

Fall 2011

Covenants for the Sword

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Recommended Citation

61 U. Toronto L.J. 657 (2011)

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How, and how much, can constitutional law restrain state violence? Though American constitutional law purports to regulate policing and punishment in various ways, as a practical matter these uses of force are restrained little by constitutional doctrine. This article examines explanations for that phenomenon. As Thomas Hobbes observed, it is difficult if not impossible to establish a truly independent authority to interpret and enforce legal restrictions on sovereign power. Furthermore, in order for law to restrain the state, we need a conception of the state; we need to know what entity is the subject of constitutional law. We lack clear answers to that question, and as a consequence, putative legal restraints on state violence remain largely ineffective.

Keywords: violence/constitutional law/criminal procedure/policing/punishment

I

Constitutional democracies use violence widely and regularly. They use it in military conflicts, in counter-terrorism efforts, and, of particular interest in this article, they use it in daily exercises of policing and punishment. But citizens of constitutional democracies tend not to think of their governments as particularly violent. If they notice the violence of the criminal justice system, they see it as distinctively *legitimate* and perhaps not violence at all properly so called, though similar acts would be labelled violent if conducted by private citizens. Police and punitive force are understood to be distinctive acts of public authority, rendered normatively legitimate by the political and legal context in which they take place.

In the United States, that legal context includes constitutional provisions understood to provide some outer limits on the permissible use of physical force. The Fourth Amendment prohibition of unreasonable seizures is understood to regulate arrests and other uses of force by police officers, and the Eighth Amendment prohibition of cruel and unusual punishments is understood to restrict both the legislative power to authorize criminal sentences and the executive power to

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† For comments on this project, I am grateful to participants in workshops on Constitutionalism and the Criminal Law at Tel Aviv University and the University of Toronto.

administer them.¹ To be sure, these constitutional provisions are hardly the only means by which state violence might be regulated. For most ordinary policing and punishment practices, legislative or executive regulation (including executive self-regulation) has more practical impact than judicial scrutiny of decisions to use force.² By most accounts, the Constitution provides only a kind of backstop, used to address egregious uses of force that non-constitutional regulations have wrongly authorized or failed to prevent. But even if the Constitution is only a backstop – and one placed at great distance from the action in the batter’s box – its symbolic import looms over the game. Again, the physical force used to police and punish is widely viewed as legitimate, and the Constitution is one important source of that legitimacy.³

To notice that liberal democracies do use violence to govern (and also to think of that violence as subject to constitutional constraints) is to provoke a number of questions about criminal and constitutional law that might fairly be described as Hobbesian. Thomas Hobbes, the seventeenth-century English philosopher best known for his bare-knuckled defence of a powerful sovereign legitimated by a social contract, gave special attention to violence as a source of – and partial solution to – human misery. The fact that we can hardly imagine a state without

1 US Const amend IV; US Const amend VIII. Other constitutional provisions also seem to embody anti-violence norms. The ‘due process’ clause has been interpreted to prohibit torture and other uses of force that ‘shock the conscience’; see *Rochin v California*, 342 US 165 (1952) [*Rochin*]. The Fifth Amendment privilege against compelled self-incrimination is also widely understood as an anti-torture provision, though this view does not appear to command a majority of the present Supreme Court. Compare *Chavez v Martinez*, 538 US 760 at 773 (2003) (Thomas J), arguing that the ‘due process’ clause rather than the prohibition against compelled self-incrimination governs an inquiry into alleged police torture, with *Rochin*, *ibid* at 794 (Kennedy J, concurring in part and dissenting in part): ‘To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights.’

2 Although the degree of ‘police professionalization’ is probably sometimes exaggerated to argue against the need for constitutional regulation, see e.g., *Hudson v Michigan*, 547 US 586 at 598–9 (2006) [*Hudson*], it is clear that internal self-regulation does play an important role in shaping police conduct. For a response to *Hudson* and a more nuanced account of non-constitutional sources of police accountability, see David Alan Sklansky, ‘Is the Exclusionary Rule Obsolete?’ (2008) 5:2 *Ohio State Journal of Criminal Law* 567.

3 The relationship between the Constitution and the perceived legitimacy of the criminal justice system is complex. In the eyes of many observers, applications of the rules of constitutional criminal procedure are bothersome ‘technicalities’ that impede the (independently legitimate) efforts of the state to investigate and punish wrongdoers. Nevertheless, the background fact of constitutional regulation appears to provide a kind of underwriting of the system. *C.f.* Alice Ristroph, ‘The Rhetoric of Difference and the Legitimacy of Capital Punishment’ (2001) 114 *Harv L Rev* 1599.

police or prisons calls to mind Hobbes's particular emphasis on enforcement: 'Covenants, without the sword, are but words.'⁴ One might say the same of law more generally and the criminal law in particular. Notwithstanding the powerful critiques of sanction-based theories of law advanced by HLA Hart and others, there are many instances in which law appears to require the sword in order to be more than rhetorical exhortation.⁵ But if the violence of policing and punishment suggests that Hobbes was right about the need for the sword, we might wonder how covenants *for* the sword – the constitutional provisions that restrain the punishing state – will themselves be enforced.⁶

In an argument widely rejected by modern theorists of constitutional government, Hobbes claimed that the only effective sovereign would be one with absolute, undivided authority.⁷ Since this single, powerful sovereign would possess ultimate legislative, judicial, and executive authority, no one else could reach a binding judgment that the sovereign had acted illegally or enforce sanctions against it. We tend to assume that we have long ago left behind Hobbes and his crude theory of the absolute sovereign. In a twenty-first century system of divided government, it seems clear that we have solutions to the problems of interpretation and enforcement. To the question of who will interpret the laws that bind the sovereign, we answer: an independent judiciary. To the question of how judgments against the sovereign will be enforced, we have an array of answers: monetary damages, injunctions, invalidation of legislation, and exclusion of evidence. It seems we have the necessary institutional mechanisms to interpret and enforce covenants for the sword.

Without denying the tangible effects of judicial review and constitutional remedies, I argue that in the United States these institutions do surprisingly little to restrain exercises of force by the state against its own citizens. In part, this is because the problems of interpretation and enforcement are not so easy to solve, as Hobbes might have warned us. But the

4 Thomas Hobbes, *Leviathan*, ed by Richard Tuck (New York: Cambridge University Press, 1991) at 117 [Hobbes]. Throughout this article, I have modernized the spelling, punctuation, and capitalization of quotations from *Leviathan*.

5 See John Austin, *The Province of Jurisprudence Determined* (London: Widenfield and Nicholson, 1954); HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). For a recent reappraisal of the debate, see Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 *Ratio Juris* 1.

6 As metaphors go, the sword is a mighty one. For Hobbes, 'the sword' is the enforcer, the sovereign empowered to use violence. In speaking of covenants for the sword, I am invoking a similar idea – the sword is the entity with the monopoly on legitimate violence, and the question is how restrictions on the sword itself will be enforced. In an important article that addresses some similar issues, Walter Dellinger deployed the same word to different figurative ends, to describe the Constitution as the source of affirmative causes of action; see Walter E Dellinger, 'Of Rights and Remedies: The Constitution as a Sword' (1972) 85 *Harv L Rev* 1532.

7 See Part II-B below.

inefficacy of covenants for the sword is also a manifestation of a different problem, one that Hobbes did not identify and may, in fact, have helped produce. In order for law to regulate the state or the government, it must assume some conception of that entity. What, exactly, is 'the state' that is the subject of constitutional law? We don't have good answers to this question, I argue. Constitutional doctrine rarely addresses it directly.⁸ But a study of the constitutional law of violence yields some clues.

In many respects, constitutional law assumes an anthropomorphic conception of its own legal subject. In the simplest terms, the anthropomorphism of interest here is the idea that we should analogize the government to a human individual.⁹ On this view, the government reasons, intends, acts, speaks, and responds to stimuli in ways comparable to the behaviour of natural human persons. Carol Steiker once described constitutional criminal procedure as 'substantive criminal law for cops.'¹⁰ Steiker's image is a richly productive one for several reasons explored in this article. For the moment, substitute 'the state' or 'the sovereign' for 'cops' and we may identify one consequence of anthropomorphizing the state: doctrines of constitutional law structured as substantive criminal law for the state. Substantive criminal law regulates individuals by imposing sanctions on defined offences, and the defendant's mental state is often a key component of the offence definition. Both Fourth and Eighth Amendment doctrines define constitutional violations in terms of what might be called sovereign *mens rea* standards, and in both

8 I am not making a point about state-action doctrine, although that doctrine may well still be a 'conceptual disaster area'; Charles L Black, Jr, 'Foreword: "State Action," Equal Protection, and California's Proposition 14' (1967) 81 Harv L Rev 69 at 95. State-action doctrine addresses the extent to which the Constitution constrains apparently private actors or 'the constitutional implications of distribution of the background rights of contract, property, and tort'; Gary Peller & Mark Tushnet, 'State Action Doctrine and a New Birth of Freedom' (2004) 92 Geo LJ 779 at 779. The state-action doctrine, muddled as it may be, is about the public/private distinction; it is about the *periphery* of the state. I argue here that we lack a theory of the *core*; that even with respect to action that we unquestioningly categorize as state action, we lack a good account of the state that is doing the acting.

9 Hobbes, *supra* note 4, offers us a memorable image of the sovereign as a person: The frontispiece to *Leviathan* depicts a long-haired, moustachioed man, sword and crosier in his widespread arms, jewelled crown atop his head. Upon close scrutiny, it becomes evident that the man's torso and arms are composed of tiny individual humans, crowded closely together and gazing toward the head of the composite Leviathan. But one need not (and should not) think of the anthropomorphic view of the sovereign as exclusively Hobbesian. From Plato's image of the city as a well-ordered soul to Louis XIV's '*l'Etat, c'est moi*' and on to contemporary invocations of the state's right to 'self-defence,' the human individual has long provided a basis to conceptualize both the state as a whole and its rulers.

10 Carol Steiker, 'Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers' (1996) 94 Mich L Rev 2466 at 2470.

doctrinal contexts constitutional remedies tend to be viewed in terms of sanctioning the sovereign.¹¹ This doctrinal structure leaves the constitutional restraints fairly weak, for two primary reasons. First, sovereign *mens rea* is elusive; what the state ‘intended’ can often be constructed or reconstructed after the fact to avoid a finding of a constitutional violation. In addition, when constitutional remedies are understood in terms of sanctions against the sovereign to deter future violations, courts can – and often do – decline to impose any remedy at all when there is reason to believe the remedy will not have a deterrent effect.¹²

A somewhat more complicated set of challenges arises from the fact that, if there is a sovereign in a modern state, it is not just any person – a natural man crowned as king – but what Hobbes calls ‘an artificial person.’¹³ An artificial person is an authorized representative, an agent who acts on behalf of a principal.¹⁴ On one simple account of representative government, one might characterize ‘the public’ or ‘the people’ as the principal and the government as their authorized agent. The government, as artificial person, is something of an abstraction. But most kinds of government action, and certainly the exercises of force under scrutiny here, require flesh-and-blood natural persons to carry them out. So a second set of principal–agent relationships must come into being: the government, now as principal, authorizes individual government officers to exercise force on its behalf.

In both types of principal–agent relationship, it is possible that the agent will act outside the scope of his proper authority or otherwise fail to serve the interests of the principal.¹⁵ In the terminology of agency

11 The notion of sovereign *mens rea* is more counter-intuitive for Fourth Amendment doctrine than for Eighth, but I argue it is applicable in both areas. See Part III below.

12 Of course, with respect to criminal sanctions of natural persons, deterrence is only one of many possible rationales. But the other rationales often cited as justifications for punishment of individuals, such as retribution or rehabilitation, seem inapplicable to the state; at any rate, sanctions for the sovereign are nearly always explained as efforts to deter future violations. For further discussion, see Part III below.

13 One very early interpretation of the US Constitution expressed doubt that it established any kind of ‘sovereign’ at all; see *Chisholm v Georgia*, 2 US 419 at 454 (1793): ‘To the Constitution of the United States the term Sovereign, is totally unknown.’ This claim in *Chisholm* was arguably repudiated by the Eleventh Amendment. See Randy Barnett, ‘The People or the State? *Chisholm v Georgia* and Popular Sovereignty’ (2007) 93 Va L Rev 1729, describing and arguing against the claim that the Eleventh Amendment repudiated the view of sovereignty announced in *Chisholm*.

14 This is Hobbes’s account, but as with the anthropomorphic view of the sovereign, for the purposes of this article, it matters little whether it is *distinctively* Hobbesian. As I show below, the principal–agent account of sovereignty and of the relationship between the government and individual government officers has deeply influenced American constitutional law.

15 Aware of this problem, Hobbes argued that monarchy was the best form of government because in it the interests of the sovereign and his constituents were most closely

scholarship, there may be ‘slippage’ between principal and agent.¹⁶ When an individual state officer exercises force on behalf of the state, courts do not always assume that the act of the government officer – the natural person – is also an act of the sovereign. In Hobbesian terms, the constitutional law of violence contemplates possible distinctions between the artificial person of the sovereign and the natural person who most immediately exercises violence on behalf of the sovereign. This distinction between artificial and natural persons helps illuminate some features of constitutional remedies. But that distinction also renders remedies unavailable in many circumstances, leaving us to wonder again whether constitutional provisions regulating the use of force are but words.

Hobbes’s own assessment of covenants for the sword was that such restrictions were both infeasible and undesirable. Without endorsing either the descriptive or normative claim, modern constitutionalists might nevertheless find that the Hobbesian account illuminates the difficulties American constitutional law has encountered in its attempts to regulate state violence. Hobbes gives us a new perspective on the already familiar problems of legal uncertainty and enforcement, and his theory brings attention to the less familiar problem of articulating the subject of constitutional law.¹⁷ The constitutional law of state violence (and perhaps, much of the rest of constitutional law) lacks a clear and accurate account of the entity it purports to regulate.

Motivated by the premise that to regulate the state or sovereign, we should know what we are regulating, Part II of the present article examines Hobbes’s account of sovereignty as personation. I do not suggest that constitutional law has directly adopted these Hobbesian concepts – far from it. But as will become clear, the notion of a personified sovereign and the related principal–agent theory of authorization and representation provide many insights into contemporary constitutional doctrine. Part III addresses one form of anthropomorphism in American constitutional doctrine: ‘sovereign *mens rea*’ standards that create a kind of

aligned. Hobbes, *supra* note 4 at 131: ‘[W]here the public and private interest are most closely united, there is the public most advanced. Now in monarchy, the private interest is the same with the public.’

16 See e.g. Elena Kagan, ‘Presidential Administration’ (2001) 114 Harv L Rev 2245 at 2273, describing ‘a typical principal–agent dilemma: how to ensure against slippage between the behavior the principal desires from the agent and the behavior the principal actually receives, given the agent’s own norms, interests, and informational advantages.’

17 While this article was under review and in the publication process, Nicholas Rosenkranz published two articles that engage many similar questions. Nicholas Quinn Rosenkranz, ‘The Objects of the Constitution’ (2011) 63 Stan L Rev 1005; Nicholas Quinn Rosenkranz, ‘The Subjects of the Constitution’ (2010) 62 Stan L Rev 1209. I am unable to incorporate a discussion of these articles here, but I expect to address Rosenkranz’s argument in subsequent work.

substantive criminal law for the state. Part IV investigates constitutional remedies to illuminate more complex claims about the relationship between natural persons and the artificial person of the state. The Conclusion suggests that, at the moment, a Hobbesian account of an extra-legal sovereign prerogative to use violence remains more true than modern constitutionalists might like to acknowledge. By identifying and acknowledging the challenges facing the constitutional regulation of violence, we put ourselves in a better position to overcome them.

II Personation, authorization, and sovereignty

Thomas Hobbes is not often consulted for insights into modern constitutional theory. There seems a clear conflict between the modern view of constitutional government as limited government, on the one hand, and Hobbes's claim that the social contract is an agreement among citizens that imposes no obligations or restraints on the sovereign, on the other. Indeed, the sociological legitimacy of a constitutional democracy – that is, the fact that its citizens accept and endorse the government – rests in no small part on the perception that government power is meaningfully limited by constitutional text and principle. The absolutist strains of Hobbes's political theory seem antithetical to now unquestioned principles of limited government.

And yet Hobbes's political theory proves a surprisingly rich resource for studies of the constitutional regulation of state violence. As noted in the introduction, Hobbes was unusually concerned with the role of violence in human affairs. Perhaps this attention to violence made Hobbes somewhat less sanguine about the promise of limited government than was his intellectual successor, John Locke, who is far more likely to appear in studies of constitutional theory.¹⁸ But the apparent intractability of violence both private and public even in today's world suggests that we should not overlook what Hobbes had to teach. Moreover, as I have argued elsewhere, Hobbes's endorsement of absolutism is often overstated; he is, in fact, the originator of many of the concepts that underlie theories of liberal constitutionalism.¹⁹ In Hobbes, we

18 For a recent example of Lockean constitutional scholarship, see David Jenkins, 'The Lockean Constitution: Separation of Powers and the Limits of Prerogative' (2011) 56 McGill LJ 543.

19 Alice Ristroph, 'Respect and Resistance in Punishment Theory' (2009) 97 Cal L Rev 601 at 605–13 [Ristroph, 'Respect and Resistance']; see also David Dyzenhaus, 'Hobbes's Constitutional Theory' in Ian Shapiro, ed, *Leviathan: Or The Matter, Forme & Power of a Common-wealth Ecclesiasticall and Civill* (New Haven, CT: Yale University Press, 2010) 453 [Dyzenhaus, 'Constitutional Theory']; David Dyzenhaus, 'How Hobbes Met the "Hobbes Challenge"' (2009) 72 Mod L Rev 488 [Dyzenhaus, 'Hobbes Challenge'].

can see the source of some of our most basic liberal ideas, and we may develop a renewed appreciation of the difficulties of translating those ideas into stable yet limited political institutions.

A THE SOVEREIGN AS PERSON, OR AUTHORIZED AGENT

To understand the sovereign, it is useful to identify first the occasions for its existence; that is, the problems that the sovereign is supposed to solve. Briefly, Hobbes claims that human relationships in the absence of governmental authority are plagued by a dangerous plurality of wills, judgments, and interests.²⁰ More specifically, each individual reasonably pursues her own self-preservation and, in so doing, poses threats to other individuals also seeking to preserve themselves. Every person is at least a potential threat to everyone else, and individuals understandably use violence to defend their own interests at the expense of others. According to Hobbes, rational individuals eventually realize that to secure peace they must renounce their individual discretion over the use of violence and instead empower a sovereign to decide how best to preserve them all.²¹

This sovereign may well be a single human – Hobbes repeatedly emphasizes the virtues of monarchy – but whether one ruler or a more complex assembly, the sovereign is best understood as an artificial person. An artificial *person* is not the same thing as an artificial *man*; Hobbes has a precise and nuanced account of personhood.²² That account merits close scrutiny, for it will prove to illuminate conceptions of state actors and authorized agents central to constitutional law. What, then, is a person? Hobbes offers this definition:

A person, is he, whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether truly or by fiction. When they are considered as his own, then he is called a natural person: And when they are considered as

20 Hobbes, *supra* note 4 at 86–90. For a slightly more detailed discussion of Hobbes's state of nature and the way out of it, see Ristroph, 'Respect and Resistance,' *ibid* at 607–11. The five (or six) most famous words in *Leviathan* are probably 'solitary, poor, nasty, brutish, and short,' *ibid* at 89, and this phrase is often invoked to show that Hobbes considered humans to be evil or at least dangerous and violent beings. But 'nasty' and 'brutish' describe the human condition not humans themselves, and these adjectives apply to the human condition only in the absence of civil government; see Ristroph, 'Respect and Resistance,' *ibid* at 607–8.

21 Hobbes, *supra* note 4 at 120–1.

22 In *Leviathan*, Hobbes, *ibid*, sometimes refers to the commonwealth as an artificial *man*, but the sovereign is described as an artificial *person*. Part One of *Leviathan* is called 'Of Man' and sets forth Hobbes's account of human psychology, but only the last chapter of that part takes up the specific subject, 'Of Persons, Authors, and Things Personated'; see *ibid* at 111.

representing the words and actions of another, then is he a feigned or artificial person.²³

Two claims here must be emphasized. First, a person is a being capable of speech and action. Second, a person speaks and acts on behalf of some conceptually distinct being: the man behind the person (if the words and actions are 'his own'), or some other man, or some other possibly non-human entity. A man who speaks for himself is called a natural person; one who speaks for some other man or being is a 'feigned or artificial person.'²⁴ Hobbes refers to theatrical language and the Latin *persona* to emphasize the distinction between the person – the representative or signifier – and the man or other entity who is represented or signified. A *persona* is a 'disguise or outward appearance of a man, counterfeited on the stage.'²⁵ A person-as-*persona* is an actor, 'and to personate, is to act, or represent himself, or another; and he that acts [as] another, is said to bear his person, or act in his name.'²⁶

Hobbesian personhood links the concept of representation to the concept of authority. 'Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the actor; and he that owns his words and actions is the author: in which case the actor acts by authority.'²⁷ To authorize is to allow oneself to be represented, or impersonated, by some separate actor. And this, according to Hobbes, is precisely what individuals do when they contract among themselves to create a sovereign. They 'appoint one man, or assembly of men, to bear their person,' and each individual is 'to own, and acknowledge himself to be the author of whatsoever he that bear their person, shall act, or cause to be acted, in those things which concern the common peace and safety.'²⁸ More specifically, a multitude of disparate individuals with potentially adverse interests reconstitutes itself into 'a real unity of them all, in one and the same person.'²⁹

23 Hobbes, *supra* note 4 at 111.

24 *Ibid*; see also Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State' (1999) 7 *Journal of Political Philosophy* 1, appeals to strict grammatical construction as well as the revisions that Hobbes made for the Latin *Leviathan* to argue that an artificial person is an entity who is *represented* by another; that is, Skinner claims that the 'artificial person' is the signified rather than the signifier. Skinner's account raises important questions concerning the distinction and relation between state and sovereign. But other passages from Hobbes, discussed below, seem to contradict Skinner's suggestion that the artificial person is the represented not the representative. See e.g. text accompanying note 27 *infra*.

25 Hobbes, *supra* note 4 at 112.

26 *Ibid*.

27 *Ibid*.

28 *Ibid* at 120.

29 *Ibid*.

Hobbes imagines the precise content of the covenant thus: '[It is] as if every man should say to every man, *I authorize and give up my right of governing myself, to this man, or this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.*'³⁰

B THE (PERSONIFIED) SOVEREIGN AS LEGAL SUBJECT

So far, we have seen that the sovereign 'bears the person' of the commonwealth and is the authorized agent of each individual subject. But what, precisely, is the scope of the sovereign authority? What does it mean to give up 'the right of governing oneself'? Or to rephrase the more narrow concern of this article: can subjects qualify their authorization of the sovereign in ways that restrict its power to use violence? could the social contract both empower and restrain the public sword?

Hobbes would answer these last two questions in the negative, for several reasons. First, the origin of the sovereign makes it logically impossible that he (or it) would be bound by covenant to his subjects. The sovereign is not a party to the social contract and could not be such a party, since he does not exist *qua* sovereign until the moment the contract is made. Instead, the sovereign is a kind of third-party beneficiary to a contract that is made among private individuals. 'Because the right of bearing the person of them all, is given to him they make sovereign, by covenant only of one to another, and not of him to any of them; there can happen no breach of covenant on the part of the sovereign.'³¹

A second reason to doubt that the sovereign could be restricted by covenant draws upon a standard interpretation of Hobbes; namely, that the sovereign's authority is unlimited, or else he (or it) is not properly called a sovereign. There is considerable textual support for this reading: for example, Hobbes says that the sovereign power 'is as great, as possibly men can be imagined to make it' and adds that 'though of so unlimited a power, men may fancy many evil consequences, yet the consequences of the want of it ... are much worse.'³² Hobbes rejects mixed government as unstable ('a kingdom divided in itself cannot stand') and insists that a single, undivided sovereign must have ultimate authority to make, interpret, and enforce the laws of the commonwealth.³³ Some of these tasks may be delegated to subordinates, but

³⁰ Ibid [italics in original].

³¹ Ibid at 122. Even if the office of the sovereign is occupied by a single natural person, we should not think that this natural person covenants with the subjects. He cannot contract with all subjects as a single party because 'as yet they are not one Person' before the sovereign has been appointed, and if the natural-person-who-will-become-sovereign contracts with each future subject individually, those contracts will be void once sovereignty is established; *ibid* at 122.

³² Ibid at 144-5.

³³ Ibid at 124-7.

Hobbes makes clear that the subordinates are *subordinates*, not independent agents with the authority to check the sovereign power. And Hobbes is explicit that the sovereign is not himself bound by the laws he makes: 'Nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound.'³⁴

Even if it were desirable to limit sovereign power, that project would face practical difficulties. Drawing on the arguments of legal positivists (arguments often and with reason traced to Hobbes), we could identify two obstacles to covenants *for* the sword, positive laws that restrict the sovereign himself. First is a challenge of legal uncertainty: there is no entity or institution empowered to determine the meaning and application of the covenants that restrict the sovereign. Hobbes rejects any 'separation of powers' theory that might assign ultimate authority over the meaning of covenants to an institution that is separate from the institution charged with enforcing the law. So who, other than the sovereign himself, could say with authority that the sovereign had violated the covenant?³⁵ And second, covenants for the sword would face a problem of enforcement.³⁶ Who, other than the sovereign himself, would sanction a sovereign who violated the covenant?

This apparent absolutism is doubtless one of the reasons that Hobbes is not often consulted by modern constitutional theorists. But the account of unlimited sovereignty sketched above is a bit too crude. Read closely, Hobbes in fact gives a more nuanced description of sovereign power. Perhaps most importantly for legal theorists, Hobbes distinguishes between power and law. Though a sovereign may sometimes act 'by virtue of his power' without establishing a prior law, *Leviathan* suggests repeatedly that the preferable form of rule is the promulgation of written laws.³⁷ Like modern constitutionalists and champions of the rule

³⁴ Ibid at 184.

³⁵ See *ibid* at 123: 'Besides, if any [subject] pretend a breach of the Covenant made by the Sovereign . . . , and others [or the sovereign himself] pretend there was no such breach, there is in this case, no Judge to decide the controversy: it returns therefore to the Sword again; and every man recovers the right of Protecting himself by his own strength, contrary to the design they had in the Institution.'

³⁶ For a discussion of similar issues, see Jack Goldsmith & Daryl J Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 Harv L Rev 1791. Goldsmith & Levinson also discuss the problems of uncertainty and enforcement, along with a third obstacle they call 'the problem of sovereignty' – the view, which they attribute to Hobbes, that any true sovereign must be an absolute one.

³⁷ Hobbes, *supra* note 4 at 152–3, distinguishing between sovereign acts 'grounded on a precedent law' and those 'demand[ed] or take[n] by pretense of his power.' On Hobbes's preference for written laws, see Ristroph, 'Respect and Resistance,' *supra* note 19 611–2; see also Dyzenhaus, 'Constitutional Theory,' *supra* note 19; Dyzenhaus, 'Hobbes Challenge,' *supra* note 19.

of law, Hobbes emphasizes consistency and predictability as virtues of a stable legal system. Moreover, even if the sovereign is not subject to *civil* law, he or it is bound by the *laws of nature*.³⁸ To be sure, the laws of nature are potentially undermined by the problems of uncertainty (or contested interpretive authority) and enforcement. Subjects of the sovereign have no means to enforce the sovereign's obligations to honour the laws of nature, and for that reason some have questioned the status of these laws as true law.³⁹ But Hobbes himself views these laws as real laws, binding on the sovereign, even if it is only God that can address the sovereign's violations.

Hobbes's sovereign may also face practical and moral constraints, if not legal ones, by virtue of the subjects' right to resist uses of force against them. As I have explored elsewhere, Hobbes's apparent absolutism is severely undermined by his crystal clear insistence that subjects, even guilty and duly convicted subjects, have a right to resist punishment.⁴⁰ The 'right' to resist punishment is a peculiarly Hobbesian right, one that imposes no duties on the sovereign and does not disrupt the sovereign's authority to punish. Yet Hobbes's insistence on this right, peculiar as it may be, demonstrates commitments to individual liberty and equality far more robust than those offered by many later liberal theories of punishment.

Nevertheless, even with this more nuanced account of the scope of sovereign power, one may doubt whether Hobbes's theory can shed much light on contemporary constitutional law. Even the less absolutist Hobbesian sovereign does not exist in modern constitutional democracies.⁴¹ Most obviously, constitutional governments do not unify legislative,

38 Hobbes, *supra* note 4 at 224: 'It is true, that Sovereigns are all subject to the Laws of Nature; because such laws be Divine, and cannot by any man, or Commonwealth be abrogated.'

39 E.g. John Deigh, 'Reason and Ethics in Hobbes's *Leviathan*' (1996) 34 *Journal of the History of Philosophy* 35.

40 Ristroph, 'Respect and Resistance,' *supra* note 19.

41 Indeed, a sovereign that actually satisfies all the criteria identified in *Leviathan*, especially the requirement of consent, has probably never existed anywhere. On my reading, Hobbes is not a theorist of hypothetical consent. That is, he does not permit a sovereign's authority to be based on a judgment (by whom?) that subjects *would have* authorized the sovereign had they been fully rational. Indeed, I see Hobbes's emphasis on actual consent as one reason his theory is more compelling than later liberal accounts that explicitly base political authority on hypothesized consent. As a deep egalitarian and individualist, Hobbes thought it normatively important whether individuals actually consented – not whether the sovereign or his apologists could plausibly assert that subjects should have consented if they'd only understood their interests properly. One could develop these points into a more radical critique of American constitutional government, arguing that the US Constitution is not a valid contract or covenant and the government it establishes is illegitimate. *C.f.* Randy Barnett, 'Constitutional Legitimacy' (2003) 103 *Colum L Rev*

executive, and judicial power in a single person or assembly. Instead of a true Hobbesian sovereign, in modern constitutional democracies we find multiple quasi-sovereigns: distinct institutions among which power is shifted and shared. And this arrangement has not led to the dire consequences that Hobbes predicted. I think it is safe to say that, as an empirical matter, Hobbes has been proven wrong insofar as he claimed that political stability requires a single unified ruler with combined legislative, executive, and judicial authority.

The fact of divided sovereignty seems to address the problem of legal uncertainty identified above, and maybe also the problem of enforcement: an independent judiciary might be endowed with the final authority to interpret the covenants that bind the sovereign, as American courts are empowered to interpret the United States Constitution. Even though courts lack swords to enforce their findings of unconstitutionality, perhaps constitutional culture has rendered those more rigorous forms of enforcement unnecessary. So long as the executive and legislative branches do in fact respect the judgments of courts with respect to the Constitution, there is a sense in which the Constitution should function as a covenant for the sword.

But to what degree has a system of divided government, with separate executive, legislative, and judicial powers, actually solved the problems of uncertainty and enforcement? Notice, first, that constitutional theory remains embroiled in arguments about the legitimacy of judicial review, or more precisely, the legitimacy of judicial supremacy on questions of constitutional interpretation, and about the ‘under-enforcement’ of constitutional norms.⁴² And notice that, as an empirical matter, we rarely see judicial findings that the legislative or executive branch has exceeded its power to use physical force. In the next two parts of this article, I examine why, even in a system of divided sovereignty, covenants restricting the sword may turn out to be little more than words. Even if we do not find – and do not expect to find – a Hobbesian sovereign in a

111, distinguishing the US Constitution from a valid contract but developing an alternative theory of constitutional legitimacy. For the purposes of the present article, I leave aside those arguments and focus on the narrower question whether the Constitution can effectively limit state violence.

42 The literature on these topics is too vast to canvas here. For a few recent discussions, see Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* (Princeton, NJ: Princeton University Press, 2007); Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *6* *Yale LJ* 1346. For a recent debate on questions of constitutional under-enforcement, see Richard H. Fallon, Jr., ‘Judicially Manageable Standards and Constitutional Meaning’ (2006) 119 *Harv L Rev* 1274 [Fallon, ‘Manageable Standards’] and responses to that piece in the *Harvard Law Review Forum*.

contemporary constitutional government, Hobbes's account of political authority and 'personation' gives us conceptual resources to understand and evaluate constitutional restrictions on state violence.

III *Constitutional anthropomorphism*

Laws, it seems, should know their subjects: a law that purports to regulate the state should have an account of what the state is. In the previous part, I reviewed a Hobbesian account of the sovereign as an artificial person. In this part and the next, I examine the conceptions of the state or sovereign that inform Fourth and Eighth Amendment doctrine. The constitutional law of state violence, it turns out, is premised on an anthropomorphic account of the state in several respects. In structure, the law of public violence bears significant parallels to the law of private violence (and other private misconduct) – the substantive criminal law. Recall Carol Steiker's description of constitutional criminal procedure as 'substantive criminal law for cops.'⁴³ This part examines doctrinal standards that incorporate inquiries into sovereign *mens rea*, the 'mental state' of the government or its representative agent. Part IV examines the conception of remedies for constitutional violations as penalties levied against the government.

A SOVEREIGN *mens rea*

i *The fourth amendment*

Under standard principles of substantive criminal law, the legality of conduct often turns on the mental state of the actor. Whether firing a lethal gunshot is murder, manslaughter, or justified self-defence can depend on the knowledge, beliefs, and intentions of the person who fires the gun. Something similar is afoot in Fourth Amendment doctrine, where 'objective reasonableness' makes the difference between constitutional and unconstitutional seizures. This claim may surprise those familiar with Fourth Amendment doctrine, for the very phrase 'objective reasonableness' may seem to foreclose inquiries into subjective mental states.⁴⁴ And indeed, the Supreme Court has held in many contexts that a police officer's subjective intent will not itself make the difference

⁴³ See text accompanying note 10 *supra*. There is a much more literal source of substantive criminal law for government agents: 18 USC § 242, which makes it a crime to intentionally deprive a person of his constitutional rights. Since this statute does not itself define the scope of constitutional rights, I do not discuss it in detail in this article.

⁴⁴ Indeed, in an earlier article, I emphasized the distinction between Fourth and Eighth Amendment doctrines on the question of state intentions. See Alice Ristroph, 'State Intentions and the Law of Punishment' (2008) 98 J Crim L & Criminology 1353 at 1389–91 [Ristroph, 'State Intentions']. As will become clearer below, a kind of mental state inquiry characterizes even Fourth Amendment doctrine; but whose

between constitutional and unconstitutional conduct.⁴⁵ To show that objective reasonableness is analogous to a *mens rea* standard takes some explanation.

That the Fourth Amendment governs seizures of the person, and that it does so under the rubric of reasonableness may appear evident from the constitutional text itself – its prohibition of ‘unreasonable searches and seizures.’⁴⁶ This constitutional text is the primary source of constitutional regulation of official uses of force that take place prior to a criminal conviction.⁴⁷ But the reasonableness standard for Fourth Amendment seizures depends not only on the rationale for and timing of the initial intrusion but also on the manner in which the seizure is carried out.⁴⁸ Thus, ‘notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him.’⁴⁹ Deadly force is reasonable, the Court held in *Tennessee v Garner*, ‘where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.’⁵⁰

By framing the reasonableness of a use of force with reference to probable cause, the Court introduced a mental-state requirement of sorts. ‘Probable cause’ is a notoriously elusive concept, but it is always described with reference to *belief* – albeit a projected, hypothesized belief.⁵¹ ‘The

mental state matters – who or what counts as ‘the state’ – varies from one amendment to the other and even within the doctrinal rules for each amendment.

45 See e.g. *Whren v United States*, 517 US 806 (1996) [*Whren*]; *United States v Mendenhall*, 446 US 544 at 554, n 6 (1980) [*Mendenhall*] stating that an officer’s subjective intent to detain individual is relevant to the question of whether ‘seizure’ occurred only insofar as that intent was conveyed to the individual.

46 US Const amend IV.

47 *Graham v Connor*, 490 US 386 at 395 (1989) [*Graham*]: ‘[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analysed under the Fourth Amendment and its “reasonableness” standard’ [emphasis in original].

48 *Tennessee v Garner*, 471 US 1 at 8 (1985) [*Garner*].

49 *Ibid* at 9.

50 *Ibid* at 11. *Garner* could be read (and was, by some lower courts) to impose a somewhat more detailed three factor test to evaluate the constitutionality of a use of deadly force: deadly force is permissible when (1) the officer has probable cause to believe the suspect poses a threat of serious physical harm, (2) the use of deadly force is necessary to prevent escape, and (3) the officer has warned the suspect, if feasible; see *ibid* at 11–2. But the Supreme Court rejected this interpretation of *Garner*, *supra* note 48, in *Scott v Harris*, 550 US 372 (2007) [*Harris*]. The majority opinion in *Scott* did not mention ‘probable cause’ at all, relying instead on a general reasonableness inquiry.

51 The term ‘probable cause’ appears in the Fourth Amendment, though not in the (un)reasonable searches and seizures clause. The warrant clause provides that ‘no warrants shall issue, but upon probable cause’; US Const amend IV. It is not clear, however, that the phrase had any precise or consistent meaning at the time the

substance of all . . . definitions of probable cause is a reasonable ground for belief' in some legally relevant fact.⁵² For *Garner's* use of force standard, what matters is whether the circumstances provided sufficient reason to believe that the suspect posed a serious threat. To be sure, probable cause refers to a hypothesized mental state rather than an actual one; the question is what a reasonable officer could have believed, not what the particular officer involved actually did believe.⁵³ In this sense, probable cause is an objective standard, as courts often emphasize. It does not depend on the actual subjective mental state of a particular police officer.

Notwithstanding the Court's insistence that the reasonableness standard does not turn on actual officers' actual motivations, it is still useful to think of the inquiry as a variant of a mental-state requirement. This is so because reasonableness is a question of belief and perspective; that is, beliefs formed from the perspective of a hypothetical officer in the shoes of the actual officer.⁵⁴ Reasonableness is not assessed with the benefit of knowledge that was unavailable to the officer at the time he or she decided to use force; it is not assessed 'with the 20/20 vision of hindsight.'⁵⁵ If a reasonable officer would not have known that an apparently uncooperative suspect was in fact suffering diabetic shock, then the suspect's actual medical condition should not be considered when assessing the reasonableness of the use of force against him.⁵⁶ Put differently, objective reasonableness is not omniscience.

Sovereign *mens rea* determines not only the constitutionality of the manner of a seizure but also the constitutionality of the fact that the seizure takes place at all. First, the sovereign's mental state has some relevance for the threshold question whether a seizure has occurred: a

Fourth Amendment was adopted or that it has any such meaning today. See Albert W Alschuler, 'Bright Line Fever and the Fourth Amendment' (1984) 45 U Pitt L Rev 227 at 253-4, tracing historical meaning of 'probable cause' and noting fluidity of the concept in modern doctrine.

52 *Brinegar v United States*, 338 US 160 at 175 (1949) [internal quotations and citation omitted].

53 'An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.' *Graham*, supra note 47 at 397; see also *Scott v United States*, 436 US 128 at 136 (1978) [*Scott*]: '[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'

54 *Ornelas v United States*, 517 US 690 at 696 (1996): 'The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause.'

55 *Scott*, supra note 53 at 136.

56 See *Graham*, supra note 47 at 389.

seizure occurs only 'when there is a governmental termination of freedom of movement *through means intentionally applied*.'⁵⁷ In other words, the government cannot seize an individual through accidental or negligent conduct.⁵⁸ An auto accident caused by an officer's reckless driving in a high-speed chase is not a seizure, for the accident victim is not stopped 'through means intentionally applied.'⁵⁹

Once government action has been classified as a seizure, the constitutionality of the action is again a matter of probable cause, defined in terms of objective reasonableness. If an officer is aware of facts and circumstances that would give a reasonable officer probable cause to believe an individual has committed a crime, the officer may seize that individual.⁶⁰ Again, it does not matter what the actual arresting officer's actual motivations were. A custodial arrest may be, in fact, 'merely gratuitous humiliation imposed by a police officer who was (at best) exercising extremely poor judgment.'⁶¹ If a hypothetical reasonable officer exercising better judgment could have found probable cause, the arrest is valid. Similarly, a traffic stop that is in fact motivated by racialized judgments is nonetheless constitutional so long as a hypothetical reasonable officer could have found probable cause to believe that a traffic violation had occurred.⁶²

57 *Brower v County of Inyo*, 489 US 593 at 597 (1989) [emphasis in original].

58 Ibid: '[I]f a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment.'

59 *County of Sacramento v Lewis*, 523 US 833 at 843–5 (1998). A seizure requires some actual restraint of liberty. That is easy enough to establish when the individual is handcuffed and taken into police custody, or shot, or otherwise physically restrained. When an individual claims to have been seized through an explicit or implicit threat of force instead of the application of immediate physical restraint, the analysis turns from the sovereign's mental state to the mental state of a hypothetical reasonable *suspect*: the question is whether 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' *INS v Delgado*, 466 US 210 at 215 (1984), quoting *Mendenhall*, supra note 45 at 554 (Stewart J). In these cases where the government officer has not applied direct physical restraint, the officer's intent to terminate freedom is relevant only insofar as it has been communicated to the suspect; see *Mendenhall*, supra note 45 at 554, n 6 (Stewart J).

60 See *Atwater v City of Lago Vista*, 532 US 318 at 354 (2001) [*Atwater*]. *Atwater* sustained a custodial arrest for a misdemeanour offence committed in the arresting officer's presence. The majority opinion left open the possibility that probable cause would not justify a custodial arrest for a misdemeanour offence that occurred outside of the officer's presence. For felony offences, probable cause justifies a custodial arrest whether or not the offence occurred in the officer's presence. In addition, if a seizure is less than a full custodial arrest, just a brief 'Terry stop,' the officer need only have a 'reasonable suspicion' that 'criminal activity may be afoot'; *Terry v Ohio*, 392 US 1 at 30 (1968).

61 *Atwater*, ibid at 346–7.

62 *Whren*, supra note 45.

One might think of the difference between objective reasonableness, which matters greatly to Fourth Amendment inquiries, and officers' subjective intentions, which generally do not matter, in terms of Hobbes's distinction between artificial and natural persons. Objective reasonableness is a *mens rea* standard for an artificial person. Permissible uses of force are defined with reference to the beliefs of a perfect agent, an actor who represents the state with no slippage. A particular officer's subjective intentions – dislike of the suspect, or pleasure in cruelty – are characteristics of the individual officer as a natural person, and they are irrelevant to the question of constitutionality. We could say that objective reasonableness posits an agent of the state who acts with the epistemic limitations of a natural human being but without the emotions or passions.⁶³

ii *The Eighth Amendment*

Police officers are not, of course, the only state officials who may use physical force against individuals. When force is exercised after an individual has been convicted and sentenced, it is usually classified not as a 'seizure' but as 'punishment,' and it is the Eighth Amendment rather than the Fourth that ostensibly defines what is permissible.⁶⁴ But like the Fourth Amendment, the Eighth Amendment could be understood as a kind of substantive criminal law for the state. In this area of constitutional law, even more obviously than in Fourth Amendment doctrine, the constitutionality of uses of force often depends on an inquiry into the sovereign's mental state. I have analysed the relevance of state intentions to Eighth Amendment doctrine in detail elsewhere and offer only a brief summary here.⁶⁵

63 Some commentators have questioned whether 'objective reasonableness' is really possible, whether it is possible to identify a universal standard of rationality. See Dana Raidgroski, 'Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment' (2008) 17 *Tex J Women & L* 153 at 166: '[T]he particular criteria [of reasonableness], the overarching concept of reasonableness and the concept of common sense are suspect from a feminist perspective because of their claims to objectivity and universal point of viewlessness ... [T]hey embody the particular and privileged perspective of affluent white men.' Here, I make only a narrower descriptive claim that the structure of the Fourth Amendment doctrine evaluates government conduct with reference to a kind of mental-state requirement.

64 See *Ingraham v Wright*, 430 US 651 at 671, n 40 (1977): '[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.'

65 Ristroph, 'State Intentions,' *supra* note 44.

First, as in the seizure context, the sovereign's intentions may determine the threshold issue of whether 'punishment' has been imposed. This threshold issue rarely arises for Eighth Amendment claims because most federal courts have interpreted the Eighth Amendment to apply only after an individual has been convicted and sentenced.⁶⁶ A criminal conviction is easy to establish, and there is rarely doubt about whether individuals raising Eighth Amendment claims are being 'punished.'⁶⁷ Instead, the analysis is usually focused on the question whether the instant punishment was cruel and unusual.

For that issue – not the fact of punishment, but its cruelty and unusualness – the sovereign's intent is again important. The precise way in which sovereign intent matters varies with context, as does the determination of who or what counts as the sovereign. If an individual argues that her sentence is cruel or unusual because it is disproportionately severe, the court may examine the state's 'penological purposes' and ask whether the punishment is excessive in light of those purposes. Usually, penological purpose is a question of *legislative* intent.⁶⁸ If, in contrast, an individual challenges not her overall sentence but some discrete event or circumstance within prison, the relevant mental state is that of the prison officials. In this context, constitutional law is perhaps most explicitly analogous to 'substantive criminal law for the state.' Eighth Amendment claims by prisoners are said to have an 'objective component' and a 'subjective component'; one could think of these two components as analogous to *actus reus* and *mens rea* in the substantive criminal law. The objective component is simply a 'sufficiently serious' deprivation within prison.⁶⁹ The subjective component, or *mens rea*, of a prisoner's Eighth Amendment claim depends on the nature of the claimed violation. Challenges to conditions of confinement require the prisoner to show that prison officials acted with 'deliberate indifference' to known deprivations, and claims that a prison official used excessive physical force require the prisoner to show that the official acted with malicious

66 See *Graham*, supra note 47 at 392 n 6 (1989). The threshold question whether punishment has occurred does arise with respect to other constitutional provisions that purport to regulate punishment, such as the 'double jeopardy' clause or the '*ex post facto*' clause. In those contexts, the analysis does focus on the state's 'punitive intent.' See Ristroph, 'State Intentions,' supra note 44 at 1370–4.

67 In a number of separate opinions, Justice Thomas has argued that prisoners' Eighth Amendment claims should first address the threshold question of whether their claimed deprivation constitutes 'punishment' at all; see e.g. *Farmer v Brennan*, 511 US 825 at 859 (1994) (Thomas J, concurring) [*Farmer*]; *Helling v McKinney*, 509 US 25 at 40 (1993) (Thomas J, dissenting) [*Helling*]; *Hudson v McMillian*, 503 US 1 at 28 (Thomas J, dissenting) [*McMillian*].

68 See e.g., *Ewing v California*, 538 US 11 (2003); see Ristroph, 'State Intentions,' supra note 44 at 1375–9.

69 See *Wilson v Seiter*, 501 US 294 at 298 (1991).

and sadistic intent.⁷⁰ In defining and justifying the ‘deliberate indifference’ standard, the Supreme Court referred explicitly to *mens rea* standards from the substantive criminal law.⁷¹ And the words ‘malicious and sadistic,’ on their face, invoke *mens rea* categories familiar from substantive criminal law.

Notably, in the prison context the relevant mental state is the mental state of the actual, human prison official involved. It matters what the natural person was thinking. It is still appropriate, in my view, to think of the inquiry as one into sovereign *mens rea*, but now the mental state of the natural person is imputed to the artificial person of the state. (Were it otherwise, we might ask why malicious violence by an individual state employee is classified as state punishment at all. Indeed, Justice Thomas does ask this question and, finding no satisfactory answer, concludes that at least some acts of violence by prison officials are beyond the purview of the Eighth Amendment.⁷²)

B INTERPRETIVE CONSTRUCTION IN CONSTITUTIONAL LAW

So far, the main argument of this part of the present article has been the analytical claim that Fourth and Eighth Amendment doctrines reveal assumptions of a personified state. Specifically, these doctrines are structured around what might be called sovereign *mens rea* inquiries: the permissibility of various actions by the state turns on what the state, or its designated agent, or a hypothetical reasonable state official believed or intended. Before turning to another dimension of constitutional anthropomorphism – constitutional remedies as punishment for the state – a brief note on the import of sovereign *mens rea* inquiries is in order.

Determining mental states requires a kind of mind-reading, and it is difficult enough when a court or fact-finder is guessing at the thoughts of a single individual. As one scholar has recently noted, the widespread assumption that jurors or judges ‘can accurately determine . . . mental state[s] through common-sense generalizations’ is undermined by research in cognitive psychology.⁷³ In reality, mental-state inquiries are occasions for ‘interpretive construction’: the fact-finder sorts and evaluates information in a non-rational process that is often shaped by the

70 See *Farmer*, supra note 67; *McMillian*, supra note 67 at 6–7; *Wilson v Seiter*, 501 US 294 at 301–5 (1991); see also Ristroph, ‘State Intentions,’ supra note 44 at 1380–4.

71 *Farmer*, ibid at 836–7.

72 See e.g., *Helling*, supra note 67 at 40 (1998) (Thomas J, dissenting): ‘[J]udges or juries – but not jailers – impose punishment.’

73 Kevin Jon Heller, ‘The Cognitive Psychology of *Mens Rea*’ (2009) 99 J Crim L & Criminology 317 at 321; see also Deborah Denno, ‘Criminal Law in a Post-Freudian World’ (2005) 2005 U Ill L Rev 601 at 605, noting, of mental states, ‘[h]ow odd for a legal system to base so much on something about which it seems to know so little.’

fact-finder's own values, beliefs, and experiences.⁷⁴ Put more simply, assessing someone else's mental state is never an 'objective' enterprise.

The opportunities for interpretive construction are no less, and may be much greater, when we assess the 'mental state' of a complex entity rather than that of an individual person. There are, of course, disputes over whether groups and organizations can be said to have intentions, knowledge, or other mental states at all.⁷⁵ But even the defenders of collective or institutional intent characterize it as a 'construct.' Intentions must be attributed to the collective entity by some interpreting observer.⁷⁶ Consequently, sovereign *mens rea* standards are points of great flexibility in constitutional law.

Many commentators have observed and evaluated the role of motive analysis in other areas of constitutional law, especially the First and Fourteenth Amendments.⁷⁷ They have offered a variety of justifications for such analysis, such as the claim that constructions of state intent serve as good proxies for desired or undesired effects of state action, or an argument that some governmental motives are intrinsically harmful, or the claim that motive analysis helps guarantee a neutral and fair political process.⁷⁸ I have argued elsewhere that the normative justifications of motive analysis in First and Fourteenth Amendment doctrine are somewhat less applicable to constitutional provisions purporting to regulate the use of force.⁷⁹ But there may be a much more pragmatic

74 Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 *Stan L Rev* 591 at 592–3. Kelman discusses another type of interpretive construction, 'time-framing,' that also turns out to be quite important to Fourth Amendment analysis; see *ibid* at 600–16. Several of the limitations on the Fourth Amendment exclusionary rule depend on the adoption of a narrow time frame through which to view the constitutional violation. See e.g. *United States v Leon*, 468 US 897 at 906 (1984): '[T]he use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself' [internal quotation marks and citation omitted].

75 See e.g. Michael Keeley, 'Organizations as Non-Persons' (1981) 15 *Journal of Value Inquiry* 149; William S Laufer & Alan Strudler, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 *Am Crim L Rev* 1285; William Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43 *Emory LJ* 647; Kenneth A Shepsle, 'Congress Is a "They," Not an It: Legislative Intent as an Oxymoron' (1992) 12 *Int'l Rev L & Econ* 239.

76 See Ristroph, 'State Intentions,' *supra* note 44 at 1366, n 60.

77 See e.g. Lawrence A Alexander, 'Introduction: Motivation and Constitutionality' (1978) 15 *San Diego L Rev* 925; Paul Brest, '*Palmer v Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive' 1971 *Sup Ct Rev* 95; Sheila Foster, 'Intent and Incoherence' (1998) 72 *Tul L Rev* 1065.

78 These arguments are described in more detail in Ristroph, 'State Intentions,' *supra* note 44 at 1385–91.

79 *Ibid* at 1394–404.

explanation for the focus on governmental motive. Motive tests, or what I've called here sovereign *mens rea* requirements, allow courts to dispose of a great many constitutional challenges that would survive if we focused only on the effects of government action. Without motive analysis, perhaps we would find more constitutional litigation and more successful challenges to state action than our society is willing to accept. It is possible that constructions of the state's motivations or intentions serve as a necessary fiction, a way to accommodate the fact that we cannot or will not deliver on the stated guarantees of the Constitution. But whether we could or should abandon the practice of attributing intentions to the state, we should recognize the interpretive opportunities inherent in that practice.

III *Conceptualizing constitutional violations: Who to 'punish'?*

There is a second sense in which the constitutional regulation of uses of force assumes an anthropomorphic state. For many (not all) Fourth and Eighth Amendment violations, the availability of remedies turns on judgments about the need to penalize the state, and more specifically, the need to deter future violations. This part explores the conceptions of the state that underlie discussions and doctrines of constitutional remedies. When we think of remedies as penalties, I argue, we practice a second type of anthropomorphism: we assume the state to be an entity that responds to disincentives in ways similar to the responses of natural persons to punishment. It is important to emphasize, though, that there is no clear or uniform conception of the state that underlies the law of constitutional remedies. Even if we think the state must be penalized, we are not always sure who or what to punish. We are not sure how to conceptualize constitutional violations; nor do we always know which person or persons, natural or artificial, to hold responsible. The sovereign proves elusive.

Before delving into the specific remedies available for unconstitutional uses of force, a few general observations on the right-remedy relationship are in order.⁸⁰ First, and most broadly, a concern to find effective constitutional remedies is consonant with the Hobbesian claim that served as

80 Scholarly scrutiny of constitutional remedies, of the challenges of implementation and the phenomenon of under-enforcement, spans many areas of constitutional doctrine. See e.g. Fallon, 'Manageable Standards,' *supra* note 42. But constitutional criminal procedure appears to be a particularly rich terrain for these inquiries for a few reasons. Both Fourth and Fifth Amendment doctrine are largely shaped by remedies alleged to be independent of the underlying constitutional right – the Fourth Amendment exclusionary rule and the *Miranda* exclusionary rule under the Fifth Amendment. The Fourth and Fifth Amendments are also probably among the most litigated constitutional provisions and so are the provisions for which remedies are

this article's point of departure: 'Covenants, without the sword, are but words.'⁸¹ Indeed, one of the Supreme Court's most famous decisions on constitutional remedies, *Mapp v Ohio*, which extended the Fourth Amendment exclusionary rule to the states, offers a similarly dismissive view of the value of laws that lack sanctions: the exclusion of illegally seized evidence was held to be 'a constitutionally required – even if judicially implied – deterrent safeguard without ... which the Fourth Amendment would have been reduced to "a form of words."⁸² The worry that rights without remedies will be 'mere words' appears often in other contexts as well.⁸³

And yet, even if rights without remedies are 'but words,' enthusiasm for constitutional remedies is hardly uniform. I suggested earlier that constitutional motive analysis may serve to whittle away legal challenges that, though potentially meritorious, are thought to put too much pressure on the government. That view implies that our legal and political system simply lacks the capacity to perform the full measure of the Constitution's promises. A similar resignation (or pragmatism, perhaps) seems to underlie the claim that 'a right-remedy gap is probably inevitable in constitutional law.'⁸⁴ On this view, it is one thing to interpret the Constitution and another to implement it.⁸⁵ Implementation is the art of the possible, an enterprise in which the promise of remedies is only 'a principle, not an ironclad rule, and its ideal is not always attained.'⁸⁶

A slightly different but still deeply pragmatic account closes the right-remedy gap by levelling down to the available remedies: insisting that

demanded most often, and they may protect rights that many courts (and other observers) have little desire to remedy.

81 Hobbes, *supra* note 4 at 117.

82 *Mapp v Ohio*, 367 US 643 at 648 (1961), quoting *Silverthorne Lumber Co v United States*, 251 US 385 (1920).

83 Chief Justice Marshall famously proclaimed that although the US government had been 'termed a government of laws, and not of men,' it would 'cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right': *Marbury v Madison*, 5 US 137 at 163 (1803). See also *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 at 399 (1971) [*Bivens*] (Harlan J, concurring), noting and eventually endorsing the view that federal courts have power to devise remedies for violations of constitutional rights 'when the absence of alternative remedies renders the constitutional command a mere form of words' [internal quotation marks and citation omitted]; *c.f.* Karl Llewellyn, *The Bramble Bush* (Dobbs Ferry, NY: Oceana Publications, 1960) at 83, stating that '[a]bsence of remedy is absence of right.'

84 John C Jeffries, Jr, 'The Right-Remedy Gap in Constitutional Law' (1999) 109 Yale LJ 87 at 87.

85 See Richard H Fallon, Jr, *Implementing the Constitution* (Cambridge, MA: Harvard University Press, 2001) at 37–42.

86 Richard H Fallon, Jr, & Daniel J Meltzer, 'New Law, Non-Retroactivity, and Constitutional Remedies' (1991) 104 Harv L Rev 1731 at 1778.

constitutional rights exist only so far as they can be and are remediated. Under Daryl Levinson's 'remedial equilibration' model, '[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.'⁸⁷ To know the parameters of a constitutional right, look to the remedy. The right just *is* what the courts (or other branches of government) will enforce.

Contra Levinson's more extreme positivist claims, normative and pre-remedial conceptions of rights surely do and must shape constitutional analysis in important ways.⁸⁸ But I share Levinson's view that looking at the back end of constitutional law, at its practical consequences, can tell us much about its conceptual underpinnings. In this remainder of this part, I examine remedies in search of a slightly different pay off: I want to see if remedies can reveal not what rights are but what constitutional *violations* are. After all, nobody brings a constitutional complaint when she believes all her rights are being respected. So the critical question may be what counts as a violation rather than what is the nature of the right. And it turns out that how we understand a constitutional violation is bound up with how we understand the violator – the state or sovereign that is the target of constitutional law.

On this question of violations and violators, consider the structure of modern constitutions. With some isolated exceptions, including the Preamble to the US Constitution, these documents are not written in the voice of contracting subjects.⁸⁹ Instead, they are phrased as descriptive statements of government powers and individual rights or as prohibitions of certain conduct: 'The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated'⁹⁰; or 'Excessive bail shall not be required, nor excessive fines imposed, nor

87 See Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Colum L Rev* 857 at 858. See also *ibid* at 880: 'The only way to see the constitutional right . . . is to look at remedies.'

88 At times, Levinson's impatience with 'rights essentialism' leads him to a wholesale dismissal of normative theory. See e.g. *ibid* at 924–5, theorizing that a 'true constitutional conception' of a right, one independent of what courts have protected, is 'both pointless and indeterminate.' But none of us – not courts, not Levinson, not the constitutional pragmatists whose work he endorses – can escape normativity. Even when courts make 'pragmatic' remedial judgments, they rely on some independent conception of the right in question in order to evaluate the available options. Levinson sometimes acknowledges this; indeed, the very phrase 'remedial equilibration' sometimes invokes a dynamic relationship between empirical constraints and theoretical ideals. See e.g. *ibid* at 927: '[T]he enterprise of constitutional law . . . is as much about public policy as it is about political theory, moral philosophy, or backward-looking interpretation of text or history.'

89 'We the people of the United States, in order to form a more perfect union . . . do ordain and establish this Constitution for the United States of America.'

90 US Const amend IV.

cruel and unusual punishments inflicted.⁹¹ Like almost all of the US Bill of Rights, these provisions are written in the passive voice. Without a specified actor as their subject, it is unclear exactly who or what might violate these provisions. And, of course, the provisions themselves tell us nothing about what should happen if the right of the people to be secure *is* violated or if cruel and unusual punishments *are* inflicted.⁹²

This linguistic structure yields (at least) two very different ways of conceptualizing a constitutional violation. On one view, the constitution describes the parameters of sovereign power, and acts beyond those parameters are not properly attributed to the sovereign at all. This view is the inverse of Richard Nixon's famous claim that if the president does it, it's not illegal. On this view of constitutional violation, if an act is unconstitutional, it is not really the act of the true sovereign. The artificial person of the sovereign exists only insofar as he (or it) complies with the constitution. When a putative sovereign or its putative agent conducts an unreasonable seizure or imposes a cruel and unusual punishment, that actor is revealed as an impostor.⁹³ So we might call this concept of constitutional violation 'the impostor theory.'

On the second view, duly authorized sovereigns can and do violate the constitution. Constitutional law should strive to discourage such violations, and it should devise appropriate remedies when violations do occur. But constitutional violations are acts of the state; in fact, *only* acts of the state can violate the constitution. On this conceptualization, the rules and procedures that establish a sovereign (or particular government institutions, such as Congress or the president) are independent of the rules that restrict the conduct of the sovereign. Call this 'the sovereign misconduct theory': it recognizes that a true sovereign may nonetheless violate core constitutional restrictions.

It is a scholarly indulgence to invent new labels for old ideas, and previous scholarship may have captured the distinctions I am drawing here. Matthew Adler and Michael Dorf have argued that the Constitution sets

91 US Const amend VIII.

92 The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, contains ostensibly similar substantive provisions but also includes an enforcement provision. See *ibid* s 8: 'Everyone has the right to be secure against unreasonable search or seizure'; *ibid* s 12: 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment'; *ibid* s 24(1): 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances'; and *ibid* s 24(2) (exclusionary rule).

93 A similar argument was made and rejected in *Monroe v Pape*, 365 US 167 (1961) at 172, which held that 'state action' includes the acts of 'those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'

forth 'existence conditions': it describes the conditions under which a law exists *qua* law or under which an authoritative government entity exists as authority.⁹⁴ Unlike application conditions (rules by which to evaluate acts of the duly constituted government), existence conditions tell us whether the government is duly constituted at all or whether an act counts as official government action.⁹⁵ Though I take the liberty of using my own labels,⁹⁶ it could be that the impostor theory corresponds to the view that *all* constitutional provisions set forth existence conditions.⁹⁷ An individual or organization who violates the constitution is not a true sovereign or legitimate agent of the state but an impostor. If, on the other hand, we think that the Bill of Rights sets forth only application conditions, then violations of the Bill of Rights are better characterized as sovereign misconduct. A duly authorized sovereign has misbehaved, but he or it is no less a true sovereign.⁹⁸

At different times and in different contexts, US constitutional law has relied on each of these conceptions of a constitutional violation. The sovereign misconduct theory seems to be the official and more frequently visible approach. Indeed, state-action doctrine in the United States seems to insist that it is always and only the state (or its authorized agents) that can violate the Constitution. If a private individual breaks into my home without authorization to search for evidence of a crime, he has probably violated burglary and trespass laws, but he has not violated the Fourth

94 Matthew D Adler & Michael C Dorf, 'Constitutional Existence Conditions and Judicial Review' (2003) 89 Va L Rev 1105 at 1119 [Adler & Dorf], defining the constitutional existence condition with reference to criteria for legal validity; see also *ibid* at 1110, using the concept to identify legitimate government actors.

95 *Ibid* at 1119–20.

96 Adler & Dorf themselves may have invented a new label for an old concept; see *ibid* at 1109, n 13, explaining that the jurisprudential term 'legal validity' is equivalent to their 'existence condition.'

97 Adler & Dorf do argue, *ibid* at 1112, that 'all constitutional provisions might be understood as setting forth existence conditions.' They also use the term 'impostor' in several instances, explaining that constitutional criteria enable us to distinguish legitimate government institutions and true state officials from impostors; *ibid* at 1110. See also *ibid* at 1127, 1141, 1200.

98 To put the point a third way, we might proceed from Abner Greene's observation that the Constitution both enables and disables government agents; Abner S Greene, 'Can We Be Legal Positivists without Being Constitutional Positivists?' (2005) 73 Fordham L Rev 1401 at 1403. The difference between the impostor theory and the sovereign misconduct theory may turn on whether we think this enabling and disabling happen in only one step or in separate steps. If the Constitution disables by enabling only so much, if enabling and disabling happen all at once, then an entity that violates the Constitution is an impostor. If, however, the Constitution enables government agents and then, in independent provisions, disables them, an agent who violates a disabling provision is nonetheless a legitimate government actor: this is the sovereign misconduct theory.

Amendment. In contrast, when a police officer breaks into my home without a warrant and without probable cause, he has violated the Fourth Amendment. On this account, the police officer remains the sovereign's agent, a state actor, even as he violates the Constitution.

But how well does he represent the state? Suppose the police officer does not break into the suspect's home but instead breaks the suspect's leg intentionally and gratuitously. Police violence can constitute state action in the sense that the Fourth Amendment will apply, but the remedy available for an excessive force violation is premised on the notion that the individual officer, as *natural* person, is personally liable for the harm.⁹⁹ It turns out that different conceptions of a constitutional violation and different conceptions of the violator underlie different constitutional remedies.

In many instances, the available constitutional remedy is simply invalidation of the unconstitutional government action. If a court finds an act of legislation to violate the Fourth or Eighth Amendment (or some other constitutional provision), the court pronounces the statute invalid and directs other government officials not to apply it.¹⁰⁰ Nullification is a potential remedy for other types of government action; a court may reverse a conviction or order a prisoner set free if it finds she is being held in violation of the Constitution.¹⁰¹ In most cases, nullification of government action seems to presume sovereign misconduct rather than an act of an impostor because the remedy does not question the legitimacy of the government actor itself. When a death penalty sentence is invalidated under the Eighth Amendment, the claim is not that the legislature who passed the authorizing statute or the trial court that imposed the sentence is an impostor. The focus is on the action, not the actor, and the remedy is to end or nullify the unconstitutional act.

Some challenges to state violence, such as an Eighth Amendment challenge to a statute or an individual defendant's sentence, may permit nullification or invalidation as a remedy.¹⁰² More often, though, claims of an unconstitutional use of force arise in suits for money damages. And for monetary remedies, the underlying theory of constitutional violation seems closer to the impostor theory. This is so thanks to the notably Hobbesian concept of sovereign immunity. To get around the sovereign's

99 See text accompanying note 104 *infra*.

100 See e.g. *Berger v New York*, 388 US 41 (1967), invalidating state law authorizing eavesdropping without probable cause.

101 'The basic and essential remedy of constitutional rights is defensive assertion against government action'; John C. Jeffries, Jr, 'Structural Reform Revisited' (2007) 95 Cal L Rev 1387 at 1391, citing Henry M Hart, Jr, 'The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic' (1953) 66 Harv L Rev 1362 at 1373.

102 E.g. *Kennedy v Louisiana*, 554 US 407 (2008); *Coker v Georgia*, 433 US 584 (1977).

prerogative to decline to be sued, the law of monetary damages for constitutional violations imagines the individual government official as an impostor who has usurped the cloak of public authority and thus is personally liable for the violation.

Under American law, both the federal government and state governments enjoy sovereign immunity.¹⁰³ Derived from English common law, sovereign immunity is premised on claims that evoke Hobbes's assertion that the sovereign could not be subject to civil law. In Blackstone's terms, 'the king himself can do no wrong.'¹⁰⁴ Whatever its conceptual justification (or normative merit), the doctrine of sovereign immunity would seem to rule out damage actions as means of enforcing constitutional provisions.¹⁰⁵ Justice Scalia has called sovereign immunity 'a monument to the principle that some constitutional claims can go unheard.'¹⁰⁶

But in some instances, American law has found a way around the obstacle. Illustrating, perhaps, the fact that sovereignty is plural rather than unified, shortly after the civil war, Congress enacted a federal statute permitting lawsuits against government officials who violate the federal constitution. Under this statute, '[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'¹⁰⁷ As interpreted by US courts, this

103 See e.g. *McMahon v United States*, 342 US 25 (1951) (federal); *Alden v Maine*, 527 US 706 (1999) (state). Either the federal or a state government may waive its immunity and permit itself to be sued, but it is immune until such waiver.

104 William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: JB Lippincott, 1893), bk 1 at *244. See also Samuel Pufendorf, *De Jure Naturae et Gentium*, translated by CH Oldfather and William Oldfather (Oxford: Clarendon Press 1934), vol 2 at 1342-3: '[If a king] has discovered any fault in a pact of his making, he can of his own authority serve notice upon the other party that he refuses to be obligated by the reason of that fault; nor does he have to secure of the other a release from a thing which, of its own nature, is incapable of producing an obligation or right.'

105 Both federal sovereign immunity and state sovereign immunity have many critics. See e.g. *United States v Lee*, 106 US 196 at 208-9 (1882): 'Under our system the *people* . . . are the sovereign . . . [T]here is no reason why deference to any person, natural or artificial, not even the United States, should prevent [a citizen] from using the measure which the law gives him for the protection and enforcement of [his] right'; Vicki C Jackson, 'Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence' (2003) 35 *Geo Wash Int'l L Rev* 521; Vicki C Jackson, 'Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity' (2000) 75 *Notre Dame L Rev* 953.

106 *Webster v Doe*, 486 US 592 at 613 (1988) (Scalia J, dissenting).

107 42 USC § 1983 provides a cause of action against state officials who violate constitutional rights: 'Every person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

statute holds government officials accountable as private individuals – or in more Hobbesian terms, as natural persons rather than artificial ones.

Here, we see traces of the impostor theory of constitutional violation. One way to explain § 1983 is to say that a government agent who violates the constitution acts ‘under color of law,’ but not with genuine legal authority. When such an agent steps beyond constitutional bounds, he cannot be understood as the artificial person of the sovereign for purposes of immunity; he is, instead, a natural person usurping the mantle of public authority. To be sure, *qualified* immunity and indemnification make identifying the true target of the penalty still more complicated, which is why one can say at most that 1983 doctrine reveals traces of an impostor theory.¹⁰⁸

For the moment, I want to contrast nullification or invalidation as a constitutional remedy with the monetary remedies that are more often pursued for ‘excessive force’ violations under the Fourth and Eighth Amendments. Nullification remedies involve a pronouncement that the sovereign has exceeded its power. At the same time, they are forward-looking, in that they put a stop to an otherwise continuing violation. But they do not attempt to ‘punish’ a misbehaving ruler. Damages, in contrast, seem to at least flirt with the notion that it was not the true sovereign but an impostor who violated the Constitution.¹⁰⁹ And as remedies, they look back to the past, to a violation that has already taken place. Most importantly, monetary remedies, along with the exclusionary rule as presently understood, are portrayed as penalties, intended to deter future violations.

The availability of these constitutional remedies suggests that Hobbes was wrong, in some respects, or at least that his claim about the impossibility of subjecting the sovereign to law is inapplicable to a system of divided sovereignty. We have identified, in theory, ways to enforce judgments that the sovereign has violated the foundational covenant. In

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.’ A similar cause of action against *federal* officials, for certain constitutional violations, is available under *Bivens*, *supra* note 83. Federal law also provides a criminal equivalent to § 1983; see 18 USC § 242.

108 In practice, many government agencies indemnify their employees, taking responsibility both to defend § 1983 suits and to pay any damage award. In addition, the doctrine of qualified immunity operates as a kind of safe harbour for the natural persons who act as agents of the sovereign. Under this doctrine, a government official is immune from suit under § 1983 unless his or her conduct violated a ‘clearly established’ right. Given the indeterminacy or at least the under-determinacy of constitutional law, courts find that few rights against the use of force are sufficiently ‘clearly established’ to permit a § 1983 suit to proceed. See Rachel Harmon, ‘When Is Police Violence Justified?’ (2008) 102 Nw UL Rev 1119 at 1140–3.

109 Criminal liability under 18 USC § 242 seems premised on this idea as well.

practice, however, imagining constitutional remedies as sanctions for a true or pretended sovereign may be a self-defeating proposition.

There is a sense in which a sanction-based theory of constitutional remedies pulls itself down by its own bootstraps. If we rationalize Fourth and Eighth Amendment remedies as penalties designed to deter a personified sovereign, then these remedies will seem inappropriate in circumstances where they do not deter. That is exactly what has happened to the exclusionary rule: the Supreme Court has identified numerous circumstances where excluding evidence is unlikely to deter government misconduct and has held the exclusionary rule inapplicable in those circumstances.¹¹⁰ Similarly, monetary remedies for constitutional violations have been criticized on the grounds that they do not effectively deter the government, for the government does not respond to financial disincentives in the same ways that private individuals do.¹¹¹ Even the liability of individual government officers – natural persons – under § 1983 has been dramatically limited by the doctrine of qualified immunity, and often, these limitations on liability are justified with reference to theories of deterrence. Sometimes, the claim is that constitutional violations made in good faith are not deterrable and so should not be penalized; sometimes, the claim is that a failure to provide immunity will *over*-deter and make officials unwilling to perform their duties effectively.¹¹²

It may well be the case that excluding illegally seized evidence or imposing monetary liability on government officials fails to deter constitutional violations. But that fact, in itself, is no reason to abandon the remedies. Perhaps the mistake was to think in terms of deterrence in the first place. Deterrence theories may simply reflect undue anthropomorphism. Perhaps the state is not much like a person after all, and it cannot be regulated according to the same legal models that we use for private individuals.

That possibility suggests that there is much work to be done to improve our understanding of the subject of constitutional law. Conceptualizing the state as something other than a person – cutting off the head of the king, in Foucault's memorable phrase – would require a dramatic theoretical reorientation, and I do not undertake that project here.¹¹³ It is a question that matters not just to those interested in criminal justice

110 E.g. *Herring v United States*, 555 US 135, 129 S Ct 695 (2009); *Hudson*, supra note 2; *United States v Leon*, 468 US 897 (1984).

111 See Daryl J Levinson, 'Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs' (2000) 67 U Chi L Rev 345.

112 See Alan K Chen, 'The Facts about Qualified Immunity' (2006) 55 Emory LJ 229 at 233–42.

113 For an attempt to give a non-personified account of the contemporary state, see Edward L Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton, NJ: Princeton University Press, 2005).

and regulations of the state's use of force, but to those interested in the possibility of constitutional law more generally. My aim here has been the more modest effort to identify the ways in which anthropomorphic conceptions of the state shape the constitutional law of violence. In keeping with that aim, I want to close with some final reflections specific to the subject of violence.

Conclusion: Violence and the rule of reason

Mechanisms of enforcement, remember, are only one of the challenges facing constitutional regulation of the use of force. A second challenge is one of interpretive authority: who (or what institution) will interpret the covenant and determine when it has been violated. Part II of this article mentioned this challenge but passed over it quickly, noting that the institution of judicial review seems to answer the challenge of interpretive authority. Judges interpret the covenant or constitution; they review claims of alleged violations and determine which of those claims have merit.

When they do so, however, they rarely find that a state actor has used force in violation of the Fourth or Eighth Amendments. Almost every executive and legislative use of (domestic) force falls within the scope of the Constitution as interpreted by the judiciary. One explanation of this state of affairs is that actors within the executive or legislature internalize constitutional constraints and therefore exercise their discretion within the independent limitations of the covenant. Constitutional violations are rarely found, on this account, because the Constitution is in fact rarely violated. A second explanation, more pessimistic, is that courts tend to interpret the Fourth and Eighth Amendments using the flexibility of the 'sovereign *mens rea*' standards discussed in Part III or the (non-)deterrence rationales discussed in Part IV to permit whatever actions executive and legislative officials do in fact take.

In the end, I am not sure it matters which of these explanations we adopt. Under either account, the substantive regulation of the state's use of force turns out to be a rule of reason: the state may use force as much and as often as is reasonable. This is most obvious in the substantive Fourth Amendment doctrine, but it turns out to be true of Eighth Amendment law as well. The Supreme Court has held (with respect to the Fourth Amendment) that what constitutes reasonableness is 'not capable of precise definition or mechanical application'¹¹⁴; reasonableness analysis is, instead, a 'factbound morass' through which judges must slosh.¹¹⁵ And, as Part III argues, the reasonableness that legitimates

¹¹⁴ *Graham*, supra note 47 at 396.

¹¹⁵ *Harris*, supra note 50.

state violence is often a projected reasonableness rather than an evaluation of the actual officer's actual reasons for using force. The Eighth Amendment, in contrast, does not refer to reasonableness but instead to 'cruel and unusual punishments.' But deference to legislative and executive decisions render Eighth Amendment scrutiny something quite close to rational basis review.¹¹⁶ And with respect to any Fourth or Eighth Amendment claim raised in a suit for monetary damages under § 1983, the doctrine of qualified immunity further enshrines reasonableness as the standard by granting individual officials a 'reasonable mistake' defence from liability.¹¹⁷

The substantive rule that governs the state's use of force appears to be a general rule of reason, but that is not all. In most cases, it is the legislature's or executive's self-assessment of its own 'reasonableness' that carries the day. When courts encounter a challenge to a legislative or judicial choice to use force, the characteristic response is one of deference. With respect to police force, courts emphasize that they will not judge a use of force with 'the 20/20 vision of hindsight.'¹¹⁸ Instead, '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'¹¹⁹ Analysis of other Fourth Amendment claims, including challenges to an officer's choice to make an arrest, is similarly characterized by deference to discretion – of judicial deference to the police officer's on-the-ground discretionary judgment. Judicial deference to the discretion of other branches is prevalent in Eighth Amendment doctrine as well. The United States Supreme Court has suggested that deference to legislative judgments is the first principle guiding Eighth Amendment proportionality analysis.¹²⁰ And when the Court required prisoners to show 'malicious and sadistic' intent to establish an Eighth Amendment violation by a prison official, its rationale was one of deference to prison officials' discretionary

116 See e.g. *Ewing v California*, 538 US 11 at 28 (2003), sustaining a mandatory prison sentence against an Eighth Amendment challenge, on the grounds that 'it is enough that the state ... has a reasonable basis for believing that [the sentence] advances the goals of its criminal justice system' [internal quotation marks omitted].

117 See e.g. Linda Ross Meyer, 'When Reasonable Minds Differ' (1996) 71 NYUL Rev 1467. 118 *Graham*, supra note 47 at 396.

119 *Ibid* at 396–7; see also *McCullough v Antolini*, 559 F (3d) 1201 at 1208 (11 Cir 2009), emphasizing 'the deference we afford the split-second police judgments in the field'; *Pace v City of Palmetto*, 489 F Supp (2d) 1325 (MD Fla 2007) (need for a 'measure of deference to police judgment').

120 See *Harmelin v Michigan*, 501 US 957 at 998 (1991) (Kennedy J, concurring in part and concurring in the judgment) [*Harmelin*]; see also *Ewing v California*, 538 US 11 at 23–5 (2003) (plurality opinion), adopting the proportionality principles articulated in Justice Kennedy's concurrence in *Harmelin*, *ibid*.

violence: with respect to uses of force, ‘a deliberate indifference standard does not ... convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and without the luxury of a second chance.’¹²¹

Arguably, choices made ‘in haste’ and ‘under pressure’ or under ‘tense and uncertain’ circumstances are more, not less, deserving of ex post review. But the Court implies that to subject such decisions to searching judicial scrutiny would produce a flood of litigation, some of which would lead to successful judgments against the state. And that, apparently, the Court will not countenance. It could be that a flood of litigation and some successful judgments against the state is what it would mean to have covenants for the sword. Hobbes did not think such a state of affairs was consistent with a stable sovereign, and perhaps the Supreme Court agrees.

In any case, there is probably more to the judicial reluctance to review ‘use of force’ decisions than a general concern about generating too much constitutional litigation. In the judiciary’s frequent declarations of its own incompetence on questions of proportionality and appropriate force, one finds a fairly direct suggestion that state violence is, in fact, beyond law. Part of the problem seems to be this: the judiciary has no clear methodology to decide what force is ‘reasonable’ or what punishment is ‘proportionate’; that is, *independent* of the methodology deployed by legislatures or by individual state agents. If anything, the individual police and prison officers who directly exercise force have a more developed framework in which to assess the necessity of force. Aware of its own limited methodological resources, the judiciary views deference as the safest path.

Courts could address their methodological deficit by further developing Fourth and Eighth Amendment doctrines – by articulating more specific factors that determine reasonableness or proportionality.¹²² Instead, judicial opinions have actively resisted more precise legal standards for the use of force. It seems that judges do not want to get into the business of regulating violence too closely.¹²³ I suggested earlier that we could think of the separate branches of a divided government as plural quasi-sovereigns, but perhaps this depiction needs modification. With respect to the use of the sword, which is arguably the quintessential

121 *Whitley v Albers*, 475 US 312 at 320 (1986).

122 For example, Harmon, *supra* note 105, suggests ways to do this in the Fourth Amendment context.

123 Of course, as Robert Cover famously argued, judges inevitably do give orders that other state officials exercise violence to enforce. But this is most directly true of trial judges; appellate judges and especially the Justices of the US Supreme Court may more easily imagine themselves distanced from the state’s uses of violence; see Robert Cover, ‘Violence and the Word’ (1986) 95 *Yale LJ* 1601 at 1613–4.

exercise of sovereign power, the judiciary makes no claim to sovereignty and indeed explicitly eschews it. Here, one must think of the Schmittean reading of Hobbes: sovereign is he who decides the exception, who makes discretionary judgments unbounded by rules. Schmitt argues that ultimate questions about the use of violence are beyond law. And while no US court would openly endorse this claim, the judicial deference to executive and legislative choices suggests that, at the moment, the use of force is in practice largely beyond the law.