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## **Respect and Resistance in Punishment Theory**

Alice Ristroph

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# Respect and Resistance in Punishment Theory

California Law Review, forthcoming 2009

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*Is it coherent to speak of a right to resist justified punishment? Thomas Hobbes thought so. This essay seeks first to (re)introduce Hobbes as a punishment theorist, and second to use Hobbes to examine what it means to respect the criminal even as we punish him. Hobbes is almost entirely neglected by scholars of criminal law, whose theoretical inquiries focus on liberal, rights-based accounts of retribution (often exemplified by Immanuel Kant) and claims of deterrence or other consequentialist benefits (elucidated, for example, by Jeremy Bentham). Writing before Kant or Bentham, Hobbes offered a fascinating account of punishment that will strike contemporary lawyers as both familiar and perplexing. Hobbes justified punishment within a legal system that adheres to due process, notice, and other principles of the rule of law, but he also insisted that no one consents to be punished, that punishment is an act of violence, and most surprisingly, that the condemned person has a right to resist punishment. In exploring the apparent contradictions in these claims, we find an account of punishment arguably more honest, more egalitarian, and more uniformly respectful than the accounts offered by mainstream retributivist and consequentialist theorists.*

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## Introduction

As convicted criminals go, Socrates could hardly have been more accommodating. When his wealthy friend Crito offered to help him escape on the eve of his execution, Socrates politely declined.<sup>1</sup> After he had failed in his defense against the charges of corrupting Athenian youth, and had suggested to no avail an alternative penalty (free meals for life, at public expense), Socrates decided to accept his death sentence without further resistance. Indeed, he was so helpful as to carry out the execution himself: when the jailer arrived with a cup of hemlock, Socrates solicited advice on the most efficacious way to ingest the poison, then obligingly drank to the last drop.<sup>2</sup>

At the other extreme in his attitude toward punishment—though perhaps equally suicidal—was Clyde Barrow, the more violent half of the Bonnie and Clyde criminal team that wreaked havoc across the United States in the early 1930s.<sup>3</sup> Barrow famously vowed that he would never be taken alive; he promised to resist every effort to apprehend him and, if injured and unable to escape, to take his own life before allowing lawmen to capture him. Barrow escaped from prison once and killed a number of law enforcement officers before he was finally shot to death by a team of Texas Rangers and FBI agents in an ambush in Louisiana.<sup>4</sup>

How much resistance—or accommodation—should we expect from the convicted criminal? Few convicts are as helpful as Socrates or as intractable as Clyde Barrow. In many respects, the law makes resistance to punishment especially costly, by threatening further judicial punishment or, in some cases, immediate physical harm. Resisting arrest, jumping bail (or “failure to appear”), and escaping from custody are codified as separate offenses that incur

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<sup>1</sup> This is the account from Plato’s dialogues *Apology* and *Crito*. See PLATO, 1 THE DIALOGUES OF PLATO 98-104, 118-22 (R.E. Allen trans. 1984).

<sup>2</sup> See I.F. STONE, THE TRIAL OF SOCRATES 229 (1989).

<sup>3</sup> See generally E. R. MILNER, THE LIVES AND TIMES OF BONNIE AND CLYDE (1996).

<sup>4</sup> *Id.* at \_\_\_.

independent sanctions.<sup>5</sup> In addition, under the phenomenon known as the “trial penalty,” a refusal to plead guilty often results in a more severe sentence for the underlying offense.<sup>6</sup> And, of course, the fact that so many officials within the criminal justice system are authorized to use guns, clubs, and other instruments of violence ensures that “most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk.”<sup>7</sup> These and other features of criminal justice policy can be understood as incentives for those facing punishment to behave more like Socrates than Clyde Barrow.

As a normative matter, it might seem obvious that the legitimacy of punishment and the illegitimacy of resistance to punishment stand or fall together. Since, to most observers of the legal system, there is little doubt that punishment is legitimate (even if the precise basis for that legitimacy is a subject of perpetual dispute among punishment theorists), it stands to reason that resistance to punishment is widely viewed as a basis for further condemnation.

It is thus especially curious that one of the most influential political thinkers in the Anglo-American tradition endorsed a right to resist punishment. It is all the more surprising that this thinker was Thomas Hobbes, frequently viewed as a defender of authoritarianism and absolute sovereignty. Hobbes divided what seems indivisible: he argued that state-imposed punishment was within the sovereign’s proper authority, and yet the individual facing punishment had a right to resist in any way available. To be sure, the “right” to resist punishment that Hobbes described is only a “blameless liberty,”<sup>8</sup> more akin to a pre-political

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<sup>5</sup> See, e.g., N.J.S.A. § 2C:29-2 (resisting arrest); Tex. Penal Code § 38.10 (2003) (failure to appear); Tex. Penal Code § 38.06 (2003) (escape).

<sup>6</sup> See, e.g., Nancy J. King, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 896 (2004) (describing the trial penalty, or plea discount, and offering rationales for it). In another effort to punish resistance to punishment, a new proposal would penalize prisoners who seek DNA testing if the testing provides further evidence of guilt. See Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. \_\_ (forthcoming 2008).

<sup>7</sup> Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 (1986).

<sup>8</sup> See *infra* n. \_\_ on right as blameless liberty.

natural right or a Hohfeldian privilege than a legally enforceable claim.<sup>9</sup> It would be nonsensical to require the same sovereign that punishes also to protect the subject's right to resist. But even if unenforceable, the right to resist punishment seems to undermine any account of the justification of punishment. If the state has legitimate authority to punish, how can the subject have a privilege to resist?

This essay explores that question. It is new territory for legal scholarship, which has produced almost no work on Hobbes's account of punishment.<sup>10</sup> One reason for the neglect may be that Hobbes does not fit easily into either of the two main camps in punishment theory, retributivism and consequentialism. Hobbes rejected the retributive claim that punishment is a moral duty, depicting it instead as an instrumental effort to achieve deterrence and social stability. But unlike the consequentialist theorists, he did not believe that the benefits of punishment provided a complete normative justification for the practice. And, invoking themes dear to many retributivists, Hobbes insisted on basic rights of due process and decried punishment of innocents. This, I suggest, is reason enough to read Hobbes on punishment. The continuing inability of retributivist theorists to silence consequentialists, and vice versa, suggests

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<sup>9</sup> A Hohfeldian privilege is an option to act, or the absence of a duty to refrain from acting. See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710, 747-50 (1919). A privilege to resist punishment is the absence of a duty to submit to punishment. Since, unlike rights, privileges do not imply any corresponding duties upon others, a privilege to resist punishment does not mean that the sovereign has a duty to refrain from imposing punishment. C.f. Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 675-80 (1999) (describing the right against self-incrimination in Hobbes as a Hohfeldian privilege). At the same time, what Hobbes calls the sovereign's "right" to punish is also akin to a Hohfeldian privilege—the sovereign's right (privilege) to punish does not correspond to a duty to submit to punishment. See *infra* Part IV [TAN 125].

<sup>10</sup> Hobbes is probably overlooked too much by scholars in all areas of law, see *infra* n. \_\_\_, but his virtual absence in criminal legal theory is especially striking. A rare exception is Green, *supra* n. \_\_\_, but Green focuses on the privilege not to testify against oneself rather than the more general right to resist punishment. Theories of punishment from other political philosophers have fared much better among legal scholars. Law reviews and criminal law textbooks are rife with references to Immanuel Kant and Jeremy Bentham, and occasional appeals to Hegel or Beccaria for variety. For just a few of the many available examples, see Russell Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 906-07 (2002) (discussing Bentham); *id.* at 862-63 (Hegel); Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK L. REV. 681, 694-98 (Beccaria); Jeffrie Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

Though Hobbes has been much-studied in political theory and philosophy, even in those fields Hobbes's specific claims about *punishment* have received little attention in comparison to other aspects of his work.

that as a society, we are steadfastly committed to both rights and utility. So was Hobbes. Punishment theory tends to veer toward caricatures in which rights are sacrificed to utility or vice versa, but Hobbes offered a theory that embraces both while weakening neither.<sup>11</sup>

Two additional considerations suggest that punishment theorists should begin to study Hobbes in greater detail. Amidst mainstream theories that view punishment as a morally justified practice, a right to resist is novel, radical, and potentially disruptive. Even if most contemporary scholars remain unconvinced by Hobbes's argument (as I suspect will be the case), addressing his challenges should prove fruitful for criminal law scholarship.

More narrowly, the strange notion of a right to resist punishment sheds considerable light on the issue of *respect* for criminals. Retributive theorists have long argued that we fail to respect the convicted criminal if we punish him for utilitarian reasons.<sup>12</sup> According to this view, punishment and respect are compatible only when punishment is imposed as just retribution for the deserving offender.<sup>13</sup> On the other hand, defenders of consequentialist theories have argued that they, not the retributivists, properly respect the defendant.<sup>14</sup> Distinct from retributivism as well as the mainstream consequentialist theories, Hobbes's right to resist offers an alternative and more convincing picture of what it means to respect someone even as we punish him: we respect the criminal by acknowledging that punishment, though perhaps justified by societal

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<sup>11</sup> At the same time, as will become clear below, Hobbes's account of punishment is markedly different from "hybrid" theories that reconcile retributive and utilitarian aims by specifying circumstances in which one goal should yield to the other. See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987).

<sup>12</sup> See, e.g., R.A. DUFF, TRIALS AND PUNISHMENTS 208, 234 (1986); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968), reprinted in SENTENCING 93-109 (Hyman Gross & Andrew von Hirsch eds., 1981).

<sup>13</sup> See, e.g., MARK TUNICK, HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT 97-98 (1992) (describing Hegel's theory that punishment restores mutual recognition and respect).

<sup>14</sup> See Christopher, *Deterring Retributivism*, supra n. \_\_\_, 967-70 (2002); David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623, 1632-33, 1642-56 (1992).

interests, is hardly in the condemned man's interest or legitimate from his perspective.<sup>15</sup> The right to resist grounds an account of punishment arguably more honest, more egalitarian, and more uniformly respectful than the familiar retributive and utilitarian accounts.

Since Hobbes is not widely studied by legal theorists, this essay begins by highlighting a few key features of Hobbes's political theory that help establish his contemporary relevance and provide crucial background for his theory of punishment. Specifically, Part I examines Hobbes's commitments to equality and individualism as manifested in an inalienable right to self-preservation; his liberal conception of political authority; and his adherence to rule of law values. Part II turns to punishment specifically. Here I show how Hobbes's strong commitment to an inalienable right of self-preservation produces both the sovereign's right to punish and the criminal's right to resist punishment. Part III suggests that the Hobbesian right to resist punishment provides a useful conceptualization of what it means to treat wrongdoers with respect. Some rights of the accused and convicted, I argue, could be understood as permissible, socially tolerated forms of resistance to punishment. A concluding section notes potential objections to Hobbes's account of punishment, and hopes readers will produce more. Let the arguments begin.

## **I. Reintroducing Thomas Hobbes**

Though Hobbes is a staple of the political theory canon, few of his theories are widely studied or referenced by contemporary legal theorists.<sup>16</sup> Certain features of Hobbes's arguments

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<sup>15</sup> There is some philosophical disagreement as to the relationship between justification and legitimacy. Many scholars use the terms interchangeably. *See, e.g.,* Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 703 (2002) (equating legitimacy with moral justification). Others distinguish them: "Legitimacy, when challenged, bases itself on an appeal to the past, while justification relates to an end that lies in the future." Hannah Arendt, *On Violence*, in *CRISES OF THE REPUBLIC* 151 (1972). I think it is clear that whatever others might make of the relationship between the two terms, Hobbes would deny that punishment is either justified or legitimate from the perspective of the punished. *See infra* Part II.B.

may seem to render him irrelevant to modern lawyers in constitutional democracies. After seeing his native England go through bloody civil wars from 1642 to 1651, Hobbes advanced an argument for absolute sovereignty and explicitly rejected the notion of divided or limited government. His concerns about domestic unrest and political instability led him to advocate a degree of governmental power that some commentators have compared to totalitarianism.<sup>17</sup> Perhaps most fundamentally, Hobbes is often portrayed as a profound pessimist about human nature, the man who described the natural condition of mankind as “solitary, poor, nasty, brutish, and short.”<sup>18</sup> For those who do not share Hobbes’s apparent pessimism, the political theory seemingly based on it is not particularly compelling.

Though it is impossible to address or defend the full scope of Hobbes’s arguments here, a brief discussion of a few central issues can help demonstrate his contemporary relevance to punishment theorists. This Part develops three key points. First, the charge of undue pessimism is misplaced. In fact, as a result of his great reluctance to blame humans for any of their efforts at survival, Hobbes displayed more “passionate tenderness” for humans than some later and supposedly more humane liberal theorists.<sup>19</sup> Second, though Hobbes unquestionably endorsed absolute sovereignty, his insistence on consent and authorization as the basis of the sovereign’s

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<sup>16</sup> James Boyle asked over 20 years ago, “Why does the standard jurisprudence course feature Dworkin, Raz, Hart, Kelsen, and Austin as major players, relegating Hobbes to the introductory parade of venerable, but marginal, jurisprudes?” James Boyle, *Thomas Hobbes and the Invented Tradition of Legal Positivism*, 135 U. PA. L. REV. 383, 390 (1987). Legal scholars’ continued inattention to Hobbes is demonstrated by a recent volume, *HOBBS ON LAW*, for which most of the contributions are by philosophers rather than legal scholars. *HOBBS ON LAW* (Claire Finkelstein ed., 2005). Though Hobbes’s own ideas are rarely directly engaged in legal scholarship, Hobbes is frequently cited as providing the inspiration for Oliver Wendell Holmes Jr.’s legal positivism. See, e.g., Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 158, 175 (Steven J. Burton ed., 2000) (“[I]f we are to understand Holmes as advancing a theory of law at all, that theory is clearly Hobbesian in character.”). Claire Finkelstein has recently argued that the Holmes-Hobbes relationship is overstated and based on a superficial reading of Hobbes. Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 *FORDHAM L. REV.* 1211 (2006).

<sup>17</sup> But see Robert P. Kraynak, *Hobbes’s Behemoth and the Argument for Absolutism*, 76 *AM. POL. SCI. REV.* 837 (1982) (acknowledging, and arguing against, the charge that Hobbes’s theory has totalitarian implications).

<sup>18</sup> THOMAS HOBBS, *LEVIATHAN* 89 (Cambridge ed. 1991) (1651). I have modernized spelling and, in some cases, capitalization, for several quotations from this text.

<sup>19</sup> George Kateb, *Hobbes and the Irrationality of Politics*, 17 *POL. THEORY* 355, 358 (1989).



legitimacy was, and remains, the cornerstone of the liberal tradition. Third, Hobbes was committed to familiar liberal legal principles such as due process, notice, certainty and predictability, and nowhere are these principles more central to his theory than in his discussions of punishment.

The short overview of Hobbes's thought offered here is not intended to present Hobbes as a model for contemporary policy. Instead, it is aimed to illuminate important affinities between Hobbesian thought and key principles of modern constitutional democracies. Given these affinities, the inattention to Hobbes's account of punishment is regrettable. While few modern scholars would follow all the dictates of Jeremy Bentham's utilitarianism, we would not abandon his rich discussions of the purposes and best practices of punishment.<sup>20</sup> Similarly, many thinkers reject Kant's own interpretations of the demands of the categorical imperative, but we still appreciate that Kantian retributivism has relevance to contemporary understandings of punishment theory and practice.<sup>21</sup> Hobbes is no less useful as a resource for thinking about punishment.

### **A. Human Nature**

Hobbes famously described human life in the absence of government as “solitary, poor, nasty, brutish and short,” and that memorable phrase shapes the superficial view of Hobbesian political theory. Why, precisely, is life without a sovereign political authority so miserable? Like other political philosophers, Hobbes began his theory with a description of the essential

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<sup>20</sup> For example, Bentham's proposal that poor or homeless persons should be imprisoned in a “workhouse” (to spare others the disutility of the sight of the poor) and forced to labor may not be greeted with universal acceptance today. See Jeremy Bentham, *Tracts on Poor Laws and Pauper Management*, in 8 WORKS OF JEREMY BENTHAM 361, 401 (John Bowring ed., 1843).

<sup>21</sup> Kant argued that even if a society were disbanding and individual members were moving on to other locations, the society should first execute all murderers to “the last murderer remaining” in order to avoid “blood guilt” and honor the demands of the moral law. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., 1991).

characteristics of human beings. According to Hobbes, those characteristics are equal physical vulnerability and a desire for self-preservation.

Hobbes is the theorist par excellence of human vulnerability. In his account, though humans vary in intellectual capacities and in particular physical strengths, every one of us is vulnerable to violent death.<sup>22</sup> No one is so strong or so smart that he will avoid death, or that he can repel any and all physical assaults coordinated by other human beings. Each person, aware of his own vulnerability, seeks desperately to secure himself against danger. Hobbes seemed to infer from vulnerability and the rational *desire* for self-preservation a natural *right* to self-preservation: each person will attempt to master others “till he see no other power great enough to endanger him,” and “such augmentation of dominion over men, being necessary to a man’s conservation, ... ought to be allowed him.”<sup>23</sup> Each individual must decide for himself what course of action is most conducive to his self-preservation, and he may conclude that self-preservation requires not only obviously defensive uses of violence, but seemingly aggressive and acquisitive actions as well. But if many different individuals each pursue this strategy of preemptive self-defense, they will soon come to blows. Accordingly, in the state of nature with

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<sup>22</sup> “[T]he difference between man, and man, is not so considerable, as that one man can ... claim to himself any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself.” HOBBS, *supra* n. \_\_\_, at 87.

<sup>23</sup> *Id.* at 88. Elsewhere, Hobbes elaborated in greater detail his claim that natural vulnerability to death implies a right, or “blameless liberty,” to do whatever necessary for self-preservation:

And forasmuch as necessity of nature maketh men to will and desire *bonum sibi*, that which is good for themselves, and to avoid that which is hurtful; but most of all, the terrible enemy of nature, death, from whom we expect both the loss of all power, and also the greatest of bodily pains in the losing; it is not against reason, that a man doth all he can to preserve his own body and limbs both from death and pain. And that which is not against reason, men call *right*, or *jus*, or *blameless liberty* of using our own natural power and ability. It is therefore a right of nature, that every man may preserve his own life and limbs, with all the power he hath.

THOMAS HOBBS, *ELEMENTS OF LAW* 83 (1839). The term “right,” as used here, cannot mean a legally protected interest, nor does it imply any duties in other people.

no governing authority, “every man is enemy to every man” and human life is, as we have said, solitary, poor, nasty, brutish, and short.<sup>24</sup>

Hobbes’s state of nature is sometimes compared to a prisoners’ dilemma, and indeed, with better communication and coordination, humans might be able to avoid the misery by cooperating with one another. In fact, the inhabitants of Hobbes’s state of nature do eventually realize that they are all safer if they give up their rights to decide for themselves how to pursue self-preservation and when to use violence.<sup>25</sup> Each person is more likely to avoid attack if the discretion over the use of force is concentrated in a single authority. But until there is such an authority—until there is a sovereign—each individual must decide for herself how to act to preserve herself. “The right of nature,” then, is “the liberty each man has, to use his own power, as he will himself, for the preservation ... of his own life”; this right is thus a right “of doing anything” which he judges to be “the aptest means” of self-preservation.<sup>26</sup>

On this account, it is not innate human cruelty or some irresistible tendency toward existential violence that makes government necessary. Instead, each person’s fundamental drive toward self-preservation leads him to take defensive actions, which others then perceive as threats to their own preservation. To appreciate Hobbes, we need not adopt a view of humans as “dangerous and dynamic” or “rapacious” beings.<sup>27</sup> Instead, we need only recognize that individuals seeking self-preservation will pose threats to one another. Political authority is necessary not to restrain human brutes from indulging a natural preference for violence, but to eliminate the good-faith conflicts that inevitably and understandably culminate in physical violence.

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<sup>24</sup> HOBBS, *LEVIATHAN*, *supra* n. \_\_\_, at 89.

<sup>25</sup> *See id.* at 117 (humans form commonwealths to “get[] themselves out from that miserable condition of war”).

<sup>26</sup> *Id.* at 91.

<sup>27</sup> *See* CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 61 (George Schwab trans. 1996) (“dangerous and dynamic”); LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF THOMAS HOBBS* 3 (1963) (“rapacious”).

## B. Contract and Authority

Hobbes founded the modern social contract tradition, a tradition whose basic concepts are familiar enough: individuals in a hypothetical state of nature agree to create a government for their mutual benefit. Not surprisingly, Hobbes's social contract sought to solve the particular problems of his state of nature. Since, on his account, the state of nature is a condition of dangerous plurality in which diverse individual interests produce preemptive aggression and violence, the social contract is an effort to reduce disagreement: all individuals "confer all their power and strength upon one man, or one assembly of men, that may reduce all their wills, by plurality of voices, unto one will."<sup>28</sup> The sovereign then "bears" the "person" of the state, and every individual subject "acknowledge[s] himself to be Author of whatsoever he that beareth their Person shall Act."<sup>29</sup> The social contract thus produces "a real unity of them all, in one and the same person."<sup>30</sup> The form of the social contract, as Hobbes imagined it, is a statement by every individual to every other individual: "I Authorize and give up my Right of Governing my self, to [the sovereign], on this condition, that thou give up thy Right to him, and Authorize all his Actions in like manner."<sup>31</sup> Put differently, each person renounces her natural right to do anything that she believes will contribute to her self-preservation, in exchange for a similar renouncement by others and in the hopes that the sovereign thus empowered will protect everyone.<sup>32</sup>

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<sup>28</sup> HOBBS, *supra* n. \_\_ at 120.

<sup>29</sup> *Id.* (capitalization in original).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (capitalization in original).

<sup>32</sup> Hobbes repeatedly emphasized that the exercise of individual or "private" judgment would become a threat to social stability. He had sharp criticism for the individual who engages in the "peremptory pursuit of his own principles, and reasoning," *id.* at 209, and he counted among the "diseases of a commonwealth" the "seditious doctrine" that "every private man is judge of good and evil actions," *id.* at 223.

Two features of the social contract prove crucial to Hobbes's account of punishment. First, the right given up by the parties to the contract is the "right of governing," a right which clearly encompasses some discretion to make and act on one's own judgments about the best means of self-preservation, but which is not exactly equivalent to the right to defend oneself against immediate threats. Hobbes held that the right of self-defense—the right to resist a violent assault on one's life or bodily safety—was inalienable.<sup>33</sup> Conceptually, perhaps we can reconcile the renunciation of the right to govern with the inalienability of the right of self-defense by drawing a distinction between long-term and immediate self-preservation. In giving up the "right of governing" and agreeing to obey a sovereign, each person relinquishes the right to subdue or kill all those who might *eventually* pose a threat. It is now the sovereign's decision, not each of ours, how best to prevent death tomorrow. But a knife at one's throat today, or any other direct and present threat of bodily harm, leaves no room for discretion. Consequently no one gives up the right to resist immediate threats. Contemporary doctrines of self-defense, which typically incorporate an "imminence" requirement, may be seen as recognitions of a parallel inalienable right to use force as necessary for one's immediate safety.<sup>34</sup> Individuals may use force in self-defense only against a threat of imminent death or seriously bodily harm; self-defense claims based on distant, future threats of harm will almost always fail.<sup>35</sup>

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<sup>33</sup> "[T]here be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life...." *Id.* at 93.

<sup>34</sup> *See, e.g.,* WAYNE R. LAFAVE, CRIMINAL LAW 395 (3d ed. 2000) (describing the imminence requirement). Claire Finkelstein has argued that in some circumstances, an acquittal on the grounds of self-defense can be understood as a recognition that no one can be expected not to resist a violent assault on one's own person. Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 647-49 (1996).

<sup>35</sup> Accordingly, many self-defense claims by battered women who kill their abusers have proved controversial. In the most controversial cases, the battered woman kills her abuser when he is sleeping or otherwise not posing an *immediate* threat. *See* Richard A. Rosen, *Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993).

A second crucial feature of the social contract is that the sovereign himself (or itself, if it is an assembly) is not a direct participant in the social contract. The subjects contract among themselves to recognize and obey the sovereign; the sovereign promises them nothing. At best, the sovereign might be viewed as a third party beneficiary to the social contract. This arrangement produces a sovereign who is above the law, in the sense that he possesses complete political power and is not himself bound by the laws that he issues.<sup>36</sup> To the limited extent that legal scholars have recognized Hobbes's account of sovereignty, they have understandably found it inconsistent with contemporary constitutional democracy.<sup>37</sup> Further, this theory of absolute sovereignty seems to preclude any rights of resistance or rebellion, including, of course, any right to resist punishment.

I will say more about the basis of the sovereign's power to punish and the subject's right to resist in Part II. For the moment, I wish only to emphasize that notwithstanding Hobbes's defense of a powerful sovereign, his social contract theory evinces a deep commitment to individualism and other liberal values.<sup>38</sup> Hobbes began his political theory, as we have seen, with an account of humans as naturally equal and free with an inalienable right to self-preservation. No one person has any pre-political right to rule over others; no one has any right to rule at all unless authorized by those who are to be ruled. Of course, natural equality and

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<sup>36</sup> See, e.g., HOBBS, LEVIATHAN, *supra* n. \_\_ at 130 (sovereign power must be absolute and indivisible); *id.* at 224 (“A fourth opinion, repugnant to the nature of a commonwealth, is this, *That he that hath the sovereign power, is subject to the civil laws.*”) (emphasis in original). Hobbes does say repeatedly that sovereigns are accountable to God and “subject to the laws of nature, because such laws be divine.” *Id.* But no human subject can enforce these divine laws should the sovereign violate them. The aversion to divided or limited government was doubtless a product of the conflicts Hobbes witnessed within 17<sup>th</sup> century England.

<sup>37</sup> See, e.g., Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 185 (2006) (alleging that the Framers of the United State Constitution knew, and rejected, Hobbes's account of sovereignty).

<sup>38</sup> Leo Strauss called Hobbes “the founder of liberalism,” defining liberalism as “that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man and which identifies the function of the state with the protection or the safeguarding of those rights.” LEO STRAUSS, NATURAL RIGHT AND HISTORY 181-182 (1965). Others characterize Hobbes as a “vulgar liberal” or a “kind of liberal.” See RICHARD TUCK, HOBBS 97 (1989) (“a kind of liberal”); Patrick Neal, *Vulgar Liberalism*, 21 POL. THEORY 623 (1993).

freedom create problems, for each person desires survival and may pursue it in any fashion she chooses. But the dangerous results of natural freedom and equality do not diminish the principle that political authority must originate from the subjects' consent. Hobbes claimed that individuals would trade "obedience for protection," but he insisted that this bargain be made by each individual.<sup>39</sup> There is "no obligation on any man" except those that arise "from some act of his own."<sup>40</sup> Today, we may be skeptical that individuals *would* consent to the sweeping sovereign power that Hobbes envisioned, but it remains his claim that the subjects' consent is required to make such power valid.

### C. The Form of Punishment and the Rule of Law

Perhaps Hobbes's claim that individuals would consent to a powerful sovereign becomes somewhat more plausible when we consider that in Hobbes's view, the sovereign could and should operate a political system governed by the rule of law. In legal scholarship, Hobbes is often classified as a crude legal positivist who equates law to the commands of the sovereign.<sup>41</sup> Close attention to his discussions of civil law reveals a more nuanced account. Hobbes made clear that only certain commands may be counted as law, and civil law is in fact best conceived as a system of rules rather than standards or ad hoc commands.<sup>42</sup> The rules must be clearly communicated to the subjects—a law not "made known" is no law at all.<sup>43</sup> Indeed, Hobbes

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<sup>39</sup> HOBBS, LEVIATHAN, *supra* n. \_\_\_, at 491; *see also id.* at 153.

<sup>40</sup> *Id.* at 150.

<sup>41</sup> *See, e.g.,* Michael W. McConnell, *Traditionalism and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 183-84 (describing, as Hobbes's position, "[t]he only solution to the problem of civil order is to treat as law only the command of the sovereign"). Hobbes did often equate law with the command of the sovereign, but his formulations usually emphasize that laws are the commands of one *who has the right* to command. *See, e.g.,* HOBBS, LEVIATHAN, *supra* n. \_\_\_, at 111 ("Law, properly is the word of him, that by right hath command over others.").

<sup>42</sup> *See id.* at 183 (law is not "a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to obey him"); *id.* ("Civil 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 not contrary to the Rule.").

<sup>43</sup> *Id.* at 187-88.

decried the common law system because it left too many questions unsettled and in the discretion of the judiciary.<sup>44</sup> He preferred well-drafted statutes that were communicated “publicly and plainly” to the people.<sup>45</sup> Like many contemporary defenders of the rule of law, Hobbes saw consistency, continuity, and predictability as virtues of a stable legal code.<sup>46</sup> John Rawls went so far as to label a basic conception of the rule of law—“an authorized public interpretation of rules supported by collective sanctions”—as “Hobbes’s thesis.”<sup>47</sup>

Rule-of-law values are especially important to Hobbes’s definition of punishment. This definition identifies four essential elements to punishment: it must be a harm (or “evil”); this harm must be inflicted by public authority; it must be inflicted on someone who has been judged (again, by public authority) guilty of a violation of the law; and it must be inflicted “to the end that the will of men may thereby the better be disposed to obedience.”<sup>48</sup> If any of these requirements is not met, the harm is “a hostile act” other than punishment. Put differently, punishment properly so called is imposed by the right person, on the right person, for the right reasons.<sup>49</sup>

At this level of generality, Hobbes’s account of punishment does not depart dramatically from modern liberal theories of punishment in form or purpose. Like consequentialists, Hobbes insisted that punishment must be aimed at social benefits, but like liberal retributivists, Hobbes stated clearly that only those who have violated a law should be punished: “all punishments of innocent subjects ... are against the law of nature” and can bring “no good to the

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<sup>44</sup> See THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND (Joseph Cropsey ed. 1971).

<sup>45</sup> *Id.* at 71.

<sup>46</sup> For further discussion of Hobbes’s rule of law values and their particular application in the context of punishment, see Mario A Cattaneo, *Hobbes’s Theory of Punishment* 275, 277 in HOBBS STUDIES (K.C. Brown ed., 1965).

<sup>47</sup> JOHN RAWLS, A THEORY OF JUSTICE 211 (2d ed. 1999).

<sup>48</sup> HOBBS, LEVIATHAN, *supra* n. \_\_, at 214.

<sup>49</sup> See *id.* at 214-15. Arguably, Hobbes is not strictly a positivist here; the limitation of “punishment” to properly intentioned harms introduces a normative element to his definition of punishment.



commonwealth.”<sup>50</sup> Moreover, Hobbes required a system of familiar procedural rights: his criminal justice system would adhere to the principle of legality (no punishment without law), require notice, prohibit forced confessions, and guarantee due process including an opportunity to be heard before a judge.<sup>51</sup> But here the similarities to mainstream punishment theory end. The purpose of punishment and its formal structure are two distinct inquiries, and both are distinguishable from the question of the normative justification of punishment.<sup>52</sup> On this last question, Hobbes gave an answer quite different from those given by contemporary punishment theorists.

## II. Punishment Puzzles

There is little doubt that punishment is a political necessity in Hobbes’s commonwealth. The importance of punishment is evident in Hobbes’s famous claim that covenants, without the sword, are but words, and perhaps also in his quip that in matters of government, clubs are trump.<sup>53</sup> But there is an apparent contradiction at the center of Hobbes’s account of punishment: punishment is a “right” of the sovereign and an exercise of legitimate authority, yet it is at the same time an act of violence that the condemned individual has a “right” to resist. The contradiction needs investigation.

### A. Sources of the Right to Punish

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<sup>50</sup> *Id.* at 219. One of the principles of English common law that most outraged Hobbes was the (uncodified) rule that a subject who fled prosecution but later was acquitted would nonetheless forfeit his property. Though a written statute that criminalized flight from trial would be valid, to seize the property of *innocent* subjects without statutory authority was “unchristian and abominable.” HOBBS, A DIALOGUE, *supra* n. \_\_, at 151.

<sup>51</sup> HOBBS, LEVIATHAN, *supra* n. \_\_ at 99 (rejecting testimony obtained through torture); *id.* at 151 (no man shall be compelled to accuse himself); *id.* at 203-04 (no ex post facto laws); *id.* at 218 (right to judicial hearing).

<sup>52</sup> *C.f.* Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEG. F. 437, 439-41 (distinguishing between functions of punishment and theories of punishment).

<sup>53</sup> HOBBS, LEVIATHAN, *supra* n. \_\_, at 117 (“Covenants, without the Sword, are but Words.”); HOBBS, DIALOGUE, *supra* n. \_\_, at 140 (“[I]n matter of Government, when nothing else is turn’d up, Clubs are Trump.”).

Hobbes began his discussion of punishment in the *Leviathan* with “a question ... of much importance”: “by what door the right or authority of punishing ... came in.”<sup>54</sup> As soon as he posed the question, Hobbes rejected the possible answer that individuals consent to be punished as part of the social contract: “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>55</sup> Punishment is a form of violence, and as we have already seen, Hobbes recognized an inalienable right to resist violent assaults.<sup>56</sup> Accordingly, “the right which the commonwealth ... has to punish, is not grounded on any concession ... of the subjects.”<sup>57</sup>

Instead, the right to punish is a manifestation of the *sovereign’s* own right to self-preservation:

[B]efore the institution of commonwealth, 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 commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him only.<sup>58</sup>

The natural right to do violence as one judges necessary for one’s own security becomes, in civil society, the right to punish. More precisely, the natural right to use violence preemptively, *even against someone who does not pose an imminent threat*, becomes the right to punish. Everyone but the sovereign renounces this right when they agree to the social contract. Only the sovereign—who is not a party to the social contract—retains the broad discretion to use force, and so only the sovereign may punish. Notice that Hobbes did not claim that every lawbreaker

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<sup>54</sup> HOBBS, *LEVIATHAN*, *supra* n. \_\_\_, at 214.

<sup>55</sup> *Id.*

<sup>56</sup> *See supra* Part I.B.

<sup>57</sup> HOBBS, *LEVIATHAN*, *supra* n. \_\_\_, at 214.

<sup>58</sup> *Id.*

poses an immediate threat to the life or bodily well-being of the sovereign. But nevertheless a ruler might judge that his own long-term security, and the security of society as a whole, requires him to use force against those who break the law.

So one way to understand the sovereign's right to punish is to view it as a manifestation of the right of self-preservation that belongs to all natural, mortal humans. This presents a contradiction. Even if the sovereign is also a natural person, as would be the case in Hobbes's preferred form of government (an absolute monarchy), the right to punish as a natural right could only belong to the natural person, the man who happens to be king, and not to the artificial person of the sovereign. The sovereign is a creation of the social contract, an artificial man springing into existence by fiat ("Let us make man") at the moment of covenant.<sup>59</sup> If no commonwealth, and no sovereign, exists in the state of nature, it makes little sense to say the sovereign keeps rights that he possessed in the state of nature.

The tension can be alleviated, if not entirely dispelled, by examining more closely Hobbes's state of nature. The circumstance labeled the state of nature is neither a single historical moment nor a purely hypothetical construct. Instead, the state of nature is the always-possible situation in which political authority is absent. Because political authority might appear, disappear, and reappear, the state of nature is a recurrent circumstance. Indeed, one could identify various kinds of states of nature. For example, one could distinguish between the state of nature in which no political authority has ever been established ("the original state of nature") and a state of nature in which political authority has been established but has failed or been destroyed ("a recurrent state of nature").<sup>60</sup> One could also distinguish between a state of

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<sup>59</sup> *Id.* at 10.

<sup>60</sup> Hobbes did not use these names for various states of nature, but he clearly contemplated the possibility that subjects could return to a state of nature after an established political authority collapsed. See HOBBS, *LEVIATHAN*,

nature in which political authority exists nowhere (“a universal state of nature”) and a state of nature in which political authority, otherwise intact, has been rejected only by a single individual (“a specific state of nature”).<sup>61</sup> Conceptually, then, punishment is a distinctive species of violence in that it takes place in a recurrent, specific state of nature, not an original or universal one. Once a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other. The sovereign, a uniquely political and artificial construct, now exists in a version of the state of nature, and he or it possesses the broad right of mortal beings to do whatever seems necessary to preserve himself from imminent or future threats.<sup>62</sup> But if this is all punishment is—a conflict between two mere mortals in the state of nature—then both sovereign and criminal will have equal rights of self-preservation, and the disobedient subject has as much right to resist punishment as the sovereign has to impose it. In fact, this is exactly Hobbes’s claim.

### **B. The Right to Resist**

We have just seen that the sovereign’s power to punish is derived from the natural right to use force as a means of self-preservation. When the law has been broken, the criminal has rejected the sovereign’s authority and returned himself and the sovereign to a state of nature. Hobbes’s radical egalitarianism committed him to the claim that in the absence of a reciprocally

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*supra* n. \_\_\_, at 154 (“If a Monarch shall relinquish the Sovereignty, both for himself, and for his heires; his Subjects returne to the absolute Libertie of Nature....”).

<sup>61</sup> Again, these are not Hobbes’s phrases. But one may find support for this conceptualization in Hobbes’s discussion of criminals who, having resisted the sovereign and drawn the threat of punishment, may band together to defend themselves collectively against the still-existing sovereign. The sovereign remains a sovereign for his law-abiding subjects, but vis-à-vis the band of criminals the sovereign is simply an aggressor in a state of nature. *See id.* at 152.

<sup>62</sup> Even with this elaboration of the states of nature, the claim that the right to punish is a manifestation of a natural right to self-preservation is perplexing. I noted above that Hobbes seems to view the fact of mortality, and the desire for self-preservation, to imply in humans a right to self-preservation. But why would sovereigns—who are not obviously mortal beings—have a similar right? I explore this question in a separate essay, *Political Anthropomorphism*.

recognized third party to adjudicate disputes, each individual has an *equal* claim to preserve himself by whatever means he believes necessary. This gives the sovereign a right to punish, but it also gives any individual facing punishment a right to resist.

When Hobbes imagined the general covenant by which individuals authorize the sovereign, he did not include within it *explicit* reservations other than the condition that others also grant authority to the sovereign. “I authorize and give up my right of governing my self, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.”<sup>63</sup> But there is a further, *implicit* reservation in this grant of authority: the right to defend one’s body from immediate harm. Remember, the right to resist a knife at one’s throat is inalienable.<sup>64</sup> And this inalienable right is the basis of the right to resist punishment.<sup>65</sup> Perhaps Hobbes would consider this reservation so obvious that it does not need to be stated expressly, and perhaps he is correct. To state the reservation expressly, the subject would have to say, “I authorize you to do whatever you think necessary to preserve me, but I reserve the right to resist should you attempt to destroy me.”<sup>66</sup>

On at least two occasions, Hobbes imagined the specific form of the authorization of punishment; each time, Hobbes was explicit that this authorization must include a reserved right to resist. “For though a man may Covenant thus, *Unlesse I do so, or so, kill me*; he cannot

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<sup>63</sup> HOBBS, *LEVIATHAN*, *supra* n. \_\_\_, at 120.

<sup>64</sup> *See supra* I.B.

<sup>65</sup> For a similar reading, and a detailed argument for the inalienability of the right to resist force, see Yves-Charles Zarka, *Hobbes and the Right to Punish*, in HOBBS—THE AMSTERDAM DEBATE (Hans Blom ed. 2001).

<sup>66</sup> Of course, Hobbes does not allow the subject to say to the sovereign, “I think your national security policy is lunacy and surely inadequate to protect me, so I’m going to resist you violently,” or “These tax rates are killing me; I’m going to rebel.” As explained above, we can distinguish between a strategy of long-term self-preservation on one hand and preservation of the body from immediate threats on the other hand. We give the sovereign complete authority over the former; we don’t get to second-guess his strategy. Since protection from immediate threats is necessary to long-term preservation, we expect the sovereign to protect us from immediate threats as well. But if he fails to do so, we are free to do our best to ensure our own immediate self-preservation.

Covenant thus, *Unlesse I do so, or so, I will not resist you, when you come to kill me.*<sup>67</sup> This right to resist belongs to the guilty as well as the innocent.<sup>68</sup> Hobbes makes the same point at greater length in *De Cive*: “No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body. ... It is one thing, if I promise thus: if I do it not at the day appointed, kill me. Another thing, if thus: if I do it not, though you should offer to kill me, I will not resist.”<sup>69</sup> If it seems impossible that one person should have a right to kill and the second should have a right to resist, note that this is exactly the situation of the state of nature. When an individual promises to obey a sovereign, he removes himself from the state of nature. If he later rejects the sovereign’s authority and disobeys the sovereign’s commands, all bets are off; the individual and the sovereign are in the state of nature again vis-à-vis each other—what I called above the “specific state of nature.”

The right to resist is a natural corollary of the claim that penal power is not grounded on the “concession” or consent of those who may face punishment. Security, or self-preservation, is the motivation to grant power to the sovereign in the first place,<sup>70</sup> and whatever else preservation of a person might require, it cannot require that person’s destruction. This reasoning may seem to support at most a right to resist *capital* punishment, but Hobbes explicitly recognized a right to resist imprisonment and other non-capital punishments. As “a man cannot lay down the right of resisting them, that assault him by force,” no one can be understood to have abandoned or transferred the right to resist “wounds, and chains, and imprisonment.”<sup>71</sup> Again, “[i]f the

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<sup>67</sup> HOBBS, LEVIATHAN, *supra* n. \_\_\_, at 98.

<sup>68</sup> *Id.* at 152.

<sup>69</sup> HOBBS, DE CIVE, OR THE CITIZEN 39-40 (Sterling P. Lamprecht, ed., 1949) (1651).

<sup>70</sup> HOBBS, LEVIATHAN, *supra* n. \_\_\_, at 93.

<sup>71</sup> *Id.*

sovereign command a man (though justly condemned,) to kill, wound, or maim himself, or not to resist those that assault him ... yet hath that man the liberty to disobey.”<sup>72</sup>

To understand the right to resist, one must also understand its limits. Three caveats are important. First, the right to resist hardly amounts to an endorsement of criminal activity. Hobbes viewed crime as irrational action, produced by “some defect of the understanding or some error in reasoning.”<sup>73</sup> He did not claim that every lawbreaker was insane, but did maintain that crime resulted from a miscalculation about the individual’s own interests. Ex ante, self-preservation is best realized by obeying the sovereign’s commands. It is only ex post, after the individual has already disobeyed, that self-preservation requires resistance to punishment.<sup>74</sup> Second, the right to resist is not a legally enforceable claim, but what Hobbes called a “blameless liberty.”<sup>75</sup> Resistance to punishment is perfectly human and understandable—as George Kateb has put it, Hobbes seemed to wonder, “With what right, with what possible authority, could anyone require a fellow creature not to try to preserve itself?”<sup>76</sup>—but no one is obliged to assist the resisting criminal. The sovereign is certainly not obliged to cease his attempts to punish.<sup>77</sup> Third and finally, it is only the right to defend *oneself* from immediate threats that is inalienable. According to Hobbes, persons could and should give up the discretion to defend others from

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<sup>72</sup> *Id.* at 151.

<sup>73</sup> *Id.* at 202.

<sup>74</sup> But Hobbes would acknowledge that depending on the sovereign’s capacity to apprehend the criminal and the specific nature of the threatened punishment, in some cases it may be more rational to submit than resist. *See infra* Part IV.

<sup>75</sup> *See supra* n. \_\_\_. The right to resist punishment may be, as David Gauthier has described the right to self-defense, “beyond the law.” David Gauthier, *Self-Defense and the Requirement of Imminence: Comments On George Fletcher’s Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615, 616 (1996). “A legal system which failed to recognize the right, which failed to recognize the justification each person has to act in her own protection in the light of imminent danger, could have no valid claim on the allegiance or obedience of those it sought to bring within its sway.” *Id.*

<sup>76</sup> Kateb, *supra* n. \_\_\_, at 385.

<sup>77</sup> *C.f.* Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332, 358 (2001) (“Hobbes’s right to self-defense is a mere liberty right, rather than a full-fledged claim right. That is, it is a right that places no one under a correlative duty of non-interference.”).

distant or immediate threats, including the threat of punishment.<sup>78</sup> Though I never authorize the sovereign to punish me, I can (and should, according to Hobbes) authorize the sovereign to punish *you*.<sup>79</sup>

Hence punishment may be within the sovereign's broad authority, but for the criminal, it remains a violent threat to his bodily safety and freedom. On this account, punishment is regrettable but necessary; equally necessary is the right to resist. Some commentators have found this apparent contradiction—the claim that the sovereign is authorized to punish and the simultaneous claim that punishment is violence which even guilty subjects have a right to resist—to be fatal to Hobbes's political theory.<sup>80</sup> In one scholar's dramatic language, "The mighty Leviathan, King of the Proud, is still-born. ... [T]here being no door, nor any Right, or Authority of Punishing to come through it, there is no sovereign, hence no commonwealth."<sup>81</sup> Arguably, if the right to resist punishment is inalienable, then Hobbes's "punishment-dependent political theory is in trouble."<sup>82</sup> Beyond the apparent inconsistency, scholars find troubling the apparent equanimity with which Hobbes viewed the struggle between the punisher and the punished.<sup>83</sup>

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<sup>78</sup> HOBBS, LEVIATHAN, *supra* n. \_\_, at 152 ("To resist the sword of the commonwealth, in defense of *another man*, guilty, or innocent, no man has liberty.") (emphasis added). An apparent exception to this rule is the circumstance in which several criminals, all facing punishment, join forces and resist the sovereign collectively. See *supra* n. \_\_.

<sup>79</sup> See the discussion of David Gauthier, *infra* n. \_\_.

<sup>80</sup> Other scholars, such as Deborah Baumgold, are less troubled by the implications of the right to resist because they conclude that resistance will be ineffective: the sovereign's superior power is almost certain to prevail. DEBORAH BAUMGOLD, HOBBS'S POLITICAL THEORY 29 (claiming that Hobbes grants the right to resist only because it is "politically irrelevant"). Remember, the right to resist is only a "blameless liberty," not a legally enforceable claim. Hobbes does not imagine that any government entity will honor and enforce the individual's right to resist punishment. That would be nonsensical. Rather, the right to resist punishment simply means that we should not be surprised if the condemned man fights back, nor can we say that he is wrong to do so.

<sup>81</sup> Thomas S. Schrock, *The Rights to Punish and Resist Punishment in Hobbes's Leviathan*, 44 WESTERN POL. Q. 853, 886-87 (1991).

<sup>82</sup> *Id.* at 854. Leo Strauss also notes the tension between a right to punish and a right to resist punishment as well, although Strauss does not seem to view it as fatal to Hobbes's theory. STRAUSS, *supra* n. \_\_, at 197.

<sup>83</sup> One commentator contrasts the resisting criminal to Odysseus, who had himself tied the mast and yet still resisted his bonds. "If Odysseus had broken the bonds and gone straightway to the Sirens, Homer would have recorded a moral loss. By contrast, if [the person to be punished] successfully resists and escapes, Hobbes finds no moral loss,



In fact, Hobbes was not indifferent about the outcome of the conflict between the sovereign right to punish and the criminal's right to resist. It is true that in relation to one another, the sovereign and the criminal each have a "blameless liberty" to use violence for self-preservation. But the sovereign's violence is not exactly equivalent to the resisting criminal's. In addition to the right to punish—the natural right to use violence—the sovereign also holds the *authority* to punish.<sup>84</sup> That is, the sovereign has been authorized by other subjects to punish on their behalf. The criminal himself has not authorized his own punishment, as indicated above, but other subjects have authorized the discretionary use of force that the sovereign employs to punish the disobedient subject.<sup>85</sup> It is probably the case that Hobbes did not see a *moral* distinction between the sovereign's successful punishment and the criminal's successful resistance—morality had little relevance to Hobbes's state of nature.<sup>86</sup> But there is clearly an important *political* distinction between the punishing sovereign and the resisting criminal: the sovereign acts with political authority and for the benefit of other citizens, but the criminal acts for himself alone.

Perhaps we should view the coexistence of the right to punish with a right to resist as an indication of Hobbes's awareness that diverse human interests can be reconciled only

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even if the defendant is guilty of the crime for which he had beforehand authorized the sovereign to "Kill me." Schrock, *supra* n. \_\_, at 878.

<sup>84</sup> Though I cannot develop the point at length, it is clear that "right" and "authority" are not always interchangeable in Hobbes's theory. At least some rights are natural, but all authority is artificial. Every person has rights in the state of nature, regardless of what other persons do, say, or think. But persons—note the plural—must create relationships of authority. As Hanna Pitkin points out, the person who attempts to establish authority all by himself is, for Hobbes, a fraud. See HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 23 (1972); see also HOBBS, *LEVIATHAN*, *supra* n. \_\_, at 113. Hobbes himself seemed to finesse this point by asking "by what door the *right or authority* of punishing came in." *Id.* at 214.

<sup>85</sup> *C.f.* DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL THEORY OF THOMAS HOBBS* 148 (1969) ("Each man authorizes, not his own punishment, but the punishment of every other man. The sovereign, in punishing one particular individual, does not act on the basis of his authorization from that individual, but on the basis of his authorization of all other individuals.").

<sup>86</sup> Hobbes argued that it did not make sense to speak in moral terms—of right and wrong, or good and bad—until there was a commonly recognized authority to settle moral disagreements. Many contemporary theorists follow this line of reasoning to defend democratic decisionmaking procedures. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

imperfectly. Even with the best intentions, the sovereign will not in fact serve the interests of all he represents—or at any rate, some members of his constituency will believe him not to serve their interests, and they will disobey his commands. If I am one of the disobedient, it may be the case that societal preservation requires that I be jailed or put to death—but it can never be the case that *my own* self-preservation requires my imprisonment or execution.<sup>87</sup> Hobbes made clear that when the sovereign has to choose between his own preservation (upon which depends the preservation of the society as a whole) and the preservation of an individual subject, the sovereign will and should sacrifice the subject. But he did not impose an obligation on the subject to go down quietly. This is what separates him from most contemporary liberal theorists, and what makes his theory so radical and potentially disruptive today: he did not believe that a consent-based theory of government could produce a duty to submit to punishment.

Hobbes's theory of punishment combines deep individualism and egalitarianism (which produce the right to resist) with a consequentialist concern for security and safety.<sup>88</sup> He has at times been compared to retributivists,<sup>89</sup> at times to utilitarians,<sup>90</sup> but his theory should not be confused with contemporary “hybrid theories” that seek to reconcile retributivism with utilitarianism. Hybrid theories draw upon multiple justifications of punishment to determine the appropriate distribution of penalties: a typical hybrid approach holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of the

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<sup>87</sup> I leave aside civil commitment for the mentally incapacitated.

<sup>88</sup> The important individualist and egalitarian claims of Hobbes's account are neglected in a recent discussion by Corey Brettschneider. According to Brettschneider, Hobbes thought it unnecessary to justify punishment to the criminal; criminals were “enemies” of society and as such, “unworthy” of arguments justifying the use of force against them. Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35 POL. THEORY 175, 176, 179 (2007). But it is not that justifying punishment to the criminal is *unnecessary*; rather, this task is *impossible*. Hobbes is not indifferent to the fact that criminals are subject to violent responses from the state. He simply refuses to assuage lingering discomfort about this violence by pretending that the criminal has consented to it.

<sup>89</sup> See Alan Norrie, *Hobbes and the Philosophy of Punishment*, 3 L. & PHILOSOPHY 299, 314 (1984) (“It is because of Hobbes's contractualist framework that his work exhibits a retributivist tendency.”).

<sup>90</sup> See Cattaneo, *supra* n. \_\_\_, at 289 (“Hobbes's conception contains in essence the basic principles of a utilitarian theory of punishment....”).

appropriate penalty within that range.<sup>91</sup> Hobbes had little to say about the severity of punishments, and what he did say was explicitly consequentialist.<sup>92</sup> Desert plays no role in Hobbes's theory; indeed, he stated as a law of nature that "we are forbidden to inflict punishment with any other design, than for correction of the offender, or direction of others."<sup>93</sup>

More fundamentally, Hobbes's account of punishment is unusual in its modesty, or in its open acknowledgement of its own limitations. It does not claim that anyone consents to be on the receiving end of superior physical force. It does not claim that it has transformed the exercise of such force into a cause for moral celebration. It does not claim, as some retributive theories do, that when we incarcerate or execute prisoners, we act like God and "plant the flag of truth within the fortress of a rebel soul."<sup>94</sup> It does not claim that incarceration offers prisoners an education in virtue.<sup>95</sup> It does not claim, as some utilitarian theories do, that harm to the interests of discrete individuals may be made to disappear into aggregate social benefits. The Hobbesian theory of punishment does not promise us that we can punish "without remainder": it does not promise that the right punishment restores the balance, sets the world right, and leaves no place for regret.<sup>96</sup> In the Hobbesian view, the need for physical force demonstrates a failure of

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<sup>91</sup> See, e.g., Norval Morris, *Desert as a Limiting Principle*, in *PRINCIPLED SENTENCING* 201 (Andrew von Hirsch & Andrew Ashworth eds., 1992); Robinson, *Hybrid Principles*, *supra* n. \_\_, at \_\_.

<sup>92</sup> Hobbes claimed that punishments must be sufficiently severe that they would deter illegal action: "If the harm inflicted be less than the benefit, or contentment that naturally follows from the crime committed, that harm is not within the definition [of punishment] and is rather the price, or redemption... Because it is of the nature of punishment, to have for end, the disposing of men to obey the law...." HOBBS, *LEVIATHAN*, *supra* n. \_\_, at 215.

<sup>93</sup> *Id.* at 106.

<sup>94</sup> The phrase comes from C.S. Lewis, who explains that God inflicts pain on humans not to be cruel, but to awaken them to their sins and to the truth. C.S. LEWIS, *THE PROBLEM OF PAIN* 95 (Macmillan ed. 1965). Retributive theorists have adopted this phrase. See Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1 (Wesley Cragg ed., 1992); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 718 n.80 (1981).

<sup>95</sup> "[T]he virtue ethics theory of punishment takes the principal justifying purpose of punishment to be the inculcation of virtue or habituation to virtue." Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 *WAKE FOREST L. REV.* 1, 11 (2002).

<sup>96</sup> The philosopher Bernard Williams argued that many situations present us with moral dilemmas, in which it is not possible to satisfy every morally weighty claim. He used the phrase "remainders" to describe the "moral oughts" that remain unsatisfied. See BERNARD WILLIAMS, *PROBLEMS OF THE SELF* 172-83 (1972). For a somewhat broader understanding of the term, see BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 213 n.1 (1993).

persuasion and consent. Persuasion and consent will fail on occasion, and force will be necessary, but we are all better off when consent succeeds and subjects obey.

In Hobbes's theory, punishment is at best incompletely authorized and imperfectly legitimate. The punishing sovereign acts with authority, but only with the authorization of those subjects who are not themselves punished. In relation to the condemned, the sovereign can claim only the natural right to use violence. So punishment is never fully representative. There is always a trace of the violence of the state of nature—and the rule of the stronger—in physical punishment. These considerations did not lead Hobbes to reject the practice of punishment, and they are hardly reason for us to raze the prisons. But they create a less tidy account of punishment than what is promised by most contemporary theories. Punishment is a practice that leaves the hands of the punisher a bit dirty.<sup>97</sup> I suggest in the next Part that the imperfect legitimacy of punishment is a fact we must keep in mind if we are to treat criminals with respect.

### **III. Respect and the Rights of the Guilty**

#### **A. Rationalizing Defendants' Rights**

As odd as a right to resist punishment may sound to contemporary ears, American law does, of course, recognize other rights of accused persons—rights seemingly far more useful than the right to resist, perhaps, because they are legally enforceable.<sup>98</sup> The arguments for protecting these rights may be roughly divided into instrumental justifications, which typically urge that the rights of the accused are essential to the sorting mechanism by which guilty persons are convicted and the innocent go free, and deontological claims about the inherent moral worth

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<sup>97</sup> See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

<sup>98</sup> The United States is hardly the only country to recognize rights of the accused, but it is usually viewed as having, at least on paper, an especially broad conception of defendants' rights. For discussions of defendants' rights in comparative perspective, see Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. J. INT'L L. 1 (2004).

of every person.<sup>99</sup> I suggest here that Hobbes’s theory of punishment offers a third way to conceptualize the rights of the accused. Closer to the deontological justifications, but not dependent on any particular account of moral duty, a Hobbesian defense of defendants’ rights would present them as manifestations of the right to resist punishment—the right to resist, made safe for liberal democracy. Moreover, the right to resist helps us conceptualize what it means to respect a criminal even as we punish him. Respect requires, among other things, an acknowledgment that punishment is at odds with the rational self-interest and human dignity of the condemned. We respect accused persons by acknowledging their (non-legally enforceable) right to resist punishment, and perhaps by recognizing a diluted version of this “blameless liberty” in the enforceable claim rights of criminal defendants.

Before examining defendants’ rights as derivative of the right to resist, it is worth noting that existing defenses of these rights often seem incomplete or unsatisfying. When the complaint is made, as it often is, that criminal defendants have “too many rights,” a typical rejoinder is that defendants’ rights are essential to a truth-seeking adversarial process in which guilty persons will be convicted and innocent ones will go free.<sup>100</sup> For example, the defendant’s right to present evidence in her own defense (which the Supreme Court has characterized as an essential element of “due process”<sup>101</sup>) helps ensure that jurors or judges can consider all relevant information before making a factual determination of guilt. That a right to present evidence would contribute to truth-seeking is simple and intuitive enough. Scholars have developed far more complex

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<sup>99</sup> For a catalogue of instrumental and rights-based arguments for the privilege against self-incrimination in particular, see Green, *supra* n. \_\_\_, at 640-68.

<sup>100</sup> See, for example, Akhil Reed Amar & Johnnie L. Cochran Jr., *Debate, Do Criminal Defendants Have Too Many Rights?*, 33 AM. CRIM. L. REV. 1193, 1196-97 (1996) (Amar arguing that the criminal justice system provides rights that “benefit the guilty without helping the innocent”); *id.* at 1198 (Cochran arguing that the rights of the accused are necessary to protect innocent defendants).

<sup>101</sup> *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.”).

arguments to explain how other rights of the accused, such as the right to remain silent, also protect innocent defendants and the truth-seeking mission of the criminal justice process.<sup>102</sup> Whatever the precise argument, the refrain of these justifications of defendants' rights remains the same: legal protections for all defendants serve societal interests in sorting guilty persons from innocents.

Such arguments for defendants' rights depend on uncertainty as to guilt or innocence, and they are less persuasive when there is strong evidence of the defendant's guilt. The Fourth Amendment exclusionary rule provides a stark example: under this rule, evidence of guilt is excluded if it was obtained in violation of certain procedural requirements. Since, presumably, the presence of incriminating evidence will often correspond with an actually guilty defendant, the exclusionary rule clearly helps the guilty. For that reason, commentators repeatedly urge courts to abandon or circumscribe the exclusionary rule.<sup>103</sup> Similarly, many commentators—unconvinced by the claim that the right to silence helps the innocent—have criticized the scope of Fifth Amendment privilege against self-incrimination.<sup>104</sup> Finally, the enumerated right that most explicitly protects guilty defendants—the Eighth Amendment right to be free of cruel and unusual punishment—is probably the least enforced of the criminal provisions of the Bill of

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<sup>102</sup> E.g., Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

<sup>103</sup> See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 805 (1997) (arguing that the exclusionary rule “sometimes frees the certainly-guilty”).

<sup>104</sup> See, e.g., Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996) (“[A]s embodied in the United States Constitution, the privilege against self-incrimination was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions.”); Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-80 (1968).

Rights.<sup>105</sup> Our constitutional doctrine and political climate have not been welcoming to the notion of rights for the *guilty* as opposed to rights for the accused-but-potentially-innocent.

Occasionally, however, we see a different argument for defendants' rights, one that invokes the importance of respect for the dignity of all humans—even guilty ones. As “respect for the offender” has been a meme of retributive theories of punishment, the respect-based account of defendant's procedural rights is often presented as a specifically retributive theory. Paul Butler has explained that “[r]etributivists believe that punishment communicates respect for the criminal by recognizing him as a moral agent,” and according to Butler, the “Bill of Rights codifies the retributive concern for the criminal's humanity.”<sup>106</sup> Respect provides a far more stable ground to support rights of *all* accused persons than a concern to protect the innocent or a societal interest in sorting innocent defendants from guilty ones. But it is worth elaborating what kind of respect is due to those who break the law—after all, criminal defendants are more often targets of hatred, fear, revulsion and condemnation than objects of respect.

## **B. Theorizing Respect**

Respect for criminal offenders, as the phrase is usually invoked today, is simply a subsidiary of a broader liberal commitment to “respect for persons”—a recognition of the equality and inherent dignity of all human persons. But as James Whitman has chronicled, “respect *of* persons” once invoked deeply inegalitarian practices, and two very different notions of respect have informed penal practices in America and Europe.<sup>107</sup> Blackstone praised English law over the laws of the European continent precisely because the English common law imposed

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<sup>105</sup> The Supreme Court has often stated that successful Eighth Amendment challenges are, and should be, rare. *See, e.g.,* Harmelin v. Michigan, 501 U.S. 957, 963 (1991); Ingraham v. Wright, 430 U.S. 651, 667 (1977).

<sup>106</sup> Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 1003 (2004).

<sup>107</sup> JAMES WHITMAN, HARSH JUSTICE: CRIMINAL JUSTICE AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 41-43 (2003).

punishments “without respect of persons”—or, without taking into account the social status of the particular offender.<sup>108</sup> Respect, in this inegalitarian sense, called upon punishers to treat offenders according to their pre-criminal social status: on the European continent, upper class offenders were addressed more formally and given greater privileges and better treatment than lower class offenders.<sup>109</sup> This notion of “respect of persons” depended on a discontinuity, not so much between the guilty and the innocent as between the upper class guilty and the lower class guilty.

In contrast, the modern notion of respect is strongly egalitarian. It emphasizes the universal dignity of all humans, criminal or not. According to Whitman, European punishment has moved from the first form of respect to the second. Because European countries criminalized certain offenses committed almost exclusively by high-status offenders, such as dueling, they were used to treating at least some offenders well. It was possible, then, for Europe to “level up” and extend to all offenders the respect formerly reserved for prisoners from the upper social classes.<sup>110</sup> America, in contrast, has never had a large number of high-status offenders. The American criminal justice system is nominally egalitarian among offenders, but it tends to treat all offenders badly—and as clearly inferior to those without criminal records. Somewhat counter-intuitively, Whitman argues, the more socially stratified Europe produced penal systems more deeply committed to principles of (equal) respect for all prisoners.

When contemporary retributive theorists refer to respect for criminal offenders, they invoke the egalitarian model rather than the stratified one. Indeed, theorists argue that it is a commitment to equality that requires retributive punishment in the first place. But this claim

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<sup>108</sup> *Id.* at 42 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 370-71 (1979) (1765-1769)).

<sup>109</sup> *Id.* at 9-11, 104-107.

<sup>110</sup> *See, e.g., id.* at 9-11, 125-50.



often leaves retributive theorists with the paradoxical claim that we respect offenders by treating them with worse than we do non-offenders. As formulated by Herbert Morris, all persons must share equally the benefits and burdens of the law.<sup>111</sup> Crime should be understood (on this account) as an attempt by the wrongdoer to exempt himself from the burdens of self-restraint imposed by the criminal law; by committing a crime, the criminal gains unfair benefits. Punishment is then required to restore the equal distribution of benefits and burdens. We restore equality via the temporary inequality of punishment. In doing so, we recognize the offender as a responsible moral agent. Morris's argument was framed as a challenge to the then-popular rehabilitative approaches to punishment. Morris argued that to view crime as an illness and the criminal as a sick person in need of rehabilitation is to deny the autonomy of the criminal. Penalties imposed as just deserts recognize the choice exercised by those who break the law. By inflicting suffering for those disobedient choices, we recognize them as *choices* and thus respect the wrongdoer as a free and autonomous agent.<sup>112</sup>

Another version of egalitarian retributivism focuses explicitly on the relative positions of victim and wrongdoer. Punishment is depicted as “the infliction of suffering to symbolize the subjugation of the subjugator.... And the message carried in this subjugation is, ‘What you did to her, she can do to you. So you’re equal.’”<sup>113</sup> As inequality is the path to equality in Morris's view, here disrespect is the path to a balance of respect. The offender himself is treated with

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<sup>111</sup> See Morris, *supra* n. \_\_\_, at 95.

<sup>112</sup> Morris, *supra* n. \_\_\_. Though Morris did not mention Hegel, his account closely approximates the Hegelian argument that punishment reformulates the offender's criminal act—the violation of another's freedom—as a universal law and applies it to the offender himself, and for this reason the imposition of punishment is necessary to respect the offender's rationality. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 128 (Allen W. Wood ed., H.B. Nisbet trans. 1991).

<sup>113</sup> Hampton, *supra* n. \_\_\_, at 13.

disrespect—he is stigmatized—in order to achieve equality and respect on a broader social scale.<sup>114</sup>

To many ears—including my own—these claims of respectful punishment ring hollow.<sup>115</sup> It is difficult to see how we can simultaneously stigmatize an offender and show respect for him; stigma and respect seem fundamentally incompatible. Morris’s account establishes, at most, that punishing for retributive reasons is marginally more respectful than incarcerating for rehabilitative reasons—a weak defense of the claim of respectful punishment. And as Morris himself acknowledged, the egalitarianism of his benefits-and-burdens claim depended on the premise that prior to the criminal act, the benefits and burdens of society were in fact equally distributed, a premise that is probably inaccurate in most existing societies.<sup>116</sup> Finally, the retributivist claim that punishment is respectful, especially when defended with philosophical abstractions or Hegelian metaphysics, seems particularly inconsonant with contemporary American penal practices. Jails and prisons are unpleasant places where nearly every aspect of a prisoner’s life is subject to someone else’s control: prisoners are told when (and often, if) they can eat, sleep, shower, read, work, see visitors, and so on.<sup>117</sup> Prisoners are supervised in the shower and at the toilet, strip-searched on occasion, and at all times required to obey the orders of prison officials. With respect like this, who needs insults?

Not everyone will agree that convicted criminals are entitled to any form of respect at all. But assuming that some measure of respect is appropriate, retributive respect is hardly

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<sup>114</sup> *Id.*

<sup>115</sup> See Christopher, *Deterring Retributivism*, *supra* n. \_\_, at 967-70; Dolinko, *supra* n. \_\_, at 1632-33, 1642-56.

<sup>116</sup> Morris acknowledged that if the initial distribution of benefits and burdens is not equal, “the difference between law and coercion disappears.” Morris, *supra* n. \_\_, at 103. He did not himself address whether American society or other existing systems satisfied the equal initial distribution requirement.

<sup>117</sup> See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 160-61 (2006) (describing the lack of privacy and degree of official control in prisons). There may be ways to operate prisons with some modicum of respect—Whitman describes requirements in European prisons that officers address prisoners in formal terms, or knock before entering cells—but such requirements do not exist in American prisons. See WHITMAN, *supra* n. \_\_, at 65-90.

satisfactory. It is weak in its aspirations and unfulfilled in practice. The Hobbesian account of punishment invites a very different conception of respect for wrongdoers, one more realistic and more compelling. On this account, punishment is so great an intrusion on human freedom, dignity, and self-preservation that the only way to respect the humanity of those we punish is to acknowledge their right to resist. Respect via the right to resist is similar to claims that individuals should not be forced to dig their own graves, or supply the rope for their own hangings, or pay for their executioner's bullets, but it goes further.<sup>118</sup> Hobbesian respect for criminals refuses to blame humans for acting on the fundamental and rational drive for self-preservation. In other words, Hobbesian respect would not simply refuse to require Socrates to drink the hemlock cooperatively. Had Socrates agreed to escape with Crito, Hobbesian respect would have recognized this escape as a "blameless" effort to preserve himself.<sup>119</sup>

Of course, the rhetoric of respect will never lead society to tolerate criminals who, like Clyde Barrow, resist punishment by harming the state officials who try to impose it. Violent resistance may be understandable if we take the drive to self-preservation seriously, but it cannot be condoned or overlooked. Nevertheless, the fact that we will and should condemn attacks on law enforcement officials does not end the discussion of the right to resist punishment. Perhaps there are other, less harmful, ways to resist. Were we to think of punishment in more Hobbesian terms, constitutional and statutory rights of the accused and the already-convicted might be understood as forms of legitimate, non-violent resistance to punishment.

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<sup>118</sup> See ERWIN GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955) ("[W]e do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands.").

<sup>119</sup> Larry May has reached a similar conclusion, with provisos. "Hobbes would think Socrates could have justifiably avoided his death sentence, as long as avoiding that sentence truly did not threaten the legal order. ...Hobbes does not say that it is justifiable to break any law the breaking of which would not threaten the legal order. Rather, he holds the much more restricted and reasonable view that this is only true in cases of peril to self." Larry May, *Hobbes on Fidelity to Law*, 4 *HOBBS STUD.* 77, 86 (1992). I am not sure this last provision is much of a restriction, given that Hobbes considered any threat of "wounds, chains, or imprisonment" to pose a peril to self-preservation. *See supra* \_\_\_\_.

The Fifth Amendment right not to be compelled to testify against oneself provides an excellent example. As noted above, scholars have strained to explain the Fifth Amendment right as a service to innocent defendants, but not everyone is convinced.<sup>120</sup> But from a more Hobbesian perspective, the right to remain silent when questioned by would-be punishers is a logical corollary of the fundamental right to preserve oneself, and it matters little whether the right to silence helps the innocent or helps the criminal justice system identify the truly guilty. Indeed, the very phrase “self-incrimination” suggests a concern unique to the guilty: presumably what *innocent* persons have to say will not usually be incriminating. A privilege against self-incrimination is a privilege of those who do have incriminating things to say—and its constitutional status cannot be explained by a concern to protect innocents. The relationship between a right to silence and a right to resist punishment is made especially clear by Hobbes’s claim, echoed in contemporary constitutional doctrine, that testimony can be compelled so long as the defendant is assured immunity from punishment.<sup>121</sup>

Defendants who choose to speak (or have others speak on their behalf) rather than remain silent might similarly be understood as resisting punishment. As noted above, the right to present evidence in one’s own defense has been characterized as an essential element of due process and a key element of the truth-seeking enterprise.<sup>122</sup> But we could explain this right as well or better with an appeal to the concept of self-preservation: those who face criminal charges

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<sup>120</sup> See *supra* \_\_\_\_.

<sup>121</sup> See HOBBS, LEVIATHAN, *supra* n. \_\_\_\_ at 151 (“If a man be interrogated by the sovereign ... concerning a crime done by himself, he is not bound (*without assurance of pardon*) to confess it...”) (emphasis added); see also *Kastigar v. United States*, 406 U.S. 441 (1972) (upholding federal law that permits compelled testimony provided the witness is promised that her statements will not be used to prosecute her). *Cf.* *Communist Party v. Subversive Activities Control Bd.*, 376 U.S. 1, 180 (1961) (Douglas, J., dissenting) (tracing the privilege against self-incrimination to Hobbes and the right to resist punishment). Michael Green has analyzed the Hobbesian argument for a privilege against self-incrimination; he ultimately seems to conclude that a virtue-based or republican political theory provides a non-contractual duty to obey the state that supplants Hobbesian contractualism and precludes a privilege against self-incrimination. See Green, *supra* n. \_\_\_\_, at 675-80, 716.

<sup>122</sup> See *supra* \_\_\_\_ [*Chambers v. Mississippi*].

and punishment have a right to try to exculpate themselves, and proclamations of innocence are reasonable attempts to avoid punishment. Again, under a Hobbesian view there is no duty to submit to punishment.

To be clear, the constitutional rights of the accused and convicted could be understood as forms of permissible resistance to punishment, but these rights are both less and more potent than Hobbes's version of the right to resist. They are less potent, because they do not permit actual violent resistance.<sup>123</sup> They are more potent, because they are enforceable. It would have been logically contradictory for Hobbes's unified, absolute sovereign both to punish and to protect a right of resistance, but our divided government permits the judiciary to enforce certain forms of resistance to legislative or executive power.<sup>124</sup>

Finally, I do not mean to deny the instrumentalist justifications for the rights of the accused; some procedural rights do protect the innocent or assist in distinguishing innocent defendants from guilty ones. But the rationales for defendants', and prisoners', rights are not exhausted by the interests of the innocent or society at large. In addition to whatever truth-seeking function the right to silence, the right to present a defense, and other rights of the accused may serve, they are mechanisms of self-preservation. As such, they belong to the guilty as much as the innocent.

#### **IV. Resisting Resistance**

The account of punishment offered here will, I expect, provoke resistance. When punishment theorists speak of the state's right, or authority, to punish, they usually rely on the

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<sup>123</sup> For example, the Eighth Amendment right to be free of cruel and unusual punishment does not permit a prisoner to kill officials who punish him cruelly.

<sup>124</sup> Another way of putting the point: given that Hobbes's sovereign had absolute power, the subject needed a right to use physical force in resistance. But under a sovereign whose powers are limited by the institutions of divided government, a more limited right to resist may be appropriate.

Hohfeldian sense of right: a claim that implies a correlative duty.<sup>125</sup> If the state has a right to punish criminals, criminals *ipso facto* have a duty to let themselves be punished. A Hobbesian theory disrupts this neat marriage of right and duty. It is my hope that the disruption will be a productive one for punishment theory, one that will encourage refined accounts of the relationship between the consent that allegedly legitimizes government and the force that government exercises against the disobedient.

One potential objection to Hobbes, more pragmatic than philosophical, posits that it is not in fact rational to resist punishment. It is foolish for an individual to wage battle against the vast mechanisms of physical force possessed by a modern state. If self-preservation is the individual's paramount goal, he is better off accepting his punishment. Here one might think of Victor Harris, who in 2001 attempted to flee a police cruiser and avoid a speeding ticket.<sup>126</sup> The ensuing high-speed chase ended when a police deputy maneuvered his vehicle to hit Harris's car, sending Harris over an embankment and leaving him a quadriplegic.<sup>127</sup> One newspaper account attributed to Harris these "saddest words": "If only I had pulled over...."<sup>128</sup> There is little doubt that in a society like the contemporary United States, where law enforcement officers wield the means of force and substantial discretion to use it, physical resistance is usually not only futile but counterproductive. But this pragmatic point does not diminish the power of Hobbes's claim that if there *is* any hope of escape, resistance is the rational human response. And Hobbes would

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<sup>125</sup> See Hohfeld, *supra* n. \_\_\_, at 717.

<sup>126</sup> See *Scott v. Harris*, 127 S. Ct. 1769, 1772-73 (2007).

<sup>127</sup> *Id.* at 1773. Harris sued the police deputy who pushed him over the embankment, alleging an unconstitutional use of deadly force. *Id.* The Supreme Court found that the deputy was entitled to summary judgment, basing its finding on a videotape of the chase. *Id.* at 1778-79.

<sup>128</sup> James J. Kilpatrick, *The Unhappy Lot of a Policeman*, TULSA WORLD (Oct. 15, 2006), G5.

want to remind us, as did Robert Cover, that when the sovereign does clearly possess superior force, we should not mistake rational submission for consent.<sup>129</sup>

More challenging to a Hobbesian understanding of punishment, in my view, will be philosophical claims that humans cannot or should not preserve themselves at the expense of membership in a community. Political thinkers both before and after Hobbes have argued that human beings can exist and thrive only in organized society. If this is the case, we should reject Hobbes's radical individualism and the right to resist punishment that it implies.<sup>130</sup> Given, however, that contemporary *liberal* political theory tends to endorse a fairly robust individualism, it may be fruitful to see whether and how such individualism can respond to Hobbes's challenges.

Finally, even those unpersuaded by Hobbes may find in him admirable honesty and humility. In the many different theories advanced to justify punishment as a political institution, one important variable is the ground the theory claims to cover. Some theories purport to justify punishment completely, so that the imposition of penalties is not an evil to be regretted but an affirmative good—perhaps even a moral duty. Many retributive theories fall in this category.<sup>131</sup> Other theories characterize punishment as a necessary evil, a dirty activity that always leaves something to be regretted.<sup>132</sup> Social utility or other considerations may lead us to decide that to impose punishment is better than to do nothing, but we must acknowledge the damage that

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<sup>129</sup> See Cover, *supra* n. \_\_\_, at 1607-08 (“I think it is unquestionably the case that in the United States most prisoners walk into prison because they know they will be dragged or beaten ... if they do not walk. They do not organize force against being dragged because they know that if they wage this kind of battle they will lose—very possibly lose their lives.”).

<sup>130</sup> I thank [deleted] for emphasizing this point.

<sup>131</sup> Scholars distinguish between mandatory or positive retributivism, which claims that the guilty *must* be punished, and permissive retributivism, which holds that the guilty *may* be punished. See, e.g., Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003). Kant's call to “execute the last murderer” illustrates mandatory retributivism. See *supra* n. \_\_.

<sup>132</sup> See, e.g., CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 112 (Jane Grigson trans., 1996) (1764) (“It is better to prevent crimes than to punish them.”).

punishment inevitably does. Hobbes's theory clearly belongs with the latter of these two options. Hobbes did not present punishment as a completely legitimate political practice, though he viewed it as a necessary and appropriate task. Punishment, on Hobbes's account, is never actually authorized by every single subject—it is never authorized by the individual who suffers it. For that individual, punishment is the rule of the stronger, violence imposed by a person or persons with superior physical might. Against such an imposition, it is only human to resist.