviathan*, we find that ignorance can be dangerous in two principal ways, which in turn are related both to the passions discussed above, and to the errors in reasoning which will be discussed below. First, we find that the ignorant are unable to distinguish between eloquence and flattery, on the one hand, and wisdom and kindness on the other.<sup>287</sup> Thus, the ignorant are especially prone to follow the kinds of charismatic leaders whose courage and ambition renders them threats to the commonwealth. This form of ignorance, however, does not necessarily dispose such individuals towards criminal action; rather, they are simply more likely to support criminal behaviour in others.

It is the second, related, manifestation of the risk of ignorance which is more interesting in the context of criminal dispositions. In Chapter 11 Hobbes notes that 'Ignorance of causes, disposeth, or rather constraineth a man to rely on the advise, and

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<sup>287</sup> Hobbes 2012, p. 156.

authority of others.’<sup>288</sup> This is clearly a form of ignorance linked to the one just cited, but here Hobbes suggests that it will have slightly different consequences. As a result of this type of ignorance, men are likely to form false opinions; he who is ignorant will ‘make Custom and Example the rule of his actions’ and will as a result be disposed to engage in arguments in which ‘the doctrine of Right and Wrong, is perpetually disputed, both by the Pen and the Sword.’<sup>289</sup> Ignorance, then, is the root of the kinds of false opinion which make up the errors of reasoning which, Hobbes tells us, are the third source of criminal activity.

If we turn back to Chapter 27, we find Hobbes arguing that there are three main types of error which lead to crime. The first is the result of an individual holding false principles. While there are numerous opinions which Hobbes cites throughout his works as being dangerous to the continued existence of the commonwealth, regarding crime he cites in particular the belief that ‘in all places, and in all ages, unjust Actions have been authorised, by the force, and victories of those who have committed them.’ Men prone to this error think that because ‘potent men’ break through the ‘Cob-web Lawes of their Country’, it is only ‘the weaker sort, and those that failed in their Enterprises’ who are considered ‘Criminals.’<sup>290</sup> In linking criminality with the state’s response rather than with the action itself they come to think that ‘justice is but a vain word’,<sup>291</sup> a proposition clearly linked to the idea, assimilated by the ignorant, that the doctrine of right and wrong is under dispute. Such reasoning leads to the conclusion that ‘no Act it it selfe can be a Crime, but must be made so (not by the Law, but) by

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<sup>288</sup> Hobbes 2012, p. 156.

<sup>289</sup> Hobbes 2012, p. 158.

<sup>290</sup> Hobbes 2012, p. 458.

<sup>291</sup> Ibid.



the success of them that commit it; and the same fact be vertuous or vicious, as Fortune pleaseth.<sup>292</sup>

This failure to punish may occur for the reasons outlined above: sovereigns may be lax in monitoring corruption, or may consistently pardon the powerful. They may also simply lack the ability to consistently punish wrongdoing, allowing numerous criminals to escape the consequences of their actions. The crucial flaw in this reasoning is to allow such failures to undermine one's recognition of the nature of law. This erroneous reasoning may also be a spur to revolution. Punishment, criminals may hope, might be avoided through more sympathetic leadership: 'what Marius makes a Crime, Sylla shall make meritorious, and Caeser (the same Lawes standing) turn again into a Crime.'<sup>293</sup> Thus, individuals may be tempted to effect a change in government in order to ensure that the laws will be applied, or not applied, in ways which are most beneficial to themselves.

Here, then, we have a type of criminal reasoning which is distinct from that cited above, which emphasised the roles of particular passions. Crimes which are principally driven by passion and those encouraged by errors in reasoning are both caused by the criminal's anticipation of being able escape punishment. It is this hope which principally overcomes the fear of punishment and allows the desire to commit the crime to become the will of the individual. However, while in the case of the passions, as we saw, this hope for impunity was related to a belief that civil institutions could be ignored or temporarily overcome, here the hope is that the very structures of the commonwealth, such as the identity of the sovereign or the application of the laws, can be modified.

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

This certainly looks much more like treasonous, rather than simply criminal, intention; as Hobbes notes, such endeavours, when successful, would result in the ‘perpetuall disturbance of the Peace of the Common-wealth.’<sup>294</sup> Importantly, this error of reasoning is similar to the deliberation of the vainglorious criminal who, as we saw, also hoped to ‘unsettle the Lawes with their publique discourse, as that nothing shall be a Crime, but what their own designs require should be so.’<sup>295</sup> The passion of vain-glory might, here, provide the confidence required to operate according to this error of reasoning, demonstrating yet again that while Hobbes drew clear lines between different causes of crime, he was clearly interested in the ways in which they might reinforce and encourage each other.

Hobbes’s second and third erroneous motivations for crime follow a similar pattern. He notes that, as a result of false teaching one might believe that the civil laws and natural laws are in contradiction, and hence that the civil laws are not to be followed. Finally, he suggests that among some men who are not necessarily disposed to crime, there can be a tendency to assume that determining right and wrong is simply an application of ‘common experience, and a good naturall wit.’<sup>296</sup> We might read this final case of erroneous opinion as a version of vain-glory; Hobbes notes that men prone to this type of error have ‘a great opinion of their own understanding.’<sup>297</sup> Nonetheless, as with the cases of ignorance cited in the same chapter, Hobbes seems less concerned about this final source of crime than about the passions, or the first two sources of error. While such an individual might be mistaken regarding right and wrong as they have been defined in the commonwealth, there is no indication that they are particularly attached to their definitions and will refuse correction when it is

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<sup>294</sup> Ibid.

<sup>295</sup> Hobbes 2012, p. 462.

<sup>296</sup> Hobbes 2012, p. 460.

<sup>297</sup> Ibid.

offered. More importantly, Hobbes does not suggest that this type of error is equivalent to, or a version of, that which argues that right and wrong are, despite the sovereign institution, entirely subjective.

While Hobbes does not provide a similar discussion of criminal errors of reasoning in *De Cive*, he does note that there

are some who think that those acts which are done against the Law, when the punishment is determined by the Law it selfe, are expiated, if the punished willingly undergoe the punishment...as if by the Law, the fact were not prohibited, but a punishment were set instead of a price, whereby a licence might be bought of doing what the Law forbids.<sup>298</sup>

This case suggests a fourth type of false reasoning, and one to which, like certain types of vain-glory, those who are particularly able to endure punishment might be susceptible. In such cases, importantly, we again see that while there is no hope of impunity, the criminal believes that because they have certain characteristics—such as ability to pay a fine—they have a ‘licence’ to disobey the law.

How, then, do these errors of reasoning help us to identify the deliberative processes of criminals? Unsurprisingly, given their intertwined nature, these errors of reasoning operate in a similar way to the criminal passions. There are clear parallels between those whose false reasoning suggests that they will be able to influence the application of the law, and those whose vain-glory results in the same conclusion. Similarly, the fearful, superstitious and the ignorant will be particularly disposed to believe in the false teaching of those who argue that right and wrong are in perpetual dispute.

The question remains, of course, as to why these particular passions and errors are described by Hobbes as leading to criminal, rather than to treasonous behaviour.

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<sup>298</sup> Hobbes 1983, pp. 181-2. Of course, according to the *De Cive* account this view will only be an error depending upon the sovereign’s determination of how laws and punishments should be understood. See the discussion in Chapter 1 of Hobbes’s explanation, in the same text, of how punishment might legitimately be regarded as a debt to be paid.

In *Leviathan*, as we shall see in Chapter 5, rebellious acts are defined as the renouncing of subjection, one element of which might well be the rejection of the idea that the commonwealth, through its promulgation of law, is the only legitimate source of moral judgement. In Chapter 29 of *Leviathan* Hobbes included among those seditious doctrines which are ‘Diseases of a Common-wealth’ the contention that ‘every private man is Judge of Good and Evill Actions.’ He notes that ‘from this false doctrine, men are disposed to debate with themselves, and dispute the commands of the Common-wealth; and afterwards to obey, or disobey them, as in their private judgements they shall think fit.’ While such an attitude towards the law is not immediately destructive to the commonwealth, it nonetheless ‘distract[s] and weaken[s]’ it.<sup>299</sup> Moreover, in the case of the criminals who suffer from the first type of error in reasoning, their acts go somewhat beyond simply determining whether or not to act according to the law; such individuals aim to change the common application of the law, and thus seek to not only act according to their private opinion, but also to subject all other members of the commonwealth to it.

However it is not clear that Hobbes actually sees both the holding of such opinions and acting upon them as treasonous. On the one hand, this doctrine is labelled ‘seditious’ and ‘poyson’ to the body of the commonwealth.<sup>300</sup> Actively teaching such doctrine was, Hobbes asserts, one of the causes of the civil war in England.<sup>301</sup> On the other hand, Hobbes clearly believes that these opinions lead to crime, a category of behaviour quite distinct from rebellion. Here we must draw an important distinction. The individual who commits a crime in the hope of being able to unsettle the commonwealth at some point in the future is still a criminal. Such an individual clearly

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<sup>299</sup> Hobbes 2012, p. 502.

<sup>300</sup> Ibid.

<sup>301</sup> Hobbes 2010, p. 110.

believes that they will be able to avoid punishment, but this belief is not in and of itself treasonous; as we have seen, it is characteristic of all the criminals examined thus far. However, the plan which is intended to gain this impunity is rebellious, unlike attempts to bribe judges or appeal to powerful friends and family. Thus, holding the belief that either justice as determined by the state need not apply equally (as we saw in the case of the criminal passions), or that in individual circumstances men should act according to their own understanding of good and evil is not in itself treasonous. However once an individual attempts to impose their own moral judgement upon the state, as a secondary act to the original crime itself, they can be labelled a traitor.

This analysis will become especially relevant to the case of the unjust man and the Foole, treated below, but first it is important to note that these errors of reasoning have at their heart the same basic misconception of what it means to live in society as the criminal passions; here, again, we see a rejection of equality under the law, with individuals believing either that their own wisdom means that they need not spend as much time as others contemplating the nature of good and evil, or that they may, in an attempt to avoid the legal consequences for their actions, overthrow the public, and publically agreed, conscience.<sup>302</sup>

### **The Foolish Unjust Man**

Hobbes's presentation of dispositions suggests that while there may be a multitude of potential motivations for criminal behaviour experienced by individuals, these can largely be reduced to patterns of thought which allow citizens to ignore or minimise the threat of punishment which would otherwise dissuade them from committing

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<sup>302</sup> We can again see parallels with Hall's taxonomy of vices. Hall describes the 'Presumptuous Man' as he who 'saith, I will sinne, and be sory, and escape; either God will not see, or not be angrie, or not punish it; or remit the measure.' Hall 1608, p.143.

crimes. It is these deliberative processes with which, thus far, this chapter has been concerned. This analysis has suggested that we can best understand the criminal disposition as one which, consciously or not, rejects civil equality. The evidence for this assertion has largely come from Hobbes's explicit statements on the causes of crime. However, Hobbes elsewhere in his writing presents a different, and broader, model for distinguishing between dispositions, and it is a model which reinforces this suggestion that while specific criminal motivations may differ between individuals, we can nonetheless analyse conceptual categories which explain the vast majority of criminal thought patterns and behaviours. This consists in the distinction he draws between the just man and the guiltless man.

Hobbes consistently differentiates between those who are motivated to obey the law for its own sake, and those who obey largely, or even purely, because of the risk of punishment. In doing so, he was drawing on a distinction between types of motivation which would have been familiar to any readers acquainted with Aristotle's account of human behaviour, and which was repeatedly addressed by the neo-Aristotelian Scholastics for whom Hobbes had so much criticism. However, his use of the just man/guiltless man distinction allowed him to come to very different conclusions than others using the same categories. In order to trace this shift, it is necessary first to examine how earlier theorists treated this tradition before examining Hobbes's own usage.

In Aristotle's *Nicomachean Ethics* we read that 'it is the nature of the many to be amenable to fear but not to a sense of honour, and to abstain from evil not because of its baseness but because of the penalties it entails.'<sup>303</sup> He suggests that it is possible for some men to be taught to act virtuously out of goodness rather than fear, but in

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<sup>303</sup> Aristotle 1934, p. 629.

such cases ‘the mind of the pupil must have been prepared by the cultivation of habits, so as to like and dislike aright.’<sup>304</sup> As a result of this difference in character, ‘it is proper for the lawgiver to encourage and exhort men to virtue on moral grounds, in the expectation that those who have had a virtuous moral upbringing will respond, yet he is bound to impose chastisement and penalties on the disobedient and ill-conditioned.’<sup>305</sup> Thus while Aristotle does not use the terms just and unjust to distinguish between these two types of motivation, we nonetheless see him opposing those obey the law out of a sense of justice, and those who do so from a fear of punishment.<sup>306</sup>

This distinction between two different kinds of motivation to obey the law was subsequently adopted by the theorists of the Second Scholastic. These writers believed that law was a necessary feature of human society; as Suárez writes, ‘men as individuals have difficulty in ascertaining what is expedient for the common good’ and thus require the law to ‘[point] out what should be done for its sake.’<sup>307</sup> However while all men require law, it will affect them in different ways; a differentiation between the guiding and the coercive forces of the law is thus linked to a wider debate over the nature and possibility of human freedom.<sup>308</sup> It is according to this distinction that these thinkers distinguish between those who act according to the law out of a recognition of the value of law-following, and those who act out of conformity to the law and its coercive power. Thus Francisco de Vitoria claims that while ‘everyone is

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<sup>304</sup> Aristotle 1934, p. 631.

<sup>305</sup> Aristotle 1934, p. 633.

<sup>306</sup> This Aristotelian emphasis on motivation can be found in the work of some of Hobbes’s English contemporaries. See for example Reynolds’s assertion that ‘the very best characters and truest lineaments which can be drawne of the minds of men, are to be taken from their *Desires*... Ill men dare not doe so much evill as they desire, for feare of shame or punishment.’ Reynolds 1640, p. 162. On Clarendon’s Aristotelian conception of the ‘good man’ see Robinson 1979, pp. 37-8.

<sup>307</sup> Suárez 1944, pp. 48-9.

<sup>308</sup> On Suárez’s discussion of the relationship between freedom and law see Pink 2012, pp. 125-31, 138.

*guided* by law...not everyone is *compelled* by law...no one escapes the guidance of the law [but] a man may escape the law's compulsion if he is directly responsible to a higher law.' Those who are 'truly upright people are not, strictly speaking, compelled, for they observe the law not so much for fear of punishment as for love of justice,' phrasing which, as we will see, finds a clear parallel in Hobbes's work.<sup>309</sup> Domingo de Soto makes the same point when he writes that 'the just who have habits of virtue are not subject to the law, since they do nothing because of compulsion which belongs to power, but do everything of their own free will.'<sup>310</sup>

In the passages above, Aristotle equates virtue with law-abiding behaviour motivated by such love of justice. However these categories were complicated by writers such as Suárez and de Soto. For these later theorists, lawful behaviour prompted by the coercive power of the law was virtuous. But while such actions indicated the virtue of a good citizen, they did not display the degree of virtue of those who freely obeyed the law. It was the role of the state to help citizens attain this second, more advanced degree of virtue by providing both motivations for obedience. Thus we see Suárez arguing that 'more is needed for the virtue of a good man than for the virtue of a good citizen' because 'although the virtue of a good citizen is moral and honourable as far as it goes, viewed absolutely, it is only good up to a point...and it is not enough in itself to make a completely virtuous man.'<sup>311</sup> An individual whose law-abiding behaviour is compelled is a just citizen; this limited virtue is all that the state can expect from actions motivated by the fear of punishment. Nonetheless, it is the

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<sup>309</sup> Quoted in Hamilton 1963, p. 52. Emphasis mine.

<sup>310</sup> Ibid.

<sup>311</sup> Quoted in Hamilton 1963, p. 56.



task of the state to enable the just citizen to become a just man who obeys the law because it is the right, and not merely the most advantageous, thing to do.<sup>312</sup>

Hobbes's treatment of different motivations to obey the law uses similar language. However, his model of the just man dispenses with any sense that we can consider such an individual free from obligation. The question, for Hobbes, is which obligation will take precedence in an individual's deliberation: obligation arising from their own agreement to take the sovereign's laws as authoritative, or obligation arising from one's own fear of punishment.<sup>313</sup> Nonetheless, he appears to see some value for his theory in adopting the language and categories we find in the work of these Scholastics. Before analysing how these categories can aid in our understanding of the Hobbesian criminal, it is necessary to first set out the basic elements as he presents them, and examine some shifts in his theory.

These dispositional categories are first introduced in the *Elements* where, he writes, when the terms 'justice' and 'injustice' are attributed to actions they 'signify the same thing with no injury, and injury; and denominate the action just, or unjust, but not the man so.'<sup>314</sup> Such judgements about actions correspond to our ability to label an individual guilty or not guilty of a specific act. On the other hand, 'when justice and injustice are attributed to men, they signify proneness and affection, and inclination of nature, that is to say, passions of the mind apt to produce just and unjust

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<sup>312</sup> On the ways in which punishment might enable this process, see Aquinas 1966, p. 45-9. Aquinas argues that 'a man who obeys the law solely out of fear of punishment is not really good' because while 'a kind of good deed may be done through servile fear, which is fear of punishment, it is not done well.' However, he goes on to suggest that such a man might, 'from becoming accustomed to shun what is evil and discharge what is good on account of threat of punishment' come to 'continue on that course from his own taste and choice. Hence law even as punitive brings men to good.' Thus through fear of punishment men can be habituated to obedience, and so can learn 'to [obey the law] with delight and of one's own free will.'

<sup>313</sup> The question of whether passions such as fear could act as arbitrary impediments to motion will be addressed in Chapter 4, on the purpose and proper functioning of Hobbesian punishment.

<sup>314</sup> Hobbes 1969, p. 83.

actions.’<sup>315</sup> As a result, ‘when a man is said to be just, or unjust, not the action, but the passion, and aptitude to do such action is considered.’<sup>316</sup> In speaking about just and unjust men, then, we are describing a manner or disposition; the topic under consideration has moved from a judgement of a particular act to the question of motivation. The just man and unjust man are so defined because of their tendencies towards different patterns of deliberation.

Turning to Hobbes’s definition of justice, we see in that it is also defined consistently. In the *Elements*, we read that ‘the breach or violation of covenant...is therefore called Unjust’<sup>317</sup>, while *De Cive* states that ‘*unjust* action’ is ‘*breach of Contract and trust*.’<sup>318</sup> The just man, therefore, is primarily concerned with keeping covenants; in particular, he will be concerned with keeping the covenant which has created the state, and will be largely law-abiding. During the deliberations of the unjust man, on the other hand, the need to keep contracts will not take precedence; the threat of sanction is what motivates his actions. Thus while their actions may be the same, the deliberative processes which have led to them are different. As Hobbes writes, there is an ‘*oderunt peccare* [hatred of sin] in the unjust, as well as in the just, but from different causes; for the unjust man who abstaineth from injuries for fear of punishment, declareth plainly that the justice of his action dependeth upon civil constitution, from whence punishments proceed.’<sup>319</sup>

The explanation for the just man’s actions provided in the *Elements* would seem to support the interpretation that the just man displays a just manner or

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<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Hobbes 1969, p. 82.

<sup>318</sup> Hobbes 1983, p. 62.

<sup>319</sup> Hobbes 1969, p. 83. Hobbes’s emphasis on civil constitution, as opposed to simply consequences, reminds us that while, as was noted above, we can identify pre-civil dispositions to obey the law of nature, the categories of just and unjust only emerge with the state.

disposition, and we can therefore presume that he will have a habit of performing just actions. While, as noted above, the language of dispositions and manners is not explicit in the text as whole, and thus perhaps should not be expected in the comments on just and unjust men, in describing individuals' motivation to perform just or unjust actions as an 'inclination of nature' Hobbes certainly points the reader in this direction. However, just as in later texts manners and dispositions are indications of likely rather than guaranteed behaviour, this 'proneness and affection' is not in itself an assurance of law-abiding behaviour. Hobbes notes that because of the distinction between just men and just actions, 'a just man may have committed an unjust act; and an unjust man may have done justly not only one, but most of his actions.'<sup>320</sup> Hobbes thus suggests that actual behaviour may not tell us much about patterns of individual motivation. We might witness an unjust act and presume the guilty party to be largely motivated by the kinds of motivations towards criminal activity which have already been discussed; similarly, we might witness a case of justice and extrapolate from it that the individual concerned is just. In both cases, our assumptions would, while apparently based on evidence, be potentially false.

Hobbes's presentation of this distinction in *De Cive* is similar, though increasingly framed as consisting of breaches of two different types of law: natural and civil. He writes that, because of this difference in applying the terms to men and to actions, 'he who hath done some *just* thing is not therefore said to be a *just* Person, but *guiltlesse*, and he that hath done some *unjust* thing, we do not therefore say he is an *unjust*, but guilty man.'<sup>321</sup> He defines justice in humans as 'to be delighted in just dealing, to study how to doe righteousness, or to indeavour in all things to doe that

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<sup>320</sup> Ibid.

<sup>321</sup> Hobbes 1983, p. 64.

which is just.<sup>322</sup> By the same standard, to be ‘*unjust*’ is to ‘neglect righteous dealing, or to think it is to be measured not according to my contract, but some present benefit.’<sup>323</sup> Hobbes highlights the different categories to which the terms just and unjust may be applied when he concludes by noting that ‘the *justice* or *injustice* of the mind, the intention, or the man, is one thing; that of an action, or omission, another.’<sup>324</sup> The extent to which this difference exists is highlighted in his statement that as a result of this distinction,

Innumerable actions of a *just* man may be *unjust*, and of an *unjust* man, *just*: But that 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 punishment annext unto the Law, and unrightousnesse by reason of the iniquity of the mind.<sup>325</sup>

This distinction is repeated elsewhere in *De Cive*. In Chapter 14, ‘On Laws and Sins’ Hobbes writes that ‘a man may doe somewhat against the Lawes through humane infirmity, although he desire to fulfill them, and yet his action as being against the Lawes, is rightly blam’d, and call’d *a Sinne*.’<sup>326</sup> On the other hand, unlike such temporarily weak men, ‘there are some, *who neglect* the Lawes, and as oft as any hope of gain and impunity doth appear to them, no conscience of contracts and betrothed faith can withhold them from their violation.’<sup>327</sup> As a result, not ‘only the deeds, but even the mindes [*ingenia*] of these men are against the Lawes.’<sup>328</sup> Hobbes draws a distinction between those ‘who sinne only through infirmity’ and who are ‘*good men* even when they sinne’ and those who ‘even when they doe not sin, are *wicked*.’<sup>329</sup> He

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<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Hobbes 1983, p. 178.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid. Hobbes 1984, p. 214.

<sup>329</sup> Ibid.

notes that while ‘both the action, and the mind be repugnant to the Lawes’, they should be distinguished, with ‘the irregularity of action’ labelled an ‘*unjust deed*’ and that of the ‘mind’ termed ‘*injustice, and malice.*’ The former is the result of ‘the *infirmity* of a disturbed soule’, while the latter demonstrates the ‘*pravity* of a sober mind.’<sup>330</sup>

Finally, this distinction is repeated in *Leviathan*, where Hobbes writes of the labels just and unjust, ‘when they are attributed to Men, they signify Conformity, or Inconformity of Manners, to Reason’ and that therefore a ‘Just man...is he that taketh all the care he can, that his Actions may be all Just: and an Unjust man, is that neglecteth it.’<sup>331</sup> Again, we see the same assertion that the individual actions, just or unjust, of men are not enough to determine their disposition.<sup>332</sup> However, Hobbes’s explanation of the just man differs slightly in *Leviathan* from the earlier texts cited. He explains this particular disposition by noting that among just men we find ‘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.’<sup>333</sup> *Leviathan* is also where we read the most extended discussion of the unjust man. He notes that ‘the Injustice of Manners, is the disposition, or aptitude to do Injurie; and is Injustice before it proceed to Act; and without supposing any individuall person injured.’<sup>334</sup>

As we can see, Hobbes’s presentation of the just man and the unjust man, while in many ways largely consistent, does undergo some modification over the course of

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<sup>330</sup> Hobbes 1983, pp. 178-9.

<sup>331</sup> Hobbes 2012, p. 226. Note here Hobbes’s application of the concept of ‘Manners’, introduced in *Leviathan*, to categories of behaviour which are found from the first iterations of his theory.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid. We can compare this explanation with that of ‘The Honest Man’ in Joseph Hall’s taxonomy of characters, for whom ‘Iustice is his first guide’ and who ‘hates sinne more for the indignitie of it; than the danger.’ Hall 1608, p. 13. See also Wright 1601, p. 46, which notes a number of reasons why a just action might cause delight in us. According to Wright, these include both the satisfaction of one’s conscience, and pleasure from obtaining the reputation of being one who does the right thing.

<sup>334</sup> Hobbes 2012, p. 228.

the three texts highlighted here. In particular, the explanation of the motivation of each figure appears to be slightly different. Thus while in the *Elements* we see almost no mention of the just man's motivation for action,<sup>335</sup> by *De Cive* we read that he both delights in and strives for justice. However, as the definitions in both *Elements* and *Leviathan* remind us, to delight is simply to experience 'contentment, or pleasure' with regards to some object; the desire to perform just acts, then, may be the result of any number of motions or passions which in turn produce this pleasure.<sup>336</sup> By *Leviathan*, however, we see a much more detailed explanation of why just actions cause delight in the just man. This is because they allow him to 'scorn...fraud or breach of promise', which in turn allows him to experience 'Joy, arising from imagination of [his] own power and ability.' Just acts allow the just man to glory in himself, and it is this which motivates his desire to keep contracts.

There is a long tradition in the literature of taking this final iteration of the just man as the only version of this disposition, and analysing his features on that basis.<sup>337</sup> Such discussions skirt over the fact that the introduction of forms of 'courage' as the explanation for the just man's motivation is in fact a somewhat curious one, given the equivocal nature of courage discussed above. Earlier versions of the just man limit deliberation to a question of whether or not a given act is just according to the commonwealth's determination; the just man is simply unusually aware, on this reading, of his own prior obligation. Alternatively, he might derive his 'delight' from justice through a number of passions or manners some of which, such as pity, are

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<sup>335</sup> Hobbes 1976, pp. 462-3 likewise discusses the 'good man' who 'keeps the decrees of his forefathers and who observes the laws and legal institutions' but without reference to the good man's motivating passions.

<sup>336</sup> Hobbes 2012, p. 82; Hobbes 1969, p. 28.

<sup>337</sup> See for example Oakeshott 1975, pp. 121-3; Flathman 1993, p. 87; Goldsmith 1966, pp. 79-80; Thomas 1965, pp. 203-4. For a rare discussion of the just man which argues against prioritising the version found in *Leviathan* see Harvey 2002.

consistently associated with peace and law-abidingness. In the later version, however, we have the suggestion that the just man's actions are motivated not simply by the knowledge of his covenant-based commitments to justice but rather by a form of self-regard. This would appear to undermine the suggestion that the just man's deliberation is one which is wholly in line with the kinds of deliberation which should be promoted by the state.

Rather than simply closing off certain criminal patterns of deliberation, the just man in this model deliberates by alternating between desire for a good which can only be obtained dishonestly and the potential for joy from self-regard, a model which appears to leave a gap for that criminal behaviour which also satisfies this self-regard. The example of the duel, cited in Chapter 1, would appear to be one case in which the requirements of a just disposition might come into definitional conflict with a manner defined by 'Nobleness or Gallantness of courage.' Such self-regard appears, then, to be little protection against the forms of personal judgement which Hobbes has elsewhere suggested might be the origin of crime. Indeed, it is worth noting that in the Latin *Leviathan* Hobbes appears to return to his earlier emphasis on delight; the just man, in the 1668 text, 'loves justice'.<sup>338</sup> In *De Homine* we find that 'those who do just works and give alms only for glory or for the acquiring of riches or for the avoidance of punishment are unjust even though their works are very frequently just', again equating glory with injustice.<sup>339</sup> The noble just man found in the English *Leviathan*, therefore, may not be the best guide to the disposition Hobbes outlines.

Despite these shifts in the presentation of the just man, that of the unjust man remains fairly static; in all cases, he is afraid of punishment and so his law-abiding

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<sup>338</sup> Hobbes 2012, p. 227.

<sup>339</sup> Hobbes 1998, pp. 74-5.

nature is entirely dependent upon his holding the belief that he will be punished should he break the law. As a result, if or when he does break the law it reveals the presence in his deliberation of one of the criminal passions, or one of the associated errors of reasoning. Importantly, the unjust man is therefore prone to the same basic error, whether or not he commits crimes, as those individuals who do display criminal dispositions.

It is here that we might wish that Hobbes had further distinguished between the unjust man and the prudent man discussed above. In both cases, as we have seen, their law abidingness is determined by the threat of punishment. Nonetheless, it appears plausible that prudence regarding law breaking might be a behavioural manner of the type described in *De Homine*; through habit, the prudent man might never or rarely break the law because his deliberative processes will not even consider the possibility. The description of the unjust man presented above suggests, in contrast, that he is someone who measures all his actions by their present advantage, and who, when he does commit crime, does so from a wicked disposition. This version of the unjust man appears to be far closer to those who have already been described as having criminal dispositions. In particular, the unjust man is presented as regularly engaging in precisely the debate over the ‘commands of the Common-wealth’ and whether to ‘obey, or disobey them’ as those prone to vain-glory and errors of judgement. The unjust man in this reading, then, is precisely the kind of individual who is always ready to substitute his own opinions of good and evil for that of the commonwealth and thus, again, denies that he should be subject to the same legal and social standards as his peers. The only difference is that the innocent unjust man has little hope of impunity, and hence will avoid criminal actions.



On this reading of the unjust man, he is always potentially criminal because of his internal rejection of state-defined justice as an absolute guideline for behaviour. He also begins to seem much closer Hobbes's presentation of the Foole, a figure who makes his first appearance in *Leviathan*. The just man, unjust man and Foole all appear in the same chapter, though they are not explicitly linked. We read that the

Foole hath sayd in his heart, there is no thing as Justice; and sometimes also with his tongue; seriously alleaging, that every mans conservation, and contentment, being committed to his own care, there could be no reason, why every man might not do what he thought conduced thereunto: and therefore also to make, or not make; keep, or not keep Covenants, was not against Reason, when it conduced to ones benefit.<sup>340</sup>

Importantly, the Foole 'does not therein deny, that there be Covenants; and that they are sometimes broken, sometimes kept; and that such breach of them may be called Injustice, and the observance of them justice.'<sup>341</sup> Thus, he does not deny that there are objective standards which other people will understand and adhere to; he is not foolish in the manner of those who cannot govern their own lives, cited above, and nor does he wish for the destruction of the commonwealth. Because he does not believe that a return to the state of nature would be beneficial to him, he can be distinguished from those 'needy men' who are 'not contented with their present condition' or who are 'ambitious of Military command' and are thus 'enclined to continue the causes of warre; and to stir up trouble and sedition.'<sup>342</sup> However, 'he questioneth, whether Injustice...may not sometimes stand with that Reason, which dictateth to every man his own good.'<sup>343</sup> Crucially, the Foole's logic hinges upon the idea that he will be able to 'sometimes' escape the consequences for his breaking of covenants; in the absence of this belief such actions would not stand with reason. The Foole, then, is precisely

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<sup>340</sup> Hobbes 2012, p. 222.

<sup>341</sup> Ibid.

<sup>342</sup> Hobbes 2012, p. 152.

<sup>343</sup> Ibid.

the unjust man; given that Hobbes suggests, in *Leviathan*, that just men are ‘rarely found’ he may be indicating that the majority of men are fools of this kind.<sup>344</sup> At the very least, it is difficult for men, including the sovereign, to distinguish between the just and unjust, and hence between the wise and the foolish.<sup>345</sup>

The topic of the Foole and the adequacy of Hobbes’s response to him have been the subject of extensive discussion in the literature.<sup>346</sup> In linking the Foole and the unjust man, this chapter is not attempting to resolve these discussions. Rather, I suggest that if most citizens are either unjust or must be treated as if they are, then the problem of the Foole becomes both much more widespread, and more prosaic, than has previously been recognised. The problem of the Foole, according to this reading, is not, or is not simply, that of how to convince individuals to join the commonwealth, or of how to combat the logic of potential traitors.<sup>347</sup> Importantly, Hobbes’s famous answer to the Foole can be seen as an attempt to respond to the reasons for crime listed

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<sup>344</sup> Bernard Gert suggests that ‘Hobbes’s pessimism about the number of just men is not primarily due to his belief in rareness of courage but to his awareness of the strength of man’s passions and his conviction that most people had not been properly educated and disciplined.’ Gert 1967, p. 514. The ways in which education aims to inculcate justice is explored in Chapter 4.

<sup>345</sup> See Hobbes 1983, p. 33.

<sup>346</sup> Much recent discussion has focused on whether Hobbes is primarily concerned with ‘explicit’ Fooles who, in announcing their foolish philosophy render themselves destabilizing forces within the commonwealth, or with foolish reasoning patterns, whether or not these are made explicit. See Hoekstra 1997, Hoekstra 1999, Hayes 1999, and Brito Vieira 2009 on foolishness as action; a good overview of these debates is found in LeBuffe 2007. Rhodes 1992, on the other hand, argues that the Foole is a prudential thinker who falsely believes that his prudence is true reason, or science. Springborg 2010, p. 31 also argues that the problem with the Foole is that he is guilty of ‘cognitive failure’ and thus easily led astray. Among those who emphasise the Foole’s problematic deliberative processes, there is debate over the consequences of these; Lloyd 1992, p. 95 suggests that the figure of the Foole should be primarily understood as representing the problem of rebellion, rather than ‘the general problem of crime’ while Rhodes 1992 explicitly links the Foole with the reasoning processes leading to criminal behaviour.

<sup>347</sup> For a discussion of the Foole which locates him in the state of nature, see Kavka 1986, pp. 137-44. See however Pasquino 2001, pp. 408-9, which emphasises that in the Latin *Leviathan* the Foole is located within the state: he has both made an agreement, and is subject to a power able to compel his following through on it. See Hobbes 2012, pp. 224-5; in the English text Hobbes’s response to the Foole concerns the prudence of justice in situations where ‘one of the parties has performed already; or where there is a Power to make him performe’ while the Latin text argues for covenant-keeping ‘where there is a power that compels, *and* one party has fulfilled his promise.’ Emphasis mine.

above, whether these are passions or errors of judgement. It is not simply an argument for general covenant keeping. In responding to the Foole, Hobbes is not attempting to convince unjust men to be just; the Foole's errors have already demonstrated that he is unlikely to be convinced by such reasoning. Rather, Hobbes wishes to transform the unjust man into a prudent man in whom fear inculcates not only a temporary desire to keep the law, but also a habitual manner of law-abidingness.<sup>348</sup> It is therefore structured around an attempt to make the Foole accept that he may be mistaken regarding his foundational belief justifying his injustice, that he will be able to escape punishments.

One element of Hobbes's response is that those who are found to be habitual covenant breakers, or even those who simply believe that agreements may be broken upon convenience, 'cannot be received into any Society, that unite themselves for Peace and Defence.'<sup>349</sup> However, it is not clear how convincing such an argument will be to the Foole, or indeed to unjust men generally. Such unjust fools are already fully aware of the risk of being found out; it is for this reason that they only act upon hope of impunity. Their foolishness, when it presents itself, consists precisely in believing that this impunity is possible; this is why Hobbes classifies the most-discussed criminal passion 'vain' and why the reasoning leading up to the criminal act is riddled with errors. The most effective response to the unjust Foole is therefore the assertion that in cases where an individual is able to achieve their ends solely through accident, they should not presume that this success 'make[s] it reasonably or wisely done'.<sup>350</sup> Thus, a vainglorious criminal should not assume that just because a judge accepts a

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<sup>348</sup> I therefore depart from Gauthier's analysis, which suggests that the response to the Foole is intended to demonstrate that only the just are fit for society. Gauthier 1982, p. 24.

<sup>349</sup> Ibid.

<sup>350</sup> Hobbes, 2012 p. 224. Lloyd 1992, p. 98 labels this a 'narrowly prudential reason' to act on one's political obligations. Harvey 2002, p. 85 also emphasises that Hobbes's response to the Foole can only be framed as an appeal to the latter's self-interested nature and unjust reasoning processes.

bribe and they are able to escape punishment that the criminal act was therefore, at the time of committing, a reasonable act. The judge may just as easily have refused the bribe and added a further charge of corruption. The response to the Foole, therefore, is designed to convince him not to act upon hope of impunity, rather than according to the standards of justice; this may not transform his nature and render him just, but it will reduce the chance that he will ever be guilty.

The unjust man is frightened of punishment, and in Hobbes's reading, this renders him simultaneously prudent and foolish. He is prudent regarding his short term interest, but he is unable to recognise that his disposition provides no protection against his desires when he sees any hope of impunity for his crimes. Even when this hope is not justified, it will impact his deliberative processes in the ways outlined above. Hobbesian criminality, therefore, can be characterised as a rejection of the sovereign's standards of justice, and hence an improper continuation of deliberation. As Katharine Maus has noted, this idea that criminal actions could be classified as rooted in a specific error, in which inward mental processes did not correspond to outward action was in some ways characteristic of Renaissance English jurisprudence. She argues that this 'monstrous inwardness' was 'equally applicable' as an explanation for 'murder, theft, treason...so that an accusation of one particular crime tends to slide easily into an accusation of generalized criminality.'<sup>351</sup>

Hobbes's emphasis that the requirements of civil duty allow for a degree of disjuncture between inward beliefs and outward actions has been noted by numerous

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<sup>351</sup> Maus 1991, p. 39. See for example Hall's emphasis that the honest man 'hath but one heart'; his actions are a reflection of his true intentions, rather than the result of a prudential calculation. We can thus draw a parallel with Hobbes's just man who acts on the basis of justice rather than fear, and who has no need to conceal a desire to commit crime absent legal punishment. The honest man is contrasted, in Hall's taxonomy, with 'The Hypocrite', who has 'oft times two hearts'. The hypocrite is itself a broad category, linked to profanity and the inability to recognise higher authority. This inability, for Hall, is at the root of all other vices. Hall 1608, p. 71.

readers. In some cases, this is recognised as simply a matter of public decorum. In others, we see such permitted ‘hypocrisy’ presented as evidence for Hobbes’s tolerance.<sup>352</sup> However, the case of the foolish unjust man reminds us that for Hobbes those deliberative processes which concern justice are of concern to the state.

### **Passion, Disposition and Criminal Responsibility**

The analysis of the three reasons for crime cited above, passion, error and ignorance, suggests that in each case, crime is the result of flawed deliberation. Through the force of habit, specific passions or errors of reasoning, necessary considerations regarding the consequences of actions may never take place, leading to either hope of impunity or disregard towards the law. In setting out this analysis of the causes of crime, Hobbes implies that law-abiding citizens can be understood as being motivated in one of three ways. They can be, like the foolish unjust man, frightened of immediate detection and punishment; they can be, like the prudent unjust man, aware that punishment generally follows crime; or they can, like the just man, desire to act justly out of a recognition that they have a moral obligation to consistently follow the law. However, Hobbes also recognises that even a just disposition is not enough to *guarantee* just action; in Chapter 27, as we saw, he notes that in some cases crime is the result of ‘some sudden force’ of passion. His shifting treatment of such crimes, and the allocation of individual responsibility for them, will conclude this chapter.

Before examining Hobbes’s account of such crimes, it is worth noting that the English common law recognised a distinction between those crimes which were the result of previous consideration and those which followed immediate passion. In the

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<sup>352</sup> See discussions in Runciman 2008, Brito Vieira 2009, Frost 2001 and Frost 2004.

*Institutes* Coke noted that a charge of murder required both malicious forethought on the part of the murderer and a lack of provocation on the part of the victim. Manslaughter, on the other hand, even when voluntary and hence not a case of self-defence, could nonetheless be the result of ‘some sudden falling out’ with another. In such cases, the subsequent killing was to be understood as taking place during the period when the ‘blood kindled by ire’ had ‘never cooled till the blow was given.’<sup>353</sup> As a consequence, murder was always a felony, but the classification and punishment of manslaughter was more flexible, with manslaughter, unlike murder, classified as a clergyable offence.<sup>354</sup> This stance was also common among jurists more broadly. Grotius, for example, wrote that ‘offences occasioned from such Affections’, by which he meant immediately-provoked passions such as fear and anger, are ‘in Truth less odious’ than those which are the result not of sudden emotion but of settled dispositions such as the ‘Desire of pleasure.’ Grotius concludes with the suggestion that ‘the more Judgment is hindered in making its Choice, and the more natural the Causes are by which it is hindered, the less is the Offence.’<sup>355</sup>

The differentiation between crimes which are the result of sudden passion and those which are the result of general dispositions, such as vain-glory, is not made in Hobbes’s discussion of the causes of crime. However, as the indicated by the discussion of the just men who only commit crime through weakness, the idea that there is a difference is regularly hinted at in his political writings. The just man, as we saw, is unlikely to engage in crime which requires a settled disposition conducive to crime. Those crimes which such men are prone to are crimes caused by ‘sudden

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<sup>353</sup> Coke 1669, p. 55. On the ways in which early modern courts and juries treated such cases see Herrup 1987, pp 179-80.

<sup>354</sup> Dalton 1618, p. 222.

<sup>355</sup> Grotius 2005, p.1009. See Flynn 1998 for a discussion of Aquinas’s argument that sins provoked by sudden passion were less serious than those following long consideration.

Passion, or mistake of Things, or persons.’<sup>356</sup> Notably, the just man’s crimes are not motivated by hope of impunity; indeed, he is characterised by the desire to repent even upon having committed secret sins.<sup>357</sup> This type of crime, when presented through an explanation of just and unjust dispositions, therefore appears to be of a different type than crimes caused by the criminal passions or errors discussed above, with a corresponding difference in the degree of responsibility allocated to the criminal. However, this is not a position which Hobbes held consistently throughout his works.<sup>358</sup>

In order to fully examine Hobbes’s explanation of such crimes of immediate passion, it is necessary to briefly return to his account of deliberation. In his discussion in the *Elements*, Hobbes writes that we should label as ‘voluntary’ those ‘actions that proceed from sudden anger, or other sudden appetite, in such men as can discern of good and evil.’<sup>359</sup> This is because while the onset of the passion itself, and hence the motivation for action, may not have resulted in a lengthy consideration before acting, in such men who are capable of determining general principles of action ‘the time precedent is to be judged deliberation.’<sup>360</sup> Hobbes notes that actions which are the result of sudden, overwhelming passion can therefore still tell us something about the deliberative processes of the individual, or of their habits of deliberation. The precedent deliberation Hobbes describes is not necessarily linked to the specific circumstances an individual finds himself in; rather, it tells us what a person has

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<sup>356</sup> Hobbes 2012, p. 226.

<sup>357</sup> Hobbes 2012, p. 227.

<sup>358</sup> Hobbes’s discussion of crimes provoked by sudden passion has received little attention in the literature; where readers have remarked upon such crimes, they do not comment on Hobbes’s shifting account. Thus we see David van Mill and Alice Ristroph arguing that such acts are simply a demonstration that for Hobbes contemplated actions are a better reflection of man’s will than sudden acts, while Frost emphasises the alternative model presented in the *Elements* and *Of Liberty*. See van Mill 2001, p. 57; Ristroph 2012, p.102; Frost 2004, p. 19.

<sup>359</sup> Hobbes 1969, p. 62.

<sup>360</sup> Ibid.

determined regarding ‘in what cases it is good to strike, deride, or do any other action proceeding from anger or other such sudden passion.’<sup>361</sup> According to the model of passion and action set out in the *Elements*, therefore, acts arising from sudden passion conform to patterns of thought and opinion already held by an individual, whether or not these are even known to the individual in question. In turn, those observing such acts can deduce from them a degree of knowledge about the offending individual’s thought patterns, and may even be able to predict future behaviour based on such acts.

This passage in the *Elements* is not applied to the case of crime as such, and Hobbes does not address the topic in *De Cive*. In fact, Hobbes only ever applied the logic of the *Elements* to the civil context when pushed to do so as part of a debate over his theory of the will with Bishop Bramhall, and in this instance, his theory remains unmodified. In 1645’s *Of Liberty and Necessity* Hobbes expands on the ideas expressed in his earlier writings. He notes that ‘A judge in judging whether it be a sin or not, which is done against the law, looks at no higher cause of the action than the will of the doer.’<sup>362</sup> This logic holds not only for crime, but rather reflects Hobbes’s understanding of spontaneous action more generally. He goes on to elaborate the point, writing that ‘when it comes into a man’s mind to do or not to do some certain action, if he have no time to deliberate, the doing it or the abstaining necessarily follows the present thought he has of the good or evil consequences thereof to himself.’<sup>363</sup> This ‘present thought’ can be read as analogous to the precedent deliberation cited in the *Elements*; it is the result of the consideration of hypothetical situations and principles which are then applied in a situation which will not allow for a re-evaluation through lengthy deliberation.

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<sup>361</sup> Ibid.

<sup>362</sup> Hobbes 1999, p. 29.

<sup>363</sup> Hobbes 1999, pp. 35-6.



His discussion of previously deliberated action in this text goes further than that found in the *Elements*, and foreshadows the comments on manners from *De Homine*, as Hobbes goes on to argue that this description also applies to situations where ‘a man has time to deliberate but deliberates not, because never anything appeared that could make him doubt of the consequence, the action follows his opinion of the goodness or harm of it.’<sup>364</sup> This point, that in some cases individuals will refrain either from all deliberation or will refrain from fully considering, or reconsidering, a given situation, predicts his later argument in which manners or characters can be understood as a deliberative short cut. Actions proceeding from these forms of precedent or curtailed deliberation are, Hobbes asserts, ‘voluntary’, in contrast to Bramhall’s label ‘spontaneous.’<sup>365</sup> Later in the text, Hobbes defines ‘spontaneity’ as ‘inconsiderate proceeding’, phrasing which, while it might suggest a lack of deliberation, must be understood as reflecting deliberation that is in some way deficient or otherwise curtailed.<sup>366</sup>

As a result of this model of voluntary action, Hobbes argues that it is ‘reasonable to punish a rash action, which could not be justly done by man to man unless the same were voluntary.’ As he has already explained, such actions are not to be understood as being ‘without deliberation’ despite their sudden nature, ‘because it is supposed he had time to deliberate all the precedent time of his life whether he should do that kind of action or not.’ In a conclusion that echoes the both the language and the logic of the passage in the *Elements*, Hobbes writes that ‘hence it is that he that kills in a sudden passion of anger shall nevertheless be justly put to death, because all the time, wherein he was able to consider whether to kill were good or evil, shall

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<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

<sup>366</sup> Hobbes 1999, p. 39.

be held for one continual deliberation; and consequently the killing shall be adjudged to proceed from election.<sup>367</sup>

According to this account, the fact of the action lends a certain colour to the rest of the criminal's life; clearly, if he had spent 'all the precedent time of his life' under the impression that he would happily commit a crime of this kind, he cannot have been a consistently just man. Essentially, Hobbes here suggests that the possibility of the just man (a category which does not appear in this text) committing a crime is itself a contradiction. Hobbes, then, implies that any understanding of crime which differentiates between that which is provoked by sudden passion and that which is not essentially demonstrates a failure to understand the operations of the will.

However, Hobbes appears to have slightly shifted his position by the writing of *Leviathan*. His stance on the necessary and voluntary nature of all human actions does not change in the later text. At no point, however, does Hobbes in his discussion of the passions feel the need to emphasize that actions proceeding from sudden passion are equally voluntary, as he did in the *Elements*. We might read this as an indication that his position on such cases had not changed, and that he felt that his exposition of deliberation and the voluntary nature of all acts meant that such a conclusion should be clear to the reader. However, in Chapter 27 Hobbes specifically returns to the case of acts motivated by sudden passion, and his explanation differs from that offered in the 1645 text.

In *Leviathan* he notes that 'A Crime which ariseth from a sudden Passion, is not so great, as when the same ariseth from long meditation.' This is because, he suggests, 'in the former case there is a place for Extenuation, in the common infirmity of human nature.' On the other hand, 'he that doth it with praemeditation, has used

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<sup>367</sup> Hobbes 1999, pp. 36-7.

circumspection, and cast his eye, on the Law, on the punishment, and on the consequence thereof to humane society; all of which in committing the Crime, hee hath contemned, and postposed to his own appetite.’ He thus discards the logic presented in the earlier texts, that an individual’s earlier deliberation upon principles suggests that the crime of passion is no different to any other crime. However, Hobbes has not fully rejected the model of deliberation presented in the earlier texts. He goes on to note that despite the difference in the severity of crimes, ‘there is no suddenesse of Passion sufficient for a totall Excuse: For all the time between the first knowing of the Law, and the Commission of the Fact, shall be taken for a time of deliberation; because he ought by meditation of the Law, to rectifie the irregularity of his Passions continually.’<sup>368</sup>

As readers, then, we are left with a puzzle. Hobbes’s approach to crimes of passion appears to have evolved, or at the very least his emphasis undergoes a change. But there is no corresponding reason internal to the theory of passions and deliberation that can itself explain this shift. Moreover, this shift has major consequences for how we should understand the Hobbesian criminal and the idea of the criminal disposition, and perhaps Hobbes’s theory of dispositions and manners more broadly. The presentation in the *Elements* and *Of Liberty* suggests that, because all actions are the result of deliberation they reveal something about individual deliberative patterns. In particular, the analysis of the criminal individual presented here has suggested that there are particular assumptions about impunity and hence about civil equality that underpin crime in general, whether or not the individual displays the particular criminal dispositions related to dangerous passions and mistaken reasoning. The case of the crime of passion as presented in *Leviathan*, on the other hand, suggests that in

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<sup>368</sup> Hobbes 2012, p. 474.

some cases crime is not the result of a hope for impunity, and nor does it necessarily indicate anything about one's general attitude towards justice.

While we should never discount the possibility that Hobbes simply changed his mind, it remains curious that he did not modify other elements in his theory of deliberation in his attempt to make space for a specific category of action which is the result of overwhelming passion. On the other hand, introducing the crime of passion does allow him to resolve one key issue raised in the case of the just man. By introducing a distinct category of crimes of passion, Hobbes allows for the type of crime committed by the just man to be considered, while criminal, an act that will not fundamentally remove the character of the just man. At the same time, he is able to emphasize the dangerous nature of crimes that proceed from a hope of impunity. While we may not know which type of crime Hobbes considered to be more frequent in the commonwealth, his analysis of the means by which individuals might attain such hope demonstrates that this was this type of criminal he considered most dangerous to the civil peace. It is crimes arising from a hope of impunity which Hobbes's systems of punishment and education, explored in the next chapter, are designed to prevent.

## Chapter 4: Hobbes on the Purpose of Punishment

### Introduction: The Necessity of Punishment

Throughout his works Hobbes repeatedly informs his readers that a well-designed and consistently employed system of punishment is one of the necessary conditions of civil stability. In Chapter 30 of *Leviathan* he emphasises that it is one of the duties of sovereign power to ‘make a right application of Punishments’<sup>369</sup> because society can only be provided with common standards of justice through such ‘coercive’ enforcement of judgements.<sup>370</sup> As we saw in Chapter 2, it is the sovereign authorisation which obliges members of the commonwealth to obey the civil law. However Hobbes consistently argues that it is the threat of punishment, or the ‘*vindicative*’ aspect of the law, which ensures that they will actually do so.<sup>371</sup> Punishment thus plays important roles in the commonwealth: it assures law-abiding subjects that their security will be protected by the sovereign, and it indicates to all

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<sup>369</sup> Hobbes 2012, p. 542.

<sup>370</sup> Hobbes 2012, p. 220. See also Hobbes’s assertion, in the *Elements*, that men require the security of knowing that their sovereign will employ punishment before they will willingly enter the commonwealth:

The end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defence from those to whom he doth so relinquish it. And a man may then account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves. Hobbes 1969, p. 110.

<sup>371</sup> See, for example, his comment that ‘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 contains both parts, that which *forbids* injuries to be done, and that which *punisheth* the doers of them.’ Hobbes 1983, p. 172. Hobbes’s definition of law does not require the attachment of a threat or sanction, a point emphasised by Goldsmith 1996, p. 276. However, Hobbes clearly means subjects to understand that in breaking either the positive or the natural law they are automatically liable to punishment, as he notes in his statement that ‘Punishment is a known consequence of the violation of the Lawes, in every Common-wealth; which punishment, if it be determined already by the Law’ the criminal is ‘subject to that; if not, then is he subject to Arbitrary punishment.’ Hobbes 2012, p. 456. See also Hobbes 2005, p. 14, where the Lawyer clarifies that by laws, he means ‘Laws living and Armed’ whose breach will be punished.

subjects which actions their sovereign takes to be cases of criminal injury.<sup>372</sup> Both of these functions, however, come about because of the practice's primary purpose. As a deterrent to law-breaking, punishment brings together the will of the sovereign, as expressed through laws, and the wills of individual citizens when they consider their own security and well-being. It thus provides a concrete and short-term reason to consistently obey the law, and hence encourages subjects to behave according to their pre-existing obligations.<sup>373</sup>

As we saw in Chapter 2, punishment can only take place within the commonwealth, as it requires the existence of a common or 'publique' authority. This punishing authority, in turn, is tasked with acting according to natural law and, most importantly, in ways which will protect the state from both external threats and internal criminals. Punishment, according to Hobbes, should thus be understood as an institution which seeks to preserve the community as a whole, according to the standards set in the laws promulgated by the sovereign. As a result of this commitment, Hobbesian punishment is primarily concerned with the maintenance of peace throughout the commonwealth. It therefore emphasises the harm posed by crime to the state rather than to individual victims or to God.<sup>374</sup> Therefore, in responding to

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<sup>372</sup> On punishment as providing a guarantee of security, and hence enabling men to follow the natural laws, see Warrender 1957, p. 207.

<sup>373</sup> The suggestion that, in enforcing subject's own commitments, punishment 'supplies what is defective in the rationality of ordinary men' is a helpful way of thinking about its purpose. Minogue 1972, p. 78.

<sup>374</sup> Indeed, according to the definition of crime as an offence against the commonwealth, the state should be seen as the casualty of crime's 'injury', or breach of contract, while the victim experiences 'damage.' Hobbes 2012, p. 228. As the commonwealth's representative, therefore, the sovereign is empowered to punish the wrongdoer. Runciman 1997, p. 19 argues that this presentation is illogical: if the nature of injury is the breach of contract, then subjects cannot logically injure the sovereign, just as, famously, the sovereign cannot injure them. The true victim must be, he argues, every single natural person who participated in the original covenant. However, if we understand the victim of crime to be the commonwealth, which is constituted by the multitude as represented by the sovereign, then the problem disappears. It is precisely the commonwealth who is injured by the criminal breaking their contract with all members of the original covenant. As we shall see, however, the question of the identity of the victim is largely irrelevant to Hobbes, who proposes a theory based on what is required for civil peace. Defining the injury of crime as

injury the state's correct response is a forward looking theory of punishment which discourages injurious acts, rather than one which takes as its justification the subjective experience of wrong faced by victims.

Hobbes is remarkably consistent in his various discussions of the means by which the judicious application of punishment reinforces sovereign authority. He repeatedly emphasises punishment's role in shaping individuals' outward behaviour into that of good, law-abiding citizens. As we shall see, however, while punishment has a major role in the theory, in that it restrains and regulates human interaction, its ability to provide reasons for adhering to the sovereign nonetheless remains limited. Punishment can encourage prudential behaviour, but it cannot consistently provide true knowledge regarding the necessity of civil peace and what this requires. It is therefore, Hobbes argues, an institution which must be supplemented by a system of public education emphasising the doctrine found in his works.<sup>375</sup>

### **A Forward-Looking Theory of Punishment**

From his first forays into political theory Hobbes repeatedly emphasises the necessarily forward-looking nature of punishment, grounding this aspect of the practice in natural law. As we saw in Chapter 2, once the commonwealth has been established it provides enough security for this law to be practiced by individuals, including the sovereign, *in foro externo* as well as *in foro interno*. These laws provide

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being directed against the state emphasises the illegitimate nature of private revenges, but Hobbes does not emphasise that it is the experience of injury which legitimises the state's punishment of criminals. This reading, which de-emphasises the location of the injury of crime, is consistent with Hobbes's own ambiguity. In Chapter 27 of *Leviathan*, for instance, he notes that 'in almost all Crimes there is an Injury done, *not onely* to some Private men, *but also* to the Common-wealth.' Hobbes 2012, p. 480. Emphasis mine.

<sup>375</sup> Hobbes closes the section of *Leviathan* titled 'Of Common-Wealth' with the hope that 'this writing of mine, may fall into the hands of a Sovereign' who will use it as the basis of a programme of 'Publique teaching.' Hobbes 2012, p. 574.

general guidelines for human conduct, and not simply for those interactions which citizens have with their state and its representatives. Nonetheless, they become particularly important when defining activities, such as punishment, which can only ever take place within the commonwealth and by public authority. They are, it becomes abundantly clear as we read through Hobbes's list of laws, not merely a means of creating the commonwealth but of maintaining it. Peace is both the impetus for entering into the commonwealth, and the end to which the instituted sovereign acts.<sup>376</sup> However, the sovereign's unique role in the commonwealth means that his actions, specifically, should pursue this goal through a concern for the *salus populi*.<sup>377</sup> Subjects regulate their own conduct in accordance with natural law to reduce ill-feeling and disagreeable interpersonal interactions. The sovereign, however, has a responsibility to actively promote law-abiding behaviour in the population as a whole, and to do so in such a way as to encourage civil peace. As a result, the sovereign not only has a duty to treat his subjects with equity in his dealings with them, but also to take steps to ensure that civil institutions do not encourage those passions which would undermine the state as a whole.

As a result, those natural laws which concern acts of revenge, retribution and punishment are specifically directed towards the sovereign power as the unique holder of the punishment right. As Hobbes notes, 'private' revenges are to be disallowed in the commonwealth, even when conducted according to the natural laws outlined

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<sup>376</sup> Hobbes notes in Chapter 15 of *Leviathan* that he has listed 'the Lawes of Nature, dictating Peace, for a means of the conservation of men in multitudes.' As such, they concern 'the doctrine of Civill Society', and thus indicate how men should behave towards each other. Hobbes suggests that there are further laws of nature addressing forms of intemperance, which, while still indicating what is 'destructive of [a man's] life', are essentially guides to his individual conduct and are thus irrelevant to a discussion of social life. Hobbes 2012, p. 198, 238.

<sup>377</sup> In Chapter 30 of *Leviathan* we read that 'The OFFICE of the Sovereign... 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.' Hobbes 2012, p. 520.



below. Hobbes no doubt worries that acts of private revenge would, if either threatened or carried out, increase precisely that sense of insecurity which characterises the state of war, and believes that they should be banned for this reason.<sup>378</sup> However, there is a second reason, which is related to the capacity of punishment to act as a form of harsh instruction. As we shall see, for Hobbes the threat of punishment is an inducement, aimed both at the offender and the population as a whole, to behave in a certain way. As such, in the political sphere it should only ever be carried out in order to encourage behaviour according to standards set by the sovereign.<sup>379</sup> Punishment undertaken by anyone other than the sovereign would risk forming the people's wills according to a potentially subversive set of doctrines.<sup>380</sup>

Before turning to Hobbes's account of the ways in which punishment acts as a deterrent, however, we must examine his discussion of why this can be the only justification for the practice. As Jean Hampton has argued, deterrence is an implicit part of all punishment in legal systems in which the law is reinforced with threats.<sup>381</sup> It was certainly an explicit element highlighted in a range of sources, both classical and early modern, available to Hobbes when constructing his own account. As John Witte Jr. and Thomas C. Arthus have noted, deterrence was a major feature of early Protestant discussions on the purpose of human law. Jean Calvin, for instance, vividly illustrated the role of the law in the *Institutio Christianae religionis* [*Institutes of the*

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<sup>378</sup> Hobbes makes numerous references to the danger posed by private revenge to the commonwealth and the rule of law. See Hobbes 2012, pp. 464-6, 476, 530, 1132. Hobbes's unwillingness to acknowledge, let alone unleash, the violent passions of individual subjects will be discussed below, as a feature of his account of the correct purpose of punishment.

<sup>379</sup> For a discussion of the ways in which the educative discipline of children by parents should be used to instruct the former according to the sovereign's principles see Bejan 2010, pp. 619-20.

<sup>380</sup> The danger, of course, was not simply that individuals, even powerful ones, would 'punish' according to their own standards. Importantly, the Ministers of the Church should have no right to punish crimes independent of those rights granted to it by the sovereign. See Hobbes 2012, p. 782. Hobbes's discussion of punishment thus directly parallels his account of teaching and preaching, in which the sovereign alone has the right and duty to determine what is to be taught to the people. See for instance Hobbes 2012, p. 272.

<sup>381</sup> Hampton 1984, p. 211.

*Christian Religion*] (1536), writing that it ‘is like a halter to check the raging and otherwise limitlessly raging lusts of the flesh...Hindered by fright or shame, [men] dare neither execute what they have conceived in their minds, nor openly breathe forth the rage of their lust.’<sup>382</sup> This argument found its way into accounts of punishment. In 1647 Jeremy Taylor wrote that ‘all punishment in a prudent government punishes the offender to prevent a future crime, and so [punishment] proves more medicinal than vindictive.’<sup>383</sup> Similarly, in his 1678 text *The Laws and Customes of Scotland in Matters Criminal* George Mackenzie argued that ‘Punishments are inflicted, not only to satisfy, either the public revenge of the Law, or the private revenge of the party, but rather to deter others for the future.’ In arguing that ‘what is done can no more be helped’, Mackenzie asserted that deterrence and satisfaction justified punishment, whereas simply aiming to make the criminal ‘insensible’ did not.<sup>384</sup>

Other sources choose to simply note punishment’s deterrent effect, rather than describing it as the practice’s correct purpose. In his 1676 *Advice to Grand Jurors in Cases of Blood* Zachary Babington notes that ‘example and terrour to others’ are ‘oft the end of punishment.’<sup>385</sup> This assumption that a major purpose of punishment was deterrence was not limited to learned treatises. The idea also underpinned more popular discussions and was found in both sermons and in the cheap pamphlets which regularly accompanied public executions. In a 1616 sermon Charles Richardson, for instance, argued that while ‘the better sort are directed by loue...the greater sort are corrected by feare...euen the worst that are, will abstaine from euill for feare of punishment.’ As a result, ‘by the punishment of malefactors, others will

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<sup>382</sup> Witte Jr. and Arthus 1993-4, p. 436. See also Sommerville 1992, pp. 101-2.

<sup>383</sup> Taylor 1861, p. 522. See James Morice’s similar assertion, in 1590, that ‘Penaunces...are not taken to be *pane* but *medicine*...all corrections are or should bee medicines for the amendement of manners.’ Morice 1590, p. 23.

<sup>384</sup> Mackenzie 1678, p. 557.

<sup>385</sup> Babington 1676, p. 53.

be admonished to walke more warily’, and it is for this reason that ‘publicke chastisements and punishments’ are ‘very profitable’.<sup>386</sup> Similarly the anonymous 1670 pamphlet *The Execution of the 11 Prisoners that suffer’d at Tyburn* notes that in their execution the ‘lamentable and to be deplored Miscreants’ became ‘Examples of Trophies of offended Justice’ which would ‘restrain, all leud persons from their evil course, that they may turn back from those pernicious pathes, that tend to Death and Hell.’<sup>387</sup>

What is striking about Hobbes’s account, therefore, is not that he insists upon the importance of deterrence, but rather his assertion that this is the only possible motivation which, on its own, can legitimate punishment. In presenting this argument, Hobbes set himself against a tradition of thought which emphasised the ways in which punishment could also be used, in a retributive manner, to acknowledge the experience of crime’s victims. In doing so, he was actively rejecting a long-standing distinction in the philosophy of punishment between retribution as taking active enjoyment in the suffering of another and retribution as a practice with a social purpose. Importantly, this second form of retributive punishment was not a call for unleashing the violent passions of anger, revenge and hatred against convicted criminals. As Grotius notes in his own discussion of the purpose of punishment, both classical and Christian traditions had long condemned the exacting of punishment for its own sake as irrational and hence illegitimate. Citing, among others, Plato, Seneca, Cicero and Aquinas in support, Grotius argues that it is a commonly held precept that ‘it is contrary to Nature, for one man to be pleased and satisfied with the Pain or Trouble

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<sup>386</sup> Richardson 1616, pp. 7-9.

<sup>387</sup> *The Execution* 1670, p. 8. We also find this sentiment in art; the caption to Pieter Brughel the Elder’s print *Iusticia* (1559) reads ‘the aim of the law is to correct the punished one, or that their punishment should improve others, or that, once evildoers are removed, the rest should live in greater safety.’ Quoted in Cohen 2010, p. 44.

he brings upon another.<sup>388</sup> This is the case even when this pain or trouble is to be inflicted upon an individual who has harmed another through injustice.

Nonetheless, this did not mean that retribution was simply equated with violent revenge; it could also be a rational, socially useful practice. According to thinkers who espoused this idea, the harm suffered by the punished individual had both backward and forward looking purposes. It re-established the standards of justice which had been flouted by the perpetrator, and it allowed for a series of reconciliations: between victim and perpetrator, and between both of these and society more broadly. As O. F. Robinson has emphasised, this way of thinking about punishment had a long history by the time Hobbes turned his attention to it. Robinson notes that while in classical Rome ‘there was fairly widespread agreement among philosophers...that the prime purpose of punishment was deterrence’, the practice was also considered a means of

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<sup>388</sup> Grotius 2005, p. 960. In *The Laws* Plato compares having a criminal disposition to being sick; as a result, ‘the unjust man deserves as much pity as any other sufferer’ and in punishing him one must ‘restrain and abate...anger, instead of persisting in it with the spitefulness of a shrew.’ Anger is only an appropriate response to ‘complete and unmanageably vicious corruption’, which is not the case when dealing with ordinary crime. The correct curative and deterrent aim of punishment is emphasised in the *Gorgias*, where Plato argues that ‘it is fitting for everyone undergoing vengeance and rightly suffering vengeance from another either to become better and be benefited, or to become an example to the rest, so that when others see him undergoing whatever he undergoes, they will be afraid and become better.’ Plato 2004, p. 150; Plato 1979, p. 104. On Plato’s corrective theory of punishment, see Mackenzie 1981, especially pp. 140-203. In his *De Ira* Seneca argues that ‘Anger...is hungry for payback; the presence of this lust in a human being’s...breast in no way accords with nature’ and, in accordance with Plato, that the role of punishment is to be a form of instruction in the requirements of virtue and justice. Seneca 2010, pp. 18-9. Cicero argued in *De Officiis* that there is no place for anger in punishment, which should be designed to be ‘useful to the republic’, as ‘a man who is angry when he goes to punish will never maintain that intermediate course between too much and too little...our prayer should be that those in charge of the republic be like the laws, which are led to punish not through anger, but through fairness.’ Cicero 1991, p. 35. Thomas Aquinas, in considering whether vengeance is lawful, concludes that it is not, if ‘intention [of the punishing individual] be centered chiefly upon the evil done to the recipient and is satisfied with that’, as ‘taking delight in evil done to another is in fact a type of hatred.’ Vengeance, however, is lawful when it aims at ‘the correction of the wrongdoer, or at least in restraining him and relieving others.’ Aquinas 1972b, p. 117. In light of these discussions, Reynolds’s assertion that hatred is a passion which is utterly incompatible with peace because it demands the utter subjugation of the hated, is suggestive of why hatred is inappropriate in punishment. Reynolds writes that ‘Hatred contenteth not it selfe with the death of an Enemie, but is many times prodigious in the manner of it, and after out-lives that which it hateth, insulting with pride and indignities over the dead bodie.’ Reynolds 1640, p. 160.

‘maintain[ing] the dignity and esteem of the victim.’. This maintenance was required in order to ensure ‘social stability’, rather than the ‘social safety’ achieved by punishment’s deterrent function.<sup>389</sup> Eirene Visvardi has emphasised a similar theme in Greek sources, noting the extent to which punishment was seen as a means of righting a communal moral balance.<sup>390</sup> As a result, the two directions in which punishing could ‘look’ converge: for reconciliation to take place, justice had both to be done and seen to be done.

This retributive logic could be presented both in abstract terms, as an example of the demands of justice, and in emotional ones, in which the passions of the victim could be addressed.<sup>391</sup> We consistently see, however, that these two forms are presented as mutually reinforcing. Aristotle argued in the *Nicomachean Ethics* that punishment is a necessary means of addressing the inevitable anger experienced by victims, and as a result society should not shy away from using it for this purpose. Writing that ‘the very existence of the state depends on proportionate reciprocity; for men demand that they shall be able to requite evil with evil’, he suggests that when men are unable to engage in punishment of this sort, they ‘feel they are in the position of slaves’, rather than of full citizens.<sup>392</sup> These aims, though able to justify punishment on their own terms, were frequently presented as complementary to deterrence. Plutarch, in his essay ‘On the Delays of the Divine Vengeance’ argued that while ‘chastisement...serves as a check to future crimes’, this is not the practice’s only goal. Rather, punishments are also ‘the greatest comfort to the injured.’<sup>393</sup> Taking account

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<sup>389</sup> Robinson 2007, p. 181.

<sup>390</sup> Visvardi 2015, p. 108.

<sup>391</sup> George Mackenzie’s division, cited above, between the public revenge of the law and the private revenge of the injured party is a useful way of considering this distinction.

<sup>392</sup> Aristotle 1934, p. 281. On the retributive aspect of Aristotle’s theory see Allen 2003, pp. 282-91.

<sup>393</sup> Plutarch 1959, p. 185.

of the emotional consequences of crime, therefore, could act as a means of encouraging future social peace. Such sentiments continued beyond the classical period. Tuckness and Parrish have noted Aquinas's emphasis on 'satisfaction' as something which both heals past sins and prevents future ones,<sup>394</sup> and Esther Cohen has emphasised the extent to which the writings of medieval civil law jurists presented state punishment as a form of retribution on behalf of the victims of crime.

By the time we come to seventeenth century discussions, we find that that the rational anger of the individual victim has been applied to the community as a whole, and that the punishment of malefactors is presented as required to maintain moral standards within it. Edward Reynolds's 1640 *Treatise of the Passions* notes that anger is a normal response to the feeling that one has been shown contempt; the example he gives is the rightful anger of the community of the 'lawfull' against the criminal.<sup>395</sup> We see a similar sentiment in Richardson's sermon; alongside deterrence, he notes that punishment has a role in comforting the law-abiding. He writes that 'where wicked men escape vnpunished...there the good are griued and discouraged...he hurteth the good, that spareth them that are euill...[for] it cannot be, that men should liue peaceably and quietly' in states where the wicked are not punished.<sup>396</sup> Punishment was not simply intended to reconcile the law-abiding with the institutions of justice, however. According to George Herbert's 1652 text *A Priest to the Temple* the criminal is to be recognised not as an 'enemy' but as a 'brother', with punishment a 'humbling' process enabling his return to the community.<sup>397</sup>

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<sup>394</sup>Tuckness and Parrish 2014, p. 121; Cohen 2010, p. 45.

<sup>395</sup> Reynolds 1640, pp. 317, 331. On early modern punishment more generally as a form of 'community...revenge' see also Herrup 1987, p. 5 and Friedland 2003.

<sup>396</sup> Richardson 1616, pp. 6-7.

<sup>397</sup> Herbert 1652, pp. 104-5. J. A. Sharpe notes the ways in which the rituals surrounding punishment could enact a symbolic reconciliation between the punished individual and the community as a whole. In his account of the early modern custom of the condemned making speeches from the scaffold he argues that such spectacles were considered useful not only for their

It is also in this period that we see an increasing emphasis on a further permutation of retributive punishment: that which demanded the punishment of criminals in order to meet the strictures of divine justice. In this case, however, punishment was held to be necessary to reconcile society as a whole to God, rather than to the crime's (human) victim. As Patricia Crawford has highlighted, this phenomenon emerged from the application of Mosaic principles to human justice, and was used, notably, to apply the concept of 'blood guilt' to Charles Stuart. According to this theory, the shedding of 'innocent blood' served to pollute the criminal. When this 'man of blood' was the head of the state, this required human punishment to ensure that God's wrath would not 'fall upon the whole nation.'<sup>398</sup> Once accomplished, punishment thus brought human society closer to divine standards of justice, and removed from it the stain of sin. Thus punishment received its justification from man's obligation to God, rather than out of an interest in purely human utility, or in a process of human reconciliation.

While the prevalence of this rhetoric becomes especially notable in the context of a rise in millenarian beliefs in the late 1640s and 1650s, it is important to stress that the duty of the state to enact divine justice was a theme pre-dating these religio-political developments.<sup>399</sup> Again, the case of Richardson is instructive. In the same

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deterrent effect, but also acted as public demonstrations of criminals' acceptance of 'the legitimacy of the power which had brought them to their sad end.' Sharpe 1985, p. 156. The ritual of execution thus included within it the opportunity for the criminal to be reconciled to both civil and religious authority. Such speeches were frequently printed and distributed, occasionally even before they were given. The two aims of such speeches, deterrence and social reconciliation, were thus spread beyond the spectacle's immediate audience. On the ways in which these printed sources depicted the punished criminal see Faller 1987, especially pp. 91-2 and Rosenberg 2004. Some writers were explicit about the deterrent aims such texts; the author of a 1657 collection of tales of murder, for instance, writes in the Preface to readers that his 'intent, desire, and prayer is, that...perusing and reading of these Histories may confirm thy faith, and thy defiance of all sins in general and of murder in particular.' Reynolds 1657.

<sup>398</sup> Crawford 1977, pp. 43-4. See also Baskerville 1993. On early modern punishment understood as a means of 'restor[ing] the purity and integrity of the social body' see Graves 2008, p. 40.

<sup>399</sup> See Capp 1972, pp. 39-43 and Farr 2014, pp. 82-4 on the growth of millenarian beliefs in the 1640s and 1650s, and their relationship with calls for legal reform along Mosaic lines.

sermon which cited deterrence and the needs of the human community as justifications for punishment, he argues that ‘when men are suffered to transgresse without punishment, the wrath of God is prouoked, and publike calamities are pulled down vpon the land.’ The nation is thus ‘*defiled*’ and it is only when justice is ‘executed’ upon ‘wicked doers’ that ‘the wrath of God is turned away, and he is pacified and appeased.’<sup>400</sup>

As we examine Hobbes’s account of the justification of punishment, however, it will become clear that it is precisely to avoid any concession to these forms of reconciliation that he designed a purely deterrent theory.<sup>401</sup> It is to this account, therefore, that we now turn. Hobbes’s singular focus on deterrence is apparent in his treatment of punishment in the natural laws which, as we saw, structure the definition of punishment. In the *Elements* Hobbes writes that it is a law of nature ‘*That no revenge be taken vpon the consideration only of the offence past, but of the benefit to come*; that is to say, that all revenge ought to tend to amendment, either of the person offending, or of others, by the example of his punishment’.<sup>402</sup> The comment in *De Cive* that, according to the sixth law of nature, ‘*in revenge and punishments we must have our eye not at the evill past, but the future good*’ picks up this theme and strengthens punishment’s orientation towards the future, no longer allowing that a punishing individual might have *some* concern with the ‘*offence past*.’ The requirements of the practice, however, remain the same. According to this natural law,

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<sup>400</sup> Richardson 1616, p. 5. See also George Lawson’s assertion that ‘The just execution of judgement is a means to avert God’s wrath, to protect the just, to preserve the state, and procure God’s mercy.’ Lawson 1995, p. 89.

<sup>401</sup> George Lawson, explicitly challenging Hobbes’s account, notes that punishment aims to ‘vindicate the power of the Law-giver, and the honour and force of the law, to manifest Justice and the hatred of evil’ which will ‘procure the peace and tranquility of the community’. Lawson 1995, pp. 87-8. That Hobbes’s theory did not suggest this role for the practice thus seems to have been recognised by his contemporaries.

<sup>402</sup> Hobbes 1969, p. 86.



it is lawful to punish for only two purposes, ‘that the offender be corrected’ or that ‘others warned by his punishment may become better.’<sup>403</sup> We see a similar comment in the list of natural laws presented in *Leviathan*, where we read that ‘*in Revenges*, (that is, retribution of Evil for Evil,) *Men look not at the greatnesse of the evill past, but the greatnesse of the good to follow.*’ As a result, we again discover, punishment is forbidden unless its aim is ‘the correction of the offender’ or the ‘direction of others’.<sup>404</sup>

This principle is also repeated throughout Hobbes’s political writings as a simple statement of fact, without reference to the natural laws. Thus the definition of punishment in Chapter 28 of *Leviathan* requires that it be inflicted ‘*to the end that the will of men may thereby the better be disposed to obedience.*’<sup>405</sup> As a result, ‘all evill which is inflicted without the intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes, is not Punishment; but an act of hostility.’ In the 1688 Latin edition, Hobbes repeats the point, noting that punishment has for its purpose the ‘reforming’ of the citizenry, and that ‘it is the essence of punishment that the fear of it should dispose citizens to obedience.’<sup>406</sup> As Alan Cromartie has noted, this stricture does not make an appearance in the *Dialogue*.<sup>407</sup> But this should not be taken as an indication that Hobbes had changed his mind. As Cromartie points out, the principle appears to be implied in that text’s distinction between restitution and punishment, as when the Philosopher claims that ‘dammmages awarded to the party injur’d, has nothing in common with the nature of a penalty, but

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<sup>403</sup> Hobbes 1983, p. 67.

<sup>404</sup> Hobbes 2012, p. 232. We should note that Hobbes’s use of the term ‘retribution’ should not be taken as an endorsement of backward-looking theories of punishment. As Tuckness and Parrish 2014, p. 147 notes, such terminology was common among natural law theorists to discuss forward looking theories of punishment, rather than to equate punishment with retaliation.

<sup>405</sup> Hobbes 2012, p. 482.

<sup>406</sup> Hobbes 2012, p. 484.

<sup>407</sup> Cromartie 2005, p. xlv.

is merely a Restitution, or satisfaction due to the party griev'd by the Law of Reason.<sup>408</sup> Restitution may have an incidental deterrent effect, but the primary aim is the satisfaction of the victim; it therefore cannot be classified as punishment, or 'penalty.'<sup>409</sup>

Punishment, then, can only every be justified on the principle of social utility: it must encourage law-abiding behaviour either in the punished criminal or in the citizenry more broadly.<sup>410</sup> While Hobbes does not directly deny that punishment may have further socially beneficial consequences other than deterrence, such as restraining or incapacitating a dangerous individual,<sup>411</sup> deterrence is a necessary and

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<sup>408</sup> Hobbes 2005, p. 41.

<sup>409</sup> In what follows, I will refer to those directly affected by crime as its 'victims.' It is important to note, however, that this is not the vocabulary Hobbes himself used. As we saw above, he preferred to note the distinction between those 'injured' by crime and those 'endammged' by it.

<sup>410</sup> Hobbes also argues that divine punishment is primarily aimed at deterrence, writing in *Leviathan* that God engages in 'Exemplary' punishment. Hobbes 2012, p. 710. This point is presented in more detail in *De Cive*, where Hobbes writes that 'the institution of eternall punishment was before sin, and had regard to this onely, that men might dread to commit sinne for the time to come.' Hobbes 1983, p. 80. This was an anomalous position for Hobbes to take. Tuckness and Parrish 2014, p. 141 notes the 'key retributivist premises of Christian theology', pointing out that it was common for theologians such as Anselm and Augustine to argue for deterrent human punishment and divine retributive punishment. Augustine 1998, p. 215, for instance, states that while human justice should not be retributive, 'retribution is to the Divine judgement which is passed upon sinners.' We also see this tendency among natural law theorists. Grotius 2005, p. 958, for example, states that 'God inflicts punishments sometimes upon profligate abandoned Sinners, for no other Reason but to punish them.' On Grotius's account of divine punishment see Blom 2005.

<sup>411</sup> This possible end of punishment was commonly cited in the Classical, Protestant and Catholic traditions, including as a justification for the death penalty. See Calvert 1992 on Aquinas's justification of the death penalty along these lines, and Tuckness and Parrish 2014, p. 101 for a discussion of Augustine's views. See Hill 1991, p. 156 for discussion of the Calvinist belief in the justified incapacitation of 'the wicked and pestilential man, whome...nothing will reform but death.' This justification is also frequently found in natural law accounts of the purpose of punishment, as when Grotius 2005, p. 965, notes that 'it is *less evil*' for men of 'incorrigible Tempers' to die than to live. On the early modern use of justifications of incapacitation to determine who to punish for exemplary purposes see Beattie 1986, p. 448. However Hobbes never mentions this as a possible outcome of punishment, and it is easy to see why. Physical incapacitation, according to Hobbes, is a means of removing corporeal liberty, though not the liberty of the will. Incapacitation alone, therefore, ceases to dispose the wills of men towards obedience once this external impediment to action is no longer present. Hobbes could certainly have listed this as an entirely alternative justification, separate from an account emphasising the impact of punishment on man's deliberative process. But physical incapacitation alone, if separated out from the deterrent function of punishment, is a practice that can only ever work in perpetuity. As such, it would appear to be akin to a form of internal banishment from the commonwealth. Thus, to argue for incapacitation as a (primary) justification of punishment would undermine Hobbes's commitment to presenting punishment as a civil action meted out to citizens.

sufficient condition for the fulfilment of the natural law. Moreover, Hobbes specifically disallows some consequences of punishment that, as we saw, alternative traditions had understood as necessary.

In *Leviathan* we read, in a statement that seems to echo the longstanding stricture against inflicting suffering for its own sake, that ‘the end of punishing is not revenge, and discharge of choler.’<sup>412</sup> Hobbes does not limit himself, however, to a repetition of commonly agreed platitudes, as becomes clear when we examine his definition of ‘revenge.’ While he suggests in his account of punishment that revenge can be understood simply as a ‘retribution of Evil for Evil’, his analysis of the human passions in the *Elements* defines ‘REVENGEFULNESS’ as ‘that passion which ariseth from an expectation or imagination of making him that hath hurt us, to find his own action hurtful to himself, and to acknowledge the same.’ Revenge is thus something more than simply making ‘one’s adversary displeased with his own fact’. This goal can be easily accomplished, in language echoed in *Leviathan*, by ‘returning evil for evil.’ Rather, revenge is the closest Hobbes comes to describing something similar to the reconciliation which other theorists suggested can be a central aim of punishment. This is because, if successful, it directly equates in the perpetrator’s mind the pain inflicted on the perpetrator with the suffering and wrongdoing experienced by the victim. However, according to Hobbes, most men would ‘rather die’ than recognise the suffering caused by their crimes. To attempt to inflict revenge is thus to engage in an attempt at ‘subjugation’ and ‘triumph’ over the self-conception of

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There is nothing to suggest, however, that Hobbes was unaware of this potentially beneficial side effect of the practice of punishment.

<sup>412</sup> Hobbes 2012, p. 542. This point is repeated later in the text, when Hobbes notes that ‘the purpose of lawful punishment is not to satiate people’s anger against someone, but, so far as possible, to prevent injuries, for the benefit of mankind.’ Hobbes 2012, p. 1202. Hobbes provides a concrete example of hatred driving punishment in *Behemoth*, in his account of the treason charges against Thomas Wentworth, Earl of Strafford. Hobbes 2010, p. 195.

another. It thus brings direct conflict back into the commonwealth.<sup>413</sup> This is not, Hobbes asserts, a useful or rational activity for the state to undertake or abet. There is no future benefit to enabling such interpersonal conflict between citizens, as it will be unlikely to result in the satisfaction of the victim, and may only provoke grievance in the perpetrator. As Monica Brito Vieira has put it, revenge, according to Hobbes, simply leads to an ‘operatic spiral of violence.’<sup>414</sup>

In presenting revenge in this way, Hobbes appears to collapse the two different forms of retribution we examined above: that which assuages victims’ emotions and social standing, and that which simply glories in the suffering of another. This understanding of revenge is implicit in the discussions of punishment in the subsequent texts, even where they use the term to mean something akin to punishment. Revenge, we read in *De Cive*, is ‘nothing else but a certain triumph, and glory of minde’ if it considers only the past crime and not any future purpose. It proceeds from ‘vaine glory’ and is without reason. Such actions are worse than useless: they can actively threaten the commonwealth. As Hobbes writes, ‘to hurt one another without reason introduces a warre’ and as such ‘is contrary to the *fundamentall Law of Nature*.’ It is for this reason that it is a precept of the law of nature that ‘in revenge wee look not backwards but forward’ and that the breach of this law is called *cruelty*.<sup>415</sup> The point is repeated in *Leviathan*.<sup>416</sup>

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<sup>413</sup> Hobbes 1969, p. 39. See the parallel definition at Hobbes 2012, p. 86, of revengefulness as the ‘*Desire*, by doing hurt to another, to make him condemn some fact of his own’ and Hobbes 1998, p. 57 which describes ‘the desire for vengeance’ as ‘the constant and long-term will of doing evil to someone so that he will repent of the supposed injury done by him, or it will frighten others away from doing injury’.

<sup>414</sup> Brito Vieira 2009, p. 116.

<sup>415</sup> Hobbes 1983, p. 67. Emphasis mine.

<sup>416</sup> Hobbes 2012, p. 232. This consistent desire to ensure that punishment does not, through its application, encourage those passions which themselves are dangerous to civil peace explains Hobbes’s argument that it is a consequence of the law of nature which demands that ‘*no man reproach, revile, deride, or any otherwise declare his hatred, contempt, or disesteem of any other*’ that those who ‘sit in place of judicature’ do not ‘grieve’ those who ‘are accused at the bar.’ Despite the fact that a display of ‘hatred and contempt’ might well serve a deterrent function, Hobbes

Thus Hobbes appears to have no place in his theory for the comfort of the injured.<sup>417</sup> We might consider the socially useful form of retribution to in fact be forward-looking; the types of reconciliation discussed might prevent future conflict in the state. This certainly seems to one motivation behind such theories. However, Hobbes's only discussion of the means by which a victim might derive satisfaction from the offender is that of revenge, and he presents any attempt to do so as an emotionally violent struggle which is in any case unlikely to result in genuine acknowledgement of the victim's suffering. It is significant that Hobbes's definition of repentance, which immediately follows that of revenge, is that it is a 'passion that proceedeth from opinion or knowledge that the action [an individual has] done is out of the way to the end they would attain.' All that it is, in other words, is the recognition of miscalculated action and a desire to to adapt future behaviour. There is thus, in contrast to the aims of revenge, no necessary link between it and a recognition or acknowledgement of the suffering of the injured party. Given the difficulty of enacting revenge, repentance might be the best that can be achieved through punishment or the threat of it. Punishment's actual, and only, capacity is to weigh on the deliberative

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argues that such acts are 'no part of the punishment for...crime.' This refusal to employ public shame, a standard early modern form of deterrence, can only be explained by Hobbes's intense concern with those 'signs which we shew to one another [which] provoke in the highest degree to quarrel and battle.' Hobbes 1969, p. 86. See Hobbes 1983, p. 68 for a repetition of this point. This is a Ciceronian point: in *De Officiis* we read that punishment should never be 'insulting.' Cicero 1991, p. 35. Visvardi 2015, p. 51 also emphasises that one of the messages of Thucydides' *History* is the damage done to social cohesion by the infliction of shame upon citizens. See, however, Bacon 1853, p. 403 which recommends, on the other hand, that 'there be, besides penalty, a note of infamy or punishment by way of admonishing others, and chastising delinquents, as it were, by putting them to blush by shame and scandal.' For discussion of the use of shame in early modern punishment practice, see Ingrams 2004, Beattie 1986, p. 468 and Nash and Kilday 2010.

<sup>417</sup> There is one passage in the *Elements* in which Hobbes appears to acknowledge a popular desire for retribution. He writes that a 'thing necessary for the maintaining of peace, is the due execution of justice.' If those who 'are the magistrates ordained for the same by and under the authority of the sovereign power' do not perform their duties correctly, because they have been 'corrupted by gifts' or by the 'intercession of friends', then the people, 'grieved by their injustice' may 'take upon them to make their own revenges.' However, such actions are, while provoked by sovereign mismanagement, nonetheless an illegitimate 'disturbance of the common peace.' Hobbes 1969, p. 182. The people, here, are presented precisely not as victims whose experience of injustice legitimates punishment, but as dangerous instigators of disorder.

processes of individuals and render crime a less beneficial option than it would be otherwise.<sup>418</sup>

It is perhaps unexpected that repentance may be Hobbes's desired *outcome* of punishment, given Hobbes's discussion of the relationship between pardon and punishment. The connection between these two ideas is somewhat ambiguous, as the requirements of deterrence which Hobbes repeatedly outlines may initially appear to come into conflict with the natural laws which require the forgiving of the penitent. Nonetheless, Hobbes consistently presents the one as emerging from the other, and it is my contention that, once we have properly understood this relationship, we have further evidence that a major component of Hobbes's theory is the rejection of punishment justifications based on the emotional states of crime's victims.

Like revenge and punishment, pardon is also a consistent feature of Hobbes's political theory. In the *Elements* we discover that it is a law of nature '*That a man forgive and pardon him that hath done him wrong, upon his repentance, and caution for the future... PARDON is peace granted to him, that...demandeth it.*'<sup>419</sup> It is precisely because of this law that '*no revenge be taken upon the consideration only of the offence past, but of the benefit to come.*'<sup>420</sup> The same theme is repeated in Hobbes's later works. In *De Cive* we read that the reason why punishments should be aimed at the 'future good' is that 'each man is bound by the law of nature to forgive one another.' It is the fifth precept of the natural law that '*we must forgive him who repents, and asketh pardon for what is past*'. This pardon is the 'remission of an offence', and is the granting of 'peace' to the 'penitent' individual. It therefore precludes any

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<sup>418</sup> See also Grotius 2005 p. 966 which states that 'The Benefit, that arises from Punishment to him, against whom the Offence was committed, consists in this, that it prevents for the Future the like Offence against him, either by the same Person or by others.'

<sup>419</sup> Hobbes 1969, p. 85.

<sup>420</sup> Hobbes 1969, p. 86.

punishment for the crime, despite the guilt of the offender. Crucially, pardon is offered in the recognition that the ‘mind’, or intentions, of the individual in question are no longer ‘hostile’, something which can only be demonstrated through giving ‘caution for the future.’<sup>421</sup> We see the same general justification in *Leviathan*, where Hobbes writes that the law commanding that ‘Revenge’ look to the ‘good to follow’ is ‘consequent to’ the sixth law of nature, which ‘commandeth Pardon, upon security of the Future time.’ This law, in which the granting of pardon is again presented as the granting of peace, is thus presented as a means of maintaining social harmony, and as the reason why punishment can only ever be forward looking.<sup>422</sup>

As we saw above, repentance is defined as the recognition that one’s actions have undermined one’s aim, and that such actions should therefore be avoided in the future. In this case, it therefore consists in the realisation, through either the experience of punishment, or the fear of punishment to come, that one’s actions (crime) are in contradiction with one’s aim (security). As a result, one is deterred from future crime through a better understanding of how best to achieve one’s true goals. According to Hobbes’s basic principles repentance is therefore a possible consequence of both the threat of punishment and its application.<sup>423</sup> This account, however, initially appears to be in contradiction with the presentation of the natural laws cited above. Any individual who is able to correctly identify that the punishment they are liable to undergo will consist of suffering greater than the benefit derived from their crime will experience genuine repentance. This is a category of persons which, for Hobbes’s

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<sup>421</sup> Hobbes 1983, p. 67.

<sup>422</sup> Hobbes 2012, p. 232. Emphasis mine.

<sup>423</sup> It is worth pointing out that Hobbes’s account of repentance is atypical for this period. As Cohen 2010, p. 41 points out, it was commonly held that true repentance could not be the result of fear alone; repentance consisted of a transformation of attitude, rather than simply a recognition that one’s aims and actions were contradictory. See for example Babington 1676, p. 53 which maintains that only ‘grace’ and not ‘terror, or example’ can work a ‘Reformation’ on hardened criminals. Repentance is thus associated with spiritual transformation, rather than rational calculation.

theory to work, must consist of most citizens. But if criminals, including the repentant, are not consistently punished, punishment may fail in its aim of deterring law-breaking among the population as a whole, and future criminals will gain a dangerous hope of impunity. The forgiving of today's penitents may well reduce the degree of future deterrence. The two natural laws, then, seem to be pulling the sovereign in opposite directions: punishment should deter the general population, but he may only be allowed to punish the relatively small percentage of criminals who at no point prior to their punishment understand that they have failed to calculate their own best interests.<sup>424</sup>

However, not only does Hobbes not present these two laws as being in conflict with each other, but he argues that the forward-looking nature of punishment grows out of the requirement to offer pardon and forgiveness. Hobbes is able to escape this paradox by his emphasis on the requirement that the individual in question give caution for the future. It is not enough to experience repentance. The convicted criminal must also find a way to display it, and in such a way as to demonstrate that they have indeed understood the error of their ways and will thus be deterred from further crime. By requiring the pardon only of those who can demonstrate their repentance, Hobbes was regularising the use of a mechanism already available in the English common law: that of binding over criminals, or recognisance. Not technically a form of post-conviction punishment, recognisance consisted in the demand by a magistrate that an individual who was, it was thought, liable to commit a future crime should pledge a surety, such as a sum of money, as security against that possibility. Past crimes, importantly, were seen as evidence of potential future actions. Individuals

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<sup>424</sup> This possible contradiction has been noted by Kavka 1986, p. 252. Kavka does not remark, however, on the fact that Hobbes not only presents these two laws as consistent, but argues that one emerges from the other.



who were thus bound over could be required to keep the peace, to demonstrate good behaviour, to refrain from certain actions, or to perform others. These requirements could be directed towards the community as a whole, or towards specific individuals, such as the victim of the initial crime.<sup>425</sup>

In the act of providing this security, Hobbes suggests, we have evidence of repentance and a pledge to avoid similar behaviour in the future. As such, the victim of the crime may receive no punitive satisfaction at all, as there is no concrete imposition of suffering upon the convict. However the aim of the state's legal system, the maintenance of peace, is achieved. Any punishment which does take place, therefore, is only directed towards those who have not provided other evidence of being deterred from crime. There might, therefore, not be a paradox at all: the practice of binding over itself operates as a deterrent, and hence the imposition of harm on citizens can be avoided.<sup>426</sup> Even if there is widespread failure of punishment to deter, this is immaterial: the absence of deterrent punishment is itself evidence that an alternative deterrent practice, conditional forgiveness, has already achieved punishment's aim.

This definition of punishment, and the natural laws upon which this definition is based, in turn places certain requirements upon the sovereign in designing a penal system. Even if the sovereign's purported purpose in punishing is deterrence, this alone is not enough to meet Hobbes's standards. The commonwealth's legal system must also plausibly achieve its aims: as we saw, punishment must not only have the

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<sup>425</sup> Hindle 2002, pp. 99-101. As Shoemaker 1991, p. 95 notes, recognisance was frequently employed as an alternative to indictments, and hence as a means of resolving disputes. On the use of previous crimes as evidence of future behaviour in the context of recognisance, see Walker 2003, p. 26.

<sup>426</sup> Ristroph 2012, p. 97 suggests that for Hobbes, punishment is an 'occasion for regret.' This is particularly insightful in light of punishment representing both a breach of the covenant and the failure of this alternative form of justice.

intention, but also the logical ‘possibility’ of disposing citizens towards law-abiding behaviour. One element of this is that men should have the means of determining their behaviour according to the law. Thus it ‘is only equitable that...law should plainly define both what is the crime that is condemned, and what is the method of punishment’ because it is through such definitions that ‘evil man [are] deterred from evil-doing by the expectation of punishment.’<sup>427</sup>

In addition, the system will only be effective if the designated punishment for a crime be determined in relation to what most men would regard as the crime’s appeal. As Hobbes notes, if the ‘harm inflicted be lesse than the benefit, or contentment that naturally followeth the crime committed, that harm’ is not to be understood as punishment, as it is simply the ‘Price, or Redemption’ of the crime. This is precisely because ‘it is of the nature of Punishment, to have for end, that disposing of men to obey the Law.’ If the punishment is ‘lesse than the benefit of the transgression’ it will not achieve this end, and may even encourage law-breaking.<sup>428</sup> As we saw above, punishment should also extend beyond the simple restitution of the victim’s loss. Such an action, in looking primarily towards the specifics of the past ‘evill’ and lacking an element of suffering, will not provide a reason to avoid engaging in the same behaviour in the future.

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<sup>427</sup> Hobbes 2012, p. 1202.

<sup>428</sup> Ibid. See also his comment that, in cases where the sovereign fails to design appropriate punishments, he is, by discounting the deterrent purpose of punishment, responsible for any crimes which result:

deliberation is nothing else but a weighing, as it were in scales, the conveniencies, and inconveniencies of the fact we are attempting; where, that which is more weighty, doth necessarily according to its inclination prevaile with us. If therefore the Legislator doth set a lesse penalty on a crime, then will make our feare more considerable with us, then our lust; that excesse of lust above the feare of punishment, whereby sinne is committed, is to be attributed to the Legislator. Hobbes 1983, p. 166.

While Hobbes here suggests a means of calculating minimally effective punishments, he never indicates that punishment should be limited to the minimum degree of suffering required to deter individuals from committing a specific crime. Nonetheless, he does introduce an element of proportionality into his theory by repeatedly arguing that not all crimes are to be regarded as equal breaches of the law. Alan Ryan has suggested that one of the tenets of Hobbes's theory of punishment is proportionality, by which he appears to mean some understanding that punishment should be limited according to the severity of the crime.<sup>429</sup> There is, however, no explicit evidence for this claim.<sup>430</sup> Hobbes certainly believes that not all crimes are equal, and thus that they should not all be punished in the same manner, but there is no sense in his account that a sovereign could not justifiably institute a system of universally harsh punishments, proportionate with regards to each other but utterly disproportionate to the crimes themselves. In the *Dialogue* Hobbes rejects the 'Opinion of the *Stoicks*...that all faults are equal' and the resulting inference that 'there ought to be the same Punishment for killing a Man, and for killing a Hen.'<sup>431</sup> Thus there is some evidence that any proportionality built into the system is the result not of a direct consideration of the nature of the crime past, and of the relationship between the punishment and the crime itself, but rather that punishments should be determined with reference to each other, to reflect the parallel range of severity found in crime. Proportion, therefore, is a secondary consideration following the requirements of

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<sup>429</sup> Ryan 1996, p. 233. See also Malcolm 2002, p. 531 which suggests that later developments in penal theory, according to which *only* the level of punishment required to deter a given crime was necessary, are 'Hobbesian'. Hünig 2007, pp. 224-5, on the other hand, limits Hobbesian proportionality to the relationship between punishments.

<sup>430</sup> Hobbes 1995b, p. 64 notes that cruelty 'exacts immoderate punishments', which hints at a concern for proportionality. It is striking, however, that this formulation is not repeated in the political works.

<sup>431</sup> Hobbes 2005, p. 113. Hobbes makes the same argument at Hobbes 2012, p. 466.

deterrence, rather than something connected directly to the quality of the crime itself.<sup>432</sup>

A Hobbesian system of punishment, therefore, is one which emphasises that the punishment must be in proportion to the crime committed, in that it must be greater than any benefit derived thereby. It must also only ever punish if there is a chance that the punishment will either deter the punished individual in question, or others, from committing further crime. This need not imply that punishment should be public, something which Hobbes never comments upon.<sup>433</sup> But it does suggest that the sovereign has not only an interest in, but a duty to, publicise individual instances of punishment: it is not merely the theoretical possibility of punishment, but also specific instances of its practice, which are to provide the deterrent function. This forward looking aspect of punishment is, on occasion, referred to by Hobbes as correction. It is therefore necessary to consider the specific ways in which Hobbes envisages punishment as acting upon, or correcting, citizens' wills.

### **Punishment and the Deterred Will**

As Hobbes writes in the *Elements*, the mind has two powers, the cognitive and the motivational. While distinct, these powers are of course related: the motive power is that which 'giveth animal motion to that body wherein it existeth; the acts hereof are

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<sup>432</sup> As a result, punishments for lesser crimes will be less than those meted out for greater breaches of the law. However, this consideration is a consequence of other commitments in the theory, rather than a governing principle. For precisely the opposite view, see Grotius 2005, p. 951 which states that 'that greater Offenders are more severely punished, and lesser Offenders more lightly, falls out by Accident, and is not primarily and of itself intended: For that which is simply and in the first Place intended, is an Equality between the Offence and the Punishment.'

<sup>433</sup> See however Overhoff 2000, p. 26 for the suggestion that pictures are more likely to impact the will than abstract considerations. Despite not linking publicity to the purpose of punishment, Hobbes was fully aware of the popularity such spectacles, and sought to explain the phenomenon in *De Homine*. He writes that 'men are wont to hurry together to the spectacle of death and danger to others' because it 'gives pleasure to see evil befall another.' Hobbes 1998, p. 51.

our affections and passions.’<sup>434</sup> These passions are the result of our cognition. One important aspect of cognition is memory, or what Hobbes calls ‘remembrance’: the ability to ‘imagine a thing past.’<sup>435</sup> It is through consideration of these past things, or experiences, that men are able to predict the consequences of their actions, and hence modify their behaviour in such ways that they will never have need to repent of the gaps between their actions and their true aims. One of Hobbes’s preferred means of illustrating this cognitive process is punishment. He writes in the *Elements*:

No man can have in his mind a conception of the future, for the future is not yet. But of our conceptions of the past, we make a future; or rather, call past, future relatively. Thus after a man hath been accustomed to see like antecedents followed by like consequents, whensoever he seeth the like come to pass to any thing he had seen before, he looks there should follow it the same that followed then. As for example: because a man hath often seen offences followed by punishment, when he seeth an offence in present, he thinketh punishment to be consequent thereto. But consequent unto that which is present, men call future, And thus we make remembrance to be prevision or conjecture of things to come, or EXPECTATION or PRESUMPTION of the future.<sup>436</sup>

As we saw in the previous chapter, this Hobbes repeated this example in *Leviathan*.<sup>437</sup> These accounts of the relationship between memory and prediction are examples of deliberation, or the the process of arriving at the final passion which forms the human will. In deliberating, as we saw earlier, the ‘Appetites and Aversions are raised by the foresight of the good and evill consequences, and sequels of the actions whereof we Deliberate.’ In considering crime, therefore, men consider the ‘evill consequences’ of capture, conviction and punishment, and weigh these against the benefit they expect to derive from crime. While all men may not be able to see clearly to the end of this chain of consequences, those who, through either ‘Experience, or Reason’ are able to foresee the ‘greatest and surest prospect’

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<sup>434</sup> Hobbes 1969, p. 28.

<sup>435</sup> Hobbes 1969, p. 11.

<sup>436</sup> Hobbes 1969, p. 15.

<sup>437</sup> Hobbes 2012, p. 42.

of their actions' consequences will be able to deliberate most effectively, and separate out good from evil.<sup>438</sup> Thus the clearer the consequences of actions, the more reasonable, and thus predictable, will be the deliberative processes of men.

Given that the fear of punishment is the passion to be reckoned upon in order for a deterrent penal system to function, it is a duty of the sovereign to provide his subjects with as much information about the consequences of law-breaking as possible, and to do so regularly. This includes not only the nature of the law and the punishments attached to them, but also the assurance that, if they are convicted, they will indeed face consequences for their crimes. As Hobbes notes in *De Cive*, 'the fear whereby men are deterred from doing evill, ariseth not from hence, namely, because penalties are set, but because they are executed; for we esteeme the future by what is past, seldome expecting what seldome happens.'<sup>439</sup> As we saw in Chapter 1, while all laws are assumed, through the presence of a coercive power, to have a penalty attached to them, these penalties need not be explicit in order to be carried out. Nonetheless, the model of deliberation Hobbes presents indicates that fear of a specific punishment may well be more effective in encouraging law-abiding behaviour than a more ambiguous promise of some arbitrary future evil.

In considering fear, however, we come to a second question concerning the operation of deterrent punishment upon the will, that of individual human freedom. Hobbes consistently notes that those actions which men perform 'upon appetite or fear'<sup>440</sup> are voluntary. Indeed, his entire political system requires that this be the case, the archetypal voluntary action motivated by fear being man's entry into the commonwealth. Nonetheless, at various points he seems to indicate that the fear of

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<sup>438</sup> Hobbes 2012, p. 94.

<sup>439</sup> Hobbes 1983, p. 167.

<sup>440</sup> Hobbes 1969, p. 62.

punishment can actually remove the voluntary nature of the will to behave according to the laws. In *Leviathan* he suggests that the ‘coercive Power’ of the sovereign can ‘compel men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant.’<sup>441</sup> In what way might fear ‘compel’? One possibility is that fear, like other strong emotions, behaves as an impediment to the will, and thus removes human liberty. This is suggested by Hobbes’s discussion of deliberation in *De Cive*, in a seeming departure from his earlier assertions.

In Chapter 9 of *De Cive* we read that there are two forms of impediment to motion which can restrict the will, those which are ‘externall, and absolute’, and those which are ‘arbitrary.’<sup>442</sup> At this point in his thinking, Hobbes appears to consider fear, such as the fear of punishment, an impediment of the second kind.<sup>443</sup> Moreover fear, as an impediment of this kind, is able to create obligation, and hence limit possible action. Thus in describing man’s awareness of God’s overwhelming power, Hobbes writes that

there are two Species of *naturall obligation*, one when liberty is taken away by corporall impediments, according to which we say that heaven and earth, and all Creatures, doe obey the common Lawes of their Creation: The other when it is taken away by hope, or fear, according to which the weaker despairing if his own power to resist, cannot but yeeld to the stronger. From this last kinds of obligation, that is to say from fear, or conscience of our own weaknesse (in respect of the divine power) it comes to passe, that we are obliged to obey God in his naturall Kingdome.<sup>444</sup>

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<sup>441</sup> Hobbes 2012, p. 220.

<sup>442</sup> Hobbes 1983, p. 125.

<sup>443</sup> At Hobbes 1999, p. 30 Hobbes distinguishes between necessitation and compulsion; actions necessitated by fear are compelled, while actions necessitated by all other passions are not. Both compelled necessitated action and uncompelled necessitated action are voluntary.

<sup>444</sup> Hobbes 1983, p. 187. Contrast this with the discussion at Hobbes 2012, p. 558 in which it is the ‘excellence’ of God’s power which confers his right, rather than obligation arising from man’s fear.

Those men who obey the law from fear of punishment, therefore would, on the *De Cive* account at least, thus appear to be *obliged* to obey the law. However this move, problematically, appears to eliminate the voluntary nature of those actions committed out of fear.<sup>445</sup> Quentin Skinner, in a recent discussion of this question, has argued that arbitrary impediments of this kind should therefore be understood as removing man's freedom of choice, rather than his freedom of action: our deliberation takes place in the recognition that certain options are simply impossible, due to fear, but this in no way limits our corporeal freedom, nor does it, strictly, render our actions coerced.<sup>446</sup> By the later versions of the theory, however, Hobbes seems to reject the notion that our passions can be understood as impeding either our choices or our actions, returning to a model of liberty which simply contrasts liberty as a lack of obligation, rarely possessed in the commonwealth, with corporeal liberty, which is much more common.<sup>447</sup>

The notion that fear can only encourage us in certain actions, rather than compelling us, is bolstered by Hobbes's description of how exactly experience encourages us to act upon or forego certain desires. In the *Elements* Hobbes suggests

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<sup>445</sup> See Hobbes 1983, p. 58 for the assertion that actions undertaken through fear are nonetheless voluntary.

<sup>446</sup> Skinner 2012, p. 138. Freedom of choice, it should be noted, is a type of freedom distinct from freedom from obligation. A citizen, on Skinner's account, could have the freedom of both choice and action to commit a crime, assuming he is not in fact frightened by punishment, but he could never have a freedom from his obligation to obey the law. On this point see also Lloyd 2009, pp. 292-3.

<sup>447</sup> For a discussion of these two kinds of liberty, see Pettit 2005. While these two forms of liberty are distinct, the extent to which Hobbes uses metaphors of physical constraints to describe obligations limiting our rights is striking. See for instance his description at Hobbes 2012, p. 282 of 'that dissolute condition of masterlesse men, without subjection to Lawes, and a coercive Power to tye their hands from rapine, and revenge' and his argument at Hobbes 1983, p. 170 that '*the Law tyes him being obliged, that is to say, it compells him to make good his promise, for fear of the punishment appointed by the Law.*' For an alternative reading in which, in *Leviathan*, the fear of punishment takes away both individuals' freedom and their power to commit crime, see van Mill 2001, pp. 58-9. Plamenatz 1957, p. 299 unhelpfully conflates obligation with necessitation, suggesting that because the punishments of the sovereign, and hence fear, can be 'evaded', subjects are not always *obliged* to obey his commands.



that during deliberation ‘the consequences of the action are our counsellors.’<sup>448</sup> They thus work in a similar way to those human counsellors who alternately ‘do make appear the consequences of the action’, but who, rather than controlling their advisee’s process of deliberation, merely ‘furnish’ him with ‘arguments.’<sup>449</sup> Importantly, counsel, as defined by Hobbes, is distinct from command in that it is a form of ‘provisive’ speech: it is thus unable to control the will.<sup>450</sup> If we take seriously Hobbes’s account of experience as providing counsel rather than command, then this would seem to make sense of his assertion in *De Cive* that ‘the end of punishment is not to compell the will of man, but to fashion it, & make it such as he would have it who hath set the penalty.’<sup>451</sup> He is even more explicit in *Leviathan*, writing that ‘Feare, and Liberty are consistent...so a man sometimes pays his debt, only for *feare* of Imprisonment, which because no body hindered him from detaining, was the action of a man at *liberty*.’<sup>452</sup>

It is clear that men, in deliberating, come to a form of knowledge about the best course of action to take based on their perception of the consequences of those actions. But it is important to note that punishment produces a relatively imprecise version of understanding. As Hobbes notes with regard to the man considering the plausible results of criminal activity, acting based on ‘experience’ requires deliberation based on ‘signs’ which are ‘but conjectural.’ Hobbes cautions that while their ‘assurance’ is ‘more or less’, they can never be taken as ‘full and evident.’ Experience alone ‘concludeth nothing universally.’ Clearly, the more experience one has, the more likely it is that one’s conjectures will prove correct. Nonetheless, it is

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<sup>448</sup> Hobbes 1969, p. 67.

<sup>449</sup> Ibid.

<sup>450</sup> See Hobbes 1983, p. 168 which states that to ‘follow that is prescribed by *Law*, is *duty*, what by *Counsell*, is *free-will*.’

<sup>451</sup> Hobbes 1983, p. 166.

<sup>452</sup> Hobbes 2012, p. 326.

important to remember that this form of knowledge, or ‘prudence... taking signs of experience’ is always fallible.<sup>453</sup>

Related to prudence is the category of thought which Hobbes labels ‘opinion’, or those propositions which men think likely. Opinion is not true knowledge: men are apt to err in their reasoning, or to trust the arguments of others.<sup>454</sup> Action which appears to be prudent, because it conforms to our understanding and interpretation of experience, may be based on nothing more than opinion, rather than on true knowledge. Indeed, according to Hobbes, this is more than likely. As he writes in the same text,

the propounding of benefits and of harms, that is to say, of reward and punishment, is the cause of our appetite and of our fears, and therefore also of our wills, so far forth as we believe that such rewards and benefits, as are propounded, shall arrive unto us. And consequently, our wills follow our opinions, as our actions follow our wills. In which sense they say truly and properly that say the world is governed by opinion.<sup>455</sup>

Most men, therefore, base their regular deliberation upon prudence and opinion. However, as we saw, prudence is not infallible, something which Hobbes insists upon throughout his work.<sup>456</sup> As such, it can be contrasted with science, or *sapience*, which Hobbes defines as ‘conditionall Knowledge, or Knowledge of the consequences of words.’<sup>457</sup> The difference between these two forms of knowledge, Hobbes suggests, is similar to that between a ‘man endued with an excellent naturall

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<sup>453</sup> Hobbes 1969, p. 16. It is interesting to note, in the context of Hobbes’s critique of prudence, that by the early modern period it had become associated with reason of state and hence with a certain moral flexibility and rejection of accepted norms of justice. See Stanciu 2011.

<sup>454</sup> Hobbes 1969, p. 26. See Hobbes’s contrast between opinion and knowledge in his definition of ‘repentance.’ Hobbes 1969, p. 39.

<sup>455</sup> Hobbes 1969, p. 63.

<sup>456</sup> See, for example, Hobbes’s comment in *Leviathan* that conjecture based on past experience, ‘called *Foresight*, and *Prudence*, or *Providence*; and sometimes *Wisdom*’ can, ‘through the difficulty of observing all circumstances, be very fallacious.’ Hobbes 2012, p. 42.

<sup>457</sup> Hobbes 2012, p. 98. In the *Elements* Hobbes defines science as ‘knowledge of the truth of propositions.’ As such, it is evidence of truth, which cannot be located through prudence alone. Hobbes 1969, p. 24.

use, and dexterity in handling his armes’, whose ability is equivalent to prudence, or experience, and an opponent who in addition to experience has the benefit of ‘an acquired Science, of where he can offend, or be offended by his adversarie, in every possible posture, or guard.’ The former is good, Hobbes suggests, but the latter is better, just as science is a surer guide to correct action than experience alone.<sup>458</sup>

The institution of punishment, then, can provide men with good reasons for avoiding criminal actions. It disposes their wills to peace by encouraging a fear of suffering, based on the experience of having witnessed or heard about the effective punishment of past criminals, and hence the expectation that the same will occur to them. As such, punishment encourages prudence. However, on its own it cannot convey science.<sup>459</sup> The institution of punishment cannot give reasons why men should uphold the law other than that it is probably in their immediate best interests to do so.<sup>460</sup> As we saw in Chapter 3, this poses a major problem for Hobbes, as in some

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<sup>458</sup> Hobbes 2012, p. 76. Hobbes traces the distinction between *prudentia* and *sapientia* to a classical tradition. For discussion of the two forms of knowing among his contemporaries, see Jessep 2009. Hobbes’s correspondent François Peleau challenged Hobbes’s view of prudence in 1656, arguing that, rather than being simply a reflection of experience it involves ‘analysis and synthesis’ and is therefore a form of reasoning. Hobbes 1994b, p. 332.

<sup>459</sup> It is for this reason, I suggest, that the ‘reform’ of criminals, as it was understood in the early modern period, is not a useful means of understanding Hobbesian punishment. The literature on punishment practice largely locates the shift towards such reform in the eighteenth century, with the increased use of prisons. Historians of early modern crime have, however, begun to emphasise the extent to which ‘reformation’ was cited from the sixteenth century onwards as a purpose of punishment distinct from deterrence. It was felt that reform, understood as the transformation of character, would come about through physical labour and religious instruction in houses of correction, or through the infliction of corporeal punishment (whipping posts were often labelled ‘postes of refomacion’). As the result of punishment, it was hoped, criminals would not simply be deterred from criminal acts but would no longer desire to commit crime at all. As we have seen in our analysis of Hobbesian punishment as encouraging prudence, however, Hobbes thought that punishment as such was only capable of encouraging or discouraging actions; it could not alone determine character. Griffiths 2004, pp. 15, 23; Griffiths 2004b, p. 101. On the theory of penal reform in this period, see Dalton 1661, p 122 who writes, of criminals in houses of correction, ‘by labour and punishment of their bodies, their forward natures may be bridled, their evil minds bettered, and others by their example terrified.’ See also Coke 2003, pp. 553-4.

<sup>460</sup> I thus disagree with the opinion of McBride 2007, pp. 53-4, that the aim of Hobbesian punishment is to improve judgement, and not merely strike fear into subjects. That reason which a penal system is able to inculcate is limited to increasingly accurate calculations about risk and suffering.

cases men will find that it is, at least according to their opinion, in their best short term interests to commit a crime. They may think that they will not be caught. They may erroneously believe that they are too rich, or powerful, or popular, to be punished. Thus while punishment can, Hobbes believes, act as a deterrent to most citizens most of the time, all that deterrence can do is ensure that men will act as prudential unjust men. They may be good citizens as a result, but punishment cannot motivate law-abiding behaviour on the basis of justice and true knowledge about the necessity of the commonwealth's long-term stability. While citizens may well extrapolate from their experience towards general conclusions concerning the wisdom of general law-abidingness, this is in no way guaranteed. Crucially, prudence alone cannot ensure that men will discover and adhere to the natural laws, which enjoin contract-keeping, and hence loyalty to the state.<sup>461</sup> Any sovereign who wishes to maintain civil peace will therefore be forced to turn to a different but complementary institution, that of education.

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<sup>461</sup> In the *Elements* Hobbes argues that 'we cannot from experience conclude...any proposition universal whatsoever.' Experience can only teach us how terms have been used by others, such as how our sovereign may use the term 'contract.' We can thus learn to modify our behaviour according to our appreciation of authorised usage, and in reference to the consequences we may predict of contradicting this, but prudence alone cannot teach us consistently to understand and apply the natural laws. Hobbes 1969, pp. 16-7. In *Leviathan* Hobbes makes the point explicitly, writing that men cannot be trusted to 'know how to look into their own hearts and read what is written there [i.e. natural laws]' and that therefore 'they learn from the written laws what things are to be done, and what avoided; and they do things and avoid doing things in accordance with whatever will seem, from the punishments they foresee, profitable or harmful to themselves.' Hobbes 2012, p. 1204. See Krom 2013, p. 70 on man's general inability or unwillingness to consistently act according to reason. See Lloyd 2009, p. 302 for a discussion of Hobbes's distinction between reason or wisdom and prudence. Lloyd points out that the Foole in *Leviathan* is foolish precisely because he relies on the latter rather than the former. This is entirely consistent with my claim that the Foole is unjust, and that it is prudence rather than wisdom which characterises Hobbes's unjust man.

### **The Role of Education: Complementing Prudence with Science**

Hobbes's discussion of prudence clarifies why punishment, while encouraging law-abiding, or guiltless, behaviour, cannot alone create the conditions for civil peace. As we saw in Chapter 3, the most dangerous criminals are precisely those in whom prudential deliberative processes have failed: they believe themselves to be immune from the penal aspects of the law, and thus free to break its distributive commands.<sup>462</sup> Punishment is unable, in such cases, to impose its own authority, as it is precisely this authority which is being rejected. While citizens of course remain obligated to their sovereign throughout their time as members of the commonwealth, they may not always understand or appreciate this obligation and punishment, in acting purely on the short-term deliberation of citizens, cannot foster such an understanding. It is for this reason that Hobbes suggests that education is a further, and crucial, tool in the sovereign's struggle to impose civil harmony.<sup>463</sup>

To turn to education is not to imply that there is nothing that a deterrent system of punishment can do in order to reduce the assumption of immunity. Consistent and well-publicised punishment, particularly of criminals who might believe themselves to be beyond the scope of the law, is clearly an important means of increasing the role of fear in such individuals' deliberative processes, and of reducing hope of impunity. We can therefore see it as a practical complement to Hobbes's response to the Foole, discussed in the previous chapter. It is for this reason that Hobbes insists that, as we saw in the previous chapter, the sovereign must consistently punish even the most

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<sup>462</sup> For this division in the law, see Hobbes 2012, p. 442. Punishment, on this reading, is deficient for reasons other than simply the state's inability to threaten all of the commonwealth's subjects all of the time. The problem is that punishment, no matter how consistently employed, cannot create just manners. Accounts which emphasise the capacity problem of punishment include Kavka 1986, pp. 250-4, Bejan 2010, p. 615 and Vinx 2012, p. 154.

<sup>463</sup> The point that education, and not merely coercion, is necessary for civil peace has been emphasised by numerous commentators, including Dietz 1990; Skinner 1996; Lloyd 1997; Burchell 1999; Ahrens Dorf 2000; Anderson 2003; Kow 2005; Hanin 2012 and Abizadeh 2013.

‘rich, and mighty’ criminals.’<sup>464</sup> However, while such actions might increase citizens’ prudence, they will not necessarily increase their true knowledge.<sup>465</sup> If the aim of the state is to encourage not merely law-abiding but truly just action, then education about the principles underpinning the commonwealth will be necessary.<sup>466</sup>

Education has the further advantage over punishment in that it is able to not only teach the principles of sovereignty, but can also equip subjects with the ability to correctly interpret the actions of their sovereign. It is therefore a necessary complement not only to punishment, but also to the other aspects of the legal system which are structured around punishment’s deterrent function, such as the publicising of the laws. As we saw at the beginning of this chapter, the sovereign’s understanding of just and unjust action, as defined in these laws, is enforced by the threat of punishment. However, as Hobbes notes in Chapter 11 of *Leviathan*, ‘Ignorance of the causes, and originall constitution of Right, Equity, Law, and Justice, disposeth a man to make Custome and Example the rule of his actions.’ As a result, men may consider it ‘Unjust which it hath been the custome to punish’ and ‘Just, of the impunity and approbation whereof they can produce an Example, or...Precedent.’ Such an approach is fundamentally immature: men who reason in this way are akin to ‘little children,

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<sup>464</sup> Hobbes 2012, p. 534.

<sup>465</sup> See Hobbes’s contrast between the ‘The *Vertue* of a Subject’, which ‘is comprehended wholly in obedience to the Laws of the Common wealth’, and ‘the *Prudence* of a subject’, which is ‘to obey the Laws.’ The danger of relying on prudence alone, without virtue to complement it, is illustrated by the events of the civil war. Long-term obedience is prudent, for ‘without such obedience the Common wealth which is euery subjects safety and protection, canot subsist’. However lacking the knowledge of ‘what is necessary for their own defence’ may lead men to confuse their short and long-term interests, and they may come to believe that ‘it be Prudence also in priuate men [to] craftily to withhold from the publick, or defraud it of such part of their wealth as is by Law required’. Hobbes 2010, p. 165. Emphasis mine.

<sup>466</sup> See Frost 2004, p. 5 and Frost 2001 for an alternative interpretation of the state’s aims, according to which, subjects are encouraged to learn to consistently act *as if* they value civil equality as a necessary precondition for peace, rather than encouraged to cultivate a truly just disposition. Sorell 1986, p. 118 also argues that the true aim of the Hobbesian state is to engender general guiltlessness, rather than justice of dispositions.

that have no other rule of good and evill manners, but the correction they receive from their Parents and Masters.’ Individuals who are unable to understand the reasons underpinning laws and why they should obey them are thus unable to consistently apply the lessons they have learned from observing the actions of the penal system. This is not necessarily through any fault of their own, but rather because prudential reasoning encourages one to think in terms of experience, and hence custom, rather than on the basis of the logic behind the sovereign’s laws.

Without education in the ‘causes, and originall constitution’ of the state, therefore, men are not simply morally rudderless, but are able to justify acting according to their own desires rather than the laws. As a result of this reliance on a mixture of prudence and consideration of their own perceived interests, men are inclined to dispute ‘the doctrine of Right and Wrong’, a stance which encourages law-breaking.<sup>467</sup> Moreover, from the *Elements* onwards, Hobbes was clearly convinced that, in matters of government, this tendency was particularly dangerous because in ‘moral philosophy, or of policy, government, and laws...every man thinks that in this subject he knoweth as much as any other.’<sup>468</sup> Thus men are unlikely to consider the possibility of errors in their reasoning, and are, without proper instruction, more likely to rely upon their own opinion than they might be when considering other areas of knowledge. Hobbes presents a striking example of how this can occur in describing how men, not wishing to pay state tax, will attack the sovereign’s representatives out of the fear of punishment. In such cases, simply relying on the fear provoked by punishment actually undermines the state’s ability to carry out its basic functions, such as the collection of revenue.<sup>469</sup>

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<sup>467</sup> Hobbes 2012, p. 158.

<sup>468</sup> Hobbes 1969, p. 66.

<sup>469</sup> Hobbes 2012, p. 160.

It is for these reasons that Hobbes cites ‘publique Instruction’ among the duties of the sovereign. In order to behave in a consistently law-abiding manner, citizens should be able to interpret the laws and ‘apply [them] to their own cases.’ However, as we saw above, this ability will not develop through the enactment of deterrent punishment alone.<sup>470</sup> It is in response to such concerns that Hobbes famously asserted that ‘the ground of these [the sovereign’s] Rights, have the rather need to be diligently, and truly taught’ because ‘they cannot be maintained by any Civill Law, or terrour of Legall Punishment.’<sup>471</sup> This is not a purely practical point about the impossibility of punishing all law-breakers. Rather, Hobbes wishes to emphasise that men will only recognise the legitimacy of the state, and adapt their own reason to that of the sovereign, if they also accept the natural law forbidding ‘the violation of Faith’ and hence enjoining ‘natural obligation.’ Without this theoretical framework underpinning men’s attitude towards the state, there is the risk that they will take all punishment to be simple ‘hostility’, which, when it is unable to act as a deterrent, will in turn provoke subjects’ own hostile actions.<sup>472</sup> Thus punishment alone, both because of the danger that it be taken as hostility, and because it cannot teach reasons for correct behaviour, cannot itself be used to establish the law’s jurisdiction.

It is for this reason that the right and ability of the sovereign to determine civil education is an element of every version of Hobbes’s theory. As Teresa Bejan has

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<sup>470</sup> Hobbes 2012, p. 520.

<sup>471</sup> A link between rebellion and a lack of education is a feature of all of Hobbes’s writings. See for example his comment in *De Corpore* that ‘the cause of war is not that men are willing to have it; for the will has nothing for object but good, at least that which seemeth good. Not is it from this, that men know not that the effects of war are evil... The cause, therefore, of civil war is, that men know not the causes neither of war nor peace, there being but few in the world that have learned those duties which unite and keep men in peace, that is to say, that have learned the rules of civil life sufficiently.’ Hobbes 1994a, p. 190. Unsurprisingly, this is also a major element of his history of the Civil Wars. He asks in *Behemoth* ‘if men know not their duty, what is there that can force them to obey the Laws?’ and suggests that the disciplining of the universities would address this problem. See also his famous comment that ‘the Power of the mighty has no foundation but in the opinion and beleefe of the people’ Hobbes 2010, pp. 183, 128.

<sup>472</sup> Hobbes 2012, p. 522.



noted, the form that this teaching was to take was, Hobbes believed, dependent upon the nature of the intended recipient.<sup>473</sup> Bejan emphasises that, while instruction was not to be limited to ‘the Rich, and Potent Subjects of a Kingdome, or those that are accounted the most Learned’<sup>474</sup> the practical demonstration of principles is not the type of public instruction that Hobbes thinks can be ‘scaled up’ to meet the needs of the wider population.<sup>475</sup> As we are here concerned with education as a complement to punishment, it is this broader form of education which is most relevant; both are civil institutions addressing themselves to the citizenry as a whole.

It is important to recognise that, while different elements of the population should be catered to, this was not a call for the teaching of different principles.<sup>476</sup> Hobbes suggests that there should be no obstacles to the ‘Common-peoples minds’ being able to integrate their sovereign’s teachings because barriers to learning are more frequently the result of individuals’ interests rather than the difficulty of the material itself.<sup>477</sup> The challenge of teaching consists in the discovery and demonstration of how the true principles under consideration relate the audience’s interests; in the case of sovereignty and the wider population, the clear danger of the

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<sup>473</sup> Bejan 2010, p. 617. For the suggestion that Hobbes himself adapted not merely the form, but also the content, of his arguments to suit different audiences (and hence may have advocated the same strategy to his sovereign) see Hoekstra 2006, p. 617.

<sup>474</sup> Hobbes 2012, p. 524.

<sup>475</sup> Bejan 2010, p. 617.

<sup>476</sup> Lloyd 1997, p. 40 suggests that while the central arguments of *Leviathan* should be widely taught, attempting to spread the details of the text may be potentially ‘self-defeating.’ In this context, Hobbes 1994b, p. 30, is particularly suggestive: Hobbes writes in 1636 to his correspondent, a Mr. Glen, that

I long infinitely to see those Bookes of the Sabbath; & am of your mind, they will put such Thoughts in the Heads of vulgar People, as will conferre little to their good life. For, when they see one of the ten commandments to be *Jus humanum* merely (as it must be, if the Church can alter it) they will hope also, that the other nine may be so too. For every man hither too did believe that the ten Commandments were the Morall, that is, an Eternal Law.

Noel Malcolm suggests that the work referred to may be Heylyn’s *The History of the Sabbath* (1636), which argues that the observance of the Sabbath is not a feature of the natural law. Hobbes 1994b, p. 31.

<sup>477</sup> Hobbes 2012, p. 524. On the self-evident nature of the lessons subjects will receive, see Johnston 1986, p. 131.

re-emergence of a state of nature via civil war could provide this link. As a result, there should be no major challenge in ‘the instruction of the people in the Essential Rights...of Sovereignty’.<sup>478</sup> These lessons will include the teaching of justice, and hence the necessity that men ‘not...deprive their Neighbours, by violence, or fraud, of any thing which by the Sovereign Authority is theirs...the People are to be taught, to abstain from violence to one another’s person, by private revenges; from violation of conjugal honour; and from forcible rapine, and fraudulent surreption of one another’s goods.’<sup>479</sup> Furthermore, in a lesson that goes further than that taught by either Hobbes’s response to the Foole or by the experience of punishment, men are to be taught that even if they are able to render themselves immune from the consequences of their actions through the ‘corruption either of Judges or Witnesses’, such actions will result in ‘evil consequences’. By such successful crimes ‘the distinction of propriety is taken away, and Justice becomes of no effect.’<sup>480</sup>

Hobbes appears to envisage a system of regular public lectures in which the people are to be taught loyalty to government<sup>481</sup> and to their sovereign,<sup>482</sup> writing that it ‘is necessary that some such times be determined, wherein [the people] may assemble together, and...hear those duties their Duties told to them, and the Positive

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<sup>478</sup> Hobbes 2012, p. 524.

<sup>479</sup> Hobbes 2012, p. 530.

<sup>480</sup> Ibid. A useful way of thinking about the content of public education is that it teaches subjects to distinguish between real and apparent goods; civil peace is a true good, while the benefit consequent to crime is merely apparent, and may lead to ‘damage’ from the ‘evil annexed to it.’ Those who are ‘inexperienced’ are unlikely to understand ‘the long-term consequences of things’ and hence may fall into this trap. Hobbes 1998, p. 48. See also Hobbes 1998, p. 55 and Hobbes 1976, p. 480. On the inability to distinguish between real and apparent goods as a form of cognitive corruption see Blau 2009. For an account of human conflict which relates it to man’s natural shortsightedness in the context of the state of nature, but which can also be applied to the question of these different types of goods in the state, see Murphy 1993. May 1992 associates Hobbesian justice with respect, or fidelity, to the concept of law, rather than simple obedience. Men should consistently obey the law because they know that this is the means to best preserve the institution of the commonwealth. While May does not use the terminology of real and apparent goods, it is clear that fidelity to the law is an example of the latter.

<sup>481</sup> Hobbes 2012, p. 524

<sup>482</sup> Hobbes 2012, p. 526.

Lawes, such as generally concern them all, read and expounded, and be put in mind of the Authority that maketh them Lawes.’ While Hobbes provides the example of the Jewish Sabbath, ‘in which the Lawe was read and expounded’ as a potential model to follow, he notes in the Latin *Leviathan* that ‘it is the duty of the ruler in this matter to determine the places, times, and teachers.’<sup>483</sup>

However they are organised, such compulsory assemblies are necessary, as Hobbes is firm in his belief that learning must be forced. He writes that the people, which will include both those ‘whom necessity, or covetousnesse keepeth attent on their trades and labour’ and those ‘whome superfluity, or sloth carrieth after their sensuall pleasures’, will largely be ‘diverted from the deep meditation, which the learning of truth, not onely in the matter of Naturall Justice, but also of all other Sciences necessarily requireth.’ As a result of this natural tendency to rely upon the opinions of others, they will, if civil instruction is not provided, turn to the ‘Divines of the Pulpit’, or to their seemingly educated neighbours and acquaintances, for their beliefs.<sup>484</sup>

While such lectures may, as Bejan argues, consist of nothing more than a simplified version of the doctrine of sovereignty, they would, if successful, nonetheless fulfil Hobbes’s initial definition of teaching as ‘begetting in another the same conceptions that we have in ourselves.’<sup>485</sup> Because based on genuine science, the education men receive through such public instruction, even if lacking detailed demonstration, is to be distinguished from simple persuasion, which is the result of, and can only ever inculcate, ‘bare opinion.’<sup>486</sup>

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<sup>483</sup> Hobbes 2012, pp. 528-9.

<sup>484</sup> Hobbes 2012, p. 532.

<sup>485</sup> Hobbes 1969, p. 64.

<sup>486</sup> Ibid. Recall the definition of opinion, offered in the *Elements*, as ‘all such propositions as are admitted by trust or error, we are not said to know, but think them to be true.’ Hobbes 1969, p. 26. While public lessons may consist of a form of simplified instruction, adapted to the specific needs

Education, then, rather than punishment is what pushes citizens to consider the ways in which their actions strengthen or weaken the commonwealth as a whole, and thus encourages their deliberations to consider their long-term interests. Hobbes recognises that this education can teach a lesson which punishment alone, as we saw, cannot. The final recommendation Hobbes offers is that the people ‘are to be taught, that not onely the unjust facts, but the designs and intentions to do them, (though by accident hindered,) are Injustice; which consisteth in the pravity of the will, as well as in the irregularity of the act.’<sup>487</sup> This is not a lesson which punishment, with its emphasis on correct action, can teach. As we saw in Chapter 3, the threat of punishment has the effect of reinforcing unjust, but guiltless, behaviour, and as such cannot necessarily inculcate the correct calculation of long-term interests.

### **Classifying Hobbesian Punishment**

This discussion of Hobbes’s explanation of the purpose of punishment, and the specific retributive theories he was interested in disputing, indicates that we can best understand his project in the context in which it was formed. Early modern theorists of punishment were heirs to traditions in which punishment could have multiple purposes, including deterrence, reform, retributive reconciliation and, in extreme cases, incapacitation. Punishment, while a civil institution, could thus refer to

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of the population in question, Hobbes does suggest in *Behemoth* that, if their teachers have been well-trained, the ‘multitude’ are capable of learning the correct ‘Science of Just and Vniust’ from ‘true Principles, and euident demonstration’, indicating that teaching the public may consist of something more than simple reiteration. Hobbes 2010, pp. 158-9. On this point, see also Hobbes’s statement in *De Corpore*, that ‘even they also that have not learned the first part of philosophy...may, notwithstanding, attain the principles of civil philosophy, by the *analytical method*.’ Hobbes 1994a, p. 200. Hobbes 1998, pp. 42-3 argues that ‘politics and ethics (that is, the sciences of *just* and *unjust*, of *equity* and *inequity*)’ can be ‘demonstrated *a priori*’ and thus require no special knowledge on the part of the instructed. There is thus no indication that Hobbes did not believe that the essential principles of his doctrine could not be taught, as opposed to simply promulgated. Moreover, this form of teaching is what would provide men with the capacity to both understand the jurisdiction and logic of the law and apply it to their particular case.

<sup>487</sup> Hobbes 2012, p. 530.

standards of justice external to the state. Hobbes's steadfast insistence on a single purpose of punishment, deterrence, was an attempt to remove both violent passion and arbitrary mercy from the practice. He thus emphasised that punishment and mercy could only be wielded by the state for the benefit of the commonwealth as a whole, without reference to external standards, such as religion or community feeling. It is this natural law requirement that the state act for the benefit of the whole community by promoting peace, rather than a specific concern over the suffering caused by punishment, which underpins his focus on deterrence.

According to this deterrent theory, punishment could be coercive, but not compelling. It provides reasons for actions, but does not communicate to individuals why certain actions are injurious to the state. It relies upon an understanding of punishment as suffering, but enjoins the sovereign to pardon those who demonstrate repentance. It thus does not require the punishment of criminals, but nor does it set concrete limits upon the form or degree of punishment through reference to the nature of the crime itself. For all these reasons, Hobbes's theory of punishment's purpose was atypical for his period. It is also difficult to classify according to the common categories of modern penal theory: retributive, deterrent, and corrective.

Nonetheless, this difficulty has not prevented various readers from undertaking precisely this project. I will therefore conclude with a brief discussion of two illustrative cases of such classification, and suggest why I believe they are not only mistaken, but might prevent us from recognising important features of Hobbes's theory. I will focus on the work of Mario Cattaneo and Alan Norrie, both of whom are interested in tracing the intellectual legacy of Hobbes's theory. As a result, their projects go beyond simply labelling elements of Hobbes's thought, and instead consist of attempts to align him with specific ways of thinking about punishment which

emerged in the eighteenth and nineteenth centuries. Cattaneo ties Hobbes's interest in 'correction and prevention' and his rejection of retribution to the Classical School of criminology, exemplified by figures such as Cesare Beccaria and Jeremy Bentham.<sup>488</sup> Norrie, for his part, compares Hobbes to Immanuel Kant and G. W. F. Hegel, arguing that while correction and prevention are indeed important aspects of Hobbes' theory, the latter also 'exhibits a retributivist tendency'. According to Norrie, Hobbes is thus 'the founding father of not one, but *both* the great theories of punishment.'<sup>489</sup>

This attempt to anachronistically fit Hobbes into one or other of these schools of thought runs the risk of obscuring important elements both in his theory, and in those of the theorists with whom he is being compared. Turning first to retribution, we find that the central comparison is based on a misinterpretation of Hobbes's account. Norrie presents the 'idea of the individual qualifying for punishment through his prior legislative act' as the key element of retributive punishment.<sup>490</sup> Modern retribution, therefore, consists in more than simply the requirement that punishment only be inflicted on the guilty; it involves the assertion that, even if the experience of punishment cannot be understood as willed by the punished individual, the right by which he is punished is the consequence of his reason, as demonstrated by the creation of a legislative system. Punishment, in this model, is enacted out of a concern for the maintenance of objective standards of justice external to the state, but it is carried out through a human institution to which the punished individual is understood to have consented.<sup>491</sup>

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<sup>488</sup> Cattaneo 1965, p. 289.

<sup>489</sup> Norrie 1984, p. 316. See also Norrie 1991, p. 16. See however Ristroph 1997, p. 603, who explicitly argues that Hobbes's theory does not fit neatly into modern understandings of either retributive or consequentialist philosophies.

<sup>490</sup> Norrie 1984, p. 316.

<sup>491</sup> See for example Hegel's statement that the 'injury which is inflicted on the criminal is not only *just in itself* (and since it is just, it is at the same time his will as it is *in itself*, an existence of his freedom, *his right*); it is also a *right for the criminal himself*, that is, a right *posited* in his *existent*

It is therefore worth emphasising that, as was discussed in Chapter 2, Hobbesian criminals do not ‘own’ their punishment, in contrast with all other sovereign actions. Furthermore, as D. B. Hawkins, writing more generally about the origins of the theory, points out, ‘for Kant it is an evident moral principle requiring no justification outside itself that crime requires punishment...equivalent in kind to the evil done’,<sup>492</sup> while for Hegel ‘the wrong act is a negation of right, and the negation has to be negated by the reaction of society in the punishment of the offender.’<sup>493</sup> Modern retribution theory, then, can be said to collapse the purpose and the justification of punishment into a single argument: the breaking of rules to which one has agreed qualifies one for punishment and requires society to carry it out. In Hobbes’s theory, by contrast, subjects have set up, through the authorising covenant, a legislative system that has the power to inflict punishment upon the guilty. But this system is, as we saw, created specifically to maintain peace in the commonwealth. Punishment is thus not only not required, but in many cases natural law demands that it not be inflicted at all. This is in direct contrast with those thinkers whom Norrie presents as continuing Hobbes’s legacy, both of whom present punishment as the correct consequence of crime in order to meet the standards of justice. Norrie’s project of separating out one element of retributive punishment’s purpose/justification and using it to suggest that Hobbes inspired certain elements of the later theory not only misrepresents Hobbes but retributive theory more broadly.

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will, in his action.’ This is because ‘it is implicit in his action, as that of a *rational* being, that is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action.’ Hegel 2003, p. 126. See also Kant’s statement that ‘when I draw up a penal law against myself as a criminal, it is pure reason in me...legislating with regard to rights, which subjects me, as someone capable of crime...to the penal law, together with all others in a civil union.’ Kant 2003, p. 108.

<sup>492</sup> Hawkins 1971, p. 15.

<sup>493</sup> Hawkins 1971, p. 16.

This is not, however, to suggest that Hobbes's theory is better understood by reference to the Classical School of criminology. As we have seen, there is a long history of thinking about the ways in which punishment could both deter future crime and correct criminal impulses in the offender. The variant of this tendency which Cattaneo links to Hobbes, classical deterrence theory, grew out of a utilitarian concern with maximising human happiness and minimising human pain. Its advocates were primarily concerned with justifying the harm of punishment, and argued that only that degree of suffering which succeeds in preventing future harm can be inflicted. Thus we read Bentham arguing that if 'the evil of the punishment exceeds the evil of the offence, the punishment will be unprofitable' and 'the legislator will have produced more suffering than he has prevented.'<sup>494</sup> Likewise, Beccaria writes that 'any punishment which goes beyond' what is necessary to encourage law-abiding behaviour is 'unjust by its very nature.'<sup>495</sup> As we have seen above, this is not the case in the Hobbesian commonwealth; in the latter, cruelty is determined in relation to state laws, rather than to an external standard of human happiness which could be used to undermine civil authority.

The reason for these differences becomes apparent when we consider that Hobbes's theory was in many ways a response to a very different set of questions than those which motivate Beccaria, Kant and Hegel. The Kantian and Hegelian concern that punishment cannot have deterrence as its primary end is simply at cross-purposes with Hobbes's suggestion that deterrence is compatible with individual freedom, and that it is the best means a sovereign has to encourage peace in the commonwealth to the benefit of all subjects. Punishment, in the Hobbesian theory, is the means by which

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<sup>494</sup> Bentham 2008, p. 64. See also Bentham 2008, p. 72.

<sup>495</sup> Beccaria 1995, p. 11



men are taken seriously as deliberating individuals who behave according to their own determinations of benefit and harm. It has been suggested that it is only through a retributive model that the individual as a moral agent can be properly recognized: when one is punished for a bad action, one is treated as having the potential for moral responsibility.<sup>496</sup> But as I have attempted to demonstrate, Hobbes's theory of punishment is likewise able to treat his citizens as moral agents capable of making choices which are rational and in accordance with the needs of the commonwealth.

On the other hand, the link in classical deterrence theory between humanitarian aims and consistent punishment of actions is equally alien to Hobbes's thought. Hobbesian punishment, as we have seen, can be both just and harsh, as well as consistently forgiving.<sup>497</sup> Both the classical and retributive thinkers to whom Norrie and Cattaneo compare Hobbes, I would suggest, are concerned with justifying punishment to the punished individual in question, either as a consequence to his own prior act, or as a result of his reasonable determination regarding what is necessary for civil peace. Hobbes was merely concerned with punishment as a practice conducted upon citizens, with the aims of the state overriding all other concerns. It is for this reason that Hobbes's theory of punishment is able to include within it a right to resist, while the two later schools cannot; in presenting punishment as a civil practice justified only in relation to the sovereign's legal aims, Hobbes frees himself from the need to justify punishment to the punished individual, and from the requirement that the individual in question accept his punishment.

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<sup>496</sup> See for example Hegel, who writes to justify punishment along deterrent lines 'means treating a human being like a dog instead of respecting his honour and freedom.' Hegel 2003, pp. 125-6.

<sup>497</sup> Cattaneo's argument that 'It is difficult to avoid the inference that the 'spirit of Hobbes's theory does...really imply a rejection of the death penalty' thus appears to be the consequence of reading Hobbes through an eighteenth century lens. Cattaneo 1965, p. 294.

## **Chapter 5: Rebels and Enemies: Crimes Beyond**

### **Punishment**

#### **Introduction: Individuals Outside the Commonwealth**

The argument that Hobbes's theory locates criminals outside the commonwealth is an appealing one; it equates either breaking the law, or resisting punishment, with total rejection of the original covenant, and thus seems to account for the presence of natural rights in the artificial state. As we saw in Chapter 2, however, law-breakers remain subjects of the sovereign throughout their experience of punishment. The covenant upon which the commonwealth is founded allows for legal resistance to punishment as part of the retained natural right to self-defence, and thus both crime and resistance to the state are presented as actions committed by citizens. In making this argument, Hobbes cannot help but draw our attention to those individuals who are not members of the commonwealth; criminals, despite the suffering they undergo, nonetheless remain privileged through this retained citizenship, while those outside the state have none of the legal protections outlined in earlier chapters. This becomes particularly important when we consider those whose actions effect a transformation in civil status. This is the case of those who are determined by the sovereign to be rebels or traitors.

The criminal and the rebel appear in Hobbes's theory as curiously twinned figures; both are sources of instability in the state and, as Chapter 3 suggested, there are similarities between the passions and errors of reasoning which lead to either criminal or rebellious behaviour. The line between the two may not always be clear, and, as will be explored below, it is one which ultimately depends upon sovereign judgement. However, it is precisely because of such similarities that drawing a distinction between the criminal and the rebel is crucial to understanding Hobbes's criminology. The temptation to conflate criminals with rebels led some scholars to

fundamentally misunderstand Hobbes's conception of the rights associated with citizenship, as we saw in Chapter 2. An alternative blurring of these categories, whereby rebels are seen to hold some of the rights of citizens, can lead the hasty reader to find a right to rebel in the political theory. The question of the supposed right to rebel will be addressed in Chapter 6. Before it can be properly examined, however, we need to understand how Hobbes presented the figure of the rebel, and the rights held by sovereigns against such individuals. As we shall see, Hobbes's theory conflates rebels and enemies. Moreover, his rejection of the theory of the *ius gentium*, or law of nations, allowed him to strictly differentiate between the commonwealth as a site of legal rights and protections, and the international arena as one characterised by insecurity and potential conflict.

Hobbes's crucial innovation in his discussion of rebels was to draw a theoretical equivalence between rebels and foreign enemies. He makes this move by re-defining treason as a refusal of sovereign authority, and hence a crime against the natural, rather than civil, law. As we shall see, this label, by the time we reach the final versions of the theory, does not rely upon a specific conviction, punishment, declaration of outlawry, or even upon an identifiable threat posed by the rebel to the state's security. Enmity, in Hobbes's terminology, is simply the description of a legal position with regards to the commonwealth, rather than a normative category or a description of particular aims. As such, it is best characterised by an absence of political obligation, rather than by a specific attribute displayed by certain individuals. As he writes in *De Cive*, 'whosoever are not subject either to some common Lord, or one to another, are enemies among themselves.'<sup>498</sup> Individuals in the state of nature are therefore technically enemies, even if they are not actively attacking or working

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<sup>498</sup> Hobbes 1983, p. 179.

against each other, just as the state of nature is one of war even when all that is present is the ‘known disposition thereto.’<sup>499</sup> The related proposition, that there can be no natural obligation, law or injustice between those who are not united under the same sovereign, means that once a subject is understood to have lost their civil position, any jurial relationship between the sovereign, members of the commonwealth and the treasonous rebel is removed. So too are any legal limits upon the treatment by the sovereign of his or her new enemy.

In arguing that the categories of rebel, traitor and enemy could be collapsed, with all these terms best understood as simply describing individuals outside of a given commonwealth, Hobbes presented a model in striking contrast both to English law as it existed in the seventeenth century and to early modern theories of international law, which drew a sharp distinction between those who were considered enemies of the state and those who were rebelling against a previously held political obligation.<sup>500</sup> Before examining Hobbes’s theory, it is important briefly to set out the fundamental points of law and theory which his work challenged.

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<sup>499</sup> Hobbes 2012, p. 192. Hobbes occasionally lapses into a more conventional presentation of enmity as the result of actual, rather than potential, conflict. He writes in Chapter 13 of *Leviathan* that ‘if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only,) endeavour to destroy, or subdue one an other.’ Hobbes 2012, p. 190. In this account, enmity appears to depend upon conflicting desires, rather than upon the lack of a common power. However, Hobbes more consistently uses enmity to refer to the latter conception, and this is therefore how I will treat his categorisation. Stephen Holmes takes this passage, which equates enmity with competition rather than with a lack of common power, more seriously than I do, arguing that the ‘Hobbesian enemy is the arrogant individual’ who in the state of nature demands more than his share. As a result of this emphasis, Holmes asserts that the sovereign’s ‘decisions about who is an enemy’ do not take place ‘in a norm-free zone.’ Holmes 2010, pp. 383-5. This analysis conflates the juridical status of the enemy with the reasons a sovereign might have for expelling someone from the commonwealth, and thus assigns a normative quality to the category as a whole which it seems clear Hobbes did not think was necessarily applicable.

<sup>500</sup> Hobbes’s distinction between internal criminals and external enemies has been frequently noted in the literature, but rarely put into the context of early modern accounts of these categories. See for example Cattaneo 1965, pp. 293-4; Christianson 1968, p. 430-1; Hünig 2007, pp. 221-2; Diez 2008, pp. 540-1 and Loxley 2010, p. 141.

## Distinguishing Enemies and Traitors

While English treason statutes underwent some modification over the course of the early modern period,<sup>501</sup> the legal basis of what constituted treason remained largely consistent from the fourteenth century onwards, with the original statute of 25.Edw.3 representing a common source of legal reasoning.<sup>502</sup> This defined a number of acts as treasonous, including the compassing, or imagining, of the death of the king, queen or eldest male heir and the levying of war against the king or adhering to his enemies either in England or abroad, as well as the co-option of various marks of sovereignty. It was also axiomatic in early modern English law that traitors against the king remained his subjects during their acts, accusation and trial, as well as during the punishment following conviction. Treason itself was consistently treated as a crime defined by statute law and punished by common law courts, with the accused provided with the opportunity to present, to his peers, a defence according to the laws of the realm. This was a widely understood prerequisite, with both accounts of the law and pamphlets originating outside the legal sphere asserting that that the traitor was and remained internal to the polity despite his actions. An explicit contrast between traitors or rebels and enemies was therefore common in such accounts. Coke, for example, notes in the third volume of his *Institutes* that ‘the subjects of the King, though they be in open war or rebellion against the King, yet they are not the Kings enemies, but traytors; for enemies be those that be out of the allegiance of the King.’<sup>503</sup>

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<sup>501</sup> On the tendency of Tudor monarchs, for instance, to narrow the scope of treason statutes at the outset of their reigns, only to expand it over time, see Chapter 2 of Bellamy 2013.

<sup>502</sup> Russell 1965, p. 31. See also Bellamy 1970, pp. 59-101 for a detailed history of the 1352 statute. In Hobbes’s *Dialogue* the character of the Lawyer quotes this statute at length in response to the Philosopher’s request for a definition of high treason. Hobbes 2005, pp. 68-9. Orr 2002, p. 5 notes that developments in the English conception of treason both before and during the civil wars largely consisted of novel applications of the original concepts highlighted in this and some later statutes, rather than in replacing them altogether.

<sup>503</sup> Coke 2003, p. 973.

Coke is strict in maintaining this distinction even when such scrupulousness would appear to prevent the charging and conviction of those working to undermine the state. In his discussion of charges of treason resulting from ‘adhering to the Kings enemies’ he notes that ‘if A. is out of the Realme at the time of a Rebellion within England, and one of the Rebels flye out of the Realme, whom A. knowing his treason doth aide or succour, this is no treason in A. by this branch of 25.E.3.’ The ‘traytor’ being ‘no enemy’, A. cannot be said to have adhered to one of the king’s enemies, and as such is innocent of treason despite aiding a known rebel against their common sovereign.<sup>504</sup> The same argument is made by Robert Holbourne when he writes that ‘This word *Enemy* cannot extend to Subjects, for they are Rebels and no Enemies...and therefore the *aiding of Rebels cannot be meant any way the aiding of the King’s Enemies within the Law.*’<sup>505</sup> Thus, according to the standard seventeenth century interpretation of the 1352 statute, rebels’ status as subjects, not enemies, persisted even after their identification as individuals at war with their own state.

Dalton noted this same legal distinction in *The Country Iustice*, but focused instead on the subject status of the adherent, rather than that of the rebel. He states that while ‘To be adherent to the K. enemies, ayding them in his Realme, is high Treason’, this label does not apply to foreigners. Dalton explains the implications of this distinction by noting that ‘if an alien enemy come... inuade this Realme, and be taken in warre, he cannot be indicted of treason, but he shall be put to death by Martiall Law’ whereas ‘An English Traytor pleading that hee is a Subiect to a foreign Prince, shall notwithstanding...haue iudgement as a Traytor.’<sup>506</sup> We find the same logic when the author of the anonymous 1650 tract *Traytors deciphered in an answeare to a*

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<sup>504</sup> Coke 2003, p. 972.

<sup>505</sup> Holbourne 1681, p. 13.

<sup>506</sup> Dalton 1618, p. 199.

*shameless pamphlet* argues that, contrary to anti-royalist propaganda, ‘the Kings being borne in another Country makes him not a forraigner, and to be a forraigner doth rather diminish the crime of unnaturallnesse, and merit of punishment, if the supposition had been true.’<sup>507</sup> According to this view, those arguments which supported the regicide by suggesting that the people of England could not be subject to a ‘foreign’ king, and that therefore there was no barrier to his being tried and executed for treason, were self-defeating. If the king were a foreigner, his actions by definition were not treason, and could not be labelled or punished as such. This criterion, the author points out, applied not only to the king, but also to his subjects. The text continues by arguing that ‘though Princes in the highest hostilitie draw not their captive enemies to their [civil] tribunalls, being by the Laws of nature, and Nations incompetent judges, yet these being subjects, and rebelling against their King’ may be tried in their state’s courts and according to its laws.<sup>508</sup>

According to these writers the distinction between enemies and traitors had two major implications. It determined which form of law had jurisdiction over the individual in question, and it forced the state to differentiate between two different types of threat to its security: sedition and war. As we saw in the case of Coke’s Subject A, to aid enemies in a war against one’s king is a more serious crime than helping a rebel flee the consequences of his seditious behaviour. While both pose a risk to the state, A is to be considered a traitor only when aiding war, rather than rebellion.

This differentiation between traitors and enemies is also found in numerous legal treatises on international law. We read in the *Digest* that ‘the man who with evil

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<sup>507</sup> *Traytors deciphered* 1650, p. 20.

<sup>508</sup> *Traytors deciphered* 1650, p. 48.

counsel and a traitor's intention has left his *patria* is to be counted among our enemies.<sup>509</sup> The act of treasonous desertion is thus considered adequate to effect a change in civil status. However, among early-modern theorists of international law, including among those who turned to the *Digest* as an authority, the distinction between the two categories was largely rigid. We discover in Balthazar Ayala's *De jure et officiis bellicis et disciplina militari libri III* [*Three Books on the Law of War*] (1582) that 'rebels ought not to be classed as enemies, the two being quite distinct.' Again, we see, echoing the implications of the English legal sources cited above, a contrast drawn between war against enemies and actions taken against traitors. As Ayala writes, it is because of the distinction between traitors and enemies that 'it is more correct to term the armed contention with rebel subjects execution of legal process, or prosecution, and not war.'<sup>510</sup> Similarly Alberico Gentili notes in *De jure belli libri tres* [*Three Books on the Law of War*] (1598) that the 'enemy are those who have officially declared war upon us.'<sup>511</sup> By contrast, 'one who is a subject does not by rebellion free himself from subjection to the law.'<sup>512</sup> While Gentili acknowledges that this terminology has the tendency to become porous, as 'the word *hostis*, 'enemy'...is sometimes extended to...pirates, proscribed persons, and rebels', he argues that such labels do not in themselves confer the legal status of enmity.<sup>513</sup> Grotius, in Book III of the *Rights of War and Peace*, notes that war, properly understood, can only take place between correctly identified enemies. Following

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<sup>509</sup> Watson 1998b, p. 404. It should be noted, however, that the *Digest* devotes little time to the question of treason and the precise legal status of traitors. Ulpian notes that unlike most crimes, where accusations are 'extinguished by death', in the case of charges of treason 'animated by a hostile spirit against the state or the emperor' (*perduellio*) the accused's estate is claimed by the imperial treasury upon his death. This is not the case regarding those accused of alternative categories of treason, indicating it was a somewhat malleable, rather than absolute, legal category.

<sup>510</sup> Ayala 1912, pp. 11-2.

<sup>511</sup> Gentili 1933, p. 15.

<sup>512</sup> Gentili 1933, p. 22.

<sup>513</sup> Gentili 1933, p. 25.



Cicero, he argues that this enemy must be have control of public affairs, the ability to command his people, and the right of making war and peace. Rebels, clearly, do not fall under this definition.<sup>514</sup>

### **The Hobbesian Response: Conflating Traitors and Enemies**

In contrast to this model, Hobbes is consistent in all his works of political theory that those who rebel against their state are to be considered its enemies.<sup>515</sup> In the *Dialogue the Philosopher* states that if ‘High Treason should take effect, it would destroy all Laws at once.’ As a result, the act ‘being done by a Subject, ‘tis a return to Hostility by Treachery; and consequently, such as are Traytors may by the Law of Reason be dealt with as Ignoble and Treacherous Enemies’.<sup>516</sup> Hobbes always insists that treason, rebellion and hostility can be collapsed into the single category of enmity. However, over the course of his works his views about how to explain this conceptual move appear to have changed, with his later exposition of treason describing a much wider category of behaviour. This shift both corrects certain ambiguities in his theory of treason and brings it closer to a model based purely on sovereign prerogative. Before considering the implications of this broader understanding of treason for the identification of treasonous subjects, however, we first need to take note of the major differences in the presentation of this issue in the *Elements*, *De Cive* and *Leviathan*.

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<sup>514</sup> Grotius 2005, p. 1247.

<sup>515</sup> This move was recognised by Hobbes’s contemporaries as a direct challenge to the prevailing distinctions described above. See for example Hyde 1995, pp. 266-7 who writes that

There cannot be a more pernicious Doctrine, and more destructive to Peace and Justice, then that all men who are not subjects are enemies; & than against Enemies, whom the Common-wealth judges capable to do them hurt, it is lawful by the original right of Nature to make war... [Hobbes] powerfully extinguished all those differences and priviledges, which all Writers of the Jus Gentium have carefully preserv’d between a just and unjust war, between lawfull Enemies and the worst Rebels and Traitors

<sup>516</sup> Hobbes 2005, p. 71. This text explicitly challenges Coke’s comments on treason, cited above, with the the Lawyer noting that Coke’s *Institutes* draw a distinction between enemies and traitors. Hobbes 2005, p. 72.

While the *Elements* does not treat the legal status of rebels as explicitly as the later works—despite going into detail about the causes of rebellion in Chapter 27—it does present a striking image of faction which, over the course of Hobbes’s writing, would render it very close to enmity. Hobbes writes that once the three conditions of rebellion—discontent, pretence of right and hope of success<sup>517</sup>—have been satisfied, ‘one body of rebellion’ is created, ‘in which intelligence is the life, number the limbs, arms the strength, and a head the unity, by which they are directed to one and the same action’.<sup>518</sup> This presentation of the faction as a separate, united body within the state immediately implies the foreignness of this seditious group. There are reasons to believe that Hobbes did not intend factions to be understood as fully functional commonwealths, not least from his assertion that such groups will collapse once their immediate goal has been achieved.<sup>519</sup> Nonetheless, the appropriation of obligation owed to the legitimate sovereign by the ‘head’ of the faction indicates that even this temporary unity wages something very like war against the commonwealth.<sup>520</sup> In *De Cive* Hobbes made the point much more forcefully. In the later text he repeats and expands upon this image, stating that ‘A *faction* therefore is as it were a City in a City; for as by an Union of men in the state of nature a City receives its being, so by a new union of subjects, there ariseth a *faction*.’ In contrast to the account in the *Elements*, here Hobbes also spells out the logical consequences of this analysis, arguing that as ‘the state of Cities among themselves is naturall, and hostile, those Princes who permit factions, doe as much as if they received an enemy within their walls.’<sup>521</sup>

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<sup>517</sup> Hobbes 1969, p. 168.

<sup>518</sup> Hobbes 1969, p. 175.

<sup>519</sup> Hobbes 2012, p. 258. See Chapter 6 for discussion of Hobbes’s presentation of civil unity.

<sup>520</sup> In this passage Hobbes employs a traditional image of the body of the commonwealth, in which the sovereign represents the head. By *Leviathan* he would reject this model, instead arguing that the sovereign acts as the commonwealth’s soul, much more viscerally uniting all the parts of the state. Hobbes 2012, p. 17

<sup>521</sup> Hobbes 1983, pp. 163-4.

It is however in Chapter 14 of *De Cive* that Hobbes makes the enemy/rebel conflation most explicit. Here, he defines the crime of Lèse-Majesté as ‘a word or deed whereby the Citizen, or Subject, declares that he will no longer obey that man or Court to whom the supreme power of the City is entrusted.’<sup>522</sup> This intention can be revealed through a list of actions Hobbes provides, including, most importantly, through an attempt, whether successful or not, to do ‘violence on the Sovereigns Person, or to them who execute his commands’ or through an announcement that the speaker and other citizens are under no obligation to offer obedience to the sovereign power.<sup>523</sup> Such actions or statements, alongside any pronouncement to the effect that rulers do not have the right to undertake various acts of sovereignty including anything ‘without which the State cannot stand’ are, he states, ‘Treason by naturall, not civill law’. As a result, such acts are to be understood in all commonwealths as treasonous. Analogous *civil* crimes of treason can occur when the sovereign power declares that specific actions are to be understood as such.<sup>524</sup> A given sovereign might, therefore, declare an act which does not intuitively threaten the commonwealth’s existence to be treasonous. While these two categories are conceptually different, the outcome, for the traitor, is the same.

Hobbes explicitly states in the same chapter that ‘*Rebels, Traytors, and all others convicted of Treason, are punished not by civill, but by naturall Right; that is to say, not as civill Subjects, but as Enemies to the Government, not by the Right of Sovereignty, and Dominion, but by the Right of Warre.*’<sup>525</sup> This extrajudicial

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<sup>522</sup> Hobbes 1983, p. 180.

<sup>523</sup> Ibid.

<sup>524</sup> Hobbes 1983, p. 181.

<sup>525</sup> Ibid. It is important to distinguish between this punishment according to natural right, which takes place in the state of nature, and the punishment of breaches of the natural law in the context of the civil legal system. The latter is governed by the legal processes instituted by the sovereign, whereas the former is not.

punishment applies equally to those who have committed civil treason. However, Hobbes points out that such men, while traitors, nonetheless sin ‘lesse’ because they do not break ‘all the Laws at once, but one Law only’.<sup>526</sup> Why this should be so is not made entirely clear. After all, the sovereign has, through the creation of such a law, decreed any breach of it to be equivalent to a total rejection of his authority, and hence of all civil obligation. Moreover, as will be explored below, Hobbes’ definition of the traitor as an enemy to the commonwealth depends on the latter’s having rejected the entire system of law, rather than simply one element of it. As is explicitly noted, the sin of treason breaks natural law precisely because in such cases the civil law is unable to impose its own jurisdiction conceptually, rather than in one particular instance. It is this which justifies, according to the logic of the text, the treatment of the traitor as an extra-legal figure.

It is also somewhat confusing that, in *De Cive*, this designation only occurs following a conviction. While it is unclear that Hobbes intended an accused traitor to retain, for instance, full legal rights in the courtroom, the retention of legal language is telling, and brings the case of treason closer to the civil crimes from which Hobbes otherwise wants to distance it. This intermediate step of a full trial and conviction suggests that Hobbes is unwilling, at this early stage, to apply his own logic, according to which the act of treason renders every law with regard to the treatment of the traitor ‘superfluous.’<sup>527</sup>

The result of this somewhat confusing account is that the law of treason in this version of Hobbes’s state is actually fairly narrow. The means by which a citizen reveals his intention to renounce obligation are stipulated, with the ability of the

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<sup>526</sup>Ibid.

<sup>527</sup>Ibid.

sovereign to declare his own definitions curiously undermined. When, however, we turn to *Leviathan*, the picture is different. By contrast with Hobbes's earlier texts, there is no extended discussion of what it means to be a traitor. Rather, Hobbes limits himself to the statement that

if a subject shall, by fact, or word, wittingly, and deliberately deny the authority of the Representative of the Common-wealth, (whatsoever penalty hath been formerly ordained for Treason,) he may lawfully be made to suffer whatsoever the Representative will: For in denying subjection, he denyes such Punishment as by the Law hath been ordained; and therefore suffers as an enemy of the Common-wealth.<sup>528</sup>

Here we see not only that Hobbes has provided a broader definition of the rejection of civil obligation, but that the language of positive law itself is explicitly repudiated; the penalty 'formerly ordained for Treason' is only raised to note its irrelevance. The 'Punishment as by Law' and 'penalty' which 'hath been formerly ordained for Treason' which a potential traitor might expect—yet is no longer entitled to—refers to statute law. However, the sovereign may nonetheless 'lawfully' make such an individual suffer according to his will by natural law, which is what renders such cases outside the jurisdiction of positive law entirely. There is no mention of legal process at all; instead, we see a situation where the individual is expelled from the commonwealth the moment he is determined to have denied his own subjection. Such a charge leaves no room for dissenting ideas of lawfulness or challenge to the sovereign's application of the law. Hobbes's model of treason appears to increase in severity both through greater vagueness and greater conceptual coherence. Importantly, this model of the extra-legal nature of treason does not rely upon a perception of the danger

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<sup>528</sup>Hobbes 2012, p. 486.

posed by a given traitor, or on the political situation within the state, but purely on the traitor's repudiation of his earlier obligation.<sup>529</sup>

There is a clear parallel between Hobbes's argument that denying obligation or subjection to one's sovereign results in one's leaving the commonwealth and his discussion of those who deny their relationship with God. In *De Cive* he argues that because the atheist has, through a lack of belief, never subjected himself, such individuals are

punisht either immediately by God himselfe, or by Kings constituted under God; not as a Subject is punished by a King, because he keeps not the Lawes, but as one enemy by another, because he would not accept of the Lawes; that is to say, by the Right of warre, as the Giants warring against God.<sup>530</sup>

While the atheist is in this account closer to the foreign enemy who has never participated in the commonwealth-generating covenant, rather than the rebel who has broken the fundamental terms of that agreement, we might nonetheless assume from this passage that believers who renounce their faith would fall into the same category. Indeed, Hobbes confirms this reading in *Leviathan*. We saw in Chapter 1 that banishment by sovereigns could not be considered punishment proper, as it consists in the removal of subject status. Hobbes suggests something similar regarding excommunication, noting that this is not 'properly a Punishment, as upon a Subject that hath broken the Law; but a Revenge, as upon an Enemy, or Revolter, that denyeth

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<sup>529</sup>Hobbes's account of treason as a crime against nature rather than against civil law was directly criticized by some of his contemporaries. Cumberland 2005, pp. 628, 748-51, argued that such a doctrine 'is dangerous, and tends to *sedition*'. It may even, Cumberland asserts, indicate 'a Right to commit Treason'. This right consists, he argues, in the liberty of men to 'free' themselves by 'Rebellion' from the 'condition of the Subject', at which point he is not liable to punishment. Cumberland also specifically contrasts Hobbes's theory with contemporary practice, noting that 'there are numerous Civil *Laws* in most *States*, particularly our own, which have *enacted* most grievous *Punishments* against *Traytors*'.

<sup>530</sup>Hobbes 1983, p. 179. See also his comments in Hobbes 1840, p. 294 where he repeats the point.

the Right of our Saviour to the Kingdome.’<sup>531</sup> The excommunicate and the atheist are thus presented as conceptually similar as their secular counterparts, the rebel and the enemy.

Hobbes’s own presentation of this argument indicates the extent to which it, like his comments about enmity more broadly, differed from mainstream assumptions; in 1647 he added a note to *De Cive* acknowledging that ‘many find fault that I have referr’d Atheisme to imprudence, and not to injustice.’<sup>532</sup> While atypical for the period, it is nonetheless of a piece with his analysis of treason: those who have decided to reject prior obligation are, by definition, no longer subject to the terms of the agreement creating that obligation. As such, they cannot be labelled unjust, or indeed subject to any of the other features of life within that agreement, such as positive law.

### **Hobbes’s Rejection of the *Ius Gentium***

As the passages above indicate, Hobbes’s account of the treatment meted out to enemies is extra-judicial; it is regulated by the natural law, rather than by civil law or a version of international law. This section will explore this idea in more depth and provide an account of the relationship between the extra-legal nature of treason and Hobbes’s account of political obligation. As we have seen, Hobbes’s argument denies the validity of what was, in this period, taken to be a crucial legal distinction between enemies and traitors. Before examining his account of the treatment merited by such

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<sup>531</sup> Hobbes 2012, p. 892. Alexander Ross challenged Hobbes’s claim that excommunication was not true punishment, writing that ‘excommunication is not a bare denouncing, but a real suffering of punishment.’ Ross here fails to realise for Hobbes the question does not turn upon the presence or absence of suffering, but upon the punished individual’s refusal to recognise the punisher as an authority. Ross 1653, p. 60.

<sup>532</sup> Hobbes 1983, p. 179. See for instance Bramhall’s view that just as ‘a rebellious Subject is still a Subject, *de jure*, though not, *de facto*, by right, though not by deed: And so the most cursed Atheist that is, ought by right to be the subject of God, and ought to be punished not as a just enemy, but as a disloyal traytor.’ Bramhall 1995, p. 118.

individuals, however, it is important to examine the legal structure of this distinction. As we saw in Chapter 2, retained citizenship is a source of protection for the Hobbesian subject, as it means that during conflict with the sovereign he can appeal to legal norms. But for those lawyers and theorists who maintained a strict division between rebels and enemies, this distinction served the opposite function; to be designated a traitor was to expose oneself to penalties far more serious than those applicable to official enemies. This difference in severity was enabled by a belief in separate legal jurisdictions governing these two types of behaviour: while the rebel was to be treated according to harsh provisions found in the positive law, harm could only be inflicted upon an enemy when justified by the law of nations, or *ius gentium*.

Underpinning this differentiation, according to which disloyalty was to be treated more harshly than enmity, was an emphasis on political obligation and the consequences for its betrayal. This is clear when Coke, explaining the various circumstances which might mitigate a charge of high treason, notes that

all Aliens that are within the Realme of England, and whose Soveraignes are in amity with the King of England, are within the protections of the King, and doe owe a locall obedience to the King, (are homes within this Act) and if they commit High Treason against the King, they shall be punished as Traytors, but otherwise it is of an Enemy.<sup>533</sup>

To betray a relationship from which one has gained protection is, according to Coke, far worse than to act against a sovereign from whom one has not benefited. Therefore, the former act earns a more severe punishment. Again, we see Holbourne emphasising the same point when he writes that it is not only subjects *ratione originis* who may be convicted of treason; those foreigners who have received the protection of the state

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<sup>533</sup> Coke 2003, p. 958.



are considered subjects *ratione loci* and thus, as long as they remain within the territory of the state, can be charged with the same crime.<sup>534</sup>

The distinction between the treatment of traitors and that meted out to enemies was hardly insignificant in English law, and could lead to defendants arguing that they should be treated as the latter rather than as the former. For instance, during the trial of James Hamilton the Earl unsuccessfully claimed that as he was ‘no Englishman’ and therefore ‘an alien to, and not tryable as a Traytor by, the Laws of England’, he should be declared and tried as a prisoner of war, or enemy, rather than as a traitor.<sup>535</sup>

The major part of the trial consisted not in determining whether the actions the Earl was accused of were ‘unlawful’ but rather the jurisdiction of the court itself. The punishment for those convicted of high treason was both brutal and symbolic: they were to be ‘pulled asunder and destroyed, [as they] intended to tear and destroy the Majesty of government.’ Moreover, a traitor’s lands, manors and other sources of income, including his wife’s dowery, were to be forfeited to the crown, while his children were, while still subjects, rendered ‘base and ignoble’ and his blood ‘stained and corrupted.’<sup>536</sup> Enemies, on the other hand, while still at risk of execution, could hope for better treatment with prisoner exchange and ransom, rather than execution, becoming increasingly common practices in European wars by the seventeenth century.<sup>537</sup> As Coke notes, ‘An Enemy comming in open hostility into England...and

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<sup>534</sup> Holbourne 1681, pp. 14-5. See also Forster 1654, pp. 2-3, which states that ‘The tryall against an Alien that lived under the protection of the King (amity being between both Kings) for high Treason, shall...be tryed according to the due course of common Law.’

<sup>535</sup> Steele 1649, p.15.

<sup>536</sup> Coke 1669, p. 211. See also Cowell 1607, p. 532 for a description of the elaborate punishment meted out to traitors. It should be noted that according to the monarch’s discretion, the execution of traitors could be modified, for example to be carried out by beheading. See Hobbes 2005, pp.117-8 for Hobbes’s comments on the punishment for treason according to English law. Hobbes, characteristically, notes that the punishment, being rarely carried out and thus having no basis in either common law nor custom, ‘depends meerly upon the authority of the King.’

<sup>537</sup> Parker 2003, pp. 160-1. On exchange and ransom see also Donagan 1988, p. 81.

taken', because he 'cannot be indicted of treason' instead 'shall be either executed by Marshall-Law, or ransomed.'<sup>538</sup>

To gain official enemy status was, according to the sources cited above, to gain certain protections according to the law of nations, or *ius gentium*. It was therefore imperative, many argued, that rebels should not fall under this label. This was not simply to avoid blurring legal categories, but because in gaining this status rebels would be eligible for a standard of treatment which they did not deserve. Ayala, for instance, in making the distinction writes of rebels that they 'can not proceed under the laws of war and so, e.g. they do not acquire the ownership of what they capture, this only being admitted in the case of enemies [*hostes*]'. Ayala is explicit that to be termed a rebel is to potentially suffer more than an enemy, writing that because the treatment of rebels is not governed by the law of war,

all the modes of stress known to the laws of war may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.<sup>539</sup>

In order for Hobbes to be able to base treatment standards purely on the presence or absence of political obligation, and thus collapse the categories of enemy and traitor, it was imperative that he be able to remove any suggestion of an overarching *ius gentium* from his theory. As we saw above, it is the lack of any jural relationship between enemies which means that they have a right to inflict any and all harm upon each other. The presence of a system of law superimposed upon states would remove this important characteristic from his account. It is thus of great importance in understanding Hobbes's theoretical choices in this area of his theory

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<sup>538</sup> Coke 2003, p. 973.

<sup>539</sup> Ayala 1912, pp. 11-12.

that he was writing precisely at a time when discussion of the law of nations was becoming ever more prominent, both within England and in Europe.

The Roman Law concept of the *ius gentium* was by this period considered a standard form of law, distinct both from the law of nature and the particular civil laws of various sovereign nations.<sup>540</sup> As Suárez notes, the term could have two meanings; it could be understood as ‘a body of laws which individual states or kingdoms observe within their own borders’ but which falls under this name because ‘the said laws are similar and are commonly accepted’ or it could be taken as ‘the law which all the various peoples and nations ought to observe in their relations with each other.’<sup>541</sup> It is from this latter conception of the *ius gentium* that the laws of war are derived, including rules determining, among other things, the correct treatment of hostages and prisoners of war, as well as who fell under such categories. Such a legal system was predicated upon the concept of a community of nations; as Suárez notes, this kind of law is distinct from the law of nature in that while it also emerges ‘from the force of natural reason alone’, it is ‘fitted, not for men in an absolute sense, but for men as congregated in some human society.’<sup>542</sup> As such, while it did not necessarily posit an international system of nations, or a global sovereign, it did suggest both common access to reason and international cooperation.<sup>543</sup> Moreover, by framing international relations in terms of law, thinkers were able to suggest that infractions of this law

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<sup>540</sup> In Book 1 of the *Digest* we read Ulpian’s assertion that the *jus gentium*, as distinguished from the *jus naturale* and the *jus civile*, is ‘the law of nations... which all human peoples observe.’ Gaius, in the same book, defines it as ‘that law which natural reason has established among all human beings’ and which therefore ‘all nations observe.’ Watson 1998a, p. 2.

<sup>541</sup> Suárez 1944, p. 347.

<sup>542</sup> Suárez 1944, p. 336. In the *Digest* Gaius distinguished the *jus gentium* from the *jus naturale* on the basis that the former only applied to humans, while the latter had jurisdiction over all animal life. Watson 1998a, p. 1.

<sup>543</sup> As Cavallar 2002, pp.173, 179 notes, the theory of the *ius gentium* meant that the distinction between the domestic and international spheres is less clear in the thought of its proponents, such as Vitoria, Suárez, Gentili, Grotius and Bodin, than it is in that of Hobbes, as both spheres are governed by a concept of enforceable law.

could be dealt with by legitimate punishment carried out by nations, as distinct from responses of national self-defence. State behaviour could thus be not merely regulated, but also enforced.<sup>544</sup>

The civil lawyer Richard Zouche formally distinguished between these two meanings in his 1650 treatise, labelling the law derived from reason and found in all nations as the *ius gentium*, and suggesting that the law used by nations in their interactions with each other should be termed the *ius inter gentes*.<sup>545</sup> Moreover, Zouche suggested that the source of this latter form of law was not simply the precepts of reason, but rather human agreement and custom.<sup>546</sup> The law of nations, in this reading, was positive: while designed in accordance with reason, it derived its authority from human practices, and thus implied that humans were capable of setting up a common system of law above those of individual nations. The terminology and origins of the *ius gentium* were therefore not necessarily stable in the early modern period. Nonetheless, we do see common agreement regarding the existence of a knowable system of law governing states' interactions with each other, and hence with declared enemies.

It is in contrast to this account that we must understand Hobbes's own model, in which the possibility of a *ius gentium* is dismissed. In rejecting the law of nations, Hobbes was also implicitly arguing against the assertion that individuals are protected by it when they come into conflict with a foreign state. It is important to emphasise

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<sup>544</sup> On the relationship between war and punishment in just war theory see Langan 1984.

<sup>545</sup> Zouche 1911b, p. 2. The law of nations is, in this reading, the result of 'convention and agreement', and is thus distinguished from the natural law. Zouche 1911a, p. 2.

<sup>546</sup> Ibid. For a further example of positive international law see Grotius 2005, pp. 162-3, which notes that the law of nations derives its authority from 'the Will of all, or at least of many Nations.' As a result this law is, he suggests, the result of 'continual Use, and the Testimony of Men skilled in the Laws'. It is therefore not a pure product of human reason, in contrast with the presentation in the *Digest*. See also Richard Hooker's comment that 'there is no reason that any one commonwealth of itself should to the prejudice of another annihilate that [law of nations] that whereupon the whole world hath *agreed*.' Hooker 1989, p. 98. Emphasis mine.

this point precisely because without understanding Hobbes's minimalist presentation of international norms, we might assume that Hobbes's theory, in which traitors are understood as enemies, is precisely what someone like Hamilton would have wished for. Instead, as will be shown below, according to Hobbes those falling into this hybrid category should be treated according to the law of nature alone.

David Armitage has pointed out that the question of the jurisdiction of the various forms of law was something which may have occupied Hobbes from his earliest writings.<sup>547</sup> The 1620 volume of essays *Horae Subsecivae*, attributed to William Cavendish but which subsequent stylometric analysis by Noel Reynolds and Arlene Saxanhouse has suggested may have been written by Hobbes, contains, in *A Discourse of Laws*, the standard Roman division of the law into 'three branches': the law of nature, the law of nations, and the 'Municipal Law of every Nation.'<sup>548</sup> However, while Armitage suggests that 'the definitions of the laws of nature and of nations in the *Horae Subsecivae* stand in marked contrast to what would become Hobbes's standard account',<sup>549</sup> it is notable that the definition the author provides of the law of nations only touches upon one of the two interpretations outlined above by Suárez. The text notes that 'The Laws of Nations be those rules which reason has prescribed to all men in general, and such as all Nations one with another do allow and observe for just.'<sup>550</sup>

The law of nations, in this reading, may only refer to generally accepted practices across, but still within, states, rather than to a system of law governing the interactions between them. As a result, it seems plausible that Hobbes, from his earliest thinking on the subject, was already dismissive of the idea of a system of law able to

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<sup>547</sup> Armitage 2013, pp. 61-2.

<sup>548</sup> Hobbes 1995a, p. 110.

<sup>549</sup> Armitage 2013, p. 62.

<sup>550</sup> Hobbes 1995a, p. 110.

govern and regulate states' relations with each other. Nonetheless, if the *Discourse* is by Hobbes then it remains the last time he presents the law of nations as in any way distinct from the law of nature. By the time we come to the major political works, Hobbes consistently conflates the law of nations with the law of nature, rejecting the possibility of binding obligations outside of the commonwealth.

Hobbes's initial comments on the subject are cursory. In the *Elements* he writes that 'as for the law of nations, it is the same with the law of nature. For that which is the law of nature between man and man, before the constitution of the commonwealth, is the law of nations between sovereign and sovereign, after.'<sup>551</sup> In *De Cive* Hobbes's repeats the point, and we read that '*the naturall Law* may be divided into that of *Men*, which alone hath obtained the title of *the Law of nature*, and that of *Cities*, which may be called *that of Nations*, but vulgarly it is termed the *Right of Nations [jus Gentium]*.' However it is labelled, Hobbes insists that the 'precepts of both are alike.'<sup>552</sup> It is in the later work, however, that Hobbes for the first time provides the reasoning behind his rejection of a separate, international legal sphere.

In *De Cive* Hobbes introduces what has been termed in international relations theory the 'domestic analogy', according to which states in the international arena are in the same position as individuals in the state of nature.<sup>553</sup> This is a theme to which Hobbes refers repeatedly. Thus in *De Cive* we learn that 'Cities once instituted doe put on the personall properties of men' and so 'that *Law*, which speaking of the duty of single men, we call *naturall*, being applied to whole Cities, and Nations, is called the *Right of Nations*.' In *Leviathan* he repeats this explicit comparison between

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<sup>551</sup> Hobbes 1969, p. 190.

<sup>552</sup> Hobbes 1983, p. 171; Hobbes 1984, p. 208.

<sup>553</sup> See for example Beitz 1979, p. 31 and Bull 1995, p. 44. For an overview of this literature see Singh Grewal 2016.

sovereigns in their relations with each other, and individuals in the state of nature, famously writing that while

there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators... which is a posture of War.<sup>554</sup>

Here we can see the two directions of the analogy. In *De Cive*, we see direct comparisons between individuals and states, as when Hobbes draws a parallel between ‘They who go to Sleep [and] shut their Doors; they who Travell [and] carry their Swords with them, because they fear Theives’ and ‘Kingdomes [which] guard their Coasts and Frontiers with Forts, and Castles; Cities [which] are compassed with Walls, and all for fear of neighbouring Kingdomes and Townes.’<sup>555</sup> On the whole, however, the comparison in the earlier text is used to suggest how states may act in the absence of any overwhelming power. We see the same strategy in many of the quotations from *Leviathan*, cited above. Here, however, we also see the conflict ridden world of states being used to indicate how men might behave, absent an all-powerful sovereign. The two sides of the domestic analogy are used to reinforce each other; men are like states, and states are like men. Conflict in either sphere can be used to understand the risk of it in the other, and in particular Hobbes expects that man’s observation of the international sphere will serve to indicate the danger of living without a common power. The practical absence of a binding system of international law, he implies, is obvious to anyone who bothers to look.

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<sup>554</sup> Hobbes 2012, p. 196. Hobbes was fond of the image of the gladiator; this description of states in *Leviathan* echoes the comment in *De Cive* that states, approach each other with ‘an hostile mind’ and the ‘posture and appearance of gladiators [*statu vultuque gladiatorio*]. Cotton translates this passage as simply ‘with a fighting posture and countenance.’ Hobbes 1983, 247; Hobbes 1984, p. 277. Evrigenis 2014, p. 148 suggests that the image of the gladiator can also be discerned in the frontispiece to *Leviathan*.

<sup>555</sup> Hobbes 1983, p. 45.

In both cases, the crucial element is the absence of any power capable of imposing its definitions of just and unjust, including through the enforcement of agreements. As Hobbes repeatedly emphasises, the ‘posture of War’ need not be taken as evidence that states will necessarily engage in hostilities with each other, but rather that they have a right to engage in reasonable precaution against others when they perceive themselves to be at risk. As he writes in *De Cive*, commonwealths can be understood as ‘so many Camps strengthened with armes, and men against each other’. Importantly, the ‘state’ of these states ‘is to be accounted for the state of nature, which is the state of War’ because they are not ‘restrained by any common power’.<sup>556</sup>

It is worth reminding ourselves, on this point, of Hobbes’s definition of war in the state of nature. As Hobbes remarks in Chapter 13 of *Leviathan*, ‘WARRE, consisteth not in Battell onely, or in the act of fighting; but in a tract of time wherein the Will to contend by Battell is sufficiently known... 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.’<sup>557</sup> Thus it is a lack of enforced assurance that is constitutive of the state of war between nations; just as men are capable of making agreements in the state of nature, yet such agreements are no guarantee of their own fulfilment without a coercive power, so too the lack of a coercive power renders all truces and agreements between states ‘an uncertain peace.’<sup>558</sup>

Hobbes’s rejection of a law of nations is found not only in his political works, but also in those works which he chose to translate. Thus in Thucydides’s *History of the Peloponnesian War* we read, in the Melian dialogue, the Athenians’ assertion that the ‘security of such as are at wars, consisteth not in the good will of those that are called to

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<sup>556</sup> Hobbes 1983, p. 140.

<sup>557</sup> Hobbes 2012, p. 192.

<sup>558</sup> Hobbes 1983, p. 140.



their aid, but in the power of those means they excel in.’ They explain to the Melians that the latter’s relationship with the Lacedaemonians is but weak, and that the former’s belief that the latter will ‘not betray their own colony’ is ‘absurd.’<sup>559</sup> The overriding impression is of an absence of the means to enforce agreements; in such cases, states must be pragmatic about recognising their own abilities and needs.

This is not to say that states can rightfully engage in purposeless violence. The analogy not only draws an equivalence between the law of nature and the law of nations, but also suggests that just as men are enjoined to employ their natural rights only when required, so too are states limited in what they may do with right. Thus we read, in Chapter 30 of *Leviathan*, that because ‘the Law of Nations, and the Law of Nature, is the same thing’, every ‘Sovereign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring the safety of his own Body.’ Hobbes emphasises, however, that, as in the case of men ‘that have no Civil Government’, sovereigns are to be guided by ‘Conscience.’<sup>560</sup> Much has been made of role of the natural laws in governing states’ behaviour by scholars wishing to challenge the image of the Hobbesian international sphere as not merely legally anarchic, but also persistently dangerous.<sup>561</sup> They have argued the domestic analogy is imperfect: states and men are different, and commonwealths are potentially more secure in their dealings with each other than individual men are in the state of nature. As a result, they are also under greater obligation to observe the laws of nature in their actions as well as in their intentions.<sup>562</sup>

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<sup>559</sup> Hobbes 1975, pp. 382-3.

<sup>560</sup> Hobbes 2012, p. 552.

<sup>561</sup> See for example Malcolm 2002, pp. 432-56.

<sup>562</sup> On the imperfect nature of the domestic analogy see Bull 1995, p. 47 and Tuck 2004, pp. 134-5.

It is not the purpose of this chapter to enter into a lengthy discussion of Hobbes's account of the relations between states, or of the ways in which his theory has been employed in modern international relations theory.<sup>563</sup> However, it is worth noting two important points in response to the argument that the international arena is one that, while not governed by the *ius gentium*, is still rendered stable and peaceful as a result of the natural laws. The first is that I am taking the term 'sovereigns' in the above passages simply to mean any individuals who are not subject to each other or to the same common power. International relations, on this reading, need not simply mean relations between states.<sup>564</sup> Most individuals are represented in the international arena by their respective sovereigns.<sup>565</sup> But it is also evident from Hobbes's account of the state of nature that he envisages a range of possible allegiances and groupings capable of acting in unison, however temporary these may be.<sup>566</sup> It seems equally clear that, in cases where individuals or sub-commonwealth confederacies are not represented by a common sovereign, they should be regarded as interacting on an equal theoretical footing with states. The argument that states have achieved a degree of security unavailable to humans, therefore, does not apply to all actors on the international stage, who may or may not feel able to act according to the natural laws. Enemies, and therefore threats from enemies, can take a range of possible forms, from individuals to groupings such as brigands, to overarching allegiances beyond

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<sup>563</sup> For good discussions of how and why Hobbes came to be associated with various modern schools of international relations see Chapter 4 of Armitage 2013 and Christov 2016.

<sup>564</sup> See Hayes, 2008, p. 463 for the suggestion that according to *Leviathan* pirates and buccaneers could be understood as states in the state of nature.

<sup>565</sup> This applies not only to the sovereign's rights of peace and war, but also to his right to regulate trade. Hobbes 2012, pp. 270, 392.

<sup>566</sup> As will be explored in Chapter 6, Hobbes does not think that such instances of temporary concord will be able to gain the relative permanency of true union, found in commonwealths. Nonetheless, it is clear that such groupings are possible in the state of nature. Hobbes 2012, pp. 188, 308-12. See also Malcolm 2002, pp. 449-50.

individual states; ‘sovereigns’ of all types will therefore have reason to feel threatened in a number of ways.<sup>567</sup>

Secondly, in this chapter I am concerned less with the possibility of international cooperation and regulation than with the absence of any practical requirement for it.<sup>568</sup> Sovereigns may well enter into agreements of various kinds with each other, for both peaceful and military purposes. Nonetheless, what must be emphasised is that enemies, strictly speaking, have no legal standard of treatment to which they can appeal. The international sphere, like the state of nature, is dangerous not because it is an arena of perpetual war, but rather because of retained natural right and a lack of coordinated behaviour in the absence of common authority. As a result, it may not always be in sovereigns’ interests to employ their rights against enemies, but such rights are nonetheless a vital feature of Hobbes’s account of life outside the commonwealth.

Finally, it is important to emphasise that the natural laws, while potentially regulating individual sovereign behaviour, are open to interpretation. It is for this reason that Hobbes is able to assert in *De Cive*, regarding crime, ‘What therefore *Theft*, what *Murther*, what *Adultery*, and in generall what *injury is*, must be known by the

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<sup>567</sup> The likeliness that states will possess unequal sizes, resources and power is occasionally used to argue that Hobbes’s international sphere is more likely to be peaceful than the state of nature. For the argument that the ‘rough equality postulate’ is the major obstacle to the domestic analogy see Newey 2011, pp. 62-9. For the suggestion that this inequality may contribute to international stability, see Malcolm 2002, p. 449. It is therefore important to remember that Hobbes’s dangerous state of nature is *also* made up of individuals of varying strength. See Hobbes 2012, pp. 188, 190, where we read that in the state of nature ‘the weakest has strength enough to kill the strongest’ because of the possibility of ‘*confederacy*’, and that ‘if one plant, sow, build, or possesse a convenient Seat, others may probably be expected to come prepared *with forces united*, to dispossesse, and deprive him’ of his life and goods. Emphasis mine. Thus powerful sovereigns may well have reason to feel threatened by apparently weaker actors in the international arena, and vice-versa.

<sup>568</sup> On international cooperation as a possible outcome of sovereigns’ duties towards their subjects, see Malcolm 2002, pp. 446-9. Larry May goes so far as to suggest that the role Hobbes assigns to the laws of nature in the international sphere might provide ‘partial support for international criminal law.’ May 2013, pp. 173, 189-95.

*civill Lawes*, that is, the commands of him who hath the *supreme authority*.<sup>569</sup> Thus life in a commonwealth may resemble a state of war without actually being so.<sup>570</sup> More importantly for our discussion is the fact that, outside the commonwealth, different interpretations of the natural law, like individual perceptions of risk, are equally valid. Life outside the commonwealth may appear to be regulated at various times by law, but such occasional concord should never be taken for genuine unity.

Through Hobbes's removal of the *ius gentium* from the taxonomy of law he removes precisely those protections which it affords to enemies. Once a Hobbesian individual is declared an enemy by his sovereign, and thus removed from the civil law's jurisdiction, he and the sovereign enter into a state of hostility with respect to each other. As a result, those requirements of natural law which characterised punishment are no longer binding, because the sovereign has no interest in ensuring that the individual in question recognise his actions as punishment. The sovereign thus acts purely on the basis of his power, rather than according to the requirements of the legal sphere outlined in Chapter 1. As we read in Chapter 28 of *Leviathan*,

Harme 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 transgresse it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgresse it, all the Harnes that can be done them, must be taken as acts of Hostility. But in all declared Hostility, all infliction of evil is lawfull.<sup>571</sup>

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<sup>569</sup> Hobbes 1983, p. 102.

<sup>570</sup> This is suggested by François Peleau, who in 1657 wrote to Hobbes suggesting that life in Sparta was like 'a state of nature in the civil state... For as you know, Sir, in the Republic of Sparta anyone was permitted to steal whatever he might take' and hence all men had equal right to all things. Hobbes 1994b, p. 424. In fact, as Hobbes points out in his discussion of Lacedaemon in *De Cive*, such interactions are still regulated by the civil law, as such an interpretation of the natural law, while seemingly perverse, has been promulgated as authoritative by the sovereign. Hobbes 1983, p. 101.

<sup>571</sup> Hobbes 2012, p. 486.

This removal from the jurisdiction of the civil law comes about because of Hobbes's understanding of political obligation. Rebels are treated according to the laws of nature, or of war, because in denying the terms of their own subjection they have broken the original covenant. As we read in *De Cive* 'obligation to civill obedience', which is what is violated by treason, is logically prior to the civil law; therefore, such acts are a breach of natural law, and are to be punished accordingly.<sup>572</sup> As Hobbes points out, a prince making a civil law forbidding rebellion would not get very far; in order for the law to be binding, a citizen must on some level accept its legitimate existence in the first place.<sup>573</sup> For Hobbes, aside from the natural laws there are no standards governing the treatment of enemies or those outside the polity. If necessary, innocents may be killed, torture can be applied, and all this with the sanction of natural law, which requires only that the sovereign behaving in this manner believe that it is necessary for the safety of the people.

Hobbes repeatedly states that traitors are to be treated according to the sovereign's will; in *Leviathan* we read that those who 'deliberately revolting, deny the Sovereign Power' will be made to 'suffer whatsoever the Representative will',<sup>574</sup> while in the *Answer to Bramhall* he writes that 'the Traytor loseth the privilege of being punished by a praecedent Law; and therefore may be punish'd at the King's will, as *Ravaillac* was for murdering *Henry* the 4<sup>th</sup>. of *France*'<sup>575</sup> Comments such as these

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<sup>572</sup>Hobbes 1983, p. 181.

<sup>573</sup>Ibid. The same point is also made in Hobbes 2012, p. 522.

<sup>574</sup>Hobbes 2012, p. 486.

<sup>575</sup>Hobbes 1840, p. 294. This was not the only time that Hobbes mentions the notorious regicide; in the *Dialogue* he notes the manner of his punishment, but does not suggest that this punishment was specifically according to the 'King's will.' Hobbes 2005, pp. 117-8. While the trial and punishment of Ravaillac were well-reported in both England and France, neither English nor French sources printed at the time indicate that Ravaillac's punishment was in any way understood to take place outside the normal legal jurisdiction of the French state. For instance, *Terrible and Deserved death* 1610, pp. 2-3 notes that Ravaillac was 'araigned, conuicted, and condemned by due order of law, in the great court and chamber... in Paris, before all the Assemblies, Presidents, Councillors, and Commissioners, at the request of Du Viquit, Attorney generall to the King' and that following the defendant's testimony 'the law procedded, and a most terrible sentence of death

indicate that the rebel is to be seen primarily as the enemy of the sovereign; while in Chapter 18 of *Leviathan* Hobbes notes that a man left, at the institution of the commonwealth ‘in the condition of warre’ may ‘without injustice be destroyed by any man whatsoever,’<sup>576</sup> these comments on the punishment of traitors suggest that those determined to be enemies by the sovereign are not simply to be understood as outlaws, against whom each individual in the state is understood to be at war. The relationship of subjects and the traitor is mediated through the authority of the sovereign, as it is the obligation to the commonwealth, as represented by the sovereign, which the rebel has broken.<sup>577</sup>

Despite this relationship of personal enmity between the sovereign and the traitor, sovereigns are only to act against traitors according to their judgment of what is necessary for the good of the commonwealth. Thus, while ‘the infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature’, such evil should only be exercised by the sovereign ‘as conduceth to the good of his own people.’<sup>578</sup> Of course, this caveat is somewhat mitigated by the fact that this right is held specifically against those enemies ‘whom the Commonwealth judgeth capable to do them hurt’.<sup>579</sup> Hobbes’s account of the state of nature consistently allows for the rightful infliction of harm upon enemies whom we believe

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pronounced against him there, according to a generall decree of that great court of parliament.’ *An Epitome* 1639, pp. 332-3 notes that Ravaillac was ‘declared guilty, and justly attainted, and convicted of the crime of *Lese Majestatis* in the highest degree.’ While it is true that the particulars of the punishment were tailored to the crime, if anything the accounts published in the wake of the trial focus on the law’s inability to use Ravaillac’s arrest to uncover proof of a wider Jesuit conspiracy against the French state. On this point see *Copies of a Letter* 1610.

<sup>576</sup> Hobbes 2012, p. 268. Hobbes makes a similar point in Chapter 10 of *De Cive* when he notes that outside the commonwealth ‘any man may rightly spoyle, or kill one another; in it, none but one.’ Hobbes 1983, p. 130.

<sup>577</sup> On the King’s role as the final arbiter of what constitutes treason, see also Hobbes 2010, p. 194.

<sup>578</sup> Hobbes 2012, p. 494.

<sup>579</sup> *Ibid.*

may harm us at some *future* point; we only lose this right upon entering the commonwealth and placing a protective common power over all parties. In the international arena, however, there is no such overarching power, and thus even according to natural law there are scant resources to create a model of protections for non-subjects.

While in asserting that rebels are to be judged purely according to natural law Hobbes appears to be making a definitive break with both the common and civil law traditions, it is worth remembering that both of these also conceived of categories of men whose acts preclude any appeal to legal protection, either from civil laws or from the *ius gentium*. Cicero in *On Duties* wrote that ‘if an agreement is made with pirates in return for your life, and you do not pay the price, there is no deceit, not even if you swore to do so...for a pirate is not counted as an enemy proper, but is the common foe of all.’<sup>580</sup> Accounting for this common foe became a major theme of the writers we have been looking at, and in their doing so we find arguments strikingly similar to those made by Hobbes to justify placing rebels outside the commonwealth and its laws. Gentili, for example, writes that the reason why some men do not have recourse to the law of nations is because ‘malefactors do not enjoy the privileges of a law to which they are foes. How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race [?]’<sup>581</sup> Elsewhere, in language reminiscent of Hobbes’s statement that rebels ‘having been subject to [the civil law], and professing to be no longer so, by consequence deny they can transgress it [and so are placed outside

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<sup>580</sup> Cicero 1991, p. 141.

<sup>581</sup> Gentili 1933, p. 22. See also his statement that while it is always cruel and contrary to ‘humanity’ to slay a prisoner of war, such cruelty can be tolerated against an ‘untrustworthy and treacherous enemy’; by refusing to obey the common conventions of war, such enemies have placed themselves outside of its protection. Gentili 1933, pp. 208, 237.

it]’,<sup>582</sup> Gentili states that ‘pirates are common enemies and they are attacked with impunity by all, because they are without the pale of the law. They are scornors of the law of nations; hence they can find no protection in the law...This is a warfare shared by all nations.’<sup>583</sup>

In making the argument that ‘a pirat is *Hostis humani generis*’ Coke is adopting this classical idea.<sup>584</sup> However, in the English common law tradition there is an even more striking example of those whose actions place them outside a particular legal jurisdiction. In glossing the statute of 16.R.2, on the crime of *praemunire*, Coke notes that ‘if any pursue or cause to be pursued in the court of Rome, or elsewhere, any thing which toucheth the King, against him, his Crown and Regality, or his Realm...[he] shall be out of the Kings protection.’<sup>585</sup> Expanding on this point, Coke later writes that ‘the persons attainted in a writ of Praemunire are disabled to have any action or remedy by the Kings law or the Kings writs; for the law and the Kings writs are the things whereby a man is protected and aided, so...he who is out of the Kings protection, is out the aid and protection of the law.’ Being ‘out of the kings protection’ is, in Coke’s reading, akin to outlawry; he notes that of such an individual ‘a man may do with him as with the enemies of the king and his realm’ and that ‘he that shall commit any thing against [such individuals] in body or goods or other possessions, shall be excused against all people.’<sup>586</sup> Hobbes notes in the *Dialogue* that it was argued of such men that they might be ‘lawfully killed by any Man that would, as one might kill a Wolf.’<sup>587</sup>

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<sup>582</sup> Hobbes 2012, p. 486.

<sup>583</sup> Gentili 1933, p. 423.

<sup>584</sup> Coke 2003, p. 958. See also Coke 1669, p. 113 for Coke’s account of the punishment due to pirates. In Henry VIII’s Offence at Sea Act of 1536 (28 Hen 8 c 15), pirates were described as the ‘common enemy of all nations.’

<sup>585</sup> Coke 1669, p. 119.

<sup>586</sup> Coke 1669, p. 126.

<sup>587</sup> Hobbes 2005, p. 104.



The concept of an enemy of all mankind, however, does not seem to be one with any purchase within Hobbesian political theory. The reason is that such individuals are simply those without recourse to the *ius gentium*—a category which includes all of humanity, in Hobbes’s account.<sup>588</sup> The discussions of such enemies and Coke’s account of *praemunire* do suggest that Hobbes’s categorisation of those individuals who reject political obligation as being in some sense extra-judicial was not entirely without precedent. However, in his account of this expulsion from the commonwealth and into a pure state of nature, Hobbes reminds his readers that the only source of consistent protection is the commonwealth, a step which the other theorists we have examined were unwilling to take.

While the figure of the *Hostis humani generis* is not one which is easily applied to Hobbes’s theory, its presence in early modern theories of international law reminds us that the ingredients of Hobbesian international relations were already present in the *ius gentium*; all he needed to do was to rearrange them. Gentili’s allowance of cruelty towards ‘treacherous’ enemies is an attempt to assimilate within the laws of war what others, such as Sallust, had excused on the grounds of ‘expediency.’<sup>589</sup> In line with this goal, Gentili also argues in favour of those actions which, while normally against the law of nations, the sovereign determines will hasten the end of war. He thus introduces into the law of nations precisely that element of personal judgement which Hobbes locates in the international sphere by removing the *ius gentium* from the taxonomy of law altogether. Hobbes’s innovation is to extend the ‘extraordinary and unusual circumstances’ cited by Gentili to all relations between states.<sup>590</sup>

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<sup>588</sup> For a contrasting argument, according to which Hobbes’s Foole can be understood as belonging to this category, see Jaede 2015, pp. 178-91.

<sup>589</sup> Gentili 1933, pp. 237-8.

<sup>590</sup> See Sorell 2013, p. 25 on Hobbes’s state of nature as a site of perpetual ‘emergency politics.’

Hobbes's lesson to his readers is therefore not simply that the dissolution of the commonwealth, through faction and civil strife, would be a disastrous return of all to the state of nature. He also emphasises that the sovereign has the right to interpret actions by citizens as treason, and that upon this classification, men are thrown back into a state of nature where they lack all protection. As Hobbes notes in *De Cive*, '*the name of an enemy*' is '*sometimes sharper, then that of an unjust man.*'<sup>591</sup> Criminals and rebels are thus explicitly contrasted; the rights located in Hobbes's legal system are set against a background of absolute insecurity.

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<sup>591</sup> Hobbes 1983, pp. 179-80.

## Chapter 6: Criminality and the Right to Rebel

### Introduction: Rebellion and the Resisting Criminal

Hobbes frequently claimed that the principles outlined in his *scientia civilis* were the preconditions for political order. On the second page of ‘The Preface to the Reader’ in *De Cive* we read that citizens’ understanding of the ‘true Principles’ demonstrated within the text would prevent not only ‘offences, contentions, nay even slaughter it selfe’, but more specifically regicide and rebellion.<sup>592</sup> It is particularly rebellion that much of Hobbes’s political theory is designed to forestall; *Leviathan* defines it as ‘warre renewed’, a return to the state of nature which the commonwealth was created to escape.<sup>593</sup> It seems counterintuitive, then, to suppose that Hobbes may have, consciously or not, embedded within his theory not only the possibility of rebellion in the Hobbesian state, but a genuine right to rebel held by its subjects.

Despite this, a number of Hobbes’s readers have suggested that that this is exactly what we find, if we take him at his word that upon entering the commonwealth future subjects retain certain liberties. In 1658 Hobbes’s intellectual sparring partner Bramhall famously labelled *Leviathan* a ‘*Rebells catechism*’,<sup>594</sup> while Clarendon argued in 1676 that Hobbes’s theory allowed his sovereign ‘very childish security’ against ‘Rebellion.’<sup>595</sup> In 1673 William Lucy published *A Second Part of the Observations, Censvres, and Confytations of Divers Errours in Mr. Hobbs his LEVIATHAN*. He argued that ‘all those injuries’ suffered by Charles I during the 1640s ‘had their pretence in this horrid Doctrine of [Hobbes’s], that Kings had their power

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<sup>592</sup> Hobbes 1983, p. 30.

<sup>593</sup> Hobbes, 2012, p. 494.

<sup>594</sup> Bramhall 1995, p. 145. As Parkin 2007, p. 197 notes, ‘Bramhall’s account of Hobbes as a political theorist of resistance and rebellion quickly became the semi-official [Restoration] position on the interpretation of Hobbes’s political thought.’

<sup>595</sup> Hyde 1995, p. 87.

from the people...that they made him their Representative, and not liking his Representation, they deposed him, and would be represented by one more like themselves.’<sup>596</sup> As we shall see, Lucy’s stance is atypical in its assertion that it is the Hobbesian sovereign’s representative function which allows for resistance by the people. However, later in the text Lucy picks up the standard argument that it is the subjects’ retained right to self-defence, rather than the nature of the commonwealth’s origins, which legitimates not only self-protection, but also rebellion. In common with both seventeenth century and modern readers, he argues not only that ‘*Liberty given to criminals to assist one another against the sword of justice*’ is ‘*the greatest incentive to... rebellion*’ but that ‘*The murder of Charles the first [is] legitimated by Mr. Hobbs*’ through the inclusion of this right in his theory.<sup>597</sup>

Turning to more recent interpretations, we find the same basic contention. Peter Steinberger has stated that ‘the right of self-defense is, in Hobbes’s thought, very broad indeed, and forms the basis for a full-scale theory of legitimate revolution, or at least its functional equivalent.’<sup>598</sup> Similarly, Alan Ryan has argued that Hobbes’s theory ‘must, in spite of its author’s intentions, leave room not only for individual resistance but also, *in extremis* for fully fledged revolution.’<sup>599</sup> Glenn Burgess is more circumspect in his assessment, stating that while we may find in Hobbes ‘elements of

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<sup>596</sup> Lucy 1673, p. 58. Lucy’s original critique of Hobbes, the *Examinations, Censures and Confutations of Divers Errours in the Two first Chapters of Mr. Hobbes his LEVIATHAN* (1656) was, as Parkin has noted, the first of ‘a series of rambling critical commentaries’ on the text which were poorly received by contemporaries. Despite this, upon Hobbes’s death Anthony Wood included Lucy among Hobbes’s major adversaries. Parkin 2007, pp. 164, 345.

<sup>597</sup> Lucy 1673, p. 146. Lucy’s two interpretations of Hobbes’s account are at odds with each other. He appears to assume that Hobbes’s theory allows and endorses the people changing their political representation at will. However, he then notes that the only way in which Parliamentary actions could be considered legitimate is through to the right to self-defence following an initially *unjust* act. It may be that Lucy assumes that the Parliament’s initial actions did not meet Hobbes’s presumed standards for a just change of government, but this is unclear.

<sup>598</sup> Steinberger 2002, p. 857. See Finkelstein 2001, p. 358, who also links the right to self-defence with a right to engage in ‘revolution.’

<sup>599</sup> Ryan 1996, p. 24.

an inchoate resistance theory', rebellion is best understood as the 'natural punishment' of the sovereign rather than the consequence of a legitimate right held by subjects.<sup>600</sup> More recently, however, Susanne Sreedhar has forcefully argued that 'there is an identifiable and coherent Hobbesian right of rebellion' and that it is based on rights retained by individual subjects within the commonwealth.<sup>601</sup> While many of these arguments are suggestive, it is my aim in this chapter to demonstrate that, once we have properly understood the legal standing of the rebel in relation to the commonwealth, we shall find that there is not, and cannot be, a 'right' to rebel held by subjects. A rebellious act is distinct from acts permitted by Hobbes as falling under the retained liberties of subjects and cannot be constructed from them, either explicitly or implicitly.

As we saw in Chapter 2, it is most frequently in the context of the right to resist legitimate punishment that Hobbes presents the striking extent of subjects' true liberties. As a result, it is not uncommon for readers to conflate the categories of Hobbesian criminal and Hobbesian rebel. The resisting criminal is thus a crucial test case for delineating the limits of these liberties and therefore Hobbes's theory of punishment is instructive if we wish to understand why there can be no right to rebel in the commonwealth. As will be explored below, early modern theories of punishment frequently made reference to a right to 'punish' tyrannical sovereigns; rebellion, in these theories, was an example of moral, rather than natural, punishment. As was explored in Chapters 1 and 2, Hobbes's definition and account of the origin of the right to punish directly precludes interpreting the right along these lines. Nonetheless, the close connection forged by numerous early modern thinkers between

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<sup>600</sup> Burgess 1994, p. 64.

<sup>601</sup> Sreedhar 2010, p. 136.

rebellion and punishment, and rebellion and resistance, means that the status and rights of Hobbesian criminals is an important means of shedding light on the question of legitimate rebellion in his commonwealth.

It is important to note at the outset that this examination is concerned with the importance of the theoretical right to rebel, rather than with the practical realities of something that Hobbes recognised as a real possibility. In Chapter 30 of *Leviathan* Hobbes writes that, as widespread acceptance of the sovereign's rights 'cannot be maintained by any Civill Law, or terrour of legall punishment,' it is one of his crucial duties to 'diligently, and truly' teach the basis of the rights of sovereignty.<sup>602</sup> That it is the responsibility of the ruler to prevent conditions of rebellion is made more explicit later in the same chapter, when Hobbes writes that acts such as the 'instruction of the people' are 'not onely his Duty, but his Benefit also, and Security, against the danger that may arrive to himselfe in his naturall Person, from Rebellion.'<sup>603</sup>

Just as a poor understanding of the foundations of the state is one possible cause of revolt, it is clear that Hobbes also felt that sovereign mismanagement could lead to a 'Commotion' inspired by 'great provocation...great fear, great need,' a case that will be dealt with below.<sup>604</sup> However, while Hobbes saw rebellion as a possibility, and one that places obligations upon the sovereign according to natural law, this fact does not in and of itself imply a correlative right to rebel among subjects when the

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<sup>602</sup> Hobbes 2012, p. 522. In *Behemoth* Hobbes notes that one of the causes of the civil war was that 'the people in general were so ignorant of their duty, as that not one perhaps of ten thousand knew what right any man had to command him, or what necessity there was of King or Commonwealth, for which he was to part with his money against his will.' While the civil wars had numerous causes, one of these was undoubtedly Charles's failure to fulfil his sovereign obligations. For this, he was rewarded with the natural punishment of rebellion. Hobbes 2010, pp. 110-1.

<sup>603</sup> Hobbes 2012, p. 524.

<sup>604</sup> Hobbes 2012, p. 544. Again, we see Hobbes applying his theory to his analysis of English history when he writes that a further cause of the initial rebellion was the desperation of men 'that had able bodies but no meanes how honestly to get their bread. These longed for a warre, and hoped to maintaine themselues hereafter by the lucky choosing of a party to side with.' Hobbes 2010, p. 110.

sovereign fails in these obligations. The point is succinctly made by Terry Heinrichs when he argues that ‘to suggest that the sovereign *would not* attempt to immiserate his subjects because they *might* rebel is not to say that they have a *right* to rebel by withdrawing their authorization if he does.’<sup>605</sup>

While the presence of a right to rebel is a minority position within the literature on Hobbes, and despite the convincing argument that rebellion in a Hobbesian state would, be practically speaking, ineffective,<sup>606</sup> it is nonetheless important to take the idea seriously. As we shall see, such a right is often presented as an outgrowth either of those retained liberties of subjects which Hobbes repeatedly insists upon throughout his works, or from the basic principles which underpin such liberties. Examining the supposed right to rebel can help us to understand what, if any, limits have been placed on these retained rights. A better understanding of the extent of these rights will in turn shed light not only on Hobbes’s intentions for his project, but also help us, as modern readers, to avoid the anachronistic tendency to read a more liberal Hobbes into the text than is actually to be found.

Hobbes was deeply aware of those political theories which permitted rebellion under certain circumstances. By setting his account of resistance rights, or the true liberties of subjects, alongside such theories, this chapter aims to not only demonstrate that the idea of a right to rebel found within the works is internally incoherent, but that

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<sup>605</sup> Heinrichs 1984, p. 658. It is important to remember in this context that any right correlating to the sovereign’s obligation would be, according to Hobbes’s account of natural law, held by God rather than the people. Hobbes repeatedly insists that if the sovereign breaks the natural laws, he is to be held accountable by God alone; thus in Chapter 21 of *Leviathan* we read that David’s killing of Uriah was ‘against the law of Nature, as being contrary to Equitie’ and as a result was ‘not an Injurie to *Uriah*; but to *God*...because *David* was *Gods* subject.’ Hobbes 2012, p. 330.

<sup>606</sup> See Chapter 2 of Baumgold 1988. See also Zagorin 2009, p. 84 on the sovereign’s continued security in the face of subjects’ resistance rights, Abizadeh 2013, p. 150 on subjects’ resistance as ‘hopeless’, and Kraus 1993, pp. 179-180, who argue that rebels, even in large groups, are likely to be deterred by the combined force of the power of the sovereign and the risk inherent in returning to the state of nature.

key elements of Hobbes's political theory were specifically designed to forestall the most common arguments in favour of such a right, as they were being developed in the sixteenth and seventeenth centuries.

### **Early Modern Resistance Theories 1: Individual Rights against Usurpers**

The question of whether subjects had a right to rebel, and if so, under what circumstances, was one that deeply occupied the political thinkers of the sixteenth and seventeenth centuries. Distinctions were frequently drawn between different categories of rebels and different types of targets. One of the most common legitimising strategies we find in this period is the argument that, while rebellion against a subject's legitimate, though tyrannical, king required specific provocations and processes to be lawful, action taken against a usurping power could, in the vast majority of cases, be carried out with right.

This distinction between the usurping tyrant and the tyrant by conduct was longstanding. In the *Scriptum super Sententiis* [*Commentary on the Sentences of Peter Lombard*] (1252-6) Aquinas discusses the 'Obedience owed by Christians to the Secular Power and in particular to Tyrants'. In outlining his argument, Aquinas distinguishes two ways in which a king's authority can be recognised as lacking divine sanction: there can be 'defects' regarding 'the way in which authority has been obtained, or in consequence of the use which is made of it.' When authority is 'acquired...through violence, or simony or some other illegal method' there is in fact no 'legitimate authority' and 'it is permissible, when occasion offers, for a person to reject such authority.'<sup>607</sup> Aquinas, echoing Cicero, claims that 'one who liberates his

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<sup>607</sup> Aquinas 1970, p. 183.



country by killing a tyrant is to be praised and rewarded’<sup>608</sup> A century later the Commentator Bartolus of Sassoferrato would, in his influential treatise *De tyranno* [*On the Tyrant*] (1356-7), draw on both Roman law and Aristotelian political theory to outline the contrast between these two categories.<sup>609</sup> According to Bartolus, kings can be labelled tyrannical by ‘defect of title’ or ‘on the part of exercise.’ Their categorisation according to this framework should in turn determine their legal treatment; usurpers are to be judged according to the Roman law of treason, while tyrants by conduct are not.<sup>610</sup>

Thus when Suárez writes in *Tractatus de legibus ac deo legislatore* [*A Treatise on Laws and God the Lawgiver*] (1612) that it is ‘ordinarily...asserted’ that tyrants who have acquired their title through illegitimate means may be slain by any private individual, he is referring to a distinction that would have been well known to his readers.<sup>611</sup> In making the claim that ‘the crime of lese-majesty is not committed against a tyrant of this sort, since no true majesty resides in him’, Suárez refers to Aquinas’s assertion that in such situations the object of the rebellion is not a king at all, but is

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<sup>608</sup> Aquinas 1970, p. 185. Cicero 1991, p. 107, states that the ‘Roman people...deems that deed [killing a tyrant] the fairest of all splendid deeds.’

<sup>609</sup> Julius Kirshner has noted that *De tyranno*, while part of a larger series of political writings, was read and circulated as an independent tract. He suggests that this text is ‘the first, and remarkably, only monograph by a medieval jurist on tyrants’ and that its reception history indicates the work’s wide influence among fifteenth and sixteenth century jurists. Kirshner 2006, p. 303.

<sup>610</sup> Bartolus 2012. The *Lex Julia* on treason is relatively sparse, and simply punishes treason with death. However the discussion of *perduellio*, as we saw in the previous chapter, emphasises the crime’s particular heinousness. Watson 1998b, pp. 316-8. On Bartolus’s theory of tyranny, see Maiolo 2007, pp. 139-40. Constantin Fasolt has suggested that Bartolus’s theory, in emphasising the difference between the two types of tyranny, was an outcome of his earlier claim that individual city-states had the right to create their own law. As a consequence, tyrants could no longer simply be identified by their conduct in disregarding the law. Fasolt 2014, pp. 482-3.

<sup>611</sup> As Höpfl 2004, p. 315 notes, among Jesuit theorists tyrannicide, and the cases in which it might be legitimate, was ‘simply another conventional topic’ of academic discussion, and its treatment in their treatises was routine.

rather to be understood as an ‘enemy of the state.’<sup>612</sup> As such, he is subject to legitimate violence by all individual members of the political community.

We see the same approach in the writings of sixteenth century Huguenot theorists. In Theodore Beza’s *De iure magistratum* [*On the Right of Magistrates*] (1574) we read that ‘those who, by force or fraud, have usurped a power that does not belong to them by law are not legitimate kings.’<sup>613</sup> Labelling such men ‘enemies’ and their actions an ‘attack’, Beza writes that in such cases, if individual appeals to legitimate magistrates fail, ‘each private citizen should exert all his strength to defend the legitimate institutions of his country...and to resist an individual whose authority is not legitimate because he would usurp, or has usurped, dominion in violation of the law.’<sup>614</sup> Similarly, the author of the *Vindiciae Contra Tyrannos* (1579) notes that the tyrant ‘must be one who has either usurped command by force and deception, or one who rules the kingdom granted freely and voluntarily to him contrary to what is right and proper.’<sup>615</sup>

In the *Vindiciae* rights against the first kind of tyrant are, as in earlier accounts, framed in terms of self-defence against an individual lacking political legitimacy. The author argues that that ‘natural law teaches us to preserve and protect our life and liberty ...against all force and injustice’, while the *ius gentium* fixes borders ‘which everyone is bound to defend against anyone at all.’ Finally, the civil law obliges men to ‘resist him [who] violates the society to which he owes everything...[and] undermines the country.’<sup>616</sup> Thus it is according to the ‘laws of nature, of nations, and

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<sup>612</sup> Suárez 1944, p. 711. Suárez also cites commentators, such as Conradus Brunus, who followed Aquinas in this line of argument. He does not, however, cite Bartolus on this topic.

<sup>613</sup> Beza 1969, p. 105.

<sup>614</sup> Beza 1969, pp. 105, 107.

<sup>615</sup> Brutus 1994, p. 140. While the body of the text does not cite Bartolus, there is a marginal note on this page to *De tyranno*.

<sup>616</sup> Brutus 1994, pp. 149-50.

the civil law' that 'it is lawful for any private person to oust this sort of tyrant.'<sup>617</sup> Implicit in these accounts is the assumption that the usurper is at war with the nation, and may even be an enemy of all mankind. Both Beza and the author of the *Vindiciae* make use of the Ciceronian tale of Diomedes and Alexander the Great in which, in Beza's version, the captured pirate asks of the conqueror 'What difference is there between you and me, except that you rob the whole world with a great navy and I with but a single ship?'<sup>618</sup>

This theory, which focused on the implications of the usurper's having no legitimate legal authority, constructed the right to resist directly out of individuals' right to self-defence. By the time we reach the seventeenth century, however, this direct correlation was challenged by those who considered the right to rebel one which could only ever be located in the community as a whole. Turning back to Suárez's account, we find him unhappy with this relatively straightforward classification, as it appeared to empower the individual rebel at the expense of the political community.<sup>619</sup> Suárez's account of the legitimacy of resisting usurpers is thus an attempt to reconcile

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<sup>617</sup> Brutus 1994, p. 150. The author notes that an individual who attempts to remove a tyrant of this sort is not subject to the 'Julian law on high treason', as 'he who attacks the commonwealth...without any basis in right, is not a prince; nor is he who defends his country with arms a traitor.'

<sup>618</sup> Beza 1969, p. 105; Brutus 1994, p. 149. See also Cicero 2002, p. 67. As discussed in Chapter 5, Cicero's categorisation of pirates as enemies of all mankind made its way into early modern discussions of civil law. This story also makes an appearance in Augustine 1998, p. 148.

<sup>619</sup> In what follows I will employ Suárez as an exemplar of this school of thought; in making his argument in favour of, primarily, a collective right to rebel he draws on the authority of a long tradition of Scholastic theorists, including Dominigo de Soto and Luis de Molina. Suárez, as a late theorist of this tradition, is therefore a useful means of reflecting both on the tradition's development, and on self-conscious differentiation from parallel theories of legitimate resistance. Suárez's analysis, while representative, was however not universal. Juan de Mariana, for instance, in *De rege et regis institutione* [*The King and the Education of the King*] (1599) appears to argue that where no other option is possible, individuals have the right to kill both tyrants by title and tyrants by conduct. Skinner 1979, p. 437 argues on this basis that Mariana can be understood as one of the originators of a theory of popular sovereignty. On Mariana's theory of tyrannicide and its departures from standard Scholastic arguments, see also Braun 2007, pp. 80-91, which argues that while Mariana does present a more radical theory than his contemporaries, his is somewhat inconsistent and 'invites multiple interpretations.' On Jesuit theories of tyrannicide more broadly, see Höpfl 2004, pp. 314-320.

his own broader theory of the right to rebel, which equates it with a right to punish located in the body of the people rather than in individual subjects, with the Thomist characterisation of the ‘true tyrant’ as an enemy of the state and actions taken against him as war.

In order to achieve this, Suárez concedes that resistance against usurpers is indeed best characterised as war, rather than rebellion. He suggests that, because a tyrant of this kind is ‘inflicting continual and actual violence upon the state as long as he unjustly retains the royal power by force,’ the state over which he rules ‘continually wages against him an actual or virtual war, not vengeful in its character...but defensive.’<sup>620</sup> By definition individual actions against this enemy cannot be considered crimes carried out against the majesty of the sovereign. But they are nonetheless to be considered instances of usurpation and injustice, as there is no individual right to wage war in this way. Suárez is therefore able to assimilate the Thomist recognition of the usurper’s enemy status with a rejection of absolute individual right based on self-defence.

Nonetheless, Suárez suggests that, due to the state of war in which the larger community finds itself, there is a means to legitimise individual actions. He argues that the ‘public power’ which is always required to take action against tyrants, of whatever variety, is in such cases ‘considered to have been *entrusted* to every private individual’.<sup>621</sup> Thus any act against a usurping power, even if carried out by an individual, is to be understood not only as an act of defensive war, but also as a manifestation of the public power inherent in the civil population as a whole. Therefore even among those thinkers who resisted the idea of an individual right

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<sup>620</sup> Suárez 1944, p. 716.

<sup>621</sup> *Ibid.* Emphasis mine.

against sovereigns, there was an impetus to contingently locate in individual subjects a right to challenge usurpers.<sup>622</sup>

This is also the one type of ‘rebellion’ which Hobbes appears, at least temporarily, to endorse. Moreover, his argument parallels the Thomist/Huguenot construction in which the usurper is viewed as an enemy, with actions against him lawfully undertaken by any member of the community. In the argument provided in *De Cive* against the assertion that ‘*Tyrannicide is lawfull*’ Hobbes notes that ‘he, whom men require to be put to death as being a *Tyrant*, commands either by Right, or without Right; if without Right, he is an enemy [*hostis*], and by right, to be put to death; but then this must not be called *the killing a Tyrant*, but an *enemy*’.<sup>623</sup> In designating those ruling without right as enemies, Hobbes appears to be conceding some ground to those who would justify certain forms of rebellion, a realisation which may have led him to omit the point in the parallel discussion in *Leviathan*. Indeed, Hobbes’s overarching argument throughout his political writing, that sovereigns derive their continued right to rule from their ability to protect their subjects,<sup>624</sup> would suggest that for him the category of a *hostis* ruling without right would essentially consist only of those who, after seizing power, make an ineffective pretence of

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<sup>622</sup> In differentiating between authority, which is public, and power, which is private or individual, Suárez’s account is distinct from those, such as Beza’s, which insist that actions by individuals are only to be undertaken if representative magistrates are unable or unwilling to do so.

<sup>623</sup> Hobbes 1983, pp. 147-8.

<sup>624</sup> In Chapter 21 of *Leviathan* we read that as the ‘end of Obedience is Protection... wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it.’ In the Review and Conclusion, Hobbes goes further and suggests that ignorance of this principle poses a risk to the commonwealth, with sovereigns attempting to ‘justifie the War, by which their Power was at first gotten.’ Such a task will nearly always fail, as ‘there is scarce a Common-wealth in the world, whose beginning in conscience can be justified’, and hence such discourses of legitimacy undermine civil power. Hobbes 2012, pp. 344, 1135. As Quentin Skinner has noted, Hobbes’s arguments should be seen in the wider context of mid-seventeenth century de-factoist tracts; the claim that all nations have unjust origins is, for instance, also found in George Wither’s *Respublica Angliana* (1650) and the anonymous *Excerciation Answered* (1650). Skinner 2002, p. 250. On Hobbes’s de-facto theory of rule, see Hoekstra 2004.

ruling.<sup>625</sup> Such a conception of the tyrannical *hostis* is sufficiently removed from the accepted category of the true tyrant that it was no doubt wise of Hobbes to avoid repeating this ambiguous statement.<sup>626</sup>

For Suárez true tyrants could be resisted or removed by private individuals and according to private judgement, though not on private authority. According to the earlier Thomist and Huguenot traditions, usurpation rendered one vulnerable to legitimate violence from all sides. However, the case of those rulers whose sovereignty was legitimate yet who ruled in a tyrannical manner was more complicated; it is in debating the correct response to tyrannical conduct, rather than simple usurpation, that we find truly competing arguments over the location or object of the right to rebel, and over the right's origins and relationship to punishment theory. In contrast to discussions of usurpers, it was commonly argued that rebellion against a tyrant by conduct required the exercise of a right inherent in the collective body of a commonwealth. The idea that such a right could be located in individuals, on the other hand, was, and was seen to be, a minority position. Importantly, it was this collective right which Hobbes structured his theory to undermine. I will therefore outline the arguments which were made for this collective or group right, before turning to Hobbes's argument against not only its existence, but its logical possibility.

Despite this group right being Hobbes's own theoretical target, many of the arguments made for the existence of a Hobbesian right to rebel, both early modern and

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<sup>625</sup> See Holmes 2010, pp. 382-3 in which such sovereign behaviour is categorised as 'desertion'.

<sup>626</sup> Hobbes was not the only writer of the seventeenth century to dismiss the importance of a distinction between those who come to power 'legitimately' and those who do not. John Milton's assertion that 'A Tyrant whether by wrong or right comming to the Crown, is he who regarding neither Law nor the common good, reigns onely for himselfe and his faction' makes a similar conceptual move, though for a very different purpose. Milton 1649, p. 19. We see similar sentiments in John Ponet's charge that whether they come into power 'either by usurpation, or by election, or by succession' what matters is whether a ruler 'seeketh onely, or chiefly, his own profit and pleasure'. Ponet 1642, p. 46. On Milton's use of Ponet see Lim 2000.

contemporary, assume that such a right is best understood as one which adheres to the individual, even if the consequence of this individual right is collective action. Therefore, after examining Hobbes's response to the idea of a right to rebel located in 'the people,' I will analyse the ways in which the project to construct a Hobbesian right to rebel from individual rights emerges from, but critically misunderstands, his characterisation of the true liberties of subjects.

### **Early Modern Resistance Theories 2: The People's Right Against Tyrants**

Usurpers could be considered 'true tyrants' due to the illegitimate means through which they acquired power. But when it came to 'true kings,' this label could be earned by specific actions. Thus Christopher Goodman, in *How Superior Powers Ought to be Obeyed* (1558), writes that

where as the kinges or Rulers are become altogether blasphemers of God, and oppressors and murderers of their subjectes, then ought they to be [accounted] no more for kinges or lawfull Magistrates, but as priuate men: and to be examined, accused, condemned and punished by the Lawe of God.<sup>627</sup>

Goodman repeats the point when he argues that it is better to have no ruler at all than one who behaves as a tyrant. He conflates the two situations by suggesting that, following such behaviour, 'they [tyrannical kings] are no more publik persons, contemning their publik auctoritie in vsing it agaynst the Lawes, but are to be taken of all men, as priuate persons, and so examyned and punished.'<sup>628</sup> To have a tyrant for a king, then, is precisely the same as to have no king at all, and any individual who remains on the throne following tyrannical behaviour is to be understood as a private

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<sup>627</sup> Goodman 1931, p. 139.

<sup>628</sup> Goodman 1931, pp. 187-8.

man usurping power.<sup>629</sup> Among some writers, tyrannical conduct was thus itself a form of usurpation. Describing this alternative tradition, Suárez notes that according to proto-Protestant theologians John Huss and John Wycliffe ‘temporal lords lost their supremacy *ipso facto*, in consequence of any mortal sin whatsoever, and could be rebuked at will by their subjects, on that ground.’ He points out that one possible consequence of such an approach is that ‘a king ruling in a tyrannical fashion might be slain by any private subject whatsoever, either on the ground of just vengeance and punishment, or on the ground of just defence, whether of the subject himself or of the state.’<sup>630</sup>

A version of this argument is found in George Buchanan’s *De Jure Regni Apud Scotos* [*The Powers of the Crown in Scotland*], published in 1579 but probably composed in the late 1560s. Buchanan draws on the theory of the usurping tyrant as an enemy and, through a broad understanding of usurpation, applies this label to all tyrants. He writes that while there is a difference between those who seize power and those ‘chosen by popular election’,<sup>631</sup> any ruler who ‘bestows nothing of fatherly care upon his people, but oppresses them with arrogant mastery’ and ‘who thinks his people are not given to him to be guarded but to be exploited’ is in fact ‘usurping the name of a king.’<sup>632</sup> Such men are, through their own actions, ‘not united with the rest of us by any bond of common citizenship or of humanity.’<sup>633</sup> The punishment of such tyrants is therefore legitimate and proper. Buchanan does make reference to the role

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<sup>629</sup> As Skinner 1979, pp. 230, 236-7 emphasises, once a tyrannical king is taken to be a private citizen, individuals have, from their individual covenants with God to ensure godly rule in the commonwealth, both a right and a duty to punish him. These arguments justifying individual action against tyrants, Skinner notes, are characteristic of the innovations made by English thinkers of the later 1550s, including Knox and Ponet.

<sup>630</sup> Suárez 1944, p. 707.

<sup>631</sup> Buchanan 1949, p. 91.

<sup>632</sup> Buchanan 1949, p. 94.

<sup>633</sup> Buchanan 1949, p. 93. In contrast to Goodman’s references to God and sin, Buchanan’s rhetoric is strikingly Ciceronian. See Dzelainis 2012.



played by the community as a whole in the original social contract, noting that all ‘peoples which give allegiance to rulers whom they have chosen hold this common conviction, that the people may, for just cause, demand that any power they have committed to anyone shall be given back to them’.<sup>634</sup> But this does not mean that the rights of punishment and resistance are located uniquely in this community. When faced with tyrants, it is right not only for ‘the whole people to destroy an enemy, but for the individual to do so.’<sup>635</sup>

The right of the individual to resist a tyrant by conduct thus rests on a series of connected claims: that the tyrant, through his actions, has lost his status as a legitimate monarch; that there is an individual right, and in some cases duty, to act against usurpers of public power; and that such actions can be classified not merely as self-defence, but also as punishment. Among those who, in contrast, locate the right to resist tyranny in the collective body of the people and not in individual subjects we see a strict maintenance of the difference between the two forms of tyranny; an account of the institution of the sovereign which emphasises the location of political sovereignty in the people as a whole; and a corresponding argument that the term ‘punishment’ cannot be used to describe actions taken by individual subjects against their ruler, however tyrannical the latter may be.<sup>636</sup>

In arguing against an individually-located right to resist tyranny, Suárez contends that such claims fundamentally misunderstand the right of punishment. Following Augustine and echoing the Conciliarist tradition discussed in Chapter 2, he

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<sup>634</sup> Buchanan 1949, pp. 123-4.

<sup>635</sup> Buchanan 1949, p. 143. As Skinner 1979, p. 343 points out, there is no necessary contradiction here. According to Buchanan, the people as a whole have contracted with their future sovereign, instituting him in order to protect individual rights and not simply the common good. As a result, both the people as a whole and individuals can point to a right to resist.

<sup>636</sup> As Baumgold 1988, pp. 21-3 notes, in the early modern period the term ‘private rights’ was normally used to refer to non-sovereign rights located in the collective body of the people and its representatives, rather than those rights held by individuals.

argues that it is never permitted to slay anyone without public authorisation, and that therefore ‘the power of avenging or punishing offences resides, not in private individuals but in their superior or in the whole of a perfect community.’<sup>637</sup> According to this version of the theory, as we saw, the right to punish is never held by individuals either in the state of nature or in the commonwealth. Even the demotion of a king to private person cannot sanction his killing by an ordinary citizen. As a result, ‘a private person who on that ground slays his prince, usurps a jurisdiction and power which he does not rightfully possess; and therefore, he sins against justice.’<sup>638</sup> In such situations there is no genuine state of war to justify the implicit authorisation of individuals; as a result, the removal of a tyrant by conduct can only be framed as punishment rather than self-defence, and thus lacks any legitimate foundation.<sup>639</sup>

As Suárez observes, the question of who has the authority to punish ‘private’ wrongdoing is intimately connected with the question of who has the authority to determine what constitutes tyrannical behaviour and rebel against it. While there is no necessary correlation between a theory positing a pre-social, or natural, right to punish and an individual right to rebel,<sup>640</sup> Suárez’s overview and analysis reminds us that

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<sup>637</sup> See Chapter 2 for an overview of Suárez’s account of the origins of the right to punish.

<sup>638</sup> Suárez 1944, pp. 708-12.

<sup>639</sup> This stance is logically consistent with the one case in which Suárez thinks that individuals may take action against a tyrant by conduct. Where a prince is actively attempting to destroy the state and slaughter its citizens, he is usurping sovereign power and ‘the state or commonwealth itself is in that case engaged in a just defensive war against an unjust invader, even though he be its own king.’ In such cases, as in the case of the true tyrant, an individual may act in whatever manner is required to defend the commonwealth, ‘even by slaying him if defence cannot be achieved in any other fashion.’ However Suárez notes that the case of rebellion which he is actively considering, and which requires the most thoughtful justification, is not of this type as it involves misrule, but not war. Suárez 1944, p. 710.

<sup>640</sup> Grotius, for example, as we saw posits a natural and pre-social right to punish, but does not argue that following the creation of the commonwealth this is *necessarily* retained, either by the individual or in the collective. As he writes in Grotius 2005, pp. 260-1 ‘we must reject their Opinion, who will have the Supreme Power to be always, and without Exception, in the People; so that they may restrain or punish their Kings, as often as they abuse their Power’ because, according to both Roman and Hebrew law, it is lawful for both men and communities to ‘transfer the Right of governing them upon him or them, without reserving any share of that Right themselves.’ Any retained right, therefore, must be built into the original transfer of right, rather than remaining, by definition, with the community as a whole or with individuals. See Ascham

among early modern theorists of the state it was recognised that the sword of justice was double-edged. Determining the location of the original right to punish, then, was crucial in concluding how it could be employed in the most politically extreme of circumstances. In outlining the location and application of the right as collective, Suárez notes that in order for the *people* to exercise it, rather than individuals, certain procedures must be followed. He writes that ‘the state, acting as a whole, and in accordance with the public and general deliberations of its communities and leading men, may depose’ a tyrannical prince.<sup>641</sup> He argues that such a process is licit through Roman private law, which allows for the use of force against force (*vim vi repellere licet*). More strikingly, however, he also justifies the right by noting that in such circumstances rebellion is necessary for ‘the very preservation of the state’, and as such represents an exception to ‘that original agreement by which the state transferred its power to the king.’<sup>642</sup> Rebellion, therefore, is not simply presented as a reactive right; it is one built into the transfer of right upon which the magistrate’s power is based, and represents the employment of a retained right to punish located in the community as a whole.<sup>643</sup>

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1649, p. 121 for a reading of Grotius which emphasises this aspect of his thought. While Grotius rejects outright any right of rebellion on the basis of punishment, he is more ambiguous with regards to rights of resistance grounded in self-defence. Thus while he argues that if a ‘promiscuous Right of Resistance should be allowed, there would be *no longer a State*, but a Multitude without Union’ and suggests that ‘when People are thus oppressed, they should cry unto GOD for help’, he nonetheless provides some allowance for individuals, and even groups, in the ‘last Extremity’ to resist their sovereign. Grotius 2005, pp. 338-9, 343-4, 358. On Grotius and resistance, see Straumann 2015, pp. 202-6 and Tuck 1993, p. 200.

<sup>641</sup> As Braun 2007, p. 85 points out, Mariana’s account of tyrannicide also assumes that the initial response to tyranny will be public deliberation and deposition of the sovereign; it is only when such meetings are prevented that individuals gain the right to act on their own authority.

<sup>642</sup> Suárez 1944, p. 718.

<sup>643</sup> We see the same argument made by Almain when he adds as a corollary to his theory of punishment, in which the right is held by the community, that ‘The whole community has power over a prince constituted by it, by means of which, if the king rules not to the edification but to the destruction of the polity, it can depose him, otherwise it would not have the sufficient power to preserve itself.’ Almain 1997, p. 137.

Suárez repeats this point in a later chapter, arguing that sedition is intrinsically evil; he notes that when ‘the state as a whole’ rises ‘in revolt’ against a tyrant, this act should not be considered a form of sedition, and hence not blameable. In this case, ‘the state, as a whole, is superior to the king, for the state, when it granted him his power, is held to have granted it’ upon a series of conditions. The most important of these is that ‘he should govern in accord with the public weal, and not tyrannically; and that, if he did not govern thus, he might be deposed from that position of power.’<sup>644</sup>

This Scholastic theory of rebellion thus rests on three connected assumptions: first, that there exists a body, termed the state, people or perfect community, which is able to act; second, that the transfer of power from this people to the ruler takes place upon certain conditions; and third, that if these conditions are broken, this pre-political body retains a right to depose the ruler from his position. This last step is to be considered a form of punishment, and not simply self-defence. Because this right was located in the people and not in each individual member of the community, certain deliberative means of determining that the act really was authorised by the collective, as opposed to simply being the will of an individual, became necessary.

### **Early Modern Resistance Theories 3: Corporation Theory and the Hobbesian Response**

It is in the work of French Huguenot polemicists that this Scholastic model of the people’s authority is combined with a Roman law account of the means by which a collective right is to be located and lawfully exercised. Over the course of François Hotman’s *Francogallia* (1573), Beza’s *De jure magistratuum* [*The Right of Magistrates*] (1574) and the pseudonymous *Vindiciae, Contra Tyrannos: Or,*

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<sup>644</sup> Suárez 1944, p. 855

*concerning the legitimate power of a prince over the people, and of the people over a prince* (1579) we find the argument that rights, including the right to depose a sovereign, can be exercised by the representatives of a state or community due to the latter's essentially corporate character. It is this insight to which Henry Parker would turn in order to claim Parliament's right of rebellion and governance during the English civil war, and which Hobbes would ultimately appropriate and empty of all revolutionary potential.

The last and most representative of these treatises, the *Vindiciae Contra Tyrannos*, sets out the problem clearly: in arguing that not only is it 'lawful for Israel to resist, if the king is overturning the law or the church of God' but that 'Israel' has a duty to do so, the author considers the problem of how a 'rushing multitude' is to either decide upon or carry out such acts.<sup>645</sup> His solution is to turn to the capacity of the people as a whole to act through their representatives: 'When we speak of the people, we mean those who have received authority from the people.'<sup>646</sup> These men are 'the magistrates' who, while 'inferior to the king' are 'chosen by the people, or constituted in some other way...they represent the people the whole assembled people.'<sup>647</sup> It is these magistrates rather than the king or private individuals who, because of this representative capacity, have the right to determine when the people has decided that their monarch is behaving tyrannously, and that the collective will is to depose him.

In phrasing that would be echoed by both Suárez and, later, Parker, the text asserts that while 'As individuals the officers are inferiors to the king...all together as

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<sup>645</sup> Brutus 1994, pp. 45-6. The authorship of the *Vindiciae* is unknown; while most scholarship attributes the text to Philippe Du Plessis Mornay, George Garnett suggests that the text is most probably a collaboration between Mornay and Hubert Languet.

<sup>646</sup> Brutus 1994, p. 46.

<sup>647</sup> Brutus 1994, p. 47.

a whole they are his superiors' and that 'he who accepts authority from any assembly is inferior to that assembly although superior to the individuals.'<sup>648</sup> For this balance to be struck, only the acts of the inferior magistrates, not those of the king or of the 'rushing multitude', are to be understood as the true acts of the people as a whole. These magistrates, then, act with a collective right, rather than as individuals, and it is this fact which renders their actions legitimate.

In explaining how this is possible, the Huguenot theorists drew on the work of the Medieval Commentators, and in particular on a theory of political corporations developed by Bartolus of Sassoferrato and his student, Baldus de Ubaldis. As Joseph Canning has argued, these fourteenth century jurists were crucial in developing an understanding of the sovereign *populus* as a corporate unity in two major ways. The first was in assigning this corporate unity, or *universitas*, an existence distinct from its collective members. Drawing on the Pauline discourse of the *corpus mysticum*, used to describe the body of the church, Baldus is able to distinguish between the *populus*'s abstract existence as an organised corporation, and its material reality as a group of individuals. As Canning writes, 'Baldus is careful to define the *populus* as a collection of men *into a corpus mysticum*.'<sup>649</sup> As a result, the *populus* is able to will and act in ways which are distinct from the the wills and actions of individuals within the state. Secondly, these jurists argued that this abstract corporate body was itself a *persona* and 'thus arrived at the concept of the legal person.'<sup>650</sup> In making this claim the jurists, while drawing on the Roman law language of persons, applied it in new ways. The *persona* of the people, as a result, could be described as engaging in various activities and having rights which were available to persons under Roman private law.

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<sup>648</sup> Brutus 1994, p. 48.

<sup>649</sup> Canning 1980, p. 13. On the innovations by Bartolus and Baldus, see also Canning 1987, pp. 185-203 and Canning 2011, pp. 153-4.

<sup>650</sup> Canning 1980, p. 15.

Importantly for the account of sovereignty and resistance, this included ownership, including over the commonwealth itself.

Crucially, this account of the corporate *universitas* argues that this new legal person is able to act without the intervention of external agents, through popular assemblies and the appointment of representatives.<sup>651</sup> These men, when acting in their representative capacity, are termed *universi*, to distinguish from their actions as individuals, or *singuli*.<sup>652</sup> When it does appoint such representatives, the *universitas* is always to be understood as legally *superior* to these *inferior* officers; similarly, Baldus notes that the people can be understood as the *dominus*, or master, of its *rector*, or governor.<sup>653</sup> Thus despite the appointment of various officers of the state, these only act with the authority of the *universitas* as a whole. Furthermore, the latter is able, in its capacity as a legal person, to turn to civil law procedures to ensure that its ownership is respected. It is to this theory of corporation to which the *Vindiciae* refers when it notes of Israel that when it entered into agreement with God, the community was able to act as a ‘single person’ because of its status as a ‘corporation of men.’<sup>654</sup> In its relations with the king, the people take on the same role, and are able to claim a collective right of perpetual legal ownership over the commonwealth. As such, Huguenot theory asserts that even when the king is in possession of sovereignty, and is thus *maior singulis*, he is nonetheless *minor universis*.<sup>655</sup> When this sovereignty is not used for the purposes for which it was intended, the ‘vindicators’ of the

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<sup>651</sup> Canning 1980, p. 27.

<sup>652</sup> Canning 1987, p. 187.

<sup>653</sup> Canning 1980, pp. 29-30.

<sup>654</sup> Brutus 1994, p. 38.

<sup>655</sup> Brutus 1994, p. 156. On the ways in which Huguenot theorists used Roman private law, and particularly the law of ownership, to supplement those arguments built on the *lex regia* and transfer of *imperium* see Lee 2008. Lee argues that the most prominent set of legal ideas in these treatises is that of *dominium* and the related right of *vindicare*, available to owners not currently in possession of their property. See also Baumgold 2010, p. 30 on the use of Roman private law in resistance theories.

commonwealth ‘fight against the tyrant on the basis of their office and supported by their authority’. This action is undertaken ‘not [by] individuals [*singuli*], but all together as a whole [*universi*]’, with those challenging the king in the position of ‘lords [*domini*] who are seen to demand an account [*ratio*] of his deeds from their agent.’<sup>656</sup>

In presenting this agreement as taking place between the people as a corporate entity, though their representative magistrates, these theorists were also able to argue against any individual right to resist tyrants by conduct. As the author of the *Vindiciae* argues, ‘it is not individuals who constitute a prince, but all do so together as a whole [*universi*].’ As a result, any decision to resist a tyrant by conduct requires the ‘command of all together—of those, that is, who represent all together as a whole in the kingdom.’ The people is, despite being in legal fact the *dominus* of sovereign power, akin to a ward in that it cannot act without the ‘agency’ of its tutors, the magistrates.<sup>657</sup>

That Hotman, Beza and the author of the *Vindiciae* would have drawn on the work of medieval corporation theory is unsurprising. The legal training of Beza and Hotman at the University of Orléans provided them with a background in the Bartolist School of jurisprudence. Hotman would go on to criticise the Bartolists as ‘barbarians’, but as Donald Kelley argues, he nonetheless was influenced by this practice of ‘applying civil law to practical problems.’<sup>658</sup> In doing so, he helped to set the tone and argumentative strategies of the most important Huguenot tracts.<sup>659</sup>

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<sup>656</sup> Brutus 1994, p. 157-8.

<sup>657</sup> Brutus 1994, pp. 168-9. That argument that the Huguenot resistance theorists were drawing on Roman law concepts of corporation and representation, and that these in turn enabled them to restrict the right to rebel against tyrants by conduct to magistrates, or *universi*, has been challenged by McLaren 2006. McLaren argues that the author of the *Vindiciae* did not distinguish between different types of tyrants at all, and as a result intended a much broader individual right against tyrants than has been presented here. However, see Garnett 2006 for a convincing rebuttal.

<sup>658</sup> Kelley 1973, pp. 26, 184.

<sup>659</sup> See Giesey 1970 for discussion of the ways in which Beza and the author of the *Vindiciae* build on, and depart from, the central arguments of the *Francogallia*.



This account of legitimate resistance, in which the people's sovereignty could be asserted through their representatives, quickly gained traction in England in the first half of the seventeenth century. By the 1640s both advocates and critics of parliamentary arguments made reference to this French legacy. In his 1642 tract *A Persuasion to Loyalty, or the Subjects Dutie* the royalist David Owen accused the members of the Long Parliament of being influenced by, and even explicitly repeating, Huguenot arguments. This trend continued in 1643, with the publications of Henry Hammond's *Of Resisting the Lawfull Magistracie*, John Bramhall's *The Serpant-Salve; or a Remedie for the biting of an Asp* and *The Discovery of Mysteries* by Griffith Williams. Such accusations were hardly unfounded. In 1643 William Prynne published *Sovereign Power of Parliaments*, which not only made reference to Huguenot theory, but also included, as an appendix, an English translation of the third *questio* of the *Vindiciae*. In 1644 Samuel Rutherford would discuss the importance of the *Vindiciae* in *Lex, Rex*.<sup>660</sup> By 1648 the full text of the *Vindiciae* was available in English translation, printed by Matthew Simmons and Robert Ibbitson. However the first of the parliamentary writers to make use of these terms and concepts was Henry Parker, who used them to bolster his argument for parliamentary sovereignty.

In his important pamphlet *Observations upon some of his Majesties late Answers and Expresses* (1642), Parker argues that the true source of sovereign power is not God but rather 'the Pactions and agreements of such and such politique corporations', or people understood as a single legal entity.<sup>661</sup> Political power is, Parker explains 'nothing else but that might and vigour which such or such a societie contains in it selfe'<sup>662</sup>, and is granted to kings on 'conditionate and fiduciary'

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<sup>660</sup> Salmon 1959, pp. 72-93. See also Zagorin 1954, pp. 78-86.

<sup>661</sup> Parker 1642, p. 1.

<sup>662</sup> Ibid.

grounds.<sup>663</sup> He notes that if this analysis is correct, then ‘the King, though he be *singulis Major*, yet he is *universis minor*’ and the people may impose such limits as they please during his institution.<sup>664</sup> Further echoing the Huguenot theorists, Parker notes that if the monarch himself becomes the source of ‘unnaturall destruction... a mischiefe almost as fatall as to be without all magistracie’,<sup>665</sup> they are not to be ‘tryed...by any private parties.’<sup>666</sup> Rather, ‘the whole community in its underived Majesty shall to do justice’<sup>667</sup>, and in Parker’s account ‘the whole community’ is represented in parliament. Thus when Parker states that ‘if the King will not joyne with the people, the people may without disloyalty save themselves’ he is not arguing for an individual right to resist a tyrannical king, but rather for a collective right exercised through parliament’s representative function.<sup>668</sup>

John Ponet’s *A Short Treatise of Politique Power*, while originally published in 1556, was reprinted in London in the same year that Parker published his *Observations*. With its emphasis on the ‘conditionate and fiduciary’ nature of sovereign power, its appeal to the Parliamentary party is clear. According to Ponet, it is because ‘*Kings, Princes and Governours* have their authority of the people’ that the people may revoke this authorisation, just as ‘men may revoke their *Proxies*, and Letters of *Attorney* when it pleaseth them: much more, when they see their *Proctors* and *Attorneys* abuse it.’<sup>669</sup> Nonetheless, in comparing these two pamphlets we can see the impact of the integration of corporation theory along Huguenot lines. In making his case for parliament’s authority over the king, Parker is able to draw on a theory in

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<sup>663</sup> Parker 1642, p. 4.

<sup>664</sup> Parker 1642, p. 2.

<sup>665</sup> Parker 1642, pp. 13-4.

<sup>666</sup> Parker 1642, p. 15.

<sup>667</sup> Ibid.

<sup>668</sup> Parker 1642, p. 16.

<sup>669</sup> Ponet 1642, pp.49-50.

which the collective body of the people has a legal and political status separate from their sovereign, with their own representatives within the commonwealth who are distinct from their ruler. Ponet, on the other hand, is firmly rooted in a traditional political discourse pre-dating the Huguenot works. Drawing on the long-established metaphor of the commonwealth as a body, he legitimises rebellion by arguing that while ‘Kings, Princes, and other Governours’ are ‘the heads of a politique body, yet they are not the *whole* body’; it is therefore the role of the people ‘to cut away an incurable member, which (being suffered) would destroy the whole.’<sup>670</sup>

One of the innovations of this model, wherein the people are understood as a *universitas* or ‘politique corporation’, was its implication that certain rights could only be wielded through political representation. While a right might be employed by a private person, its correct use, by definition, reflected the representative nature of the individual in question. As a result, the model insists upon the existence of the subject of such rights: the person of the people is a perpetual legal entity, distinct from its sovereign and empowered to authorise its own separate representation. It was in response to this idea that Hobbes formulated his alternative account of the state as a corporation, in which not only can the person of the commonwealth only act through its sovereign representative, but a separate entity known as ‘the people’ has no legal or theoretical existence of its own.

The definition of a right as a ‘blameless liberty of using [one’s] own natural power and ability’ provided in the *Elements* undergoes little modification in *De Cive*

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<sup>670</sup> Ibid. Emphasis mine. On the medieval representation of sovereignty as a corporation including the king, see Kantorowicz 1997, pp. 363-83. Ponet is here drawing on a Ciceronian image: in *De Officiis* Cicero writes of tyrants that ‘just as some limbs are amputated, if they begin to lose their blood and their life, as it were, and are harming the other parts of the body, similarly if the wildness and monstrosity of a beast appears in human form, it must be removed from the common humanity, so to speak, of the body.’ Cicero 1991, p. 111.

and *Leviathan*.<sup>671</sup> As we saw in Chapter 2, Hobbes is resistant to the Scholastic idea that we can distinguish between two different types of rights: those which adhere to individuals, and those which are created through the institution of the community or state and hence belong to this new body alone. As was explored above, this dual understanding of rights is also implicit in the Bartolist/Huguenot construction: certain rights, such as *dominium* over the commonwealth, only make sense in relation to a perpetual *universitas*. For Hobbes, on the other hand, rights can be transferred, but this process does not in itself create any new civil rights beyond those which were already located in individuals. While Hobbes employs an incorporation model of the state, his version of the process of incorporation and its consequences is thus fundamentally different from those theorists we have examined above. As we saw in the *Vindiciae*, these theorists of resistance were concerned with the problem of the ‘rushing multitude.’ But this was primarily due to the question of how to attribute action to that multitude. There is no denial of the existence of the people as such, or of its unique capacity to exert legal rights of ownership. In Hobbes’s model, in contrast, the political representative is empowered by his capacity to employ the rights granted to him on an individual basis. This transfer in turn binds future subjects as individuals, rather than as a community; those rights which are retained despite this agreement, then, are located purely at the individual level.

This emphasis on the individual nature of rights is reinforced by Hobbes’s conception of the person of the people. In contrast to the Scholastic, and subsequently Huguenot and Parliamentary, model of incorporation, Hobbes rejects the political value of the initial common agreement to subsequently form a commonwealth in favour of the more important mutual covenant to be represented by the same

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<sup>671</sup> Hobbes 1969, p.71; Hobbes 1983, p. 47; Hobbes 2012, p. 198.

sovereign. It is only through the ‘Generation of that Great LEVIATHAN’ that ‘the Multitude’ is united in one Person.’<sup>672</sup> This emphasis on the multitude as lacking coordination is a feature of all of Hobbes’s theoretical works. In the *Elements* we read that while ‘consent (or concord)’ is possible among men with a common purpose, such as ‘the fear of a present invader, or by the hope of a present conquest, or booty’, this concord only lasts as long as ‘that action endureth.’ Inevitably, it will break down through the ‘diversity of judgements and passions in so many men contending naturally for honour and advantage one above another.’<sup>673</sup> As a result, the multitude ‘are many, and (as yet) not one; nor can any action done in a multitude of people met together, be attributed to the multitude, or truly called the action of the multitude.’<sup>674</sup> It is only through ‘some mutual and common fear to rule them’ that this collective can truly become a unity.<sup>675</sup> Thus already by 1642 Hobbes stresses that it is only through the unity of a common ruling power that anything resembling a ‘BODY POLITIC’ or ‘civil society’ can exist.<sup>676</sup> Hobbes explains that it is precisely because of this inability of concord to evolve naturally into unity that there can be no agreement between ‘a multitude, considered as one aggregate’ and a future ruler. Such an agreement, Hobbes argues, assumes the presence of unity, and hence sovereignty, where it can never be found.<sup>677</sup>

Hobbes’s strategy against his Parliamentary opponents is to lay claim to their terminology, yet put it to very different use. Thus we read in the *Elements* that the ‘person civil’ is, in contrast to the multitude, a unity of individual wills.<sup>678</sup> Hobbes

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<sup>672</sup> Hobbes 2012, p. 262.

<sup>673</sup> Hobbes 1969, p. 101.

<sup>674</sup> Hobbes 1969, p. 108.

<sup>675</sup> Hobbes 1969, p. 102.

<sup>676</sup> Hobbes 1969, p. 104.

<sup>677</sup> Hobbes 1969, p. 119.

<sup>678</sup> Hobbes 1969, p. 124.

expands on this definition in *De Cive* where he writes that a ‘*union* thus made [through the submission of all individual wills to that of a single man or council] is called a *City* [*civitas*] or *civill society*, [*societas civilis*] and also a *civill Person* [*persona civilis*].’<sup>679</sup> Like the *persona* of the Bartolist tradition, this *persona* has its ‘own Rights and properties’<sup>680</sup> and so can have acts attributed to it. Unlike in the earlier tradition, however, it can only act through a single representative, that of government. Thus Hobbes is able to use the same terminology as that employed by resistance theorists to argue that ‘The *People* rules in all Governments, for even in *Monarchies* the *People* Commands; for the *People* wills by the will of *one man*.’<sup>681</sup> The point is repeated even more forcefully in *Leviathan*, where we read that:

A Multitude of men, are made *One Person*, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*... And *Unity*, cannot otherwise be understood in Multitude.<sup>682</sup>

The person of the commonwealth thus has a legal existence. However, this only persists so long as there is continued representation by the sovereign; not only can the people in no sense authorise alternative representation, but only those actions undertaken by the person’s legitimate representative count as actions by the people at all. As a result, Hobbes writes, ‘the opinion of them, that say of Sovereign Kings, though they be *singulis majores*, of greater Power than every one of their Subjects, yet they be *Universis minors*, of less power than them all together’ is simply an ‘absurd’

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<sup>679</sup> Hobbes 1983, p. 89.

<sup>680</sup> Ibid.

<sup>681</sup> Hobbes 1983, p. 151.

<sup>682</sup> Hobbes 2012, p. 248.

misunderstanding of the nature of the person of the people. Action by ‘all [subjects] together’ is impossible, and hence can never represent a power greater than the king.<sup>683</sup>

### **The Rebel’s Catechism: The Liberties of Subjects and the Right to Rebel**

Hobbes’s explanation of the origins of political authority is designed to demonstrate that there is no ‘people’ in whose name a challenge to sovereignty could be launched.<sup>684</sup> By disallowing any covenant either between this non-existent corporate entity and a future sovereign, or between the latter and the individual members of the commonwealth,<sup>685</sup> Hobbes was able to present a version of contract theory which emptied it of the revolutionary potential identified by the thinkers discussed above. His theory thus responds directly to an account of legitimate rebellion developed in sixteenth century France and employed by the Parliamentary cause during the English civil wars. Hobbes’s additional rejection of the right to rebel against an (effective) usurper, through his *de facto* account of political legitimacy and the purposes of government, was intended to undermine a separate justification of ‘tyrannicide.’

It has been the contention of numerous readers, however, that while Hobbes focused on undermining rebellion by the people or in their name, a right to rebel nonetheless entered his theory by a different door. When Bramhall stated that *Leviathan* provides the ‘bellows to kindle the fire of a civill warre, and put a whole commonwealth into a combustion’,<sup>686</sup> or when Clarendon suggested that the text

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<sup>683</sup> Hobbes 2012, p. 280. As Skinner 2002, p. 179 notes, the representative apparatus for Hobbes’s alternative presentation of the person of the state is, like that of the earlier tradition, grounded in the Roman law of persons; the polemical nature of these claims is thus even more apparent.

<sup>684</sup> On this point see Baumgold 1988, pp. 24, 54; Runciman 1997, p. 12; Skinner 2002, pp. 197-8; Brito Vieira 2009, pp. 157-8 and Abizadeh 2013, p. 134.

<sup>685</sup> Hobbes 2012, p. 266.

<sup>686</sup> Bramhall 1995, pp. 144-5; Hyde 1995, p. 234.

‘liberally and bountifully confers upon [subjects]’ a ‘liberty as no honest man can pretend to, and which is utterly inconsistent with the security of Prince and People’, they were concerned not with a right held by the people as whole and deployed by its representatives. Rather, they contended that in the Hobbesian commonwealth it is individuals who have retained too much liberty, because it is, as Bramhall put it, according to the ‘discretion of the subject’ to determine what security requires.<sup>687</sup> The individual right to resist harm becomes, in the hands of such readers, a fully-fledged right to rebel against legitimately-constituted sovereign power. As we saw above, it is this line of interpretation which has persisted among modern readers.

To address these arguments, the different manifestations of subjects’ natural liberty, and the limits that Hobbes ascribes to them, must be examined in more detail. In what follows, I will argue that for Hobbes the true liberties of subjects are best understood as reactive and dependent on circumstance. While there is indeed a certain ‘discretion’ implied in their use, not all actions by subjects fall under the category of true liberties, even when these have self-preservation as their aim. Moreover, employing these liberties ‘correctly’, as we saw in Chapter 2, does not itself place subjects outside the commonwealth. As a result, these rights, broad as they may seem, cannot be used to construct a right to rebel against the state or its representative.

Before proceeding, it is important both to remind ourselves of the definition of rebellion, and of what makes it different from those acts which Hobbes does permit subjects to undertake in the pursuit of their own safety. As we saw in Chapter 5, Hobbes’s definition of rebellion in *Leviathan* is that it is the deliberate denial of sovereign authority; in ‘renouncing...subjection’, one removes oneself from the

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<sup>687</sup> Bramhall 1995, p. 145. See Hampton 1986, pp. 199-202 for a restatement of this point.



commonwealth.<sup>688</sup> As such, it is the open declaration, through words or deeds, that one no longer sees any obligation whatsoever towards the sovereign and, as discussed above, it is for this reason that any actions against rebels are acts of war against enemies rather than the punishment of citizens. Based on this definition, a Hobbesian right to rebel would seem to be a right to engage in activity which makes it clear that one is no longer subject to the authority of the state. While we might argue that such an act is always possible, with all the attendant risks it brings, to argue that there is a *right* to perform it is to suggest that in performing such an act an individual is in no way contravening his pre-existing obligations.<sup>689</sup> This profoundly misunderstands Hobbes's general theory of the true liberties of the subject, which are, Hobbes stresses, defined in relation to the 'Artificiall Chains, called *Civill Lawes*'.<sup>690</sup> Such rights are only meaningful within the commonwealth; in the state of nature they would simply be liberties.

Once the state has been instituted, to have a right to do something and to be capable of it are conceptually distinct: one only has the right to act either in ways which are in concordance with the will of the sovereign, or which have been allowed by the covenant instituting him. Thus while in the state of nature our rights are limited only by our physical capabilities, to act according to right in the commonwealth is to behave in ways which cannot be punished by the law or merit treatment as an enemy. Just as one might have the ability to commit a crime, but to speak of a right to engage in criminal activity would be absurd, so too we can engage in rebellious behaviour, though we lack the right to do so. Those rights which do exist in the commonwealth are limited in such a way that they specifically disallow activities which could be

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<sup>688</sup> Hobbes 2012, p. 494.

<sup>689</sup> Hobbes 2012, p. 200.

<sup>690</sup> Hobbes 2012, p. 328.

understood as a general renunciation of subject status. While the liberties allocated to subjects may initially appear to be quite broad, Hobbes's description of their actual use indicates that they can and should be consistently understood as the actions of citizens rather than of rebels. Following a discussion of these limits, and hence of the true nature of retained rights, I shall discuss the ways in which the principles which ground them have been used to argue for a right to rebel based on material necessity. I will then examine one particular manifestation of subjects' true liberties, that of collective resistance to the state. This example has suggested to many readers that the right to rebel can not only be constructed from Hobbes's principles, but is found in the specific manifestations of the true liberties as well. As I will demonstrate, however, even the case of permitted collective resistance disallows rebellion by maintaining individuals' subject-status throughout. The moment such action becomes rebellion proper, those engaging in it lose their civil status and are to be treated as enemies of the commonwealth.

There has been some debate among Hobbes's readers over whether resistance to the sovereign in the service of self-preservation is a duty, which must be adhered to, or a right.<sup>691</sup> While the law of nature suggests that individuals must always act to preserve their lives, a more consistently accurate interpretation is that Hobbes leaves self-defence as an option which cannot be renounced by subjects, but which individuals may nonetheless choose not to act upon.<sup>692</sup> Hobbes clearly believes that

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<sup>691</sup> See for example King 2013, p. 315; Warrender 1957, p. 216. For discussion of this point among Hobbes's contemporaries, see Tuck 1979, pp. 130-1.

<sup>692</sup> It is important to note that the law of nature is defined in *Leviathan* as 'a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same.' Thus it is a plausible interpretation that Hobbes only considers giving up the *right* to self-preservation (man's 'means of preserving' life) as a breach of the law of nature. Rights, importantly, are a 'liberty to do, or to forbear', and thus are maintained even if not consistently employed. Hobbes 2012, p. 198. For an important discussion of the Hobbesian individual's ability to act against his material self-interest, see Lloyd 1992.

there are some fates which an individual might choose death to avoid. For example, he argues that subjects should not be forced to execute their parents, as ‘a Son will rather die, then live infamous, and hated of all the world.’<sup>693</sup> While Hobbes suggests that sovereigns should respect these realities on the basis of natural law, he nonetheless recognises that they may not. However, to fail to choose the ‘best’, or most effective, option to preserve one’s life is in no way to renounce the right to self-preservation altogether. A subject might, for instance, choose death rather than patricide, but it is never implied that in doing so he is renouncing his more general right, and he may well resist the sovereign’s men when they come to enforce the agreement. Thus subjects have at their disposal a range of options when it comes to self-preservation, the use of which is never to be seen as contrary to earlier choices and behaviour, or against the covenant instituting the commonwealth.

The sovereign’s right to attack a subject, and the subject’s right to resist, are emphasised throughout *De Cive* and *Leviathan*. However, while physical assault is Hobbes’s preferred means to illustrate this right, subjects’ rights to self-preservation can be understood in broader terms. As we saw, starving citizens have the right to steal food, assuming that they sincerely believe that this is their only means of survival. Moreover, when sovereign power is a cause of danger rather than a source of protection, these rights apply even in situations in which death is not imminent, as during imprisonment.<sup>694</sup> In Chapter 14 of *Leviathan* we read that a man cannot lay down his right to resist ‘Chayns, and Imprisonment; both because there is no benefit consequent to such patience...as also because a man cannot tell, when he seeth men

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<sup>693</sup> Hobbes 1983, p. 98.

<sup>694</sup> It is for this reason that punishment as such, and not merely capital punishment, cannot be authorised by subjects. The argument, found in Heyd 1991, p. 121 that ‘only the extreme penalties of torture and death’ can be resisted, thus appears to be mistaken. See May 1992 for another example of this argument.

proceed against him by violence, whether they intend his death or not.’ The most important reason, however, is that the purpose of the individual’s original entry into the commonwealth was the ‘security of [his] person’, which is not fulfilled through (punitive) imprisonment.<sup>695</sup> While we might question the grounds on which this removal of liberty can be legitimately resisted,<sup>696</sup> that it is included among the retained rights of subjects does indicate two important things about Hobbes’s understanding of subjects’ resistance rights. The first is that he seems to allow resistance at any point during a long-term, harmful, but not immediately life-threatening situation inflicted by the sovereign. Presumably, the right to resist chains can be invoked at any point during the imprisonment period and not simply at its commencement. The second is that we must take him seriously when he grounds the right to resist in the ends for which the original commonwealth-instituting covenant was entered into. Hobbes’s major justification for the right to resist such non-life-threatening penalties is, rather than the immediate risk of death, that there is ‘no benefit consequent’ to enduring these.

It is the combination of these two points that has caused some commentators to suggest that they might constitute the grounds for justified rebellion on the basis of material necessity. It has been argued that subjects have a right to resist in situations which they perceive as long-term and unsustainable, but which the sovereign might simply regard as nothing more than an unavoidable ‘inconvenience’, the type of which Hobbes assures readers are inevitable in any commonwealth.<sup>697</sup> If the right to rebel under these conditions is indeed among the true liberties of subjects, or can be constructed from them, then as a consequence such rebels remain, by definition,

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<sup>695</sup> Hobbes 2012, p. 202.

<sup>696</sup> On this point see Finkelstein 2001.

<sup>697</sup> Hobbes 2012, p. 320.

subjects rather than enemies. Their actions should be understood as neither criminal nor hostile, and in turn the sovereign's response should not include either punishment, or hostility.

Sreedhar has suggested that Hobbes must allow a right to engage in rebellion 'from necessity' in cases where subjects' ongoing lives are so precarious that they can see no advantage to remaining within the commonwealth.<sup>698</sup> She writes:

Hobbes...has a general principle of political obligation committing him to a right of rebellion. He explicitly endorses the following general principle: *a subject has no obligation to obey the sovereign if he judges that the sovereign is not providing for his security*. If we add a plausible premise (if the sovereign is not protecting a person, joining forces with others in order to effect political change may be the best way to preserve himself), this implies a right of rebellion.<sup>699</sup>

The entire question turns on Sreedhar's addition of the 'plausible premise', in which the individual right to self-preservation is taken to include the right of joining with others to effect a change in government.

It is true that, if the source of insecurity is the state, or the state's negligence, then, assuming that this has already been attempted, no further appeal to the commonwealth need occur before individual defensive actions are undertaken. This is because there need not be an immediate threat to life to justify legitimate acts of resistance, as we saw in the case of the prisoner who can act to preserve himself at any point during his punishment. As a result, we might consider that the choice to join, or found, a rebel group to address one's concerns could be considered as legitimate as resisting an attack. However, it is unclear that is indeed the case, both on the basis of Hobbes's explicit comments, and on the underlying mechanics of the theory.

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<sup>698</sup> Sreedhar 2010, p. 143.

<sup>699</sup> Sreedhar 2010, p. 139.

In Chapter 30 of *Leviathan* we read that in the case of a ‘Commotion’ that is caused by ‘great need’, as we might imagine a rebellion from necessity to be, it is best for the sovereign enact ‘Punishment of the Leaders, and teachers...[not of] the poore seduced People.’<sup>700</sup> This suggests that for Hobbes, there is a model of collective action driven by what is perceived to be mutual need. However, he does not at this point recognise a right to engage in such action; while the people are not punished, this is only because their ignorance is clearly the result of sovereign mismanagement, not because their actions were committed with right. The leaders are most certainly punished, even if they themselves are simply acting in ways which they believe will best provide for their security (organising a ‘commotion’). Such actions are, Hobbes implies, criminal but not hostile; they therefore do not meet the qualifications for an action to be considered an expression of subjects’ true liberties, but nor are they necessarily rebellious.

Hobbes therefore appears to dismiss the possibility of a right to engage in rebellion from necessity by outlining the legal consequences of something that looks very much like what Sreedhar proposes. The coordinate action of the needy is excused for pragmatic reasons, rather than by his theory of the liberty of subjects. Moreover, the structure of the theory itself also appears to preclude precisely this kind of rebellion, forcing us to reject Sreedhar’s adoption of the ‘plausible premise’ that the true liberties allow any behaviour whatsoever which the subject believes will help him in his goal of self-preservation.

While the Hobbesian self-preservation principle appears to allow any and all action deemed necessary by a subject, this is in stark contrast with the limited nature of the true liberties of subjects as described in *De Cive* and *Leviathan*. The case cited

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<sup>700</sup> Hobbes 2012, p. 544.

above, of the son refusing to engage in patricide, illustrates this well. A son may refuse, upon questioning, to accuse his father, and may even refuse to execute him. However, as we saw in Chapter 2, the son has no right to defend his father from the hangman. The son's wider obligation to the state remains intact despite his right to resist the sovereign in defined ways. This obligation in turn limits the range of actions he may commit with right. These limits exist despite there being a potential argument that the son has a right to defend his father's life in order to preserve his own life, if he relies on his father's income to survive, and from the son's purpose in joining the contract, which now forces him to react passively to his father's execution.<sup>701</sup> From this hypothetical scenario, we can see that Hobbes envisages limits to defined rights of resistance, even if these are not always clear. The right to resist, despite Hobbes's reference to broader principles, does not seem to permit unlimited resistance even in cases of extremity. Assuming additional rights beyond those listed by Hobbes, on the basis of either direct self-preservation or a lack of good to oneself, would therefore appear to be a dubious strategy.

Furthermore, there appears to be an escalation of proportionate permitted behaviour in the employment of the true liberties. At the point of accusation, there is only a right to non-incrimination; while this act might frustrate the ability of the sovereign to carry out criminal investigations and identify and punish lawbreakers, it is essentially an act of passive, rather than active resistance. During the act of punishment itself, once the subject has been condemned and sentenced, physical

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<sup>701</sup> The grounds of this particular right were unclear to some of Hobbes's contemporaries; his correspondent François du Verdus, for instance, wrote in 1657 asking 'on your account that no one is obliged to accuse those whose death or torture would make his own life less pleasant, I should like to ask you this: was the person who vowed to sacrifice his daughter (Jeptha, I think) obliged to keep his vow?' Hobbes 1994b, p. 417. Here, du Verdus does not link the right to non-incrimination with either natural feeling nor with the right of self-preservation, or with the right to avoid shameful demands.

resistance by the punished individual alone becomes a legitimate option. At this point, the sovereign's ability to employ the sword of the commonwealth is at risk, but the subject's intention is primarily to protect his own life rather than to threaten the commonwealth's existence. Throughout their resistance, subjects are only permitted to engage in activity which is a direct, proportional and necessary response to the situation in which they find themselves. The starving man may steal food to address his physical need, but there is no indication that he has the right to steal money, even if poverty is the condition that underpins his inability to sustain himself. Hobbes thus appears to regard the underlying causes of insecurity to be the responsibility of the sovereign, rather than the correct domain of the true liberties. Thus in the case of the commotion discussed above, the public protest is simply, according to Hobbes, an illegitimate response to need, as it does not directly address the situation at hand.<sup>702</sup> The aims of such an event are too far removed from the specific insecurity which is its cause: while Hobbes would permit large scale theft, collective violent action is neither proportionate to the experience of those involved, nor is it likely to result in a situation of greater security.

There is a second problem with constructing, from the true liberties of subjects, a right to rebel from necessity. It is doubtful that those who experience lives that are fundamentally and consistently insecure, and who therefore come to the conclusion that effecting a change in government is their only option, should be regarded as subjects at all. Steinberger has suggested that, for people in such a situation, the state has essentially ceased to exist as a legitimate source of political obligation.<sup>703</sup> Hobbes

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<sup>702</sup>But see Frost 2004, p. 35 for an alternative reading which links the sovereign's duty to ensure general welfare with a right to 'to break the peace with the aim of rectifying a situation in which living itself is impossible.' Frost here suggests that not only is direct self-preservation allowed by the true liberties, but so too is a defensive attempt 'reshuffle the political order.'

<sup>703</sup>Steinberger 2002, p. 858 claims that 'for Hobbes the bonds of the commonwealth dissolve when it fails to achieve the ends for which it was created.'



himself appears to support this position when he writes that 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.’<sup>704</sup> In considering rebellion, we might wish to include considerations of sovereign choice as well as ability. An individual or group who feel that they are being actively neglected or persecuted despite adhering to the commonwealth’s laws might well feel that they no longer owe the sovereign any obligation whatsoever. Hobbes’s assertion that ‘he that wants protection, may seek it anywhere’ indicates that this is a correct interpretation.<sup>705</sup> If we accept this reading, then there is no ‘right’ to rebel as such. There is merely a right for individuals who are no longer part of the state to act as they wish to best secure their interests. In such a scenario, it is questionable that initiating a war with what is presumably a much larger state would necessarily be the best course of action. But if an individual or group were to consider this their best chance to ensure their security, this is not a problem for Hobbesian theory, as such individuals are already outside of the state.

This reading, as Bramhall notes, is indeed built upon the ‘discretion’ of subjects as to their security. The sovereign may consider these individuals members of the commonwealth, despite subjects’ own judgement of its persistent inability to provide for their security. However, faced with subjects’ own determination, this claim is irrelevant. Once we recognise this, it becomes clear, however, is that in expressing, through rebellion, their belief that the state has failed to provide for their security, subjects are also indicating that they no longer feel that they are part of the commonwealth. An action such as resisting punishment or stealing food is an expression of temporary insecurity which might well, in the future, be alleviated by

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<sup>704</sup> Hobbes 2012, p. 344.

<sup>705</sup> Hobbes 2012, p. 518.

the state. But these rebels are instead suggesting that it is the state itself, rather than contingent conditions, which they find oppressive. They are thus enemies facing the commonwealth, and any discussion of the true rights of subjects becomes irrelevant.

While the principles of self-preservation do not allow for a constructed right to rebel from necessity, the assertion in Chapter 21 of *Leviathan* that ‘a great many men together’ who ‘have already resisted the Sovereign Power unjustly, or committed some Capitall crime, for which every one of them expecteth death’ may ‘joyn together, and assist, and defend one another’<sup>706</sup> has been taken as providing exactly this right.

In his description of such a right, Hobbes does not label this act ‘rebellion’, an interesting choice given his willingness to use the term elsewhere when discussing attempts to overthrow the state. However, the passage has certainly suggested the idea both to Hobbes’s contemporaries and to some modern readers. It was specifically in response to this coordinated resistance to the state that Bramhall asked ‘Why should we not change the name of *Leviathan* into the *Rebells catechism*? ...T. H. alloweth Rebels and conspirators to make good their unlawfull attempts by armes: was there ever such a trumpetter of rebellion heard of before?’<sup>707</sup> It was also in response to this particular right that Clarendon argued that Hobbes provides ‘very childish security...for his Soverign against this Rebellion.’<sup>708</sup> More recently, Sreedhar has argued that ‘Not only do participants in an ongoing rebellion nicely fit this description [of rebels], but the original act of resistance was also a collective act of the right sort (‘a great many men together’ committed a certain act, namely, ‘resisting the sovereign

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<sup>706</sup> Hobbes 2012, p. 340.

<sup>707</sup> Bramhall 1995, p. 145.

<sup>708</sup> Hyde 1995, p. 87. See also Cumberland 2005, p. 724 and Filmer 1995, p. 11 for criticism of this right. Filmer notes that Hobbes’s description of the right appears to contradict his earlier statement, that subjects do not have the right to defend guilty men, and suggests that the right to do precisely this undermines the sovereign’s power to punish criminals.

power.')<sup>709</sup> Therefore, for her, this passage represents 'Hobbes taking the right of self-defence to its logical conclusion, explicitly acknowledging that it permits engaging in collective resistance to the sovereign power.'<sup>710</sup>

Because of such arguments, it is important to analyse this particular right in more depth. The passage appears to refer to two distinct groups to whom the right to mutual defence applies: those who are already rebels, and those who are convicted criminals fleeing or resisting punishment, but who are not yet considered rebels. Some of Hobbes' contemporaries, such as William Lucy, argued for Hobbes's implicit endorsement of the Parliamentary cause on the basis of this passage, so I will take the case of the rebels first, those men who 'have already resisted the Sovereign Power.' If these collectively-organised men are indeed rebels, it is difficult to see why their 'right' to resist the sovereign is listed as a true liberty pertaining to subjects, as this term in no way applies to them. By resisting the sovereign power unjustly, they have already placed themselves in the category of 'enemy' and as such are in a state of war with the state. For these to continue in their attempt to resist or overthrow the state is a logical response to being outside the commonwealth. Given their legal status, there is no advantage to Hobbes in considering any further action a 'new unjust act.' As a faction in the state of nature, they have no covenant with the members of the commonwealth, and so injustice towards the sovereign is a theoretical impossibility.

However, the second group, those individuals who expect death as a result of their crimes, are in a different position. They are engaging in a legitimate right to resist; the question is whether this right extends to mutual aid and, if so, if this act would constitute a rebellion. As we saw above, subjects' resistance is only to be

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<sup>709</sup> Sreedhar 2010, p. 138.

<sup>710</sup> Sreedhar 2010, p. 139

considered legitimate when it directly responds to the risk at hand, and in examining this right, we find important restrictions built into it. If we return to the definition of rebellion, we see that, unlike the group of rebels, our hypothetical gang of murderers has not overthrown all obligation to the state, merely that which involves the obligation not to come to the defence of others against the sword of the commonwealth.<sup>711</sup> Just as a man might lie to the sovereign and his agents to avoid self-incrimination but not on unrelated matters, these criminals have only decided to come to the defence of a narrow group: those who will also, directly and at that moment, come to their defence. Moreover, these individuals must *also* be facing execution for the right to engage in mutual defence. Such a right, especially as it only lasts as long as the risk from the state continues, does not appear to meet the definition of rebellion provided by Hobbes, which is the casting off of all obligations and agreements. This is a potentially dangerous right of resistance which has been left to subjects, but its scope is, by definition, limited to individuals who the state had already assumed it would have to defend itself against. Such an act does not seem to constitute either a rebellion in Hobbes's sense, or in a wider one.

Moreover, Hobbes has provided a further hint that neither the sovereign nor the resisting criminals should regard such a group as an enemy faction. In concluding his comments on this particular right, he notes that 'the offer of pardon taketh from them, to whom it is offered, the plea of self-defence, and maketh their perseverance in assisting, or defending, the rest, unlawfull.'<sup>712</sup> The sovereign's pardon would only make continued resistance unlawful if these individuals are in fact subjects. The mere offer of pardon would not, if they were enemies of the commonwealth, create a bond

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<sup>711</sup> In such cases of mutual protection, the immediacy of the benefit legitimises interference with the sovereign's right of punishment. We can therefore distinguish between the right outlined in Chapter 21, and the example of the son wishing to protect his condemned father, discussed above.

<sup>712</sup> Hobbes 2012, p. 340.

of obligation. As Hobbes repeatedly notes throughout his work, such a relationship is only created by the making of a covenant, and cannot be made simply through capturing or overpowering. A pardon is not a covenant, and so the obligation to lay down arms when it is offered is something which has existed throughout the period of resistance. This right, taken by Bramhall and Sreedhar to be the ultimate exemplar of an unbounded right in the commonwealth, is in fact a typical case in which resistance rights are to exercised in relation to, and hence are limited by, the subject's treatment by his sovereign.

## Conclusion

At the beginning of this thesis I argued that a fuller understanding of Hobbes's criminology is necessary for us to properly grasp his political philosophy. I should like to conclude by suggesting that, once we have accepted the coherence of this element in his thought, we can better appreciate the nature of his political project more broadly, and recognise that his discussion also has important implications for the history of the philosophy of punishment.

In my Introduction I indicated that the philosophy of punishment in contractarian political theory is beset by two problems: how to classify those who break the social contract, and how to justify the infliction of harm upon those who have created the state through their consent. Hobbes's solution was to limit both crime and punishment to a legal sphere governed by the rule of law rather than by the political power of the authorised sovereign. This, alongside his definition of these concepts according to natural law, means that he is able to limit the sovereign's power against subjects if the sovereign wishes his actions to be understood as punishments for crimes. It is these limitations that give Hobbes's theory of punishment its unique attributes.

In particular, as we saw, the natural law prevents individuals from alienating their right to self-preservation, and hence they cannot 'own' the punishment they experience. Consequently, we find a retained natural right among subjects to resist the sovereign's actions, even though they continue to acknowledge the sovereign as their authorised ruler. Punishment is therefore best understood as a practice conforming to specific norms rather than an authorised sovereign right.

Hobbes's statements at the beginning of Chapter 28 of *Leviathan* indicate that he was not only fully aware of the complexity of the task he had set for himself, but

also of the fact that the right to punish was already the topic of much consideration. As we have seen, alongside the development of seventeenth century state theory, debates flourished over the purpose of punishment, the origins of the right, and the rights of those accused of breaking the social contract. Hobbes's innovation was to insist that as a purely civil institution, the nature of punishment will necessarily be determined by the social contract upon which the state is founded. A Hobbesian theory of the state which prioritises the commonwealth's role in ensuring individual security means that punished individuals cannot be expected to will or acquiesce to their own punishment. This insight affects both the nature of punishment's legitimacy and its purpose.

This realisation regarding the interdependence of theories of the state and of punishment was one that subsequent theorists were eager to employ in their own reconceptualizations of the nature of the punishment right. Looking forward to the Classical School of criminology, we find Cesare Beccaria arguing that the death penalty can never be employed by governments precisely because man, in consenting to the creation of the state, could not have 'willingly given up to others the authority to kill him.'<sup>713</sup> The 'right to punish' is created by men 'surrender[ing] to the public repository...the smallest possible portion consistent with persuading others to defend' them, and so the limits of the right are defined by the nature of the social contract.<sup>714</sup>

It is frequently asserted or implied that it is only in the eighteenth century that we see the beginnings of serious philosophical reflection on these problems of punishment. One reason is that modern penal theory, as we saw in Chapter 4, continues

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<sup>713</sup> Beccaria 1995, p. 66.

<sup>714</sup> Beccaria 1995, p. 11. Beccaria mentions Hobbes once in *On Crimes and Punishments*; like Rousseau, however, he does so deny the validity of Hobbes's account of the state of nature. Beccaria 1995, p. 5. In arguing that Beccaria employs Hobbes's insight, I am not intimating that we can refer to a specific instance of influence. I am rather suggesting that we can see a set of shared concerns and approaches.

to be framed by reference to Enlightenment theories of deterrence or retribution. Another is the related focus on a perceived humanitarian shift in attitudes towards criminals which some find in Enlightenment narratives.<sup>715</sup> The result of these two impulses is that it is not only the practice of punishment in the early modern period that is frequently understood as fundamentally alien to modern conceptions. The theory of the period is also assumed to be largely irrelevant to later developments in the philosophy of punishment.

In questioning these assumptions, I am not, however, arguing that Hobbes should be primarily understood as a liberal precursor to Enlightenment theories. It is important to emphasise this because it is precisely his theory of crime and punishment which is frequently employed to present Hobbes as a liberal or proto-liberal figure.<sup>716</sup> I have already given reasons, in Chapters 3 and 4, for doubting this characterisation of Hobbes's theory. I should like to end by noting a further reason for regarding it as a misreading to treat Hobbes in this way.

Those who locate a liberal element in Hobbes's political theory are often careful to clarify that he should not be understood as liberal in a contemporary sense. Vickie Sullivan, for instance, notes that 'although Hobbes is not a liberal himself, elements of his thought point in a liberal direction.'<sup>717</sup> Alan Ryan suggests that, although 'Hobbes was strenuously opposed to many of the things that define liberalism as a political theory', we should nonetheless recognise that 'many things about his political theory would sustain a form of liberalism, and he held many of the attitudes

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<sup>715</sup> See for example Venturi 1971, pp. 99-106; Maestro 1973, pp. 3-34; Jenkins 1984; Brown and Esbensen 1988; Hirst 1994, p. 274; Fish 2008, p. 63; Israel 2011, p. 340. In the wake of Michel Foucault's *Discipline and Punish*, a number of scholars have explored the ways in which penal reform was motivated by the desire to control and reform the criminal personality, and not simply by humanitarian concerns. Nonetheless, such studies also take the eighteenth century, with its increasing emphasis on penal incarceration, as a starting point. Foucault 1991; Ignatieff 1981.

<sup>716</sup> See for example Cattaneo 1965, p. 297; Green 1993, p. 69; Ryan 1996, p. 233.

<sup>717</sup> Sullivan 2004, p. 105.



typical of [its] later defenders.’<sup>718</sup> Ryan goes so far as to argue that it ‘is easy to feel that as long as nobody talked about their ‘rights,’ a Hobbesian state would be indistinguishable from a liberal constitutional regime.’<sup>719</sup> According to those who read Hobbes in this way, these liberal tendencies are reflected in politics within the polity, and hence by the relationship between the sovereign and his subjects. Sullivan’s assertion is based on two related aspects of Hobbes’s theory: that ‘government must be understood as the instrument of the people themselves’ and the existence of a retained right to self-defence.<sup>720</sup> For Ryan, Hobbes’s treatment of criminals is the key example for his assertion that ‘a Hobbesian sovereign who observes these [natural law] requirements will go a surprisingly long way toward recognising everything that human-rights advocates demand of governments.’<sup>721</sup>

According to such readings, Hobbes’s rejection of the *ius gentium* is largely immaterial to how we should understand political rights and relations within the commonwealth. However, an examination of Hobbes’s criminology points to an important role played by the boundary between the state and the international sphere in both effecting and affecting the state-subject relationship. Ioannis Evrigenis has suggested that in Hobbes’s theory punishment acts as a constant reminder to citizens of the dangers of the state of nature, reinforcing their commitment to the commonwealth.<sup>722</sup> I would argue that this mechanism exists, but that it is the risk of losing citizenship, rather than being punished, which effects this loyalty. According to

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<sup>718</sup> Ryan 1996, p. 237.

<sup>719</sup> Ryan 2012, p. 182. See on the other hand Gutmann 1980, p. 5 who states that ‘Hobbes is the most prominent example of a liberal theorist who, taking the liberal method of aggregating individual interests as one of his points of departure, does not arrive at the liberal state.’

<sup>720</sup> Sullivan 2004, p. 105.

<sup>721</sup> Ryan 2012, pp. 178-9. A third aspect of Hobbes’s theory often marshalled for such arguments is Hobbes’s refusal to allow his sovereign direct jurisdiction over his subjects’ innermost beliefs, a concession which, to some, points to Hobbes as an advocate of religious toleration. See Owen 2005 on this tendency in the literature.

<sup>722</sup> Evrigenis 2008, p. 125.

Hobbes, the circumstances under which one can be labelled a rebel are fairly broad, with the sovereign as the only figure capable of making such a determination. Sovereigns can not only act against their enemies pre-emptively, they can also relegate citizens to enemy status by the same standard. Stephen Holmes has suggested that the ‘Hobbesian ‘enemy’ is not simply chosen by the sovereign without any reference to a norm...the enemy, for Hobbes, is precisely the individual who violates the fifth law of nature, namely, *compleasance*’.<sup>723</sup> However, individuals do not to have actually break this law of nature for the sovereign to rightfully expel them; all that is required is the belief that they have rejected the state’s authority.

In the context of this sovereign right, Hobbes’s account of the international sphere becomes all the more striking. By prioritising the state as the only source of justice and protection, Hobbes is able to present his readers with a theory of crime and punishment which strikes readers as ‘liberal’ precisely because it is only designed to address those whom the sovereign has already decided deserve such treatment. This model of punishment, based on due process and citizenship, is possible, Hobbes implies, precisely because the sovereign retains the political power to expel into a deeply insecure international arena those who have not simply broken, but repudiated the social contract. Good citizens, in this theory, are not simply defined in opposition to criminals, but also to those rebels who are removed from the commonwealth altogether. Hobbes’s theory of crime and punishment is thus set against, and derives its authority from, his presentation of life outside the commonwealth, and the sovereign’s ultimate authority to determine who is in and who is out.

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<sup>723</sup> Holmes 2010, p. 385.

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