

4-2009

Respect and Resistance in Punishment Theory

Alice Ristroph

Brooklyn Law School, alice.ristroph@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Criminal Law Commons](#)

Recommended Citation

97 Cal. L. Rev. 601 (2009)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Respect and Resistance in Punishment Theory

Alice Ristorph†

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 firmly declined.¹ 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.²

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.³ 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 jail once, and killed a number of law enforcement officers on

Copyright © 2009 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Associate Professor, Seton Hall University School of Law. For helpful comments, thanks to Vera Bergelson, Sarah Burgess, Michael Cahill, David Dyzenhaus, Claire Finkelstein, Stuart Green, Rick Greenstein, Adil Haque, Kyron Huigens, Melissa Murray, Stephen Schulhofer, Carol Steiker, Martin Stone, Bob Weisberg, Ekow Yankah, and workshop participants at Temple Law School, Willamette University College of Law, the 2008 Criminal Justice Workshop at Harvard Law School, the 2008 Law & Humanities Junior Scholar Workshop at UCLA, and the Safra Foundation Center for Ethics at Harvard University. This Essay was generously supported by the University of Utah, S.J. Quinney College of Law, and by a Faculty Fellowship at the Safra Foundation Center for Ethics, Harvard University.

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

2. See I.F. STONE, THE TRIAL OF SOCRATES 229 (Doubleday 1989) (1989).

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

separate occasions, before he was finally shot to death by a team of Texas Rangers and FBI agents in an ambush in Louisiana.⁴

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 independent sanctions.⁵ 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.⁶ 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.”⁷ 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 is no surprise 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,” more akin to a prepolitical natural right than a legally enforceable claim.⁸ It would be

4. *Id.* at 22-25 (describing Barrow’s escape from jail); *id.* at 134 (listing several law enforcement officers killed by Barrow); *id.* at 139-143 (describing ambush in Louisiana).

5. *See, e.g.*, N.J. STAT. ANN. § 2C:29-2 (West 2008) (resisting arrest); TEX. PENAL CODE ANN. § 38.10 (Vernon 2003) (failure to appear); TEX. PENAL CODE ANN. § 38.06 (Vernon 2003) (escape).

6. *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. 263 (2008).

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

8. There are some affinities between a Hobbesian “blameless liberty” and a Hohfeldian privilege: both entail an option to act, or the absence of a duty to refrain from acting. *See* Wesley

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 right 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.⁹ One reason for the neglect may be that Hobbes does not fit easily into either of the two main camps in punishment theory, retributivism¹⁰ 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 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 retributivists to silence consequentialists, and vice versa, suggests 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

Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 747-50 (1917). 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. Cf. 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). And, of course, Hobbes does recognize the sovereign's "right" to punish. But Hobbesian rights do not map neatly onto Hohfeld's categories, as discussed in more detail below. For more on rights as "blameless liberties" and the inadequacy of Hohfeld, see *infra* Part II.B.

9. Hobbes is probably overlooked too much by scholars in all areas of law, see *infra* note 16, but his virtual absence in criminal legal theory is especially striking. A rare exception is Green, *supra* note 8, 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 G.W.F. Hegel or Cesare Beccaria for variety. For just a few of the many available examples, see Russell L. Christopher, *Deterring 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 U. L. REV. 681, 694-98 (Beccaria); Jeffrie G. 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.

10. In this Essay, I use the terms "retributivism" and "retributive arguments" interchangeably. But for a more nuanced account of the concepts than is required here, see Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 820 (2007) (distinguishing between "retributive" theory and "retributivist" theory).

neither.¹¹

Two additional considerations suggest that punishment theorists should begin to study Hobbes in greater detail. First, amidst mainstream theories that view punishment as a morally justified practice, a right to resist is novel, radical, and potentially disruptive. Taking seriously the right to resist may lead us to conclude that punishment cannot be fully reconciled with the criteria for political legitimacy set forth in modern liberal theory. Instead, punishment creates a dilemma for liberals: physically coercive punishments may be socially necessary, but they are also acts of violence, persistent traces of the rule of the stronger in a system otherwise committed to rule by consent. I do not propose to resolve this dilemma—it is the nature of dilemmas not to be resolved—but if we were to acknowledge it, we would probably punish differently, and much less frequently and severely. And even if many contemporary punishment theorists remain unconvinced by Hobbes's argument, 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. Retributivists have long argued that we fail to respect the convicted criminal if we punish him for consequentialist reasons.¹² According to this view, punishment and respect are compatible only when punishment is imposed as just retribution for the deserving offender.¹³ On the other hand, defenders of consequentialist theories have argued that they, not the retributivists, properly respect the defendant.¹⁴ 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 interests, is hardly in the condemned man's interest or legitimate from his perspective.¹⁵ The right to resist grounds an account of punishment that is

11. 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).

12. 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).

13. 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).

14. See Christopher, *supra* note 9, at 967-70; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632-33, 1642-56 (1992).

15. 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). Hobbes did not use either term very much and

arguably more honest, more egalitarian, and more uniformly respectful than the familiar retributive and utilitarian accounts.

Since legal theorists do not often give sustained attention to Hobbes, 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. The concluding Part notes potential objections to Hobbes's account of punishment, and hopes readers will produce more. Let the arguments begin.

I

REINTRODUCING THOMAS HOBBS

Though Hobbes is a staple of the political theory canon, he has received comparatively little attention from contemporary legal theorists.¹⁶ Certain features of Hobbes's arguments 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

focused instead on authorization. But I think it is clear that Hobbes would reject efforts to show that punishment is legitimate, or justified, from the perspective of the person punished. See *infra* Part II.B.

16. James Boyle asked over twenty 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, jurisprududes?" James Boyle, *Thomas Hobbes and the Invented Tradition of Legal Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383, 390 (1987). The contributors to a recent collection on Hobbes's accounts of law include philosophers and political theorists, but few law professors. HOBBS ON LAW (Claire Finkelstein ed., 2005). Though legal scholarship rarely directly engages Hobbes's own ideas, he 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).

compared to totalitarianism.¹⁷ Perhaps most fundamentally, Hobbes is often portrayed as a profound pessimist about human nature, as the man who described the natural condition of mankind as "solitary, poor, nasty, brutish, and short."¹⁸ For those who do not share Hobbes's apparent pessimism, his political theory does not seem 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.¹⁹ Second, though Hobbes unquestionably endorsed absolute sovereignty, his insistence on consent and authorization as the basis of the sovereign's 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 arguments offered here is not intended to present Hobbes as a model for contemporary policy. Instead, I aim 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.²⁰ 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.²¹ Hobbes is no less useful as a resource for thinking about punishment.

17. *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).

18. THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., 1991) (1651). I have modernized spelling, punctuation, and capitalization for quotations from this text.

19. George Kateb, *Hobbes and the Irrationality of Politics*, 17 POL. THEORY 355, 385 (1989).

20. 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).

21. 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) (1797).

A. Human Nature

Hobbes famously described human life in the absence of government as “solitary, poor, nasty, brutish, and short,”²² 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 characteristics of human beings. According to Hobbes, those characteristics are: (1) equal physical vulnerability; and (2) a desire for self-preservation.

Hobbes is the theorist par excellence of human vulnerability. His account emphasizes that although humans vary in intellectual capacities and in particular physical strengths, every one of us is vulnerable to violent death.²³ 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.”²⁴ 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 no governing authority, “every man is enemy to every man,” and human life is, as we have said, “solitary, poor, nasty, brutish, and short.”²⁵

Hobbes’s state of nature is sometimes compared to a prisoner’s dilemma,

22. HOBBS, *supra* note 18, at 89.

23. “[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.” *Id.* at 87.

24. *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 NATURAL AND POLITIC 71 (Ferdinand Tonnies ed., 1839) (1640) [hereinafter HOBBS, ELEMENTS OF LAW]. The term “right,” as used here, cannot mean a legally protected interest, nor does it imply any duties in other people.

25. HOBBS, *supra* note 18, at 89.

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 most of their natural liberty to decide for themselves how to pursue self-preservation and when to use violence.²⁶ 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.²⁷

On this account, it is not innate human cruelty or some irresistible tendency toward gratuitous 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.²⁸ 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.

B. Contract and Authority

Hobbes founded the modern social contract tradition, the basic concepts of which are familiar enough: individuals in a 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 upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.”²⁹ The sovereign then “bears” the “person” of the state, and every individual subject “acknowledge[s] himself to be author of whatsoever he that bears their person shall act.”³⁰ The social contract thus produces “a real unity of them all, in one

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

27. *Id.* at 91.

28. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 61 (George Schwab trans., 1996) (1927) (“dangerous and dynamic”); LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS* 3 (Elsa M. Sinclair trans., 1963) (“rapacious”).

29. HOBBS, *supra* note 18, at 120.

30. *Id.*

and the same person.”³¹ 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 myself, to [the sovereign], on this condition, that you give up your right to him, and authorize all his actions in like manner.”³² Put differently, each person renounces her natural right to do *absolutely anything and everything* 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.³³

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.³⁴ 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 subject’s, how best to prevent death tomorrow. But a knife at one’s throat today, or any other direct threat of immediate 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.³⁵ Individuals may use force in self-defense only against a threat of imminent death or serious bodily harm; self-defense claims based on distant, future threats of harm will almost always fail.³⁶

31. *Id.*

32. *Id.* (emphasis omitted).

33. 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,” 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 209, 223 (emphasis omitted).

34. “[T]here [are] 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.

35. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* §10.4(d) (2d ed. 2003). 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).

36. 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

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.³⁷ At best, the sovereign might be viewed as a third party beneficiary to the social contract. This arrangement appears to produce 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.³⁸ To the limited extent that legal scholars have recognized Hobbes's account of sovereignty, they have understandably found it inconsistent with contemporary constitutional democracy.³⁹ 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.⁴⁰ 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 prepolitical 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 freedom create problems, as 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 *each* individual must make this bargain.⁴¹ There is "no obligation on any man"

is sleeping or otherwise not posing an *immediate* threat. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993).

37. See, e.g., HOBBS, *supra* note 18, at 120 (describing the form of the social contract).

38. See, e.g., *id.* at 130 (sovereign power must be absolute and indivisible); *id.* at 184 ("The sovereign ... is not subject to the civil laws."); *id.* at 224 ("A fourth opinion, repugnant to the nature of a commonwealth, is this, *That he that has the sovereign power, is subject to the civil laws.*"). Hobbes does say repeatedly that sovereigns are accountable to God and "subject to the laws of nature, because such laws [are] 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 17th century England.

39. 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 States Constitution knew, and rejected, Hobbes's account of sovereignty).

40. 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* 181-82 (Univ. of Chi. Press 1971) (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).

41. HOBBS, *supra* note 18, at 491 (stating as the aim of LEVIATHAN "to set before men's

except those that arise “from some act of his own.”⁴² 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 any political 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 sometimes classified as a crude legal positivist who equates law to the commands of the sovereign.⁴³ Close attention to his discussions of civil law, however, reveals a more nuanced account. Hobbes made clear that only certain commands may be counted as law, and civil law is best conceived as a system of rules rather than standards or ad hoc commands.⁴⁴ The rules must be clearly communicated to the subjects—a law not “made known” is no law at all.⁴⁵ Indeed, Hobbes decried the suggestion that judges “make” law themselves.⁴⁶ He extolled well-drafted statutes that were communicated “publicly and plainly” to the people.⁴⁷ Like many contemporary defenders of the rule of law, Hobbes saw consistency,

eyes the mutual relation between protection and obedience”); see also *id.* at 153 (“The obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasts, by which he is able to protect them.”).

42. *Id.* at 150.

43. See, e.g., Michael W. McConnell, *Tradition 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, *supra* note 18, at 111 (“Law, properly is the word of him, that by right hath command over others.”).

44. See HOBBS, *supra* note 18, 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 commonwealth has 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.”) (emphasis omitted).

45. *Id.* at 187-88. Hobbes suggests that laws of nature are evident to men through their own reason, rather than via any sovereign proclamation, but he goes on to explain that all laws, especially the laws of nature, need to be interpreted. The task of interpretation falls to judges duly authorized by the sovereign. See *id.* at 188-92.

46. See THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed., 1971) (1681) [hereinafter HOBBS, DIALOGUE] (“It is not wisdom, but authority that makes a law.”); see also *id.* at 70-73, 87, 140-42. 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.” *Id.* at 151; see also HOBBS, *supra* note 18, at 193.

47. HOBBS, DIALOGUE, *supra* note 46, at 71.

continuity, and predictability as virtues of a stable legal code.⁴⁸ 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."⁴⁹

Rule-of-law values are especially important to Hobbes's definition of punishment. This definition identifies four essential elements to punishment: (1) it must be a harm (or "evil"); (2) this harm must be inflicted by public authority; (3) it must be inflicted on someone who has been judged, by public authority, guilty of a violation of the law; and (4) it must be inflicted "to the end that the will of men may thereby the better be disposed to obedience."⁵⁰ If any of these requirements are not met, the harm is a "hostile act" other than punishment.⁵¹ Put differently, punishment properly so called is imposed by the right person, on the right person, for the right reasons.⁵²

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, and 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 commonwealth."⁵³ 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.⁵⁴

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.⁵⁵ As familiar as the purpose and structure of Hobbes's punishment

48. 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).

49. JOHN RAWLS, *A THEORY OF JUSTICE* 211 (2d ed. 1999) (1971).

50. HOBBS, *supra* note 18, at 214.

51. *Id.* at 215.

52. *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.

53. *Id.* at 219. I mean only to point out the compatibility between Hobbes and retributive theory. Hobbes himself was no retributivist, see *infra* notes 101-102 and accompanying text, and in general one need not be a retributivist to object to punishing the innocent. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 *DUKE L.J.* 263, 273 n.31 (2005).

54. HOBBS, *supra* note 18, 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).

55. *Cf.* Kyron Huigens, *On Commonplace Punishment Theory*, 2005 *U. CHI. LEGAL F.* 437, 439-41 (distinguishing between functions of punishment and theories of punishment).

system are, on the question of justification, he 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 in his quip that in matters of government, "clubs are trump."⁵⁶ 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. This contradiction needs investigation.

A. The Right to Punish

Hobbes began his discussion of punishment in *Leviathan* with an inquiry "of much importance": "by what door the right or authority of punishing . . . came in."⁵⁷ 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."⁵⁸ Punishment is a form of violence, and as we have already seen, Hobbes recognized an inalienable right to resist violent assaults.⁵⁹ Accordingly, the commonwealth's right to punish "is not grounded on any concession . . . of the subjects."⁶⁰

Instead, the right to punish is a manifestation of the *sovereign's* 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 . . .⁶¹

Thus, in Hobbes's view, an individual's natural right to do violence as he judges necessary for his own security becomes, in civil society, the sovereign's

56. HOBBS, *supra* note 18, at 117; HOBBS, *DIALOGUE*, *supra* note 46, at 140.

57. HOBBS, *supra* note 18, at 214.

58. *Id.*

59. *See supra* Part I.B.

60. HOBBS, *supra* note 18, at 214.

61. *Id.*

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 poses an immediate threat to the life or bodily well-being of the sovereign. 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.

Thus, 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. But this produces a new puzzle. 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.⁶² If no commonwealth, and thus 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.

This tension can be alleviated, if not entirely dispelled, by examining more closely Hobbes's state of nature. "State of nature" is a term of art that refers to 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").⁶³ One could also distinguish between a state of 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").⁶⁴

62. *Id.* at 10.

63. 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. *Id.* at 154 ("If a monarch shall relinquish the sovereignty, both for himself, and his heirs; his subjects return to the absolute liberty of nature . . .").

64. 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.

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 possesses the broad right of mortal beings to do whatever seems necessary to preserve himself from imminent or future threats.⁶⁵ But if this is all punishment is—a conflict between two mere mortals in the state of nature—then both the sovereign and the criminal will have equal rights of self-preservation, and the criminal 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 version of the state of nature.⁶⁶ Hobbes's radical egalitarianism committed him to the claim that in the absence of a reciprocally 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 any *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 you give up your right to him, and authorize all his actions in like manner."⁶⁷ 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.⁶⁸ And this inalienable right is the basis of the right to resist punishment.⁶⁹ Perhaps Hobbes considered this reservation so obvious that it did not need to be stated

65. 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 it is not clear why sovereigns—who are not obviously mortal beings—would have a similar right.

66. I do not mean to suggest that every crime is a profound political statement. I mean simply that the criminal has put himself and the sovereign into a conflict with no mutually recognized third-party adjudicator.

67. HOBBS, *supra* note 18, at 120.

68. See *supra* Part I.B.

69. 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 71 (Hans Blom ed., 2001).

expressly, and perhaps he was 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."⁷⁰

On at least two occasions, Hobbes imagined the specific form of the authorization of punishment. Each time, he was explicit that this authorization must include a reserved right to resist. Hobbes states in the *Leviathan*, "For though a man may covenant thus, *unless I do so, or so, kill me*; he cannot covenant thus, *unless I do so, or so, I will not resist you, when you come to kill me*."⁷¹ This right to resist belongs to the guilty as well as the innocent.⁷² 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."⁷³ 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."

It should be clear by now that Hobbesian rights do not imply correlative duties. The sovereign's right to punish does not imply that the individual

70. 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 am going to resist you violently," or, "These tax rates are killing me; I am 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 are not allowed 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.

71. HOBBS, *supra* note 18, at 98.

72. *Id.* at 152.

73. HOBBS, *DE CIVE, OR THE CITIZEN* 39-40 (Sterling P. Lamprecht ed., 1949) (1651). Two passages in *LEVIATHAN* sometimes lead commentators to argue that Hobbesian subjects do consent to be punished. In rejecting a general right of revolution, Hobbes claimed that "if he that attempts to depose his sovereign be killed, or punished by him for such attempt, he is author of his own punishment, as being by the institution, author of all his sovereign shall do." HOBBS, *supra* note 18, at 122. Hobbes later expanded this argument: "[B]ecause every subject is by this institution author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever [the sovereign] does, it can be no injury to any of his subjects." *Id.* at 124. The second of these passages is easy to reconcile with the right to resist punishment if we remember that Hobbes defines "injury" as a breach of contract, see *id.* at 104, and it is clear that the sovereign breaches no contract in imposing punishment. Punishment damages the subject, see *id.* at 120, but it does not injure him. The discussion of efforts to depose a sovereign is more challenging, but it is clear from other passages that the right to resist extends even to punishment for treason or rebellion. See *id.* at 152.

subject has a duty to submit to punishment, and the individual's right to resist punishment does not imply the sovereign has a duty to refrain from punishing. In other words, these are not Hohfeldian "claim rights."⁷⁴ The rights to punish and to resist punishment bear some resemblance to what Hohfeld called privileges—legal options to act, unburdened by duties owed to others. But Hobbesian rights are not exactly Hohfeldian privileges, since Hohfeld understood privileges to imply a correlative "no-right" in others.⁷⁵ Indeed, Eleanor Curran has recently suggested that a close study of Hobbes reveals inadequacies in Hohfeld's framework.⁷⁶ Whatever we make of Hohfeld, the critical point here is that Hobbesian rights imply no correlative duties. They are instead "blameless libert[ies]."⁷⁷ The preeminent natural right, according to Hobbes, "is the liberty each man has, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life."⁷⁸ The sovereign's right to punish and the subject's right to resist are both manifestations of that natural right.

Even in the absence of right-duty correlations, there is a sense in which Hobbes's recognition of a right to resist punishment is related to his claim that penal power is not grounded on the consent of those who may face punishment. A desire for security or self-preservation provides the motivation to grant power to the sovereign in the first place,⁷⁹ 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. Since "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."⁸⁰ He reasoned that there was "no benefit consequent" to the one who suffered these non-capital punishments, and one who allows himself to be physically restrained puts himself at the mercy of his captor.⁸¹ Again, "[i]f the sovereign

74. See Hohfeld, *supra* note 8, at 717 (defining claim rights as those with correlative duties); see also 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.").

75. Hohfeld, *supra* note 8, at 710, 747-50.

76. See Eleanor Curran, *Lost in Translation: Some Problems with a Hohfeldian Analysis of Hobbesian Rights*, 19 HOBBS STUD. 58 (2006).

77. "[T]hat 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." HOBBS, *ELEMENTS OF LAW*, *supra* note 24, at 71.

78. HOBBS, *supra* note 18, at 91.

79. *Id.* at 93.

80. *Id.*

81. *Id.* Claire Finkelstein has argued that "surely it would sometimes be beneficial for me to lay down the right to resist him who wounds me, puts me in chains or imprisons me," and suggests that it might sometimes be worthwhile to sell one's right to resist. Finkelstein, *supra* note

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.”⁸²

To fully understand the right to resist, however, 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.”⁸³ 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 may require resistance to punishment.⁸⁴ Second, as I have already emphasized, the right to resist is not a legally enforceable claim, but rather a “blameless liberty.”⁸⁵ 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?”⁸⁶ But no one is obliged to assist the resisting criminal. The sovereign is certainly not obliged to cease his attempts to punish. 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 distant or immediate threats, including the threat of punishment.⁸⁷ Though I never authorize the sovereign to punish me, I

74, at 338-39. Whatever notion of self-interest motivates Finkelstein’s claim, it is not Hobbes’s. Hobbes would probably acknowledge that it may sometimes serve a person’s interest to decline to resist. But to renounce permanently the right to resist is tantamount to saying, “I am not and never will be the best agent of my own preservation; I bargain that my interests in preservation are best served by granting you complete discretion over my continued existence.” Hobbes would see such a bargain as deeply irrational, and I am inclined to agree. It should be noted that according to Hobbes, rational human beings care not simply about being preserved, but about *self*-preservation. They are agents of their own security, not mere passive recipients of protective services.

82. HOBBS, *supra* note 18, at 151.

83. *Id.* at 202.

84. But Hobbes would acknowledge that depending on the sovereign’s capacity to apprehend the criminal and the specific nature of the threatened punishment, it may sometimes be more rational to submit than to resist. See *infra* Conclusion.

85. See *supra* note 77. 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.*

86. Kateb, *supra* note 19, at 385.

87. HOBBS, *supra* note 18, 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.

can (and should, according to Hobbes) authorize the sovereign to punish *you*.⁸⁸

C. Implications for Punishment (and Political) Theory

Hence punishment may be within the sovereign's broad authority, but from the criminal's perspective, it remains a violent threat to 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 that even guilty subjects have a right to resist—to be fatal to Hobbes's political theory.⁸⁹ 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."⁹⁰ Arguably, if the right to resist punishment is inalienable, then Hobbes's "punishment dependent political theory is in trouble."⁹¹ Beyond the apparent inconsistency, scholars find troubling the apparent equanimity with which Hobbes viewed the struggle between the punisher and the punished.⁹²

In fact, Hobbes was not indifferent about the outcome of the conflict between the sovereign's 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.⁹³ That is, the sovereign has been authorized by other

88. See *infra* note 94 and accompanying text.

89. See, e.g., JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION*, 197-207 (1986). 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 (1988) (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.

90. Thomas S. Schrock, *The Rights to Punish and Resist Punishment in Hobbes's Leviathan*, 44 *POL. RES. Q.* 853, 886-87 (1991).

91. *Id.* at 854. Leo Strauss also notes the tension between a right to punish and a right to resist, but does not seem to view it as fatal to Hobbes's theory. STRAUSS, *supra* note 40, at 197.

92. Thomas Schrock contrasts the resisting criminal to Odysseus, who ordered his men to tie him to the mast and yet still resisted the 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, even if the defendant is guilty of the crime for which he had beforehand authorized the sovereign to 'Kill me.'" Schrock, *supra* note 90, at 878.

93. 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

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 employed by the sovereign to punish the disobedient subject.⁹⁴ It is possible that Hobbes did not see a *moral* distinction between the sovereign's successful punishment and the criminal's successful resistance, as morality had little relevance to Hobbes's state of nature.⁹⁵ 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 and the right to resist as an indication of Hobbes's awareness that diverse human interests can be reconciled only imperfectly. Even with the best intentions, the sovereign will not in fact serve the interests of everyone 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.⁹⁶ 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.⁹⁷ At times, he has been compared to

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 FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 23 (1972); see also HOBBS, *supra* note 18, at 113. Hobbes himself seemed to finesse this point by asking, “[B]y what door the *right or authority* of punishing in any case came in.” *Id.* at 214.

94. Cf. GAUTHIER, *supra* note 88, at 148 (“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 from all other individuals.”).

95. 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 decision-making procedures. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

96. I leave aside civil commitment for the mentally incapacitated.

97. 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

retributivists,⁹⁸ and at times to utilitarians.⁹⁹ 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 appropriate penalty within that range.¹⁰⁰ Hobbes had little to say about the severity of punishments, and what he did say was explicitly consequentialist.¹⁰¹ 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.”¹⁰²

More fundamentally, Hobbes’s account of punishment is unusual in its modesty and its open acknowledgment 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 to have transformed the exercise of such force into a cause for moral celebration or self-congratulation. It does not pretend that we punish prisoners for *their* benefit rather than our own.¹⁰³ 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.”¹⁰⁴ It

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 Hobbes did not argue that justifying punishment to the criminal is *unnecessary*; rather, his claim was that this task is *impossible*. I do not think Hobbes was indifferent to the fact that criminals are subject to violent responses from the state. He simply refused to assuage lingering discomfort about this violence by pretending that the criminal has consented to it.

98. See Alan Norrie, *Thomas Hobbes and the Philosophy of Punishment*, 3 L. & PHIL. 299, 314 (1984) (“It is because of Hobbes’s contractualist framework that his work exhibits a retributivist tendency.”).

99. See Cattaneo, *supra* note 48, at 289 (“Hobbes’s conception contains in essence the basic principles of a utilitarian theory of punishment . . .”).

100. See, e.g., Norval Morris, *Desert as a Limiting Principle*, in PRINCIPLED SENTENCING 201 (Andrew von Hirsch & Andrew Ashworth eds., 1992); Robinson, *supra* note 11, at 38-39.

101. Hobbes claimed that punishments must be sufficiently severe to 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 . . .” HOBES, *supra* note 18, at 215.

102. *Id.* at 106; see also *id.* at 240 (“[T]he end of punishment is not revenge, and discharge of choler; but correction, either of the offender, or of others by his example. . .”).

103. Hobbes might have enjoyed *Cool Hand Luke*, the film in which Luke Jackson, played by Paul Newman, repeatedly resists punishment by escaping a rural prison. When Luke is captured and returned to the prison after one escape attempt, a prison captain has him shackled and advises him never to stop listening to the sound of his chains, “because they gonna remind you of what I’ve been sayin’—for your own good.” Luke replies, “I wish you’d stop being so good to me, Cap’n.” COOL HAND LUKE (Warner Brothers 1967).

104. 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 Co. 1965) (1940). Retributive theorists have adopted this phrase. See Jean Hampton, *An Expressive Theory of Retribution*, in RETIBUTIVISM AND ITS CRITICS 1 (Wesley

does not claim that incarceration offers prisoners an education in virtue.¹⁰⁵ 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 that we can punish “without remainder”; nor does it claim that the right punishment restores the balance, sets the world right, and leaves no place for regret.¹⁰⁶ In the Hobbesian view, the need for physical force demonstrates a failure of 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.¹⁰⁷ I suggest in the next Part that we must keep in mind the imperfect legitimacy of punishment 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—

Cragg ed., 1992); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 718 n.80 (1981).

105. “[T]he virtue ethics theory of punishment takes the principal justifying purpose of the criminal law 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) (footnote omitted).

106. 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* 179 (1973). These remainders are cause for regret—which is not to say that we would act differently if faced with the dilemma again. “Regret necessarily involves a wish that things had been otherwise, for instance that one had not had to act the way one did. But it does not necessarily involve the wish, all things taken together, that one had acted otherwise.” BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* 31 (1981). For a somewhat broader understanding of the term “moral remainder,” see BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 213 n.1 (1993).

107. See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160 (1973).

rights seemingly far more useful than the right to resist, perhaps, because they are legally enforceable.¹⁰⁸ The arguments advanced in favor of 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 of every person.¹⁰⁹ I suggest that Hobbes's theory of punishment can inspire 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, this neo-Hobbesian account explains defendants' rights as weaker relatives of the right to resist punishment.¹¹⁰ 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 the 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 punishment, 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.¹¹¹ 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)¹¹² 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

108. 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) and Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

109. For a catalogue of instrumental and rights-based arguments for the privilege against self-incrimination in particular, see Green, *supra* note 8, at 640-68.

110. As becomes clear below, this account is loosely Hobbesian, but it is not Hobbes's own view. I do not argue that Hobbes himself would defend legally cognizable defendants' rights such as those nominally protected in the Bill of Rights to the U.S. Constitution.

111. See, e.g., 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).

112. *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.").

contribute to truth-seeking is simple and intuitive enough. Scholars have developed far more complex 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.¹¹³ 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 the guilty from the innocent.

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 have repeatedly urged courts to abandon or circumscribe the exclusionary rule.¹¹⁴ Similarly, many commentators—unconvinced by the claim that the right to silence helps the innocent—have criticized the scope of the Fifth Amendment privilege against self-incrimination.¹¹⁵ 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 Rights.¹¹⁶ 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 theme of retributive theories of punishment,¹¹⁷ the respect-based account of defendants' procedural rights is often presented as a specifically retributive theory. Paul Butler has explained that “[r]etributivists believe that punishment communicates respect

113. See, 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).

114. 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”).

115. 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 J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-80 (1968).

116. 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, 667-68 (1977); see also *Ristroph*, *supra* note 53, at 307-14.

117. See *supra* note 12 and accompanying text.

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.”¹¹⁸ Respect can provide a far more stable ground to support rights of *all* accused persons than does 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 means, literally, to look (back) at, but for at least a few centuries, the word has been used in two different senses. The first simply implies a neutral acknowledgment—“I will not address any question with respect to the exam.” But in a second, more normatively meaningful sense, respect is a particular kind of recognition or regard: to respect is to look at with admiration or deference. This is the sort of respect of which Aretha Franklin sang, and that Rodney Dangerfield did not get. Respect in this sense is closely associated with the concepts of equality and dignity. To treat a person with respect is to acknowledge her, to take her into account, but in a specific way: not to mock her, but to esteem her. 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 how, specifically, does one punish respectfully? As James Whitman has chronicled, “respect *of* persons” was once associated with deeply inegalitarian practices, and two very different notions of respect have informed penal practices in England and its former colony, the United States, on one hand, and continental Europe, on the other.¹¹⁹ Respect of persons, on the European continent, meant taking into account the social status of the particular offender. Respect, in this inegalitarian sense, called upon punishers to treat offenders according to their pre-criminal social status; upper-class offenders were addressed more formally and given greater privileges and better treatment than lower-class offenders.¹²⁰ This notion of “respect of persons” depended on a discontinuity, not between the guilty and the innocent, but between the upper-class guilty and the lower-class guilty. As Whitman notes, Blackstone praised English law over the laws of the European continent precisely because the English common law imposed punishments “*without* respect of persons.”¹²¹

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

119. JAMES WHITMAN, HARSH JUSTICE: CRIMINAL JUSTICE AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 41-43 (2003) (emphasis added).

120. *Id.* at 9-11, 104-07.

121. *Id.* at 42 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF

In contrast to the inegalitarian “respect of persons,” the modern notion of respect *for* persons is strongly egalitarian. It emphasizes the universal dignity of all humans, criminal or not. We respect the fact that the offender *is* a person; we do not privilege him or her based on the particular kind of person he or she is. According to Whitman, European punishment has moved from a hierarchical notion of respect to an egalitarian one. Because European countries once 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 classes.¹²² America, in contrast, has never had a large number of high-status offenders.¹²³ 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.¹²⁴

When contemporary retributivists refer to respect for criminal offenders, they invoke the egalitarian model rather than the stratified one. Indeed, some theorists argue that it is a commitment to equality that requires retributive punishment in the first place.¹²⁵ But this argument often leaves retributivists with the paradoxical claim that we respect offenders by treating them worse than we do non-offenders. As formulated by Herbert Morris, all persons must share equally the benefits and burdens of the law.¹²⁶ On this account, we should understand crime 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 criminal’s autonomy. In contrast, 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.¹²⁷

ENGLAND 370-71 (1979) (1765-69)).

122. See, e.g., *id.* at 9-11, 125-50.

123. See, e.g., *id.* at 178.

124. See *id.* at 191-92.

125. In addition to the works of Herbert Morris and Jean Hampton discussed below, see Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L. J. 1307, 1335-36 (2007); John Finnis, *Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 102 (1999).

126. See Morris, *supra* note 12, at 95.

127. *Id.* at 102-05. Though Morris did not mention Hegel, his account closely approximates

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.’”¹²⁸ 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 disrespect—he is stigmatized—in order to achieve equality and respect on a broader social scale.¹²⁹

To many ears—including my own—these claims of respectful punishment ring hollow.¹³⁰ 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 depends 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.¹³¹ Other retributive arguments are simply circular: they assert that responsible agents must be punished, and that failure to punish is failure to recognize the criminal as a responsible agent.¹³² In fact, judgments of responsibility and agency are independent of judgments of how to respond to a responsible agent.¹³³ Finally, the retributive 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

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., Cambridge Univ. Press 1991) (1820).

128. Hampton, *supra* note 104, at 13.

129. *Id.*

130. See Christopher, *supra* note 9, at 967-70; Dolinko, *supra* note 14, at 1632-33, 1642-56.

131. Morris acknowledged that if the initial distribution of benefits and burdens is not equal, “the difference between law and coercion disappears.” Morris, *supra* note 12, at 103. He did not himself address whether American society or other existing systems satisfied the equal initial distribution requirement.

132. See, e.g., Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 260-61 (2009) (arguing that retributive punishment “communicates to the offender that we are respecting him by holding him responsible as a moral agent,” and stating that a failure to punish may be taken “as a statement of condescension” to the offender).

133. In other words, unless one is *already* committed to the retributive view that bad acts by responsible agents necessarily require a punitive response, one can easily recognize a bad act as a deliberate choice of a responsible agent and still decline to respond by punishing.

someone else's control: prisoners are told when (and often, if) they can eat, sleep, shower, read, work, see visitors, and so on.¹³⁴ 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 satisfactory. It is weak in its aspirations and unfulfilled in practice. Can Hobbes—not known as a theorist of respect—offer a more attractive vision? Perhaps Hobbes can remind us of what we should see when we look at a criminal offender. Hobbes, with his steadfast commitment to an equal right of self-preservation, would see a vulnerable human being about to encounter physical force that is almost certain to overwhelm him. To be sure, this vulnerable being may be a cruel and vicious criminal, a menace to innocent victims and to society at large. And yet, if we are to respect the offender as a person, and if we share Hobbes's egalitarian individualism, we will see that the criminal's nasty acts do not eliminate his right to try to preserve himself. The right to self-preservation—a “blameless liberty”—is inalienable.

The Hobbesian account of punishment invites a very different conception of respect for wrongdoers, one more realistic and more compelling than that provided by retributivists. 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.¹³⁵ 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 action as a blameless exercise in self-preservation.¹³⁶

134. 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* note 119, at 65-90.

135. See ERWIN N. 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.”).

136. Larry May has reached a similar conclusion, with provisos: “Hobbes would think that 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*, 5 HOBBS STUD. 77, 86 (1992). I am not sure that this last provision is much of a

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 societal interests demand that this resistance not be condoned or overlooked. Nevertheless, the fact that societies will condemn attacks on law enforcement officials need 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, we might understand constitutional and statutory rights of the accused and the already-convicted as forms of legitimate, nonviolent resistance to punishment.

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.¹³⁷ 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; it matters little whether the right to silence serves the innocent or helps the criminal justice system identify the truly guilty. Indeed, the very phrase “self-incrimination” suggests a concern of special importance to the guilty, who are presumably more likely to incriminate themselves than the innocent. 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.¹³⁸

Defendants who choose to speak (or have others speak on their behalf), rather than remain silent, sometimes might be understood as resisting punishment. As noted above, the right to present evidence in one’s own defense

restriction, given that Hobbes considered any threat of “wounds, chains, or imprisonment” to pose a peril to self-preservation. See *supra* text accompanying note 80. And Hobbes does not limit the right to self-preservation to circumstances in which the legal order is not threatened; Hobbes does not require the individual to sacrifice his own safety for the sake of the larger community.

137. See Seidmann & Stein, *supra* note 113.

138. See HOBBS, *supra* note 18, 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* note 8, at 675-80, 716.

has been characterized as an essential element of due process and a key element of the truth-seeking enterprise.¹³⁹ But we could explain this right as well or better with an appeal to the concept of self-preservation: those who face criminal charges and punishment have a right to try to exculpate themselves, and proclamations of innocence are reasonable attempts to avoid punishment.¹⁴⁰ This fits within the Hobbesian view that 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.¹⁴¹ 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.

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' 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 also mechanisms of self-preservation. As such, they belong to the guilty as much as the innocent.

CONCLUSION: RESISTING RESISTANCE

The account of punishment offered here will provoke resistance. When punishment theorists speak of the state's right, or authority, to punish, they usually rely on the Hohfeldian sense of right: a claim that implies a correlative duty.¹⁴² 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.¹⁴³ 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.

139. See *Chambers v. Mississippi*, 410 U.S. 284 (1973).

140. This principle was reflected in the now-defunct "exculpatory no" doctrine, which used to serve as a defense to charges under 18 U.S.C. § 1001 (2000). Under that doctrine, a person was excused from criminal liability if her only false statements to a federal officer were simple denials of guilt. See *Brogan v. United States*, 522 U.S. 398, 401-02 (1998) (describing, and rejecting, the doctrine).

141. 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.

142. See Hohfeld, *supra* note 8, at 717.

143. See Curran, *supra* note 76 and accompanying text.

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, it is better to accept non-capital punishment than to flee. Here one might think of Victor Harris, who in 2001 attempted to flee a police cruiser and avoid a speeding ticket.¹⁴⁴ The ensuing high-speed chase ended when a sheriff's deputy maneuvered his vehicle to hit Harris's car, sending Harris over an embankment and leaving him a quadriplegic.¹⁴⁵ One newspaper account attributed to Harris these "saddest words": "If only I had pulled over . . ."¹⁴⁶ 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.¹⁴⁷ But this pragmatic point does not diminish the power of Hobbes's claim that if there *is* any hope of success, resistance is a rational human response.

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.¹⁴⁸ Some may view the moral claims of community as reasons to reject Hobbes's radical individualism and the right to resist punishment that it implies.¹⁴⁹ 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

144. See *Scott v. Harris*, 127 S. Ct. 1769, 1772-73 (2007).

145. *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.

146. James J. Kilpatrick, *The Unhappy Lot of a Policeman*, *TULSA WORLD*, Oct. 15, 2006, at G5.

147. See Cover, *supra* note 7, at 1607-08 ("I think it is unquestionably the case in the United States that 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.").

148. Indeed, in his famous response to "the Foole," Hobbes himself made the point, though he did not take it to undermine his argument for a right to self-preservation. See HOBBS, *supra* note 18, at 101-03.

149. I thank Rick Greenstein for emphasizing this point.

into this category.¹⁵⁰ Other theories characterize punishment as a necessary evil, a dirty activity that always leaves something to be regretted.¹⁵¹ Under this second approach, 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 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.

150. 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 KANT, *supra* note 21.

151. See, e.g., CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 112 (Jane Grigson trans., Oxford Univ. Press 1964) (1764) ("It is better to prevent crimes than to punish them.").