

## On The Content and Context of the Right to Punish in Hobbes's *Leviathan*

### I

Chapter XXVIII of *Leviathan – Of Punishments, and Rewards* – has no precedent in Hobbes's earlier works and has attracted little scholarly interest.<sup>1</sup> This is surprising, as the right to punish occupies a central place in Hobbes's project of making consent the origin and foundation of all legitimate political power. Specifically, the sovereign must possess not simply the power, but also the right, to punish; if no such right is established then (as one commentator has dramatically alleged) there can be "no sovereign, hence no commonwealth" and the mighty Leviathan will be "still-born".<sup>2</sup> Indeed, of the small number of commentators who have examined Hobbes's account of punishment most have accused him of falling into contradiction when attempting to establish a right to punish,<sup>3</sup> with the more vociferous proclaiming his reasoning a "shambles"<sup>4</sup> that offers "no solution at all".<sup>5</sup> Even those who refrain from accusations of crass error or confusion suggest that Hobbes's account cannot in the last instance be sustained, and is made to work only by conceptual sleight of hand.<sup>6</sup>

By contrast, this essay seeks to establish the consistency of Hobbes's account of the right to punish. This is done by examining the theory of authorisation which likewise has no precedent in Hobbes's earlier work, but upon which the right to punish depends. The logic and consistency of Hobbes's account established, I then locate it in the intellectual context within which it arose. This serves to highlight intimate (but easily overlooked) connections between punishment and the possibility of collective political resistance. Finally, what Hobbes's says in Chapter XXVIII *after* establishing the right to punish is considered, something which has attracted little (if any) critical

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<sup>1</sup> For a discussion of the brief treatments of punishment in *The Elements of Law* and *De Cive* see Zarka 1990, pp.183-7. Compare *Leviathan* XXVIII with the scattered remarks in Hobbes 1994 (e.g. p.163); Hobbes 1998 treats punishment on just two occasions (p.49, pp.61-2).

<sup>2</sup> Shrock 1991, p.887.

<sup>3</sup> Such claims are common to Norrie 1984, Schrock 1991, Heyd 1991 and Ristroph 2008. Not all of these commentators, however, are alert to the dramatic upshot of the alleged failure of Hobbes to establish the right to punish, namely the failure of his wider political project. An early discussion of punishment is offered by Cattaneo 1965 but is of little interest to the contemporary Hobbes scholar.

<sup>4</sup> Schrock 1991, p.873.

<sup>5</sup> Norrie 1984, p.308.

<sup>6</sup> See especially Zarka 1990, followed closely by Hüning 2007.

attention thus far.

Although this essay therefore consists of three distinct sections it is nonetheless united by two connected claims: that *Leviathan* is the definitive statement of Hobbes's political thought, and that Hobbes's project of grounding legitimate power in the consent of the ruled cannot be regarded as complete until the sovereign right to punish is established. In turn this urges against a strain of interpretation, associated especially with Richard Tuck, which views *Leviathan* as providing little more than a "restatement" of Hobbes's ideas, being "substantially the same as the earlier versions".<sup>7</sup> Quentin Skinner has already counselled against this view, arguing that *Leviathan* represents a re-embracing of classical rhetorical techniques purposefully abandoned in the *Elements of Law* and *De Cive*,<sup>8</sup> whilst more recently highlighting that Hobbes's conception of liberty undergoes significant changes between these works.<sup>9</sup> The underlying thesis offered here is thus different, but complementary, to Skinner's: that whatever the virtues of turning to *De Cive* over *Leviathan* for certain historical purposes, it is nonetheless the latter treatise which constitutes the most developed and complete version of Hobbes's political philosophy.<sup>10</sup>

## II

Although Hobbes defines punishment at the outset of Chapter XXVIII, this definition rests upon earlier arguments regarding the nature of civil law and crime. In Chapter XXVI we learn that:

*CIVILL LAW, Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary, to the Rule.*<sup>11</sup>

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<sup>7</sup> Tuck 1989, p.28.

<sup>8</sup> Skinner 1996, pp.4-6.

<sup>9</sup> Skinner 2008, pp.xv-xvi.

<sup>10</sup> Tuck 2006, p.172 argues that *De Cive*, not *Leviathan*, was the work most circulated and read amongst continental thinkers in the 17<sup>th</sup> and 18<sup>th</sup> centuries, indicating that the earlier work should be used in assessing Hobbes's impact and influence in such contexts. I here consider the Latin *Leviathan* as a restatement of the English version, rather than a fourth and separate articulation of the political theory.

<sup>11</sup> Hobbes 2008, p.183. Emphasis in original.

Hobbes goes on to claim that “The Law of Nature, and the Civill Law, contain each other, and are of equal extent”. However, in the state of nature lacking sovereign power the laws of nature “are not properly Lawes, but qualities that dispose men to peace, and to obedience.” Only when a commonwealth is established “are they actually Lawes...being then the commands of the Commonwealth; and therefore also Civill Lawes: for it is the Sovereign Power that obliges men to obey them”. To make laws binding “there is need of the Ordinances of Sovereign Power, and Punishments to be ordained for such as shall break them; which Ordinances are therefore part of the Civill Law”.<sup>12</sup> For Hobbes civil law presupposes sovereign power, but such laws can only be made binding when a power of punishing is held by the sovereign. Hence punishment is a correlate to civil law, yet both presuppose sovereign power, which is necessary if men are to escape the brutish state of nature. This conceptual ordering is highly important for Hobbes’s account of the right to punish, and is developed in significant ways.

In particular we must consider the distinction between crime and sin drawn in Chapter XXVIII:

“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>13</sup>

Although sin requires mere intention, crime requires actual performance and as a result “where law ceaseth, sin ceaseth”. Yet because “the Law of Nature is eternal...all facts contrary to moral virtue, can never cease to be a sin”.<sup>14</sup> The possibility of sin is therefore ubiquitous. What of crime? This applies only to the transgression of positive law, which Hobbes identifies with *civil* law only (the laws of nature being not properly laws but mere qualities disposing men to peace). Hence “the Civill Law ceasing, Crimes cease: for there being no other Law remaining, but that of Nature, there is no place for Accusation; every man being his own Judge”.<sup>15</sup> Accordingly “when the Sovereign Power ceaseth,

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<sup>12</sup> Hobbes 2008, p.185.

<sup>13</sup> Hobbes 2008, p.201.

<sup>14</sup> Hobbes 2008, p.202.

<sup>15</sup> Hobbes 2008, p.202.

Crime also ceaseth".<sup>16</sup> Crime is committed only when an actual civil law has been enacted, promulgated and transgressed; civil law exists only when there is sovereign power.

Having established that a power to punish is required to make civil law effective,<sup>17</sup> Hobbes is ready to supply his definition of punishment in Chapter XXVIII:

A PUNISHMENT, 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>18</sup>

Hobbes's dictum that punishment is an evil inflicted specifically by "public authority" is thus not introduced arbitrarily or by *fiat*, but rests upon his earlier insistence that positive law presupposes the existence of sovereign power, a conceptual precondition for crime. Correspondingly, Hobbes confirms that there are no punishments in the state of nature but only "private revenges" that cannot "properly be stiled Punishments; because they proceed not from publique Authority".<sup>19</sup> Punishment is therefore conceptually tied, from the outset, to the existence and possession of sovereign power.

Yet Hobbes immediately alerts his readers to a matter of "much importance": "by what door the Right, or Authority of Punishing in any case, came in".<sup>20</sup> This is a particularly pressing question, arising out of the distinction between the mere power to punish and a *right* to do so. For on the one hand so long as sovereign power exists and civil laws are promulgated all that is required to make civil laws binding is the ability to use coercive force against transgressors. However, Hobbes's political project has a more ambitious theoretical underpinning than merely enumerating the conditions of *de facto* political organisation. The central contention of *Leviathan* is that all legitimate sovereign power is based on the consent of the ruled, despite such power being necessarily absolute and undivided. Thus mere (*de facto*) power to punish is not enough: Hobbes must show that the

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<sup>16</sup> Hobbes 2008, p.202.

<sup>17</sup> See footnote 12.

<sup>18</sup> Hobbes 2008, p.214. Emphasis in original.

<sup>19</sup> Hobbes 2008, pp.214-15.

<sup>20</sup> Hobbes 2008, p.214.

sovereign, consented to by subjects, possess the *right* to use coercive force when punishing law-breakers.<sup>21</sup>

Hobbes's task is both conditioned and aided by his novel understanding of consent. In particular, his innovation of understanding freedom to be the mere absence of physical restraint enables him to argue that even covenants made in extreme fear – or what we might now call duress – are valid.<sup>22</sup> Accordingly, submission given even at the point of a sword is deemed an act of consent. What makes a conqueror sovereign is not the victory itself, but the fact that the vanquished “cometh in, and Submitteth to the victor”.<sup>23</sup> Importantly, Hobbes insists that such sword-point consent is on an equal footing with mutual agreement amongst men to submit themselves to a sovereign erected by “institution”. Indeed sovereigns by both “institution” and “dominion” possess exactly the same rights, regardless of their genesis.<sup>24</sup>

Yet even employing what Skinner has appropriately denoted Hobbes's “expansive view of consent”, the question remains of how a right to inflict coercive force on lawbreakers can be established.<sup>25</sup> Hobbes's solution is supplied at the start of Chapter XXVIII:

For by that which has been said before, no man is supposed bound by Covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person. In the making of a Common-wealth, every man giveth away the right of defending another; but not of defending himselfe. Also he obligeth himselfe, to assist him that hath the Sovereignty, in the Punishing of another, but of himself not. But to covenant to assist the Sovereign, in doing hurt to another, unless he that so covenanteth have a right to doe it himself, is not to give him a Right to Punish. 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. But I have also shewed formerly, that before the Institution of Common-wealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing,

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<sup>21</sup> Due to Hobbes's expansive view of consent, the right and the power to punish may rarely come apart in practice. However they are at least conceptually distinct and must be treated accordingly. The issues of *de facto* possession of power and a right to wield such power quickly shade over into the wider issue of Hobbes's theory of obligation, which cannot be considered here. See Hoekstra 2004 for a comprehensive and illuminating account.

<sup>22</sup> Hobbes 2008, p.97, 138.

<sup>23</sup> Hobbes 2008, p.141.

<sup>24</sup> Hobbes 2008, pp.138-9, but also Chapter XX, XXI and *A Review and Conclusion* generally.

<sup>25</sup> Skinner 2008, p.203. See Hoekstra 2004 for an excellent discussion of consent in Hobbes's complex account of political obligation.

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. For the Subjects did not give the Sovereign that right, but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so it was not given, but left to him, and to him only; 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>26</sup>

This crucial passage has, however, caused great confusion and consternation in what commentary it has attracted, and detailed clarification of Hobbes’s account is therefore required. As we have seen, punishment exists for Hobbes only when positive laws have been promulgated by sovereign power. Given that there can be no punishment in the state of nature, the “door” by which the right to punish “comes in” can open only when sovereign power is established; there can be no pre-societal right to punish which subjects somehow “gift” to the sovereign. Yet for sovereign power to be such it must be able to keep men in awe. To this end, Hobbes explains, subjects have made not just an “artificial man”<sup>27</sup> but “artificial chains, called civil laws, which they themselves, by mutual covenants, have fastened at one end to the lips of that man, or assembly, to whom they have given the sovereign power, and at the other to their own ears”.<sup>28</sup> And although the bonds imposed by law are “in their own nature but weak” they “may nevertheless be made to hold, by the danger, though not by the difficulty of breaking them”.<sup>29</sup>

It is essential to note that what is now being considered is a different (though intimately connected) argument from that considered in reference to Chapters XXVI and XXVII above. There Hobbes established that civil law presupposes sovereign power, and that consequently punishment is predicated upon the possession of such power. Here we are considering Hobbes’s account of how a *right* to punish exists and arises, and of crucial importance is the insistence that the “artificial chains” of civil law are enacted by “mutual covenants”. That is, the establishment of civil law is a

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<sup>26</sup> Hobbes 2008, p.214.

<sup>27</sup> Throughout the work Hobbes refers to the Leviathan as an “artificial man” as apparently distinct from the “artificial person” of the sovereign, who is the representative of, and authorised actor for, the subjects. See Hobbes 2008, p.9, p.135, 147, 175. For contrasting views on the relationship between the sovereign and the Leviathan see Skinner 2002a and Runciman 2000.

<sup>28</sup> Hobbes 2008, p.147.

<sup>29</sup> Hobbes 2008, p.147.

product of subjects *authorising* their sovereign.

The theory of authorisation given in Chapter XVI of *Leviathan* – having no precedent in *The Elements* or *De Cive* – ranks as possibly the most important conceptual innovation in Hobbes’s political theory, with particular importance for the right to punish.<sup>30</sup> Hobbes defines a “person” as “he, whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.”<sup>31</sup> A distinction is then drawn between “natural persons” whose words and actions are “considered as [their] owne”, and “Feigned or Artificiall” persons who represent the words or actions of another.<sup>32</sup> Hobbes goes on to state that “Of Persons Artificial, some have their words and actions *Owned* by those whom they represent. And then the Person is the *Actor*; and he that owneth his words and actions, is the *Author*: In which case the Actor acteth by Authority”. Accordingly “it followeth, that when the Actor maketh a Covenant by Authority, he bindeth the Author no lesse than if he had made it himself; and no lesse subjecteth him to all the consequences of the same”.<sup>33</sup>

Hobbes’s sovereign, whether in practice a monarch or assembly, is a single “artificial person” who acts as the unifying representative of what would otherwise be a mere multitude of individuals, unified only by the one person of the authorised representative.<sup>34</sup> This means that each individual authorises the sovereign as their actor and representative. And as Hobbes’s makes clear, sovereigns who acquire their title by conquest are no less authorised by subjects than those erected by “institution” – not least because in both cases subjects consent (and on Hobbes’s “expansive” understanding, consent equally) to sovereign power being erected over them.<sup>35</sup> This in turn allows for a further dramatic and essential claim: that subjects “have authorized all [the sovereign’s]

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<sup>30</sup> For the best discussion of Hobbes’s theory of authorisation see Skinner 2007.

<sup>31</sup> Hobbes 2008, p.111. Emphasis in original.

<sup>32</sup> Hobbes 2008, p.111. Emphasis in original.

<sup>33</sup> Hobbes 2008, p.112. Emphasis in original.

<sup>34</sup> Hobbes 2008, p.114.

<sup>35</sup> Hobbes 2008, p.138, 142, 148.

actions, and, in bestowing the sovereign power, made them their own".<sup>36</sup>

We may now put the pieces together. The Hobbesian sovereign is consented-to by its subjects, and is the actor authorised by them. For sovereign power to be such it must wield the public sword, enforcing as well as enacting laws so as to keep men in awe and thereby secure peace. Having the power to punish is a concomitant part of civil law's being meaningful; as Hobbes tells us, "Of all Passions, that which enclineth men least to break the Lawes is Fear. Nay, (excepting some generous natures,) it is the onely thing".<sup>37</sup> But a mere power to punish is not the same as a right to, and only by possessing the latter can a Hobbesian sovereign properly be considered such; without a *right* to punish the sovereign cannot wield legitimate coercive power grounded in the consent of the ruled. However subjects authorise their sovereign, and in the process must necessarily authorise that sovereign to enforce as well as enact civil laws. Insofar as subjects will the end – to live under sovereign power and escape the state of nature – they must therefore will the means: that the sovereign have the "Right, or Authority" to enforce civil laws. An authorised sovereign, therefore, *just is* a sovereign with the right to punish, and the "door" by which the right of punish enters is the same one through which the sovereign passes; the right to punish enters not just when, but precisely because, the sovereign does.

To complete his account, however, Hobbes must still explain how the sovereign came to have a right to punish – to lay "violent hands" – that could not exist prior to the sovereign's inception, and was not "gifted" from subjects to sovereign. His solution is ingenious: an appeal to the right of nature as the "foundation" of punishment. Recall that the right of nature consists of "the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature, that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement and Reason, hee shall conceive to be the aptest means thereunto".<sup>38</sup> In other words, the right of nature is but a blameless liberty of an individual to do whatever is deemed necessary to survive, entailing

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<sup>36</sup> Hobbes 2008, p.172.

<sup>37</sup> Hobbes 2008, p.206.

<sup>38</sup> Hobbes 2008, p.91.

no corresponding duties incumbent upon the holder.<sup>39</sup> This blameless liberty is of course purposefully curtailed – though never fully renounced – in society. Indeed it is the very point of civil law to achieve this curtailment, and when sovereign power is erected subjects renounce the immediate exercise of their rights of nature and instead consent to live under the public sword.<sup>40</sup> Yet because the sovereign remains *ex hypothesi* above the laws<sup>41</sup> the sovereign *eo ipso* retains the right of nature, which is after all nothing but a blameless liberty possessed by the relevant agent. The only difference is that after the erection of sovereign power this blameless liberty is exercised not for the preservation of a single individual, but to promote the protection, peace and commodious living of all. Just as the individual's right of nature in the state of nature includes the use of violence, the extended right of nature of the authorised sovereign includes whatever is deemed necessary to enforce civil laws, including even the use of "violent hands" to inflict "Evill" upon law-breakers. Thus the right to punish – despite being impossible in the state of nature, and thereby never gifted by subjects to a sovereign – nonetheless has its foundation in the right of nature, whilst remaining dependent on the inception of an authorised sovereign.

Hobbes's account thus turns on a sort of conceptual alchemy, made to work by a combination of the theory of authorisation and the right of nature. Yet the consistency of this solution has been challenged. In particular Yves Charles Zarka – followed closely by Dieter Hüning – has alleged that Hobbes's alchemy must fail. Zarka argues that the right to punish cannot be established "a priori" (i.e. as described above) and can only be smuggled-in "a posteriori", justified on grounds of necessity which ultimately fall short of the demands made by Hobbes's project of founding legitimate power in consent.<sup>42</sup> However Zarka's concerns about Hobbes's "a priori" establishment of the right to punish can perhaps be allayed. Against his concern that Hobbes abandons an appeal to authorisation when establishing the door by which the right to punish enters, we can now see that authorisation in

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<sup>39</sup> See especially Hobbes 2008, p.91; cf. Hoekstra 2004 p.64.

<sup>40</sup> Hobbes 2008, pp.91-2.

<sup>41</sup> Hobbes 2008 p.184. "The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes".

<sup>42</sup> Zarka 1990, pp.183-96.

fact remains at the heart of Hobbes's account.<sup>43</sup> Certainly Hobbes distances his discussion of authorisation in Chapter XVI (and the consequences this has for the rights of sovereigns developed and expounded in Chapter XVIII) from the sustained discussion of punishment in Chapter XXVIII. But as we shall see he arguably does this for reasons which are quite deliberate and easily-understood. Zarka is also troubled by the belief that only the *natural* person of the sovereign may wield the right of nature, and not the *artificial* representative person who is authorised to punish.<sup>44</sup> But to this the reply can be made that for Hobbes a person is simply something that speaks or acts, either for itself (a natural person) or another (an artificial person). There is no inherent reason why an artificial person cannot possess the blameless liberty of the right of nature.

Both Zarka and Hüning are also keen to enlist the following passage of Pufendorf's against Hobbes:<sup>45</sup>

[Hobbes] in his *Leviathan*, chap xxviii, lays down that the right held by a state to punish does not arise from the concession of citizens, but that the foundation of this right is based upon that other, which, before the establishment of a state, belonged to every man, namely, to do whatever seemed to him necessary for self-preservation. And that therefore this right was not given but left to the state, which, however, it may use at its own pleasure, supposing it has the strength, in order to preserve all its citizens. *To this the reply can be made that the right to exact punishment differs from that of self-preservation, and that since the former is exercised over subjects, it is impossible to conceive how it already existed in a state of nature, where no man is subject to another.*<sup>46</sup>

Yet it is not clear why this passage should be read as a substantive complaint against Hobbes (as Hüning in particular presents it). The claim that "the right to exact punishment differs from that of self-preservation" is, after all, perfectly acceptable to Hobbes; the former is dependent upon the creation of an authorised sovereign, but the latter isn't. As for the claim that it is "impossible to conceive" how the right to punish somehow already existed in the state of nature, this is misleading. Hobbes does not claim that the right to punish exists in the state of nature; at most its *foundation* (the blameless liberty of the right of nature) is located there. As we have seen Hobbes makes clear

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<sup>43</sup> Zarka 1990, p.190.

<sup>44</sup> Zarka 1990, p.191.

<sup>45</sup> Zarka 1990, p.191; Hüning, 2007 p.232.

<sup>46</sup> Pufendorf 1934, p.1160. Emphasis added.

that punishment, like crime, is conceptually dependent upon the existence of sovereign power. This point is reinforced twice in Chapter XXVIII when Hobbes states that “revenges” and “injuries of private men” do not constitute punishment because they “proceed not from publique Authority”, and that “it is of the nature of Punishment, to be inflicted by publique Authority, which is the Authority only of the Representative itself”.<sup>47</sup> On Hobbes’s conception, punishment *ex hypothesi* cannot exist in the state of nature, even if its “foundation” is the right of nature held by all. Thus it is misleading to claim the Hobbes posits a pre-societal right of punishing.

In fact, although these stand as fair replies to Zarka and Hüning’s deployment of this specific passage, Pufendorf himself is not vulnerable to such straightforward retorts. For in the immediately preceding paragraph to that quoted by Zarka and Hüning, Pufendorf states:

just as in the case of natural substances there may result, from the mixing and balancing of several simple substances, a compound in which are to be found qualities not observable in any of the ingredients of the mixture, so moral bodies as well, composed of several men, can possess some right, consequent upon their union, which was not formally inherent in any of the individual members, which right, also arising from such a banding together, is exercised by the governors of those bodies.<sup>48</sup>

To which he adds: “In the same manner there can exist in the head of a moral body the faculty of restraining each member by punishments, which faculty, however, was not before that time in the individuals”.<sup>49</sup> This is of considerable importance. Pufendorf is appealing to a natural law tradition that pre-dates Hobbes, which holds that by a political concord of men powers and rights may arise which were absent or impossible when considering only a mere multitude of particular individuals. Such an account, provided by Francisco Suárez, will be examined in detail in the following section. Suffice to note here that the point of disagreement between Pufendorf and Hobbes consequently cuts much deeper than any simple knock-down claim of Hobbes’s attempting to derive a right of punishment from the right of nature, resting as it does upon deep disagreement about natural law

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<sup>47</sup> Hobbes 2008, p.125, 216.

<sup>48</sup> Pufendorf 1934, p.1159.

<sup>49</sup> Pufendorf 1934, p.1159.

and the foundations of political society.<sup>50</sup> It is therefore unhelpful to quote Pufendorf as purportedly showing that Hobbes's account of the right to punish fails, not least because few modern readers would wish to subscribe to the underlying conception of natural law which generates and substantiates the attack.<sup>51</sup>

Before turning to contextualise Hobbes's account, however, it is worth heading-off one source of anxiety that has frequently been expressed in the secondary literature: that Hobbes renders "the institution of the Commonwealth...a self-defeating proposition" by attempting to enact both a right to punish and a right of each individual to resist violence.<sup>52</sup> Hobbes tells us that "no man is supposed bound by Covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person".<sup>53</sup> Furthermore, "Whensoever a man Transfereth his Right, or Renounceth it; it is either in consideration of some Right reciprocally transferred to himself, or for some other good he hopeth thereby".<sup>54</sup> Hobbes is clear that men do not renounce their right of nature when entering civil society, but simply suspend the immediate exercise of it. In situations of physical and mortal danger the right of nature is retained to do whatever is deemed necessary to survive. From this Norrie is typical in arguing that "Punishment...is the infliction of evil, and so it could not be the case that the individual would give the sovereign the right to inflict it upon him".<sup>55</sup>

In considering this charge we must focus upon Hobbes's claim that "it cannot be intended, that [an individual] gave any right to another to lay violent hands upon his person". The reason for this is twofold. Firstly, Hobbes believes that men only ever aim at their own perceived best interest.<sup>56</sup> A

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<sup>50</sup> See Hont 2005, chapter 1 for a detailed discussion of Pufendorf's partial repudiation of Hobbes.

<sup>51</sup> In fairness Zarka acknowledges the earlier passage in Pufendorf, although appears to be unaware that it represents an appeal to a pre-Hobbesian tradition of natural law thinking and cannot be employed as a straightforward indictment of Hobbes. Hüning does not acknowledge the context of Pufendorf's criticism.

<sup>52</sup> Norrie 1984, p.308. This line of criticism is advanced also in Ristroph 2008, Schrock 1991 and Heyd 1991, in varying forms. The reply to Norrie may serve as sufficient treatment for present purposes.

<sup>53</sup> Hobbes 2008, p.214.

<sup>54</sup> Hobbes 2008, p.93.

<sup>55</sup> Norrie 1984, p.302.

<sup>56</sup> See Hoekstra 1997, p.622 for further elucidation.

man's will is the last act of his deliberation, and that is determined by the strength of his relevant appetites and aversions.<sup>57</sup> Correspondingly, "of the voluntary acts of every man, the object is some *Good to himself*".<sup>58</sup> Violence is treated with aversion by human beings, and hence on Hobbes's psychology one could not consistently intend for another to inflict violence upon one's person; one would not in full consciousness ever transfer any right to lay "violent hands". Secondly, the fact that individuals always retain the right of nature means that no right to lay violent hands can ever be transferred in good faith. I cannot transfer a right for you to inflict violence upon me because as soon as you begin that violence I will inevitably resist, meaning my original rights-transfer was no such thing.

Yet this is not the situation regarding the sovereign's right to punish. Firstly, and as noted above, Hobbes does not claim that subjects transfer (or "gift") any right of punishing to the sovereign. Instead, when subjects lay down the immediate exercise of their rights of nature and authorise the sovereign (who *ipso facto* is authorised to punish) they merely strengthen the latter to use his own right of nature. So although the right of nature is the "foundation" of the right of punishing, the former can become the latter only in the hands of an authorised sovereign wielding public authority. Accordingly it is a mistake to claim that Hobbes falls into contradiction by asserting a right to resist physical violence whilst claiming we transfer a right of punishment to the sovereign; no such rights-transfer takes place. Secondly, the situation vis-à-vis punishment could not be one of simple rights-transfers in any case. Rather it is one of accepting that authorising the sovereign entails authorisation to inflict punishment on those who transgress promulgated laws. The situation is thus of subjects knowing that *if* they break the sovereign's laws *then* the authorised sovereign will retaliate with violent hands. Is this consistent with Hobbes's psychological account and his view of rights transfers? Manifestly so: it is only by authorising a punishing sovereign that men can secure peace and commodious living, which are in their own best interests. Furthermore, subjects do not

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<sup>57</sup> Hobbes 2008, p.45.

<sup>58</sup> Hobbes 2008, p.93.

straightforwardly authorise the sovereign to punish them *simpliciter*; it is conditional upon their first breaking promulgated laws. We here recall that “though a man may covenant thus, *Unless I do so, or so, kill me*; he cannot Covenant thus, *Unless I do so, or so, I will not resist you, when you come to kill me*”.<sup>59</sup> There is no doubt that individuals retain a right of resistance if the sovereign comes to lay violent hands upon them (“every man giveth away the right of defending another; but not of defending himself”), yet this betrays no contradiction. It is in each individual’s best interest to authorise a sovereign who is *ipso facto* a sovereign with punishing power (“unless I do so, or so, kill me”). But if that sovereign comes to punish any individual, the right of nature guarantees a right of resistance (“he cannot covenant...*I will not resist you*”). There is thus certainly the possibility of rights-conflict in Hobbes’s account, but there is no contradiction.<sup>60</sup>

*Leviathan’s* evocative frontispiece announces at the outset that Hobbes’s sovereign possesses *ius gladii*, the right of the sword. Whilst this right had long been considered a necessary and constitutive component of *summa potestas*, Hobbes gives it a radically new foundation. Whereas divine right absolutists such as Robert Filmer claimed that *ius gladii* could exist only when granted by God, Hobbes’ rival brand of absolutism dispenses entirely with appeals to divinity, founding the right of punishing – a necessary component of sovereignty – in the consent of the ruled themselves.<sup>61</sup> In turn, Hobbes is able to meet populist agitators for Parliamentary power such as Henry Parker on their own ground, attempting to refute them accordingly.<sup>62</sup> The right to punish, founded upon the theory of authorisation, thus lies at the heart of Hobbes’s attempt to pass “unwounded” between the points of “those that contend, on one side, for too great Liberty, and on the other side for too much Authority”.<sup>63</sup>

### III

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<sup>59</sup> Hobbes 2008, p.98.

<sup>60</sup> Against those who would claim that a conflict of rights just is a contradiction, see Waldron 1993.

<sup>61</sup> See Filmer 1991, p.7.

<sup>62</sup> See Skinner 2009, pp.337-48.

<sup>63</sup> Hobbes 2008, p.3.

With Hobbes's account of punishment brought into focus, it is fruitful to turn to the intellectual context within which it was originally offered. In this section I focus on two of Hobbes's predecessors, the natural law theorists Francisco Suárez and Hugo Grotius. This is for two, connected, reasons. Firstly Suárez, Grotius and Hobbes all ground their accounts of legitimate political power in consent. Whilst their respective conceptions of the nature and role of consent differ (Hobbes's most especially), this common grounding of legitimate power, and therefore sovereignty, makes for particularly instructive comparison and delineates these thinkers from alternative approaches such as the divine right absolutism of Filmer. Secondly, Suárez and Grotius stand as major political thinkers in the period immediately prior to Hobbes, and it is worth considering the extent to which Hobbes's account of punishment represents a reply to them.

This second point needs substantiating. Although we have no direct evidence of the extent to which Hobbes was familiar with Suárez's political writings, he is one of the few modern authors to be cited directly by Hobbes in *Leviathan* – albeit only to disparage, Hobbes singling out Suárez's *Of the Concourse, Motion, and Help of God* and asking “When men write whole volumes of such stuffe, are they not Mad, or intend to make others so?”<sup>64</sup> Given the status of Suárez as a major theorist of the early 17<sup>th</sup> century it is unlikely that Hobbes would not have been at least acquainted with his political work.

Regarding Grotius a few remarks are necessary concerning recent scholarly debates, especially the interpretation offered by Richard Tuck. Tuck's account – which has been particularly influential<sup>65</sup> – interprets Grotius' *De jure belli ac pacis* as expounding a radically new philosophy grounded in a doctrine of self-interest only minimally admitting of any principle of sociability and intended as a refutation of the neo-scepticism of Montaigne and Charron.<sup>66</sup> Tuck has also argued that Hobbes's political work constitutes a “Grotian theory” insofar as the latter laid the fundamental and enabling

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<sup>64</sup> Hobbes 2008, p.59.

<sup>65</sup> See Brooke 2008, p.26, footnote 3.

<sup>66</sup> See for example Tuck 1979, Tuck 1983 pp.43-62, Tuck 1993 and Tuck 2005.

groundwork for the former.<sup>67</sup> These interpretations have recently been called into serious question, however, and appear unsustainable. That Grotius' work relies heavily on appeals to natural sociability as well as individual self-interest has been persuasively demonstrated by Brian Tierney and Robert Shaver, who also rejects the "Hobbes as Grotian" account.<sup>68</sup> That Grotius is primarily concerned to refute scepticism (or that Montaigne and Charron were themselves even sceptics) has been convincingly challenged by Thomas Mautner.<sup>69</sup> Johann P. Sommerville likewise counsels against reading Grotius as preoccupied with scepticism, and demonstrates that *De jure belli ac pacis* exhibits extensive continuities with the language and ideas of previous natural law theorists, representing neither a radical break with previous thinking nor the establishment any new "modern" moral theory.<sup>70</sup> Perez Zagorin has similarly undermined the case for Grotius as anti-sceptic, whilst he and Michael P. Zuckert have strongly urged against reading Hobbes as a "Grotian" thinker on account of Hobbes's thorough-going denial of natural sociability, which grounds his account of the right of nature and the laws of nature, themselves forming the basis of a radically systematised and deductive political theory marking a clear analytic break with Grotius' humanist natural law approach rooted in late-medieval scholasticism.<sup>71</sup>

Nonetheless, even if the "Hobbes as Grotian" thesis is rejected it does not follow that Hobbes paid no attention to Grotius. On the contrary Hobbes had access to *De jure belli ac pacis* – recognised as a major work by the time he was writing – in the Hardwick library,<sup>72</sup> and Zagorin has persuasively argued that key passages of *Leviathan* are targeted squarely at Grotius' *magnum opus*.<sup>73</sup> There remain, however, sound methodological reasons for not over-enthusiastically assuming that Hobbes "must" be replying to Grotius (or Suárez), simply because of a congruence of

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<sup>67</sup> Tuck 1983, p.59, p.61.

<sup>68</sup> See Tierney 1997, pp.319-324, and Shaver 1996, pp.29-37 (regarding sociability and Hobbism), and pp.37-45 (regarding scepticism). See also Brooke 2008 regarding stoicism and natural sociability in Grotius' *De jure belli ac pacis*.

<sup>69</sup> Mautner 2005.

<sup>70</sup> Sommerville 2001.

<sup>71</sup> See Zagorin 2000 and Zuckert 1994, Chapter 5, esp. pp.142-5.

<sup>72</sup> Skinner 2008, p.95.

<sup>73</sup> Zagorin 2000, pp.25-28.

arguments.<sup>74</sup> The following comparisons should therefore be read not only as alleging and tracing a line of influence, but as exploring aspects of *Leviathan* likely to go otherwise unnoticed.

Although Suárez's *De legibus ac deo legislatore* of 1612 is now largely ignored, it was a major work of early-17<sup>th</sup> Century natural law theory.<sup>75</sup> Book III of *De legibus* offers Suárez's core political insights, and it is there we must start. Suárez begins in Aristotelian fashion by assuming the natural sociability of man and an innate desire for society; a human nature completed by social living, and a common good attached to that sociable nature.<sup>76</sup> The "imperfect" union of family alone will not suffice, not least because of inevitable conflict between competing families. Therefore man must (and does) remedy his situation by joining in "perfect", or political, society. Yet political society necessarily requires a common power<sup>77</sup>. This is partly to solve what we would now call co-ordination problems, but also to ensure that men obey the civil laws which are instantiated for the common good, achievable only by political society: "It is...repugnant to natural reason to assume the existence of a group of human beings united in the form of a single political body, without postulating the existence of some common power which the individual members of the community are bound to obey".<sup>78</sup> Yet this presents a particular problem: where does political power – including the power to coerce via punishment of law-breakers – come from?

Suárez denies that coercive political power belongs innately to individuals, holding that in a pre-political condition political power *ipso facto* cannot reside in any person or persons.<sup>79</sup> Yet it is manifest both that political society necessitates political power and that observed political societies exhibit such power. "Therefore, we must say that this power, viewed solely according to the nature of things, resides not in any individual man but rather in the whole body of mankind".<sup>80</sup> Yet the

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<sup>74</sup> See Skinner 2002b, especially pp.75-6.

<sup>75</sup> Notable exceptions include Skinner 1978, chapters 5-6; Sommerville 1982; Tierney 1997, pp.309-15; Irwin 2008, pp.1-69.

<sup>76</sup> Suárez 1944a, p.364.

<sup>77</sup> Suárez 1944a, p.365.

<sup>78</sup> Suárez 1944a, pp.375-6.

<sup>79</sup> Suárez 1944a, pp.372-3.

<sup>80</sup> Suárez 1944a, p.373.

question remains: from where does the power arise? Suárez considers the argument that political power was originally vested in Adam by God, but rejects this on the grounds that Adam could only have enjoyed “imperfect” power over Eve as the head of the first family.<sup>81</sup> The claim that God grants political power to particular men (i.e. rulers) is also rejected. Such a thing would be known by divine revelation – but it isn’t, therefore God does not grant political power directly.<sup>82</sup> The problem of accounting for the origin of legitimate coercive power remains.

Suárez’s solution begins by considering mankind from two different perspectives. On the one hand man in multitude may be considered “simply as a kind of aggregation, without any order, or any physical or moral union.” So-viewed men do not constitute “any unified whole, whether physical or moral, so that they are not strictly speaking one political body and therefore do not need one prince, or head”. But viewed from this standpoint, “one does not yet conceive of the power in question as existing properly and formally, on the contrary, it is understood to dwell in them at most as a fundamental potentiality”. But there is a second possibility: a multitude of men “should...be viewed from another standpoint, that is, with regard to the special volition, or common consent, by which they are gathered together into one political body through one bond of fellowship and for the purpose of aiding one another in the attainment of a single political end”. From this perspective the multitude is transformed. “Thus viewed, they form a single mystical body which, morally speaking, may be termed essentially a unity; and that body accordingly needs a single head.” This innovation provides the conceptual framework of Suárez’s account for the origin of political coercion and punishment: “in a community of this kind...there exists in the very nature of things the power of which we are speaking”.<sup>83</sup>

As things stand Suárez’s solution may appear confusing: *why* does “mystic unity” provide a basis for coercive political power? Part of the answer is provided by Irwin, and lies in Suárez’s appeal to

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<sup>81</sup> Suárez 1944a, p.374.

<sup>82</sup> In rejecting the view that God directly grants political power Suárez explicitly rejects the view of many natural law forerunners, particularly Vitoria. See Tierney 1997, p.310.

<sup>83</sup> Suárez 1944a, p.375.

consent as the foundation of (legitimate) political power.<sup>84</sup> Due to man's natural sociability "the human good requires promotion of a common good, and hence requires some agent with the specific task of promoting it. Insofar as human beings recognise a common good, and will an effective means of promoting it, they have a common will that makes a single community".<sup>85</sup> This common will makes it in accord with "right reason" that men should agree to constitute some agent with the task of promoting the common good, yet who will require the use of coercive force to do so. "This is the 'special will or common consent' that makes a single political body, and hence makes a body capable of placing its legislative power in some agent with the special task of promoting the common good".<sup>86</sup> Given man's natural sociability and the need for society to secure the common good men must consent to be ruled by some coercive power. Thus although the right to coerce does not exist by nature in any individual before the institution of political society, such coercive power is necessary, demanded as it is by natural sociability.

Although this heavily consent-centred approach is not incorrect, Irwin unfortunately over-emphasises it at the expense of Suárez's clear statement that coercive political power depends ultimately upon God. Whilst, as noted above, political power is not granted directly by God, Suárez is nonetheless clear that legitimate coercive power does ultimately rest upon an indirect divine foundation. "The power under discussion comes from God, as its primary and principal author", for "since this power is...in absolute sense a good thing, extremely valuable and necessary for the good estate of human nature, it therefore must flow from the Author of that nature", and not least because the persons administering coercive power "are the ministers of God, [and] they accordingly administer a power received from God".<sup>87</sup> Irwin's emphasis on consent has the unfortunate effect of portraying Suárez as a sort of proto-Kantian, positing rational sociable agents as grounding political power in hypothesised systems of consent. And although it may be replied that the structure of

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<sup>84</sup> Suárez admits that many political societies have been founded not on consent but by tyrannical force, yet he argues that this is a non-necessary aberration arising from the corrupt nature of man. See Suárez 1944a, p.370.

<sup>85</sup> Irwin 2008, p.66.

<sup>86</sup> Irwin 2008, p.66.

<sup>87</sup> Suárez 1944a, p.379.

Suárez's thought is such that God *could* be removed from the account without conceptual consequence, the fact is Suárez *does* retain an explicit appeal to God as the (indirect) foundation of political power. Given that Hobbes in turn dispenses entirely with such divine foundations it is best – especially from a historical point of view – not to ignore Suárez's appeal to God simply because it might not ultimately be necessary to the logic of his account.

A certain similarity therefore exists between Suárez's "mystic unity" and Hobbes's account of a multitude given unity via representation in the artificial person of the sovereign. Just as Suárez's "mystic unity" accounts for the legitimate origin of coercive political force, Hobbes's conception of unity-via-representation is a key component of his theory of authorisation, which as we have seen undergirds the right to punish.<sup>88</sup> We shall return to this comparison in due course, but we must first consider an important upshot of Suárez's conception of legitimate political power: the right to resist and depose tyrants.

By grounding legitimate power in consent, Suárez conceives sovereignty as being granted to a particular ruler by the people: "[political] power...resides immediately in the community, and therefore, in order that it may justly come to reside in a given individual, as in a sovereign prince, it must necessarily be bestowed upon him by the consent of the community".<sup>89</sup> However, once that consent is bestowed it does not follow that "the state" can revoke sovereignty at whim.<sup>90</sup> On the contrary, "Once the power has been transferred to the king, he is through that power rendered superior even to the kingdom which bestowed it, since by this bestowal the kingdom has subjected itself and has deprived itself of its former liberty". For Suárez, this almost completely removes any right of collective resistance or rebellion – yet there remains an important exception. For when a

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<sup>88</sup> However this similarity also conceals a fundamental and important divergence. Istvan Hont has shown that Hobbes repudiates the Aristotelian "concord" exemplified by Suárez's "bond of fellowship", instead advocating a "union" rooted in individual self-interest, independent of any appeal to natural sociability, and intended to wholly displace the earlier tradition. Hont 2005, p.20-1, 41.

<sup>89</sup> Suárez 1944a, p.384.

<sup>90</sup> Suárez 1944a, p.386.

ruler “lapses into tyranny...the kingdom may wage a just war against him”.<sup>91</sup>

Suárez’s specific treatment of the right to resist (and overthrow) tyrants is given in his *Defensio fidei catholicae*, an attack on the divine right theories of James I and VI of England and Scotland, published a year after the *De legibus*. There Suárez is particularly concerned with two questions: whether there is a right to resist usurping tyrants, and whether there is a right to resist legitimately-constituted rulers who have fallen into tyranny. Suárez has no compunction in justifying the first sort of resistance, and eventually licenses the second under specific circumstances.<sup>92</sup> As regards the overthrowing of a legitimately-constituted tyrant Suárez is clear that a lone individual may depose a tyrant only upon receiving permission from the Pope – a proposition which, unsurprisingly, was not greeted kindly by James I and VI, who had Suárez’s work burned.<sup>93</sup> However a people, or “state”, considered collectively retain the right to overthrow a tyrannical ruler precisely because legitimate political power is founded in an act of consent flowing from the natural sociability of man which requires the common good to be secured by the use of coercive force. Yet insofar as a ruler becomes a tyrant he ceases to promote the common good, and if “the state” can find “no other means of self-defence” when acting “as a whole in accordance with public and general deliberations of its communities and leading men”, it accordingly possesses the right to rebel and depose him.<sup>94</sup> Thus, whatever the affinities between Suárezian “mystic unity” and Hobbesian authorisation, the former’s correlate doctrine of resistance is sheer anathema to the latter.

Turning to the work of Grotius it is helpful to move backwards, starting with the lengthy discussion of punishment in Book II Chapter XX of *De jure belli ac pacis* before exploring the wider significances of his views in Book I. Grotius begins the account in Chapter XX by re-affirming the principle he had expounded in his earlier *De jure praedae*; that wholly contrary to the views of Suárez or Vitoria there exists a natural right to punish in all individuals:

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<sup>91</sup> Suárez 1944a, p.387.

<sup>92</sup> Irwin 2008, pp.64-5.

<sup>93</sup> Copleston 1963, p.175.

<sup>94</sup> Suárez 1944b, p.718.

since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state...the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent.<sup>95</sup>

Defining punishment in *De jure belli ac pacis* as “the Evil that we suffer for the Evil that we do”, Grotius insists that “nature herself” tells us it is “lawful and just...that he that doth Evil should suffer Evil”.<sup>96</sup> Again, the right to punish resides innately in each individual: “forasmuch as he that punishes, if he punish justly, must have a Right to punish, which Right arises from the Crime of the Delinquent”. Indeed “he that commits a Crime, seems voluntarily to submit himself to punishment”.<sup>97</sup> Grotius is clear that a guilty man has no *injury* done to him when he is punished (for he has no right not to be punished), but it is initially unclear as to why a guilty man must be punished at all.<sup>98</sup> The answer is that it is a precept of natural law that men may (and must only) harm others for the sake of some future good. Hence Grotius, like Hobbes, advocates a broadly consequentialist doctrine, licensing punishment only insofar as it promotes either the good of the offended party, the good of the offender, or the good of the rest of society. Punishments that are mere revenges should not be exacted.<sup>99</sup>

Yet a problem exists as to who in a given circumstance should exact punishment, especially when it involves “Stripes, or have any Thing of Violence and Compulsion in it”. For “Nature does not distinguish to whom it is lawful [to punish], and to whom it is not, nor indeed could it make this distinction”, something especially true in cases where the offended party cannot exact punishment and it falls to a third party (e.g. murder). Happily, however, “what Nature could not do the laws have done”.<sup>100</sup> Punishment involving violence beyond the mere “chastisement between friends” is delegated to the impartial magistrates of the state thus preventing the partial passions of mankind

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<sup>95</sup> Grotius 1950, p.92.

<sup>96</sup> Grotius 2005, p.949.

<sup>97</sup> Grotius 2005, pp.953-4.

<sup>98</sup> Grotius 2005, p.956.

<sup>99</sup> Grotius 2005, pp.956-65. The exception is God, who alone may (and at the day of judgement will) punish for the sake of punishing.

<sup>100</sup> Grotius 2005, p.964.

to cause them to unduly harm one another. “The Liberty which Nature indulged in them of vindicating every Man his own Quarrel was then taken away, and Judges appointed to determine all controversies between Man and Man”.<sup>101</sup>

Although the natural right to punish remains “still in Force where there are no courts of justice”, within civil society the delegation to magistrates of the right to punish poses a particular problem for Grotius. As a Christian keen to reconcile natural law, the learning of antiquity and Holy Scripture, Grotius must confront the objection that Christians may never exact punishments because of the teachings of the Gospel; that one should turn the other cheek and seek not revenge. Grotius solution, albeit a somewhat uncomfortable one, is that whilst Christians are certainly debarred from private revenges, public punishment aiming at a future good is of a different class and therefore permitted. However, Christians concerned for their immortal souls should only assume public office which oversees the infliction of punishment with great gravitas and proceed carefully in discharging their duties.<sup>102</sup>

As with Suárez, Grotius’ views on the origin of punishment bear an important relation to his views on collective resistance. We see this by turning to Book I of *De jure belli ac pacis*. In a notorious<sup>103</sup> passage of Book I, Chapter III Grotius claimed:

It is lawful for any Man to engage himself as a Slave to whom he pleases; as appears both by the *Hebrew* and *Roman* Laws. Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share of that Right to themselves?<sup>104</sup>

Yet it must be noted that this freedom of a people to enslave itself to sovereign absolutism was only one possible form of legitimate government considered by Grotius. Indeed he was quick to temper the possibility:

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<sup>101</sup> Grotius 2005, p.968.

<sup>102</sup> Grotius 2005, pp.977-94.

<sup>103</sup> See for example Tuck 2005, p.xxxi.

<sup>104</sup> Grotius 2005, p.261.

But as there are several Ways of Living, some better than others, and every one may chuse which he pleases for all those Sorts, so a People may chuse what form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers opinions, but by the Extent of the Will of those who conferred it upon him.<sup>105</sup>

This stipulation that sovereignty is granted to ruler(s) by a freely-consenting people, and that it may accordingly be granted on condition, is of some importance when Grotius turns to discuss whether a people possess the right to resist and depose a sovereign. As Baumgold has noted, Grotius was possibly “more successful in laying out competing, pertinent considerations than in resolving the resistance question”.<sup>106</sup> For although he begins Chapter IV (“Of a War made by Subjects against their Superiors”) by reaffirming that the doctrine “that [the people] may restrain or punish their Kings, as often as they abuse their Power” is false and occasioning of “Mischief”, his initial championing of what might be termed (anachronistically, but usefully) passive obedience quickly runs into trouble.<sup>107</sup>

Grotius initially claims that when a sovereign inflicts violence and hardship on a people they “ought rather to bear it patiently than to resist by force”.<sup>108</sup> Furthermore, whilst all men have a natural right to secure themselves by resistance, it remains that society is constituted to secure mutual preservation and “therefore [there] immediately arises a superior Right in the state over us and ours, so far is necessary for that End.”<sup>109</sup> This rules-out “promiscuous” resistance *tout court*, for such resistance would endanger the proper end of society. Yet Grotius is forced to equivocate on the question of resistance *in extremis* when recalling his doctrine that sovereignty is granted by a people to its ruler(s), and that it can be granted on condition. In particular – and with special relevance to the issue of punishment – Grotius concedes that:

Those Princes who depend on the People, whether they at first were established on that Foot, or their Authority was thus rendered subordinate by a posterior Agreement...if they

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<sup>105</sup> Grotius 2005, p.262.

<sup>106</sup> Baumgold 1993, p.8.

<sup>107</sup> Grotius 2005, p.261.

<sup>108</sup> Grotius 2005, p.338.

<sup>109</sup> Grotius 2005, p.339.

offend against the Laws, and the State, may not only be resisted by Force, but if it be necessary may be punished by Death.<sup>110</sup>

The logic – later more fully exploited by Locke – is clear: if a people grant a ruler sovereign power upon condition, but retain unto themselves their natural right to punish, a ruler violating the terms of agreement is liable to deposition and punishment.<sup>111</sup> We must, of course, be careful not to over-emphasise the role of punishment in Grotius' equivocation regarding resistance: he clearly stipulates that sovereigns who forfeit or attempt to alienate their power, who make war on their subjects, or are usurpers of titles, may all be resisted (on account of their undermining the foundation of legitimate power in consent).<sup>112</sup> Yet by asserting a natural right to punish, combined with the claim that legitimate sovereignty depends upon consensual transfer from subjects to ruler(s), Grotius leaves the door open for a collective right of resistance.

The doctrines of resistance granted by both Suárez and Grotius are virulently opposed by Hobbes. The most important manoeuvre he makes in rejecting such doctrines is to claim that, whilst legitimate power and sovereignty is founded always in the consent of the ruled, it does not follow that sovereignty is transferred or that it can be granted by a people unto a sovereign, and especially not according to any terms of usage:

The opinion that any Monarch receiveth his Power by Covenant, that is to say on Condition, proceedeth from want of understanding this easie truth, that Covenants being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the publique Sword; that is, from the untyed hands of that Man, or Assembly of men that hath the Sovereignty, and whose actions are avouched by them all, and performed by the strength of them all, in him united. But when an Assembly of men is made Soveraigne; then no man imagineth any such Covenant to have past in the Institution; for no man is so dull as to say, for example, the People of *Rome*, made a Covenant with the Romans, to hold the Sovereignty on such or such conditions; which not performed, the Romans might lawfully depose the Roman People.<sup>113</sup>

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<sup>110</sup> Grotius 2005, p.372-373.

<sup>111</sup> See Grotius 2005, p.377. Hobbes also (disapprovingly) notes the same thing, see Hobbes 2008, p.124.

<sup>112</sup> Grotius 2005, pp.372-383. These claims are systematically denied by Hobbes in *Leviathan*, see Hobbes 2008, p.139.

<sup>113</sup> Hobbes 2008, p.123.

Although Skinner has convincingly argued that Hobbes' main target is probably Henry Parker and his claim that the English Parliament represents the assembled sovereign people, the efficacy of such a reply easily encompasses the positions of Grotius and Suárez.<sup>114</sup> Indeed regarding the latter's contention that a people may lawfully depose a tyrant (a term Grotius is reluctant to employ), Hobbes has another rejoinder: that tyranny signifies nothing but kingship disliked.<sup>115</sup> As for Suárez's contention that an individual subject may depose a ruler provided he receives permission from the Pope, Hobbes denies this entirely as part of his wider project of subsuming all spiritual matters under temporal sovereign power, papal authority being rejected as a division of sovereignty leading inevitably to the state of war.

Yet this should not blind us to an important affinity between Suárez's "mystic unity" and Hobbes's account of authorisation and punishment. Hobbes's innovation was to unite the right of nature conceived as a "blameless liberty" with the theory of authorisation. Like Suárez, Hobbes could thus establish that the power and right to punish exist only in political society. Yet the innovation of authorisation, combined with a stark denial of man's natural sociability, enables Hobbes to dispense entirely with Suárez's final (albeit indirect) reliance upon God when grounding legitimate coercive power. The right to punish for Hobbes is thus pure artifice, brought into existence only with the establishment of sovereign power. Accordingly, Grotian concerns as to whether Christians may inflict punishment can be avoided completely. Whatever the Gospel says about revenge, punishment is purely the sovereign's business, and firmly in the temporal realm; men's souls cannot be endangered by inflicting punishment hence such questions need not even be considered.

Hobbes is likewise able to wholly counteract Grotian equivocation on the right of collective resistance. Whilst the right of nature guarantees each *individual* subject a right to resist the sovereign in order to defend life and limb, this cannot be translated into a *collective* right of resistance. In part this is because sovereigns do not covenant with their peoples nor hold

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<sup>114</sup> Skinner 2009, pp.337-48.

<sup>115</sup> Hobbes 2008, p.130.

sovereignty upon condition. But furthermore as there is no natural right to punish there can be no intelligible claim of a right to collective resistance founded upon, or justified by, appeal to a right of punishing. As we have seen, punishment for Hobbes is conceptually dependent upon the theory of authorisation and sovereignty. Yet punishment receives no treatment in Chapter XVI-XVII, is considered only briefly in Chapter XVIII, and is instead given an entirely separate treatment in Chapter XXVIII.<sup>116</sup> This, I contend, is a deliberate rhetorical strategy. Hobbes seeks to distance the issue of the basis of sovereign power from the right to punish in the minds of his readers, even though they are two sides of the same coin. In an intellectual context in which theories of punishment were typically coupled with theories of resistance, separating the two as far as possible would be an astute move for a theorist wishing to deny the latter but needing to establish the former.<sup>117</sup> In turn, the reason for the relative lack of scholarly interest in Hobbes's theory of punishment and the under-appreciation of its importance to his theory of sovereignty, as well as Zarka's concern at the apparent abandonment of authorisation in Chapter XXVIII, can now be accounted for. It is at least in part a consequence of Hobbes's deliberately distancing his discussion of punishment from that of the foundations of legitimate sovereignty, a strategy whose efficacy appears to have lasted far beyond its immediate intended application.

In light of the above it is now worth briefly turning to John Locke's *Second Treatise* to note the power of explicitly reconnecting punishment and resistance. Locke's account can be briefly summarised as follows. There exists a natural right to punish (and Grotius was right to cite the state's right to punish foreigners as proof).<sup>118</sup> This "strange doctrine" states that the right to punish exists in every individual, but each is prepared to give it up so as to enter political society in order to escape the inconveniences of the state of nature, and most especially to secure property against

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<sup>116</sup> In Chapter XVIII Hobbes merely asserts that the sovereign has power of punishing and rewarding, deferring discussion of the *right* to punish until Chapter XXVIII.

<sup>117</sup> Although Grotius treats of punishment separately in *De jure belli ac pacis* from his earlier discussion of resistance, recall that he has no compunction in talking of a people deposing *and punishing* a sovereign under approved circumstances.

<sup>118</sup> Locke 1988, pp.272-3.

invasion by others.<sup>119</sup> A crucial distinction must be drawn, however, between the state of nature and the state of war (a distinction which Hobbes fails to draw). The state of nature exists when there is no common arbitrator wielding common power by the consent of the ruled, yet a state of war exists whenever force is used without right.<sup>120</sup> Thus, a state of nature (where the laws of nature given by God still apply) need not be a state of war, and the latter may (and frequently does) erupt even in civil society.

Absolute monarchy is inconsistent with civil society: men quit the state of nature so that each man is not his own judge, yet absolute monarchy privileges one man as judge without appeal, meaning the state of nature effectively remains.<sup>121</sup> A clear (though unstated) implication is that because men possess a natural right to punish in the state of nature, absolute monarchs may therefore be punished, i.e. deposed and killed. However even legitimate rulers may lapse into tyranny, defined (contra-Hobbes) as “*the exercise of Power beyond Right*”.<sup>122</sup> Tyrants employ force without right and therefore put themselves into a state of war with their subjects, violating the terms upon which they were granted sovereignty, which thus returns to the people.<sup>123</sup> In extreme cases not only government but civil society itself is dissolved and men return to the state of nature. The natural right of punishing returns, and tyrants – who are like noxious beasts, lions and tigers threatening men’s safety – may duly be punished and killed. In such times of extreme necessity the justification of resistance lies in an appeal to heaven.<sup>124</sup>

Remembering Laslett, we must recall that Locke had many opponents besides Hobbes in the *Second Treatise*; not only Filmer but also Barclay, against whom the bulk of Chapter XIX “Of the Dissolution of Government” is directed.<sup>125</sup> Nonetheless, the efficacy of asserting a natural right to punish in establishing a theory of collective resistance against tyrannical sovereignty is clearly

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<sup>119</sup> For example Locke 1988, p.350, 324.

<sup>120</sup> Locke 1988, p.281.

<sup>121</sup> Locke 1988, p.326.

<sup>122</sup> Locke 1988, p.398. Emphasis in original.

<sup>123</sup> Locke 1988, p.367.

<sup>124</sup> Locke 1988, pp.406-428.

<sup>125</sup> Laslett 1988, of course, inclines to the position that Hobbes is not a target *at all* in the *Second Treatise*.

demonstrated. From this we may draw some further considerations.

There appear good grounds for supposing that Hobbes, like Locke, recognised the efficacy of asserting a natural right to punish in constructing a theory of collective resistance. But whereas the former sought to deny any such collective right, the latter expressly affirmed it. This might incline one to think of Hobbes and Locke as addressing themselves to left-over issues from Grotius, and indeed Baumgold has suggested that both authors be understood as responding to a “Grotian problem”.<sup>126</sup> Given what has been said above regarding Suárez, however, that this is simply a *Grotian* problem cannot be sustained. And it does not seem helpful to re-label it a “Suárezian problem” either, or indeed to think in terms of neat problems handed down from one thinker to the next. Instead I would urge the recognition that four of the most influential 17<sup>th</sup> century political thinkers, grounding their accounts of legitimate power in consent, are all preoccupied by the extent and nature of resistance, and the connected nature of any right to punish (even if, in the case of Hobbes, the connection is deliberately disguised). Explaining the origins, structure and significances of this preoccupation may not be best-served by assuming that one particular thinker must have originated it alone, bequeathing it *in vacuo* to succeeding thinkers.

#### IV

I now conclude by returning to Chapter XXVIII of *Leviathan* and considering some aspects of Hobbes’s discussion which have attracted little critical attention. After establishing the right to punish, Hobbes proceeds to enumerate the details of punishment properly understood. Amongst other things we learn that punishment must follow public condemnation; that usurpers (having never been authorised) cannot punish; that punishment must have some possibility of disposing either the offender or other men to obey the laws in future; that punishments must outweigh the benefits of a crime or else constitute an inducement to law-breaking; and that punishing the “Representative of the Commonwealth” is oxymoronic because “it is of the nature of Punishment, to

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<sup>126</sup> Baumgold 1993, p.8.

be inflicted by publique Authority, which is the Authority only of the Representative it self".<sup>127</sup>

Hobbes's consequentialist account is unsurprising, and flows from the definition of punishment examined earlier. Yet Hobbes then advances considerations that appear to contradict some of his claims earlier in *Leviathan*. He tells us in Chapter XXVIII that "Harme inflicted upon one that is declared enemy, fals not under the name of Punishment" because "seeing they were either never subject to the law, and therefore cannot transgress it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgresse it, all the Harmes that can be done them must be taken as acts of Hostility".<sup>128</sup> Hobbes continues that in "declared Hostility" all infliction of evil is lawful, and hence any subject that denies "the authority of the Representative of the Common-wealth" 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 Commonwealth; that is, according to the will of the Representative".<sup>129</sup> Hobbes returns to this subject several paragraphs later, insisting that punishment against non-subjects is impossible and that hostility may be inflicted upon non-subjects by the sovereign with impunity: "all men that are not Subjects are either Enemies, or else they have ceased from being so, by some precedent covenants".<sup>130</sup> Hobbes stresses that against "enemies" it is "lawfull by the originall Right of Nature to make warre" and the sovereign may do so insofar as "it conduceth to the good of his own People", before going on to repeat and even extend his point about rebels:

[To] subjects, who deliberately deny the Authority of the Common-wealth established, the vengeance is lawfully extended...because the nature of this offence, consisteth of the renouncing of subjection; which is a relapse into the condition of warre, commonly called Rebellion; and they that so offend, suffer not as Subjects, but as Enemies. For *Rebellion*, is but warre renewed.<sup>131</sup>

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<sup>127</sup> Hobbes 2008, pp.215-16.

<sup>128</sup> Hobbes 2008, p.216.

<sup>129</sup> Hobbes 2008, p.216.

<sup>130</sup> Hobbes 2008, p.219.

<sup>131</sup> Hobbes 2008, p.219. Hobbes in this passage also considers the inflicting of harm upon innocent non-subjects, following his earlier discussion of punishing innocents to be discussed below. Prior to the quoted passage he is frank that whether non-subjects are "nocent or innocent" is irrelevant to the sovereign. As non-subjects are not punished but only met with "hostility" this is quite consistent.

Taken alone these passages are quite consistent with the rest of the discussion offered in Chapter XXVIII. Problems emerge, however, when we recall Hobbes's remarks in Chapter XVIII:

They that are subjects to a Monarch, cannot without leave cast off Monarchy, and return to the confusion of a disunited Multitude; nor transferre their Person from him that beareth it, to another Man, or other Assembly of men: for they are bound, every man to every man, to Own and be reputed Author of all, that he that already is their Sovereigne, shall do, and judge fit to be done: so that any one man dissenting, all the rest should break their Covenant made to that man, which is injustice: and they have also every man given the Sovereignty to him that beareth their Person; and therefore if they depose him, they take from him that which is his own, and so again it is injustice. Besides, if he that attempteth to depose his Sovereign, be killed, or punished by him for such attempt, he is author of his own punishment, as being by the Institution, Author of all his Sovereign shall do: And because it is injustice for a man to do any thing, for which he may be punished by his own authority, he is also upon that title, unjust.<sup>132</sup>

On the one hand we seem to have Hobbes insisting that rebels are outside political society and therefore cannot be punished but only treated with hostility, whereas on the other Hobbes apparently says that rebels *have* authorised their own punishments and as owners of all the sovereign's acts thereby punish themselves. Has Hobbes flatly contradicted himself?

I would suggest not, for Hobbes is in fact operating on two different but complementary levels. In Chapter XVIII Hobbes's aim is to build on the theory of authorisation and sovereign by institution developed in Chapters XVI-XVII. In particular he is keen to emphasise that subjects do not (and cannot) covenant with their sovereign, but that as authors they own all the sovereign's acts. In the quoted passage it is clear that part of Hobbes's intention is to counteract those theorists who fail to see the "easie truth" that sovereignty is not transferred, and certainly not upon any condition.<sup>133</sup> Here Hobbes invokes the example of rebels to show – via the most extreme example – that sovereignty is inalienable, and that authorisation is binding; that *even rebels* authorise their own punishment.

In Chapter XXVIII Hobbes's immediate purpose is different. There he is concerned to discuss the logic and working of punishment within the established state, and accordingly non-subjects are not

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<sup>132</sup> Hobbes 2008, p.122.

<sup>133</sup> Hobbes 2008, p.123.

considered as receiving punishment but hostility. Does this lead to contradiction? I suggest not. Rather than contradicting himself, Hobbes has all his bases covered. From one perspective rebels who have been subjects but claim to renounce the sovereignty are attempting something impossible, declaring themselves hostile elements and traitors who authorise their own punishment in the process. Yet from another perspective such rebels are *de facto* putting themselves outside political society; they are effectively non-subjects and enemies of the commonwealth who can be met with unlimited hostility and violence accordingly. The result is thus not so much contradiction as the ensnaring of secessionists and rebels: whether viewed from the perspective of authorising subjects or non-subject enemies, rebels are met with violence and death in either case, meted out with impunity by the inalienable absolute sovereign.<sup>134</sup> The significance of this in light of the earlier discussion of collective resistance should not be lost.

There remains an outstanding paragraph of Chapter XXVIII, however, which calls for comment:

All Punishments of Innocent subjects, be they great or little, are against the Law of Nature: For Punishment is only for Transgression of the Law, and therefore there can be no Punishment of the Innocent. It is therefore a violation, First, of that Law of Nature, which forbiddeth all men, in their Revenges, to look at any thing but some future good: For there can arrive no good to the Common-wealth, by Punishing the Innocent. Secondly, of that, which forbiddeth Ingratitude: For seeing all Sovereign Power, is originally given by the consent of every one of the Subjects, to the end they should as long as they are obedient, be protected thereby; the Punishment of the Innocent, is a rendering of Evill for Good. And thirdly, of the Law that commandeth Equity; that is to say, an equall distribution of Justice; which in Punishing the Innocent is not observed.<sup>135</sup>

Hobbes is quite consistent, given his definition of punishment, to say that “punishing the innocent” is oxymoronic. Yet what follows is striking because the arguments Hobbes supplies as to why the sovereign will not punish the innocent are conspicuously poor. In particular, the claim that “there can arrive no good to the Commonwealth, by Punishing the Innocent” appears manifestly false.

Although it will probably be a bad general policy for a sovereign to arbitrarily attack innocent

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<sup>134</sup> For more complex and developed examples of Hobbes’s “multi-level” approach to dealing with opponents, see Hoekstra 2006.

<sup>135</sup> Hobbes 2008, p.219.

subjects on a regular and widespread basis insofar as this may induce rebellion and sedition, it does not follow that “no good” can ever come to the commonwealth from such activities. Somewhat trivial examples from contemporary moral philosophy can help show this – imagine the innocent man hanged to appease the baying mob preparing to burn down the capital – but so can numerous examples from history. Whilst the semi-indiscriminate liquidation of innocent citizens as a method for securing central power was only refined and “perfected” in the 20<sup>th</sup> century by various totalitarian regimes, the efficacy of persecuting innocents could have been attested to Hobbes by the agents of the Spanish Inquisition.<sup>136</sup> Furthermore, although it would certainly be against gratitude and equity for the sovereign to punish innocents, this offers no guarantee that a sovereign will not undertake such activities; the laws of nature, after all, are but “qualities” that dispose men to peace, and the sovereign might not always abide by them. Indeed to make matters worse Hobbes himself appears, in Chapter XXI, to offer a counter-example to his own stipulation:

For it has been already shewn that nothing the Sovereign Representative can doe to a Subject, on what pretence soever, can properly be called Injustice, or Injury; because every Subject is Author of every act the Sovereign doth; so that he never wanteth Right to any thing, otherwise, than as he himself is the Subject of God, and bound thereby to observe the laws of Nature. And therefore it may, and doth often happen in Common-wealths, that a subject may be put death, by the command of the Sovereign Power; and yet neither doe the other wrong...And the same holdeth also in a Sovereign Prince, that putteth to death an Innocent Subject.<sup>137</sup>

Again the solution to this apparent problem lies in reflecting upon the dynamics of Hobbes’s project in *Leviathan*. Hobbes in Chapter XXI is keen to follow through with the full implications of the theory of authorisation, whereas by Chapter XXVIII authorisation operates in the background as Hobbes supplies the specifics of punishment in an established state. Yet more can be said. Kinch Hoekstra has suggested that at certain key points the text of *Leviathan* must be read as conditioned by the political theory the work itself advocates, which Hoekstra denotes variously as the “doctrine of doctrines”, describing Hobbes as “one who adjusts his sails according to the prevailing winds”,

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<sup>136</sup> To those replying that the Inquisition believed all its victims guilty, one recalls Dostoyevsky’s Grand Inquisitor. See Dostoyevsky 1994, p.309-31.

<sup>137</sup> Hobbes 2008, p.148.

making him “a principled trimmer, and a trimmer by principle”.<sup>138</sup>

Something of this sort appears to be at work in Chapter XXVIII. Hobbes can in the last instance offer no guarantee that sovereigns will never “punish” the innocent. Worse, should such a thing happen individual subjects, despite retaining their individual rights to physical resistance, have no legal or other such right of *remonstrance* in the face of sovereign violence, nor may they defend even the innocent from attack.<sup>139</sup> Being authors of all the sovereign does, the sovereign can commit no injustice against his subjects. Even more dramatically, should a sovereign come to “punish” innocents then all subjects are, by the theory of authorisation, authors of this hostility. This dramatic upshot is one of the least palatable aspects of Hobbes’s political theory – yet what Hobbes appears to be doing is purposefully “toning-down” his account, the principled trimmer making his overall theory appear more acceptable to sceptical readers than it might otherwise seem. That although innocent subjects have no guarantee of non-molestation by the sovereign, and no right of remonstrance should he attack them, this need be of no concern since we can be sure that in practice sovereigns won’t indulge in such behaviour. And it was perhaps to this sort of attitude that Locke’s memorable dictum was intended as a rebuke: “to think that Men are so foolish that they take care to avoid what Mischiefs be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*”.<sup>140</sup>

But despite downplaying this unpalatable upshot of his account of punishment – and indeed of sovereignty more generally – Hobbes was nonetheless clear about the position of subjects vis-à-vis an authorised sovereign with the right to punish. For he closes Chapter XXVIII with nothing less than reference to the Book of Job, “where God having set forth the great power of *Leviathan*, calleth him King of the Proud.”<sup>141</sup> Just as the innocent Job must endure the travails cast upon him by the immortal God, Hobbesian subjects must accept, as by their own authorship, whatever hardships that

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<sup>138</sup> See Hoekstra 2004, p.54 and Hoekstra 2001, p.434.

<sup>139</sup> Hobbes 2008, p.152.

<sup>140</sup> Locke 1988, p.328.

<sup>141</sup> Hobbes 2008, p.221. For an interesting reading of the Job passage see Ryan 1988, pp.96-7 which, however, is problematic insofar as it uncritically assumes Hobbes to be a straightforward Christian theist.

“mortal God Leviathan” visits upon them, a final inalienable right of individual physical resistance notwithstanding.<sup>142</sup>

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<sup>142</sup> Hobbes 2008, p.120.

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