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The Criminal and the Enemy in Seventeenth Century English Thought

By

Megan Claire Wachspress

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor David Lieberman, Co-chair
Professor Kinch Hoekstra, Co-chair
Professor Wendy Brown
Professor David Grewal

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Abstract

The Criminal and the Enemy in Seventeenth Century English Thought

by

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Doctor of Philosophy in Jurisprudence and Social Policy

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Professors David Lieberman and Kinch Hoekstra, Co-Chairs

Seventeenth century England saw major theoretical and legal innovations in how political community, sovereignty, and violence were understood—occasioned in significant part by two civil wars in the 1640s and 1680s. In my dissertation, I call attention to an important theme running through many of the major political and legal theoretical treatises, political pamphlets, and popular literature of the period that identifies criminality with the pirate (or his land-based equivalent, the highwayman), and punishment with war. My project begins by drawing a contrast between English natural law thinkers and two of their significant Scholastic predecessors. Whereas for the Scholastics membership had been a precondition of punishment, Hugo Grotius, Thomas Hobbes, and John Locke instead embraced a natural right to punish and a view of the commonwealth as founded upon, rather than giving rise to, the *ius gladii* or right of blameless violence. Although in some respects these thinkers, along with Alberico Gentili, were engaged in an intellectual project meant to distinguish civil punishment from war outside the commonwealth's borders, this natural right to punish and a justificatory account of punitive violence tied to an offender's loss of status ended up reproducing extralegal violence within the commonwealth in Hobbes's *Leviathan* and Locke's *Second Treatise of Civil Government*. This theoretical tendency has a parallel in the popular identification of the pirate—the *hostis humanis generis*, or enemy of all mankind—with the highwayman in England during this period. The highwayman, like the pirate, disrupted trade routes by which a nascent English state attempted to project political power and was both an important figure for seventeenth century accounts of crime and punishment, and early efforts at public policing and prosecution. Treason, the subject of most public prosecutions of the period, also underwent a subtle but significant shift between the English Civil War and the Glorious Revolution. Where in the first part of the seventeenth century treason was crime of betrayal against the sovereign, by the 1680s it was increasingly understood as a threat to the status quo and security of the political community. Thus, I argue, the model for the "ordinary" adversarial criminal trial, which has its origins in the Treason Reform Act of 1696, is grounded in a theory of wrongdoing as existential threat. The idea of the "criminal" in English political and legal thought reflects an internalization of concepts associated with war.

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Writing a dissertation is an intensely self-involved endeavor, one in which a person invokes the resources of her community in service of her own ideas, on the (not-infrequently misguided) belief that those ideas are unique and offer some insight on what is, at least in my own case, a well-worn set of topics. Finishing a dissertation is, accordingly, an occasion for enormous gratitude, which I will do my best to articulate.

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Introduction

The Frankfurt School political scientist Otto Kirchheimer, in his treatise *Political Justice: The Use of Legal Procedure for Political Ends*, identifies England in the late seventeenth century as the time and place in Western Europe where the distinction "between fundamental enmity to the established political organization and the numerous minor violations of the state's authority, including its general interest in the maintenance of the public order" began to gain constitutional protections.[1] "The distinction between the *inimicus*, the private adversary, and *hostis*, the foe of the commonweal, holds true for our civilization up to a point," says Kirchheimer, and goes on to explore that distinction in the context of the twentieth century political trial.[2] My project, in the four chapters that follow, is to test the meaning and extent of this distinction between minor violations or private harms and fundamental enmity or political opposition—between "crime" and "war"—in seventeenth-century England. I conclude that one important strain of thinking about punishment during this period entailed an internalization of international legal concepts and norms: Although international legal theorists of the seventeenth century, most notably Alberico Gentili and Hugo Grotius, pulled apart notions of punishment and war as two distinct forms of violence, Thomas Hobbes and John Locke justified punishment as a kind of war by the sovereign against the criminal. This theoretical tendency had a rhetorical counterpoint in the tendency amongst seventeenth-century writers to equate the highwayman (a synecdoche for criminals more broadly) with the pirate, the *hostis humanis generis* ("enemy of all") in Grotius's and Gentili's writings. The English law of treason, in a parallel development, was at the outset of the century a crime of betrayal or deception by a member with foreign loyalties but by the end was understood by MPs, legal scholars, and political pamphleteers as a particularly dire threat to the political order as such. Membership, in both natural law theory and English statutory law, was not a precursor to punishment; punishment was a means of defining membership.

I set forth this argument in four chapters. The first half of the project is primarily engaged in the exegesis of natural law theorists of the late sixteenth and seventeenth centuries, tracing conceptual developments in their work, while the latter half incorporates English popular literature, political pamphlets, and legal treatises to describe the significance of the pirate and the traitor for the development of English notions of the criminal. In Chapter One, I argue that Gentili and Grotius, unlike their most prominent Scholastic predecessors and contemporaries, described war not as punishment carried out by a contingent authority in human community, of which commonwealths were members, but a contest between possessors of subjective right in an international field defined by the absence of political authority. With this shift came a change in the significance of the *ius gladii*, the "right of the sword" or the right to carry out blameless violence; whereas it had been a princely power incidental to lawmaking capacity for thinkers such as Suarez and Bodin, for Thomas Hobbes and John Locke, punitive violence was the foundational political right.

I devote an entire chapter to works by four theorists outside, in one or more ways, the geographic and temporal core of this project—*i.e.*, seventeenth-century England—because the insight this contrast between Suarez and Vitoria, on one hand, and Gentili and Grotius, on the other, provides for the subjects of two subsequent chapters. First, what I will argue is an isomorphism between war and punishment in Vitoria's and Suarez's just war theory provides

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[1] Kirchheimer, Otto. *Political Justice: The Use of Legal Procedure for Political Ends.* 1961. Greenwood, 1980, at 31.

[2] Kirchheimer 26.

important context for my claim that the figure of the criminal in seventeenth-century England drew so heavily from international law norms and imagery. Second, by placing the two major social contract thinkers of seventeenth century England, Hobbes and Locke, in the context of their immediate natural law theorist predecessors, I argue that Hobbes's and Locke's approach to punishment constitutes a major, *modern* break from earlier political thought and how this shared approach fell short on its own terms.

The second chapter argues that Hobbes (and Locke) followed Gentili and Grotius in asserting a distinction in the norms governing war and punishment. War took place in the absence of political authority and a mutual subjective right to violence; punishment was, in theory, curtailed by the norms established by the social contract, a regulatory function of the peaceful commonwealth. Yet when pushed to justify the use of violence against a member of the commonwealth, Hobbes (and Locke) falls back on the right of war: Punishment is the state of war reproduced between sovereign and criminal within the commonwealth.

In the third chapter I return to international legal treatises to focus on the figure of the pirate, or *latro* ("brigand"). This figure, in Gentili's and Grotius's accounts of just war, stand opposed to the legitimate enemy. The pirate is the *hostis humanis generis*, whose political illegitimacy and transgression of both geographic boundaries and international law norms puts him outside of the protections of the *ius gentium*, or law of nations. Although the primary foil to *hostes*, or legitimate enemies, the pirate is joined in his outlaw status by the tyrant, rebel, and atheist. Violence unconstrained by the usual norms of international law (such as the requirement of burial) was justified against the pirate because he (and, according to Grotius, states acting piratically) by transgressing the law, had lost status not simply as a political actor, but as a human. According to both Grotius and Locke, not just the pirate, but wrongdoers generally, could be executed as if they were wild beasts because their crimes had revealed them to be outside the community of men. I argue that English writers of the seventeenth century saw the highwayman—the robber-by-horseback who disrupted overland routes—as a land-pirate. The pirate, by way of the highwayman, was thus an important figure for seventeenth century accounts of crime and punishment, and nascent efforts at public prosecution.

In the fourth chapter I focus on English domestic law, specifically, the law of treason. Treason, a crime committed by making war against the King or adhering to his enemies, incorporates a complex, ambivalent, and often-manipulated relationship between the categories of crime and war. Histories of seventeenth century treason have, appropriately, focused on the paroxysm that seized England in the 1640s, the paradoxical execution of Charles I for treason against his own crown, and whether and how the interpersonal crime of treason was reconfigured as a crime against *the state* or some impersonal political body. This chapter takes a longer view. Although no linear narrative emerges from a study of treason in the seventeenth century, certain patterns, and a subtle but crucial shift are apparent: The treason trial was means of "winner's justice," of retroactively asserting the political legitimacy of one faction through the criminal prosecution (rather than military conquest or execution) of opponents, and anxiety about this fact drove the Whig reforms of the late seventeenth century. The *form* these changes took, however, presumed that treason was a crime against *security*, not against *political obligation*. The object of treason may have reverted to the Crown with the Restoration of the Stuarts to the throne in 1660, but theorists on both sides of the political battles of the 1640s had left their mark. The model for the "ordinary" adversarial criminal trial would have in its roots a theory of wrongdoing as existential threat. The idea of the "criminal" in English political and legal thought thus reflects an internalization of concepts associated with war.

* * *

This project is decidedly not a social history; I do not consider the day-to-day practices of criminal prosecution and punishment in any detail or make any claims about how these may have changed over the course of the seventeenth century. But the timing of these intellectual historical developments are suggestive in light of the major reforms of the eighteenth century that would come to define Anglo-American criminal administration: the adversary trial, professionalized police, and the penitentiary as the primary means of punishment.[3] As John Langbein has argued,[4] a major influence on the adversary trial is the Treason Reform Act of 1696, an act which (I argue in Chapter 4) grew in part out of a view of treason as less a usurpation or feudal betrayal and instead a physical threat to the state or status quo.

During the period covered here, however, the nascent English state had little role in criminal prosecutions and, indeed, "the criminal law" itself was not clearly defined. J.A. Sharpe argues that there was "broad continuity" in both criminal law and practice between the years 1550 and 1750, a time during which "few fundamental changes occurred" despite the constitutional upheaval.[5] During this period criminal prosecution was a largely private, interpersonal affair, mediated but not pursued by the state, and not readily distinguished from tort. Prosecutions were undertaken not by the state, but by the wronged individuals themselves. Justices of the peace "formed the essential link between the victim and the courts," both investigating an alleged offense and ensuring the parties appeared before the assizes.[6] As we will see in the discussion of highwaymen in Chapter 3, beginning in 1689 Parliament and local officials increasingly relied on rewards (either statutory or ad hoc) to induce individuals to undertake the expenses and risks associated with private prosecution.[7]

When the state did get involved, its prosecutorial and punitive infrastructure was extreme, but intermittent. Felonies were generally tried at the assizes, an intermittent court held in larger towns for the entirety of the county and presided over by a judge who often traveled from London. Assize judges were given a commission to ride a circuit (one of six in England), either of oyer and terminer (to hear and determine all offenses in the circuit) or of gaol delivery (to empty the gaols and try suspected felons).[8] Felony trials were brief, lasting ten or twenty minutes at a rate of 100 per day during assizes.[9] Between two-thirds and three-fourths of felony cases were for property crimes.[10] Recourse to the assizes was a matter of either last resort or limited to relatively marginal individuals within a community; habitual offenders were generally dealt with by local leaders.[11] As a practical matter, prosecutions were local affairs, tied up with the economic, moral, and feudal authority of the local landlord. Hence, criminal trials continued without major interruption during the interregnum; as Alan Cromartie has noted, the operation of

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[3] Smith, Bruce. "English Justice Administration, 1650-1850: A Historiographical Essay." *Law and History Review*, Vol. 25, No.3, 2007, pp. 593-634, at 602.

[4] Langbein, John H. *The Origins of Adversary Criminal Trial*. Oxford University Press, 2005.

[5] Sharpe, J.A. *Crime in Early Modern England 1550-1750*. 2d ed. Routledge, 1999, at 27.

[6] Beattie, John M. *Crime and the Courts in England 1660-1800*. Oxford University Press, 1986, 36.

[7] Beattie 51.

[8] Sharpe 32.

[9] Sharpe 55.

[10] Sharpe 79.

[11] Sharpe 131.

local courts were largely unaffected during the upheaval of the 1640s.[12] This assessment is shared by Kenyon: "Nothing is *more* remarkable than the way in which the administration of justice had proceeded under the old forms, or something very close to them, through every military and constitutional upheaval."[13] The seventeenth century did see some shift in the role of the parish constable, from a representative of his neighbors to an agent of the county bench.[14] By the mid eighteenth century, petty offenders were increasingly likely to be prosecuted at the assizes rather than locally at the manorial court, a trend that J.A. Sharpe says "demonstrated the penetration of the state into the parish."[15]

Although the distinction between crime and tort was as at least as old as Roman law, and well-integrated into English common law pleadings by 1200, it was not until Blackstone's *Commentaries* that one could speak of a distinct *substantive* body of criminal law in England.[16] In the meantime, what distinguished crime from tort was how a given act was prosecuted—through an appeal or indictment of felony, where the victim (and less often, a local official) sought capital or other bodily punishment, or through a writ or indictment of trespass, where the result was reparations or compensatory damages.[17] Criminal law could be and was widely used as means of private vengeance or restitution; in this, it operated largely independently of the sovereign or something resembling a modern, territorially unified state.

Criminal prosecution always carried the threat of state violence. Crime was understood to be a violation of "the King's peace" and subject—always in theory if less frequently in practice—to public prosecution by local officials.[18] As removed as the King or his agents might be in the practical enforcement of the criminal law, the King remained symbolically significant. Discussions of criminal law in theory among scholars and politicians readily invoked the King as ultimately responsible for the fate of the accused. In the words of the Lower House's spokesman Serjeant Glanville, as quoted by Cromartie: "'[H]is Majesty, conferring grace and favor upon some [by waiving penalties] does not do wrong to other.'"[19] The nominal penalty for every felony—including what we might now consider petty thefts—was death.

The interaction between the fundamentally local quality of criminal prosecutions and the (usually latent) extreme violence in which they could culminate in seventeenth and eighteenth-century England has been the subject of extensive historiographical debate. Douglas Hay has argued that the underutilization of the death penalty relative to its expansiveness "on the books" in eighteenth century England served to reinforce social hierarchies by making discretion and

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[12] Cromartie, Alan. *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642.* Cambridge University Press, 2006, at 269.

[13] Kenyon, J.P. *The Stuart Constitution: 1603-1689: Documents and Commentary*. 2nd ed., Cambridge, Cambridge University Press, 1966, at 336.

[14] Sharpe 50.

[15] Sharpe 133.

[16] *See* Seipp, David. "Symposium: The Distinction Between Crime and Tort in the Early Common Law." *Boston University Law Review*, Vol. 76, 1996, pp. 59-87; Lieberman, David. "Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence," *Law Crime and English Society, 1660-1830*. Edited by Norma Landau, Cambridge University Press, 2002.

[17] *Id*.

[18] Langbein, John H. "The Origins of Public Prosecution at Common Law" *The American Journal of Legal History*, Vol. 17, No. 4, 1973, pp. 313-335.

[19] Cromartie, Alan. "The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England" *Past & Present,* No. 163, 1999, at 110.

mercy of social superiors central to the operation of the criminal justice system.[20] Criminal law was a means of reinforcing economic power within cities and towns, and a reprieve from the gallows a kind of currency that local elites held over the impoverished general population. Cynthia Herrup argues a similar dynamic, controlled by the community at large rather than just the local elite, dominated the use of the death penalty in the latter part of the sixteenth and first half of the seventeenth century. Crimes against property, which "dominated the agendas of both the assizes and quarter sessions," were nominally capital felonies but generally met with "considerable leniency," with "less than half of those liable for execution…ordered to the gallows."[21] An execution, Herrup notes, required the participation of more than thirty people (twenty grand jury members, twelve petit jury members, a judge, and justices of the peace), many of whom were minor freeholders, yeomen, husbandmen, or artisans and shared the values of "local men of middling status."[22] Herrup argues that a "'domino theory' of human character permeates both the secular and religious writings of the late sixteenth and early seventeenth century."[23] What distinguished offenders from real criminals in the minds of seventeenth century common people, according to Herrup, was intention: Did the law-breaker attempt to control his own behavior and fail, or intend to do wrong? Was he weak or evil?[24]

My project ends with the beginnings of criminal justice reforms that would transform how individuals were prosecuted and punished in England. Although Hobbes, Locke, Coke, and Hale could speak of "pleas of the crown," and identify certain conduct as criminal (in the sense that it violated the law) or not, there was no body of "criminal law," little public prosecution, no personnel tasked with enforcing the law or identifying lawbreakers, and (correspondingly) no understanding of *criminals* as a distinct class of persons who broke these laws and were accordingly subject to violence from *political* authorities. Crime was an interpersonal dispute, not an act against the government. An appointed judge from London might be involved in adjudicating the conflict if it was particularly serious, but also might not; if they did, this was likely the only role an agent of the King played in a process that might culminate in the killing of the perpetrator in the King's name. The ideas I describe gained currency on the cusp of the English state's expansion into the fields of policing, prosecution, and punishment, and the development of technologies of social exclusion through transportation—the exile of felons to colonies in lieu of execution—and incarceration. What follows is, among other things, an intellectual prehistory of these dramatic changes.

* * *

Other scholars have argued that the late sixteenth and early seventeenth century saw crucial innovations in the relationship between "war" and "punishment" among European jurists. Carl Schmitt, in *Nomos of the Earth* (1979), claims that the major innovation of early modern international law was the distinction between war and punishment. Absent this distinction, war devolves into a quest for total annihilation, as each party considers the other a wrongdoer and thus without rights in the conflict. Ironically, it is by understanding violent conflict between states as morally neutral that limits on that violence may be established and enforced. I argue that

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[20] *See* Hay, Douglas. "Property, Authority, and the Criminal Law." *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*. Penguin Books, 1975, pp. 17-63.

[21] Herrup, Cynthia. "Law and Morality in Seventeenth Century England." *Past & Present*, Vol. 106, 1985, pp. 102-23, at 106.

[22] Herrup, "Law and Morality in Seventeenth Century England," 108.

[23] Herrup, "Law and Morality in Seventeenth Century England," 109.

[24] Herrup, "Law and Morality in Seventeenth Century England," 110.

Schmitt is half-right—Alberico Gentili[25] and Thomas Hobbes[26] broke with earlier natural law theorists by positing a distinction between the right of war and the right of punishment. War was, on Gentili's account (and *contra* Vitoria and Suarez—and, according to Schmitt, Scholastic just war theory more generally) grounded in subjective rather than objective right and, accordingly, could be just on both sides. However, Schmitt views this move as successful, at least with respect to European territory. Schmitt dismisses Hugo Grotius's[27] natural rights account as a mere Scholastic holdover. I argue instead that Grotius's account of a natural right to punish is, as much as Gentili's notion of just war, a critical break from earlier Scholastic accounts of the state.

In *Nomos of the Earth*, Carl Schmitt is concerned with what he sees to be the loss of the *jus publicum Europaeum*, a Eurocentric international law that was predicated on "a particular relation between the spatial order of firm land and the spatial order of free sea."[28] Distinctive about this 400-year period was a principle of mutual respect between land-based powers. While the sea operated as a lawless realm and colonial expansion, war within Europe was limited by the mutual recognition of nations' legitimacy. This, in turn, was predicated upon an understanding of land-appropriation or division (*nomos*) as logically and temporally prior to law, and thus grounded political authority in territory in a way that was impossible on the sea (thus making it a lawless space).[29] The loss of this order in the twentieth century, as the land/sea division was ruptured by the "possibility of a domination of air space,"[30] has resulted in a criminalization of war."[31] Although ostensibly designed to prevent conflict, this stigmatization of the aggressor

[25] Alberico Gentili, Italian by birth, was a Protestant jurist who spent the majority of his career in England, where he was the Spanish Embassy's lawyer (a tricky position, to say the least) and, after 1587, the Regius professor of civil (Roman) law at Oxford, where he wrote his principal work, *De Iure Belli Libris Tres* (1589). (I include similar, extremely brief biographical summaries at the first mention of each major theorist in the Introduction to orient the reader. Dates and places are taken from the *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/index.html.)

[26] Thomas Hobbes, born at the sailing of the Spanish Armada such that he told people that "fear and I were born twins together," lived an unusually long life for his day, succumbing only in 1679. The author of *Elements of Law*, *De Cive*, *Leviathan*, and *Behemoth* (a history of the civil wars), Hobbes was a supporter of Charles I during the Civil War who joined the royal family in exile in France, believed himself to be a brilliant mathematician (he wasn't), did battle with the Royal Society over the nature of scientific knowledge, and is sometimes credited with the first work of liberal political philosophy.

[27] Grotius's account of punishment as a subjective right, a major break from his Scholastic predecessors, is at the core of the first three chapters of this project. A Dutch lawyer and political operative (who, like Hobbes, spent some time in exile in France due to his political allegiances), Grotius's magisterial text, *De Iure Belli ac Pacis* was published in 1625 and widely read among the literati of England.

[28] Schmitt, Carl. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. 1950. Translated by G.L. Ulmen, Telos, 2006, at 49.

[29] Schmitt characterizes Francisco Vitoria's relections (which I address in depth in Chapter 1) as the "only…monograph" to "systematically" address the problem of land-appropriation. However, Schmitt places Vitoria soundly on the medieval side of the divide he identifies with Gentili. Vitoria's contribution, according to Schmitt, was to generalize, and make moral, what was essentially a theological conception of the *ius gentium* (law of peoples or international law). (Schmitt 115.) Vitoria nevertheless moves toward this new doctrine of *justus hostis* by asserting a principle of non-discrimination between the Spanish and Indians, though this non-discrimination is justified with reference to the limited reasons for a just war rather than a juridical principle (as would Gentili). (Schmitt 122.)

[30] Schmitt, *Nomos*, 48.

[31] Schmitt, *Nomos*, 122.

leads to the dissolution of all the previous limits on military conflict.[32] Where once even one's opponent was a similarly situated legitimate power, in the post-*jus* publicum, they are a "parasite or trouble-maker" to be destroyed.[33]

I follow Schmitt in identifying in Gentili's works on international law a move toward rigorously distinguishing war from other forms of state violence, and a move toward understanding it in terms of both subjective (rather than objective) right and relative moral neutrality. As the result of destructive religious wars across Europe, some theorists, particularly Jean Bodin,[34] began to theorize a secular state as a principle that could mediate and thus limit this violence. Whereas medieval and early modern wars between Christians and "wild" peoples or against heretics were conceived as punishment, with destruction or transformation of the enemy as the goal, under the *jus publicum Europaneum* war was "bracketed." Opponents were viewed as co-equal sovereigns, their causes secular. "The justice of war no longer is based on conformity with the content of theological, moral, or juridical norms, but rather on the institutional and structural quality of political forms."[35] Status as an "enemy," rather than subjecting one to annihilation, came to entail certain protections. Because war was understood as a conflict of equally legitimate powers, rather than an existential conflict between incompatible religious commitments, it became "possible to distinguish an enemy from a criminal."[36] Bodin, Schmitt argues, first articulated the principle of state sovereignty necessary for this status, and Gentili was responsible for first positing a "juridical frame for war" that incorporates this innovation.[37]

My account differs from Schmitt in both scale and emphasis. His goal is to construct a narrative not just about the production of an intellectual and military order, but of its degeneration in the twentieth century. I limit myself to sixteenth and seventeenth century thought and do not consider the later Enlightenment international law theorists such as Vattel and Kant. I am concerned with a close reading of a narrower set of texts. This reading reveals a different, but commensurate, reading of Gentili: Although Schmitt highlights the degree to which Gentili presented a *secular* notion of international law and rejected theological concepts, he is largely unconcerned with Gentili's move toward subjective rights as the basis for understanding the *ius gentium*.

Finally, unlike Schmitt, I argue that Grotius's work presents an innovation in early modern theories of legitimate violence as significant as Gentili's "just enemies." Schmitt is dismissive of Grotius. Where Gentili "formulated the fundamental concepts of the new international law," "Grotius's method was a scientific regression…He finds his place between Francisco Suarez[38] and Hobbes, i.e., between scholastic theologians and modern philosophers"[39].

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[32] Schmitt, *Nomos,* 123.

[33] Schmitt, *Nomos*, 124.

[34] A French polymath, Bodin is credited with the first account of sovereignty, first in his *Methodus* and then in the latter, more widely read *Les Six livres de la République* (*The Six Books of the Commonwealth*, 1576. Bodin's lifetime (1529/1530-1596) spanned the wars of religion in France, which informed his work.

[35] Schmitt, *Nomos*, 142-3.

[36] Schmitt, *Nomos*, 142.

[37] Schmitt, *Nomos*, 158-9.

[38] Francisco Suarez (1548-1617) was a Spanish Scholastic. Although he had significant works on natural philosophy, theology, and other subjects, I draw only from his 1612 *De Legibus* and 1584 disputation on war.

[39] Schmitt, *Nomos*, 134.

Grotius, Schmitt argues, while sometimes articulating Gentili's understanding of a just war as one between two appropriate forces—and thus "just" as a kind of "formal perfection"—"seriously confuses the concepts," treating "just" as a substantive determination describing cause as well.[40] However, Grotius's treatment of punishment as an individual, natural capacity (rather than an emergent, political one) puts him decidedly on the side of Hobbes against the Scholastics. Schmitt misreads Grotius's references to "private wars" as revealing a basically theological framework.[41] "Private wars," on Grotius's understanding, are not to be understood as a rejection of or reversion from Gentili's *jus hostes* but instead of a theory of a individualized, subjective right to violence that will be adopted by both Hobbes and Locke[42]. While largely distinct, both Grotius's and Gentili's innovations are both a dramatic shift away from the objective right (the *jus causa*) required for legitimate state violence by the theologians toward subjective right.

In this emphasis on Grotius's theory of punishment as an important innovation, I follow Richard Tuck's *The Rights of War and Peace*. Tuck traces much the same path through the history of European international law as does Schmitt, from the late medieval Scholastics and concluding with the Enlightenment. While Schmitt attributes the origins of this modernity to "the personalization of European territorial states," [43] Tuck makes the converse claim: Individual autonomy as a political principle *within* the commonwealth was adopted, via metaphor, from the international legal order of sovereign states. In other words: The notion of liberal citizenship which has its origins in the social contract theories of Hobbes and Locke, were predicated on treating an individual as the moral equivalent of a state. Grotius's naturalization of punishment is essential to this metaphorical appropriation; it is the "one major change in moral thinking" that made it possible for the *ius gladii* to be properly possessed by an individual as well as a magistrate.[44] This change "created the characteristic form of seventeenth- or eighteenth-century political theory, with a state of nature inhabited by jurally minimalist creatures who were to a greater or lesser extent at war with one another." [45]

Tuck's purpose in describing the impact of Grotius's "strange doctrine" is to suggest that individual, natural rights as they are conceived by relatively contemporary figures have their origins in international legal thought, and more particularly, the right to violence by one sovereign against another. Although not making any normative claims about the implications of this genealogy, Tuck notes the "paradox" that results from the fact that a liberal commitment to a civil society predicated on individual agency "is both conceptually and historically associated with international aggression."[46]

I follow Tuck in looking to international legal thought as the intellectual precursor of Hobbes's and Locke's social contract accounts. I also follow Tuck—against Schmitt—in

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[40] Schmitt, *Nomos*, 161.

[41] Schmitt, *Nomos*, 161.

[42] John Locke (1632-1704), like the other philosophers already introduced, was a natural philosopher as well as political theorist. Both he and his works played important roles in the Whig efforts to unseat James II in the 1680s and the eventual victory of 1688. Despite his extensive oeuvre, my argument largely relies on his *Second Treatise of Government* (1689), a follow-on to Locke's criticism of Robert Filmer's patriarchal account of political power that, shall we say, grew into a life of its own.

[43] Schmitt, *Nomos*, 147.

[44] Tuck, Richard. *The Rights of War and Peace*. Oxford University Press, 2001, at 22

[45] Tuck, *The Rights of War and Peace*, 228.

[46] Tuck, *The Rights of War and Peace*, 231-32.

asserting that Grotius's naturalization of the right to punish is crucial both in altering the terms on which state violence is justified and in its lasting influence on English political thought. However, unlike Tuck, the story I tell is not one of the internalization of the concept of autonomy, but rather, the transformation of a theory of punishment from one tied to juridical order to one that is naturalized and individualized but also constitutes the basis of political authority. In short, I present a narrative that is neither unidirectional with respect to interstate/intrastate conceptualizations, and that takes interpersonal violence, rather than personal autonomy, as its central concern.

I am not the first to question the direction of the arrow in Tuck's account of sovereign to citizen. Alexis Blane and Benedict Kingsbury have highlighted the degree to which Scholastic thinkers modeled an international global order as an analog for the civil state.[47] C*ontra* Tuck, if Hobbes's and Locke's civil order were in turn modeled on the international order as conceived by their predecessors, it would be a rather circular set of influences. Vitoria relied upon civil punishment and "the internal structure of the state [as] both a model for and constraint on inner-state conduct."[48] Gentili and Grotius both, according to Blane and Kingsbury, reject this jurisdictional model. Both, they argue, assert a kind of universal jurisdiction by individual states against other nations. Gentili "continues to insist that war…must respond to an injury" but expands the category of injury to include pre-emptive strikes.[49] General deterrence and the possibility of pre-emption allow states who have not actually suffered injury to act. Grotius, on the other hand, by asserting a right to punishment that "derives from the law of nature without reference to civil jurisdiction,"[50] entirely displaced the jurisdictional model employed by the later Scholastics. Grotius permits anyone to punish a wrong, whether suffered directly or by a third party—without jurisdictional authority, so long as they are not guilty of the same act.[51] Grotius goes arguably further than Gentili, delinking punishment from even the security of the punishing state.[52] In so doing, Blane and Kingsbury argue, Grotius not only opens the door to humanitarian intervention, but to colonial wars and wars of religion—any case where the object of violence can be understood to violate some natural law, whether or not it results in injury to the attacker or a third party.

Blane and Kingsbury argue that the limits on punishment are not determined by the rights of the individual wrongdoer; rather "the nature of the peace determines the extent of post-war punishment which can be instituted."[53] Thus, according to Blane and Kingsbury, the *jus post bellum* is determined by the objective conditions that are necessary to ensure a lasting peace, not the act that caused the war. Blane and Kingsbury read this general deterrence justification of victory-based punitive jurisdiction in Grotius's *De Jure Belli ac Pacis* as "divorcing the right to punish from the individual wrongdoer," but I argue this naturalization of the right to punish instead heightens the significance of the wrongdoer's moral status (or lack thereof) in the justification of punitive violence, including war. The vulnerability of *others* to limitless violence

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[47] Blane, Alexis, and Kingsbury, Benedict. "Punishment and the *ius post bellum*." *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire.* Oxford University Press, 2010, at 250.

[48] Blane and Kingsbury 250.

[49] Blane and Kingsbury 251.

[50] Blane and Kingsbury 253.

[51] Blane and Kingsbury 253.

[52] Blane and Kingsbury 254.

[53] Id. at Blane and Kingsbury 260.

as a logical or structural consequence of defining wrongdoing in terms of threat and punishment as a subjective right is a persistent theme in the four chapters that follow.

Chapter 2 turns this focus to English political theory, specifically, the social contract accounts of the state by Thomas Hobbes and John Locke. Close readings of *De Cive*, *Leviathan* and the *Second Treatise*, I argue, reveals the distinction between war and punishment adopted by these two readers of Grotius and Gentili to be more complicated. Though both Hobbes and Locke posit a fundamental opposition between political society and a state of nature, the relationship between the two turns out to be more Klein bottle than bounded sphere: The state of war is reproduced inside the commonwealth both in criminality (Locke) and punishment (Hobbes and Locke). The subject is both within the commonwealth and (I argue in Chapter 2), subject to a right of violence, the *ius gladii*, *as if* both the criminal and the sovereign were returned to the primal state of war.

This liminal status is not a consequence of Hobbes's absolutism, I argue, but rather, the consent-based account of political membership he shares with Locke. Locke, in the *Second Treatise*, offered a theory of the state that he believed would protect the individual from the vertical power of state authority. Susanne Sreedhar has argued that Hobbes (despite his reputation) shares this desideratum;[54] Hobbes wants not just to formally limit the sovereign's power of violence (i.e. what may justifiably be called "punishment") but is willing to admit justified disobedience in cases where the sovereign undermines the self-interested reasons for the subject to enter in the social contract in the first place. Hobbes is often described as the progenitor of a "modern" account of the state because *Leviathan* offers an account of consent-based political membership that, though absolutist in its conclusions, shares the basic logic adopted by the Parliamentarians of both the 1640s and 1680s, whose view of limited royal authority was ultimately triumphant. Hence Tuck's identification of Hobbes as a liberal:

> [L]iberals have usually prized a distinction between two kinds of principle governing our conduct. The first, represented usually by a civil law code but possibly also by social conventions of various kinds, are principles to which we have assented in some fashion and whose force over us derives from that assent. The second are the principles which are not self-imposed in the same way, and which do not require this kind of assent in order to govern our conduct. These second principles, for the characteristic liberal, are very few in number, forming the 'thin' account of morality familiar in social contract theory.[55]

For Hobbes, this "thin" morality is the natural law, which is based on universally available reason, and gains its force in *Leviathan* from the equally universal desire for self-preservation.[56] Unlike Grotius, who posited a natural sociability on which obligations both within and outside the commonwealth could be built, "Hobbes… delineated a juridical world without importing…a

[54] Sreedhar, Susanne. *Hobbes on Resistance: Defying the Leviathan*. Cambridge, 2010.

[55] Tuck, *Rights of War and Peace*, 11-12.

[56] In *The Elements*, Hobbes states unequivocally that natural law is based on reason, *not* the consent of nations or even men's individual passions. (Hobbes, Thomas. *The Elements of Law Natural and Politic*. Edited and translated by J.C.A. Gaskin, Oxford University Press, 1994.) Although this identification of the law of nature with reason persists through *Leviathan*, it is complicated in the 1651 English version of *Leviathan* by Hobbes's frequent recourse to man's universal desire for self-preservation as the *force* of natural law and his note in the 1668 Latin version (a concession to his positivist conception of law) that it is God's command that makes the law of nature a true law.

moral ontology on top of a natural or physical ontology."[57] The animalistic imperative for survival was sufficient (according to Hobbes), to get us into a state where civil law can take over.

Yet though Hobbes at times asserts that this positive law governs civil punishment and distinguishes it from the pure hostility of the state of nature, Hobbes cannot justify violence within the commonwealth without abandoning the criminal to the same hostility he would face outside the state. Mario Cattaneo has argued that this alienation of the criminal from the commonwealth is what makes Hobbes's account of punishment *more* liberal than that of Montesquieu or Rousseau. These two thinkers justify the death penalty with reference to the dependence of the individual upon the commonwealth for his own survival. Because the individual's existence depends upon the state, his death at the hands of political authority is justified as necessary for the collective entity that had previously enabled the criminal to live in peace.[58] Hobbes's account of punishment does not rely upon an organic notion of the state to justify killing an individual for the public good.[59] But where Cattaneo emphasizes Hobbes's putative limits on punishment, I argue, these limits are no different from the limits on his natural right of self-defense. Hobbes's justification of punishment in the Leviathan allows the state to go to war, quite literally, against its own citizens. The limits of this war—to the violence used and to when it is just—are derived not from the contract itself but from the extra-political natural law.

For Locke, as for Grotius, the identification of war and punishment is even more explicit: Punishment is a pre-political capacity, according to Locke, which is unified and regularized in the commonwealth. In the moment at which the highway robber seeks to take my cloak, I have re-entered the uncertainty of the state of nature—for the robber leverages the possibility he may also kill me to take my things. Rationally fearful of my life, I can strike back as if no judge existed to resolve the conflict because, in that moment, one effectively does not. Punishment for Locke, like slavery, is the delay and temporal elongation of this moment of existential (and thus war-like) conflict.

If Hobbes and Locke justify punishment as a kind of war, what happens to those who are subject to it? Here we turn to Locke's highwayman and, I argue, his twin: Grotius's pirate.

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[57] Brett, Annabel. *Changes Of State: Nature And The Limits Of The City In Early Modern Law*. Princeton University Press, 2011, at 109.

[58] Cattaneo, M. "Hobbes's Theory of Punishment." *Hobbes Studies*. Edited by K. C. Brown, Blackwell, 1965, at 294.

[59] At the same time (and as Leo Strauss has argued), Hobbes moved away from the religious commitments of his contemporaries, grounding the right of punishment in a secular natural right. That this relationship between the individual and public good was both troubling for Hobbes's contemporaries and often resolved by way of divine law is evidenced by the following excerpt from Hobbes's contemporary Dudley Digges:

> Naturally we love society below our selves, for the end of it was to convey to us such and such goods, and that which is loved in order to something else, is less amiable. But morally and in Christianity we are bound to prefer the public good to whatever private Interest. And the obligation is very reasonable; For if we submit nature to religion, and be content to loose our lives for the present, we shall receive them hereafter with great advantage.

(Digges, Dudley. *The unlawfulness of subjects taking up armes against their soveraigne*. London, 1644, at 123). Digges, according to Richard Tuck, was heavily influenced by Hobbes's *Elements*. (Tuck, Richard. *Philosophy and Government*. Cambridge University Press, 1993, at 275-76.)

Grotius limits war as a response to an injury, either past or immediately anticipated, but he also explicitly rejects the requirement that the aggressor be the injured party.[60] "Injury," typically understood in relational terms, is ambiguously broadened to include *any* wrong, even without a clear victim. If punishment is a subjective, relational right against a wrongdoer then only the injured party may pursue punishment. If punishment is either mandated by natural law as a necessary desert for the trespasser *or* if it puts the wrongdoer in a condition whereby others may make use of him (or it) for the sake of the common good, then any legal authority might engage in aggressive war against the violator. I argue, in an exegesis of Grotius's (and others') intellectual treatment of pirates, that the pirate's status as *hostis humanis generis*—one who can be killed by *anyone*, regardless of their authority—is linked to a theory of wrongdoing as simultaneously interpersonal and a manifestation of the wrongdoer's intrinsic nature. A wrongdoer loses status because his crime reveals himself to be outside the bounds of lawful human conduct. Locke shares this understanding of criminality—or at least, relies on it to justify his account of punishment and the state of war in the *Second Treatise.* These similarities between Grotius's and Locke's accounts are by no means a coincidence; Grotius's theory of natural law and rights in *De Iure Belli ac Pacis* was read carefully by not just Locke but Selden, Pufendorf, and Hobbes.[61]

Turning from natural law theorists to political pamphlets and popular writings in England, I argue that "the highwayman," a prominent figure in seventeenth century English literature and policy, shared many crucial qualities, and legal status with, the "pirate" of sixteenth and seventeenth century international law. This continuity is significant because the pirate was viewed as morally exceptional and rightfully subject to unlimited violence by the most influential international legal thinkers of seventeenth century England, namely, Gentili and Grotius, whereas the highwayman was, in the second half of the seventeenth century, increasingly viewed as the prototypical criminal by both lawmakers and theorists. The rhetorical link between the pirate and the highwayman and the highwayman's sometimes-role as the object of increasing efforts by a central state to effect criminal punishment, suggests that exceptional *international* violence might be incorporated into the "ordinary" *domestic* violence of criminal punishment.

Contemporary intellectual historians, however, have not seen in this connection (as I argue they should), a link between international law and "liberal" criminal punishment. Instead, informed by the American legal and extra-legal responses to the attacks of September 11, 2001, recent scholarship on the legal category of piracy has focused on the analogy between pirates and terrorists. Some legal scholars have argued that there are important parallels in how international legal norms apply to contemporary terrorists and early modern pirates.[62] Daniel Heller-Roazen has devoted a book to the subject, only a portion of which is devoted to early modern accounts of piracy.[63] Heller-Roazen argues that pirates, the "enemies of all," are both necessary to the production of the category of legitimate war between sovereign states and "bring[] about" the confusion of the categories of criminal and political.

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[60] Grotius, Hugo. *The Rights of War and Peace*. 1625. Translated by John Morrice, et al., edited by Richard Tuck, Liberty Fund, 2005, at 1024-25.

[61] Tuck, Richard. *Philosophy and Government: 1572-1651*. Cambridge University Press, 1993.

[62] *See, e.g.,* Burgess, Douglas R. "The Dread Pirate Bin Laden." *Legal Affairs*. July/August 2005, available at http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp; Greene, Jody. "Hostis Humani Generis." *Critical Inquiry*, Vol. 34, 2008, pp. 683-705.

[63] Heller-Roazen, Daniel. *The Enemy of All: Piracy and the Law of Nations.* Zone Books, 2009.

Considered only in the context of international law, these similarities between the terrorist and pirate are striking and convincing. Pirates, like terrorists, threaten both the rights of property ownership and the military integrity of states. Moreover, they cross boundaries freely and operate outside the norms of international law governing internal structure (they are not states) and external behavior (they commit violence outside the context of a declared war). But as an account of the pirate's significance in seventeenth century England, Heller-Roazen's theory is anachronistic. Heller-Roazen, by treating the "pirate" as a transhistorical category whose significance is roughly persistent across two thousand years of history, presumes the categories of "criminal" and "political" were cogent, separate, and stable enough that the transgression or indistinction of these categories by the pirate was a meaningful alternative to a norm in which violence was curtailed. But (as I argue in Chapter 1), no such stable distinction was apparent in the international legal thought of the sixteenth century and, moreover there was no fixed juridical category of the "criminal" in England; it was not until Blackstone's *Commentaries* (1765) that the "pleas of the crown" or set of procedural approaches to certain kinds of social harm were organized under the heading of "criminal law," and not until the nineteenth century that professionalized policing and public prosecution became the norm. Missing too, in this pirate-equals-terrorist formulation, is the centrality of pirates' pecuniary motivations and threat to property as well as lives and legal order to early modern Englishmen. As Jody Greene notes, commentators have "stumbled" on that portion of the definition of piracy (or terrorism) that define both as acts of violence taken outside of state boundaries and by non-state actors for *private ends*.[64] Pirates in seventeenth-century England were indeed considered particularly troublesome figures, capable of crossing boundaries and of uncertain or deceptive loyalty. However, pirates in international law were less exceptional than stand-ins for the category of "criminal" in a natural law framework. Pirates were not special for being compared to beasts or subject to universal punitive jurisdiction; that was simply what punishment entailed outside of the commonwealth.

This claim, that an "exceptional" figure plays an important role in legal innovations that eventually define responses to everyday criminals, also structures my account of the seventeenth century traitor. Histories of treason in the seventeenth century have focused on two trials: of Thomas Wentworth, First Earl of Strafford (and, as relevant to his conviction and execution as a traitor, Lord Deputy of Ireland), and of King Charles I himself. Legal historians have focused on whether these trials entailed a novel theory of treason, or whether England's long-lived treason statute, 25 Edward III, could justify the execution of the king. William R. Stacy[65] and Adele Hast,[66] for example, all argue the theory on which Strafford was executed was novel and he got a raw deal under contemporaneous laws and norms. D. Alan Orr argues that although there are some continuities in the *nature* of treason, Strafford's prosecutors offered a novel theory of its

[64] Greene 697-98.

[65] Stacy, William R. "Matter of Fact, Matter of Law, and the Attainder in the Trial of the Earl of Strafford." *The American Journal of Legal History*, Vol. 29, No. 4, 1985, pp. 323-348.

[66] Hast, Adele. "State Treason Trials during the Puritan Revolution, 1640-1660." *The Historical Journal*, Vol. 15, No. 1, 1972, pp. 37-53.

object—the state, rather than the Crown.[67] John H. Timmis[68] and Conrad Russell,[69] in contrast, argue that Strafford was convicted on a theory of treason that had firm roots in prior usages and doctrine. For each of these historians, Strafford's trial is compelling primarily as a prelude to Charles's trial and execution, a major step in the depersonalization of the idea of the "Crown" that would be necessary to put a king to death for treason against himself. At issue, in each of these accounts, was whether the execution of Charles I was a manifestation of a new theory of the state, or a dispute between branches within a constitutional order that was basically unchanged by the violent upheaval of the 1640s and thus could be restored with relative ease in the 1660s.

Although I draw from this debate, especially Orr's emphasis on the emerging notion of a state within treason jurisprudence of the revolutionary period, I am interested in tracing the before- and after- of the Revolutionary period, to changes in the meaning of treason that persisted across the century. My focus is on a different, but significant, change operating in the meaning of treason across the turbulent 1640s: Who can be treasonous? Early seventeenth century legal theoretical writing and trial transcripts offer a view consistent with sixteenth century international law: Only those with a prior commitment to a ruler, generally (but not exclusively) grounded in natural citizenship, could betray that ruler. Legal commentators on treason, like international law theorists, were therefore highly interested in working out the details of *who* had this prior membership and thus could be liable for treason if they acted against the ruler to whom they owed obedience. At the same time, the *rhetoric* of treason trials of the period was obsessed with the foreignness (and more specifically, Catholicism) of those accused of treason. To be a traitor was to have "an English face and a foreign heart." Deception featured heavily in rhetorical descriptions of treason.

The novelty of treason doctrine in the 1640s came not just from a shift in who treason could be against, whether the king's person, the Crown, the state, or the fundamental laws, but in who traitors were conceived to *be*. Of course, there had been numerous uprisings and familial conflicts for the throne over the course of English history—the notion of challenging the king for authority over the kingdom was not a new one. And, as Orr argues, even new, revolutionary threats could be conceptualized in older terms of "usurpation" of the king's prerogatives. But the 1640s also saw, in the trials that persisted through the Civil War and into the 1650s, increasing concern with the problem of multiple plausible loyalties within the same nation. To be a traitor was no longer to be an Englishman with foreign loyalties, but to be an Englishman with a different version of *what England was and who should rule it* than one's judges. Out of this instability, I argue, grew an account of treason-as-threat, rather than usurpation.

The law of treason mediated a deep instability between enemy and criminal during the English Civil War, but by the century's end, a set of treason trial reforms would create the template for adversarial criminal trials in the eighteenth century and beyond. As with Hobbes's "proto-liberal" account of the state, core "liberal" legal institutions are inflected with an

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[67] Orr, D. Alan. *Treason and the State*. Cambridge University Press, 2007.

[68] Timmis, John H. "Evidence and Eliz. I, Cap. 6: The Basis of the Lords' Decision in the Trial of Strafford," *The Historical Journal*, Vol. 21, No. 3, Sep. 1978, pp. 677-683 and Timmis, John H. "The Basis of the Lord's Decision in the Trial of Strafford: Contravention of the Two-Witness Rule." *Albion*, Vol. 8, Issue 4, 1976, pp. 311-19.

[69] Russell, C.S.R. "The Theory of Treason in the Trial of Strafford." *English Historical Review*, Vol. 90, 1965, pp. 30-50, at 30.

understanding of punishment as justified by the absence of membership or as a form of extra-state violence. Boundary crossers—whether literally by ship or on horseback, or metaphorically in the loyalties of their heart—were important models for nascent efforts as state-based criminal prosecution and punishment.

Chapter One: Punishment and Just War

I. Introduction

In the chapters that follow, I argue that seventeenth-century English legal and political theory adopted, as one model for their understanding of the criminal and punishment, international legal concepts: the criminal *was* an enemy—of the sovereign, *humanis generis*, or of the Crown. In this chapter, I describe developments in late sixteenth and early seventeenth century thought that provide analytical context and highlight the significance of this move. Specifically, I draw attention to a major shift in how and its relationship to war were understood between the sixteenth and seventeenth centuries from the writings of two leading Scholastic just war theorists—Francisco de Vitoria and Francisco Suarez—and their most prominent successors with an English readership in the seventeenth century. As Blane and Kingsbury have put it, for these two theorists "war was not a special case but subsumed into a general theory of punishment."[1] Two Protestant jurists—Hugo Grotius and Alberico Gentili—emphasized the distinction between war and punishment, although they understood this distinction in two very different ways. This distinction was, I argue, associated with another contrast in how punishment was justified vis-à-vis political community. Where, for at least some of their Scholastic contemporaries and predecessors, the right to inflict capital punishment (*ius gladii*, or right of the sword), was justified only as an emergent property of a divinely-mandated commonwealth, Grotius—and Hobbes and Locke—came to understand this right as both natural *and* in relation to human equality, necessary for rather than a consequence of human community.

The remainder of the project explores the implications of this naturalization of the right to punish and how it relates to two important figures in seventeenth-century English legal and popular writing, the pirate and the traitor. To demonstrate the significance both of Hobbes's and Locke's view of punishment *and* of the complicated and ambivalent theoretical efforts to distinguish traitor from foreigner and criminal from enemy, I begin with a necessarily partial prehistory and explication of the significance of writings by Hugo Grotius, a Dutchman, and by Alberico Gentili, a sixteenth-century Englishman, for the seventeenth-century English thought at the core of this project. To see why Hobbes's and Locke's notion of punishment is exclusionary (as I argue in the next chapter), it is important to first understand how their account of war and punishment differed dramatically from earlier texts, and why they were motivated (although ultimately, I argue, failed) to inscribe war and punishment in two distinct legal frameworks.

II. Scholasticism, Humanism, and Grotius

Though I argue that Grotius's and Gentili's work on international law opened a conceptual space later inhabited by both Hobbes and Locke, I do not wish to suggest that the understanding of the relationship between war and punishment during the late sixteenth and seventeenth centuries admits a linear narrative. Instead, the distinction I draw is related to differences between two intellectual traditions. Suarez and Vitoria wrote from within a Thomist, Scholastic, or "theological" tradition that drew heavily Thomas Aquinas's *Summa Theologica*.

[1] Blane, Alexis, and Kingsbury, Benedict. "Punishment and the *ius post bellum*." *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire.* Oxford University Press, 2010, at 251.

Both Vitoria and Suarez were innovators within this tradition, not least in their explicit attention to the *ius gentium* as a legal field distinct from either natural law or divine mandate as expressed through ecclesiastical law. Their work reflects the norms and assumptions of a Catholic Scholastic conversation primarily concerned with the problems of colonial expansion.

In contrast, each of the other writers whose work I interrogate in this chapter—Bodin, Gentili, Grotius, Hobbes, and Locke—confronted religious civil war as a problem of enormous, and immediate, urgency. Bodin and Gentili are usually classified as "humanists," "*politiques*" or "*raison d'etat*" theorists. Drawing from the texts of Roman historians, in particular Tacitus and Livy, "humanist" theorists of the sixteenth century wrote not to establish a theologically sound account of civil power, but to provide a secular, descriptive account of states and the relations among them—and often strategic advice for princes and republics.[2] The distinction between "humanists" and Thomists" was appreciated by the authors themselves: Grotius comments on the contrast between these two traditions, describing the humanists' writings as concerned with the "Art of Politicks," "the giving Rules about what it may be profitable or advantageous for us to do," and commenting that Bodin, in particular, "has confounded" this art with the *normative* questions of international law with which he (Grotius) is concerned.[3]

Later social contract theories, such as Hobbes's and Locke's, were informed by the humanists' emphasis on the supremacy of the secular state as a mediating principle within religious conflict and to a lesser extent by their use of Roman sources. Grotius, Hobbes, and Locke also share with the Scholastic tradition an emphasis on natural law as providing a fundamental normative understanding for their accounts of civil society. Grotius adopted the natural law reasoning of Vitoria and Suarez to argue against the Spanish imperial interests the Catholic scholars had attempted to defend.[4]

Francisco Vitoria was an especially influential progenitor of modern international legal theory. A Dominican priest and Thomist, Vitoria's *relectiones* (lectures) on the problem of Spanish colonial interactions in South America were among the first and certainly the most influential interventions toward establishing a conception of the *ius gentium* (law of peoples or law of nations) in the new global worldview of imperial Europe. Vitoria's best-known texts on what makes war just (or unjust) are his *Relections De Indis* (*On the American Indian*) and its sequel, *De Indis Relectio Posterior, sive de iure belli*, both delivered in 1539. Both texts seek to answer the question of what reasoning, if any, could justify the Spanish conquest of parts of South America. Vitoria famously rebuffed the claims put forth by his Dominican predecessor Sepulveda that the Spanish have the right of conquest over barbarians, such as the Native peoples of South America, either because the Indians are natural slaves, or to punish their heathenism.

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[2] One scholar has described part of the humanist project as follows: "Bodin and other sixteenth century humanist and Roman law scholars were much exercised by the problem of the diversity of laws and institutions—ultimately by the problem of relativism. This made it difficult to talk about political or legal matters in general terms. One way of doing so was to search for what underlay the diversity of laws and institutions. From this search came the concept of sovereignty, which was for Bodin (as it was for Hobbes) not a normative recommendation but an analytic characteristic of all stable polities." (Burgess, Glenn. *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642*. Pennsylvania State University Press, 1992, at 123.

[3] Grotius, Hugo. *The Rights of War and Peace*, vol. 1. Edited by Richard Tuck. Liberty Fund, 2006, at 131.

[4] *See* Schmitt, Carl. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. 1950. Translated by G.L. Ulmen, Telos, 2006, at 116. Brett, Annabel. *Changes Of State: Nature And The Limits Of The City In Early Modern Law*. Princeton University Press, 2011, at 69.

Vitoria nevertheless acknowledges that if the Indians were to violate the *ius gentium* by forbidding safe passage to the Spanish conquistadors or missionaries, such a violation would be grounds for a just offensive war.

Seventy years later, in 1612, Francisco Suarez elaborated on the principles adopted implicitly in Vitoria's work in *De Legibus*. In substance, sources, and orientation *De Legibus* is largely continuous with Vitoria's more fragmented lectures of the previous century. Although certainly not the only authors within the Scholastic tradition with international readership at the turn of the seventeenth century, both Vitoria and Suarez were well known by English political and legal theorists. Suarez was an active participant in a transnational debate about the acceptability of killing excommunicated kings—a doctrine whose adherents were accused of treason by Sir Edward Coke before the King's Bench in the early years of James I's reign.[5] Both Suarez and Vitoria were cited frequently and sometimes sympathetically—if not always faithfully—by Grotius and Gentili. At the turn of the seventeenth century, Vitoria and Suarez represented a view of the *ius naturale* and the *ius gentium* that despite its Thomist commitments was taken seriously by Protestant theorists.

By his own account, Grotius was also an appreciative but critical reader of the humanist Gentili. He cites Gentili and Balthazar Ayala[6] by name as having authored precursors of his major text, *De iure belli ac pacis*, though he takes issue with Gentili both for his supposed mistakes "in distinguishing of Questions, and the several Kinds of Right," as well as his selective use of examples and reliance on modern lawyers whose reasoning may be dominated by the "interest of those that consult them." [7] Both *De iure belli ac pacis* and *De iure praedae* are heavily populated with references to the works of Thomas Aquinas or of the Scholastics, Vitoria not least among them.

Scholars have vigorously debated whether Grotius is better placed in the theological or humanist tradition. Richard Tuck identified Grotius as a humanist, and attributes Grotius's insistence that one can punish another without having political authority over that person (Grotius's key claim for the purposes of this and the next chapter) to Grotius's humanism—that is, his secularism and reliance on Roman sources.[8] Others have disputed this characterization, arguing Grotius is fundamentally a Scholastic, who uses theological reasoning and a combination of Thomist and Biblical sources.[9] Benjamin Straumann, against both camps, has argued that

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[5] *The Case of John Owen, otherwise Collins, for Treason: B.R. Easter, 13 James I. A.D. 1615 [1 Rolle's Rep. 185* in Howell, Thomas Bayly. *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, vol. 2, London, T.C. Hansard, 1816, at 879; Suarez, Francisco. "A Defence of the Catholic and Apostolic Faith." 1613. *Selections from Three Works.* Translated by Gladys L. Williams, Ammi Brown, and John Waldron, vol. 2, William S. Hein & Co., Inc., 1995.

[6] Balthazar Ayala, a Dutch military judge, published his only major work, *De Jure et Officiis Bellicis et Disciplina Militari*, in 1582; the book was popular in its day and, like Grotius's *De Jure Belli ac Pacis* a generation later, incorporated both Scholastic just war theory and the humanist writings of Bodin. *See* Knight, W.S.M. "Balthazar Ayala and His Work." *Journal of Comparative Legislation and International Law*, Vol. 3, No. 4, 1921, pp. 220-227.

[7] Grotius, *Rights of War and Peace*, 10.

[8] Grotius, *Rights of War and Peace*, 89

[9] *See, e.g.* Panizza, Diego. "Political Theory and Jurisprudence in Gentili's De Iure Belli. The great debate between 'theological' and 'humanist' perspectives from Vitoria to Grotius." NYU School of Law, October 17, 2005, available at www.iilj.org/newsandevents/documents/Panizza.pdf; Crowe, M.B. "The 'Impious Hypothesis': A Paradox in Hugo Grotius?" *Grotius, Pufendorf, and Modern Natural Law*.

concern with the relative reliance on Roman or scriptural source is itself misguided. On the major international legal issue of the late sixteenth and early seventeenth centuries in European international thought—imperial expansion outside of Europe—policy positions ran orthogonally to the divide between intellectual traditions and frameworks. "The distinction between humanism and scholasticism," according to Straumann, "may explain less [with respect to their view of "rights and obligations in the realm external to established polities"] than it is often asked to explain; the traditions the early modern writers were drawing upon did not determine the substantive content of their doctrines.[10]

Because the central claim of this chapter concerns Grotius's influence on later thinkers, rather than his sources, I do not stake a position on whether Grotius is better classified as a humanist or Scholastic. Rather, I argue that Grotius's most significant innovation with respect to his account of legitimate state violence distinguishes him from *both* his Scholastic and humanist predecessors. Moreover, there is a direct link between Grotius's account of a natural right to punish, and the policy positions for which he was most contemporaneously controversial. (To what extent Grotius's natural law account was reversed engineered to suit his preferred policy position is an interesting question I do not address.) Moreover—and importantly for the chapters that follow—Grotius was read widely and admiringly among English political theorists of the seventeenth century. For example: Locke made "systematic [and] extensive notes" on Grotius;[11] Matthew Tindal, writing in 1694 to defend the prosecution as pirates of sailors taken at sea with a commission from the deceased James II, quotes Grotius and Gentili extensively and generally favorably;[12] and George Lawson cited Grotius as an expert on the laws of war.[13]

III. Suarez and Vitoria: War *as* Punishment

In this section I argue that an Aristotelian conception of the state drives both Vitoria's and Suarez's justificatory accounts of war and punishment and that inter-state punishment relies on internal peacekeeping as both an analog and a direct justification in this account. Moreover, *both* war and punishment are exercises of the *ius gladii*, the power to kill with moral impunity. The ius *gladii*, in the Scholastics view, presents a different problem than that of *political* authority, that is, the power to make law for and direct other persons.

For the late Scholastics, war and civil punishment were not conceptually or normatively distinct political phenomena. War was only just if in response to injury—whether that injury was ongoing (corresponding to self-defense) or completed (corresponding to punishment). Vitoria: "[T]he sole and only just cause for waging war is when harm has been inflicted."[14] Suarez: "I

Edited by Knud Haakonssen, Ashgate Dartmouth, 1999 (arguing Grotius's approach to natural law was heavily informed by Suarez).

[10] Straumann, Benjamin. "The Corpus iuris as a Source of Law Between Sovereigns in Alberico Gentili's Thought." *The Roman Foundations of the Law of Nations, Alberico Gentili and the Justice of* Empire, Oxford University Press, 2011, at 123.

[11] Aschraft, Richard. "Revolutionary Politics and Locke's *Two Treatises on Government*: Radicalism and Lockean Political Theory." *Political Theory*, Vol. 8, No. 4, 1980, pp. 429-486, at 437.

[12] Tindal, Matthew. *An essay concerning the law of nations.* 1694, at 5-8, 17-18.

[13] Lawson, George. *Politica Sacra et Civilis*. Edited by Conal Condren, Cambridge University Press, 1992, at 250.

[14] Vitoria, Francisco de. "On the Law of War (*De Indis Relectio Posterior, sive de iure belli*)." *Political Writings*. Edited by Anthony Pagden and Jeremy Lawrance, Cambridge University Press, 1991, at 303.

hold that a war may be justified on the ground that he who has inflicted an injury should be justly punished." Indeed, according to Suarez, the law of war itself "rests upon the power possessed by a given state or a supreme monarchy for the punishment, avenging, or reparation of any injury inflicted upon it by another state"; war is categorically defined as a response to injury, and punishment one of its core functions.[15]

Moreover, just war and civil punishment shared a justificatory account that relied upon the natural necessity of the commonwealth for human beings. This is not to say that Scholastic theorists did not view civil punishment and of just war as separate problems of political theory. However, the solution to both problems came via an Aristotelian conception of political communities as morally self-sufficient, and of this ordering power as intrinsically necessary to such a community. There were two communities whose well-being was at stake and therefore two sources for this power to punish in the international field: The commonwealth—which the prince may act to defend from both internal and external threats—and the human community in its entirety. For both Vitoria and Suarez, the analogy between a domestic political community and the world order dominated their understanding of just war. Just war was simply punishment carried out within the equally naturally necessary community of humankind. Within this community of all mankind, individual princes acted as temporary punitive authorities—on the basis, at least in Suarez's account, of a customary law concerning the allocation of this necessary authority.

Vitoria's account of political authority and his justification of the use of force by such an authority were built upon a Thomist understanding of the commonwealth, that is, one which is Aristotelian in its teleological orientation but described in terms of a Christian natural law. Both the commonwealth and individuals have the right to use force in self-defense, however, only states have the right to use force offensively, as an after-the-fact response to wrongdoing or harm already completed.[16] For Vitoria, while the "final and necessary cause of public powers" is natural law, the "efficient cause of this power" is located in the commonwealth.[17] Civil power is not directly bestowed on princes by God, nor is the power of the commonwealth purely a matter of human will. Instead, the commonwealth is a form of human association necessary to the safety of men and thus mandated by natural reason, which is, on Vitoria's understanding, one expression of divine will. A commonwealth can only exist, however, if there is an ordering force[18] (*uis ordinatrix*) to ensure the safety and security of this public body.[19] Civil power is therefore necessary for the existence of the social body. Because natural reason never demands what is also impermissible, the use of *uis ordinatrix* to maintain the commonwealth must therefore be morally permissible.

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[15] Suarez, Francisco de. *De Legibus*. *Selections from Three Works*. Translated by Gladys L. Williams, Ammi Brown, and John Waldron, vol. 2, William S. Hein & Co., Inc., 1995.

[16] "Any person, even a private citizen, may declare and wage defensive war. This is clear from the principle 'force may be resisted by force' quoted above from the Digest. From this we may gather than any person may wage war without any other person's authority, not only for self-defense but also for the defence of their property and goods." Vitoria, "On the Law of War," *Political Writings*, 299; *see* Blane and Kingsbury, "Punishment and *Ius Post Bellum*," 249.

[17] Vitoria, "On the Civil Power," *Political Writings*, 16-17.

[18] *Uis*, as opposed to *ius* (right) concerns physical force rather than normative rules—Vitoria here is making explicit reference to the use of physical violence as a means of managing the political community.

[19] Vitoria, "On the Civil Power," 9-10.

The civil power (*potestas*) is thus an emergent property of the self-sufficient political community. This power entails, *inter alia*, a capacity to use force to maintain the social order, including through punishment. It is not a subjective right over which the community or its leader has *dominium* (the rights of ownership and alienation). Although the *potestas* remains a characteristic of the commonwealth as such, the sovereign and his magistrates of that commonwealth have and may exercise *auctoritas*. This *auctoritas* is a kind of delegated power, distinct from but derivative of the commonwealth's *potestas*, made necessary because the multitude of the commonwealth cannot, as a collective body, carry out all the necessary tasks of self-governance directly. Though the power—the ultimate capacity to use justified force—remains intrinsic to the community, individuals may use force at their own discretion as an exercise of *auctoritas*.

Lest we suspect that the community may retract this authorization, however, Vitoria insists, "public power is of God" and "cannot be abolished even by the consensus of men."[20] Here we confront a tension within Vitoria's account. While he generally insists *potestas* is inalienable from the commonwealth, he also speaks of a "royal power" (*regia potestas*) that derives "not from the commonwealth, but from God himself."[21] This power is apparently distinct from the *auctoritas* that magistrates come to possess, but its relation to the civil power inhering in the commonwealth is unclear. Vitoria's account leaves ambiguous what, precisely, is the relation between this royal power—derived directly from God—and the civil power that the sovereign may execute or direct, but not possess outright; it is difficult to give an account of this royal power that does not either seem superfluous or undermine the notion that the power of self-ordering remains with the commonwealth.

Suarez's account of civil punishment is addressed to a question Vitoria does not directly confront: How can we distinguish civil power from divine mandate or natural law, but nevertheless insist that this *human* institution can bind with respect to one's soul?[22] If civil power can only impose purely positive law, it is inadequate to oblige humans in conscience. Nevertheless, Suarez is committed to an understanding of civil law that obligates on its own accord and of positive law that can bind subjects' consciences.

Suarez explains how human civil power may bind superhumanly by relying on, as did Vitoria, a teleological conception of the commonwealth. The divine power to obligate others' conscience derives from God,[23] but by way of the commonwealth. "Once this body [of the commonwealth] has been constituted, however, the power in question exists in it, without delay and by the force of natural reason…it is correctly supposed that it exists as a characteristic proper[l]y resulting from such a mystical body."[24] The commonwealth itself is not a purely human institution, but is a kind of "perfection," that is, the realization of natural reason or *telos*. Civil power is an emergent property of the commonwealth as a "mystical body." Just as individual men are self-governing and free by virtue of their existence, "so the political body of mankind, by virtue of the very fact that it is created in its own fashion, possesses power over itself and the faculty of self-government, in consequence whereof it also possesses power and a

[20] Vitoria, "On the Civil Power," 18-19.
[21] Vitoria, "On the Civil Power," 16.
[22] Suarez, *De Legibus*. 1612. *Selections from Three Works*, 363.
[23] Suarez, *De Legibus*, 379
[24] Suarez, *De Legibus*, 380.

peculiar dominion over its own members."[25] The right of self-governance of the commonwealth over its members is intrinsic to its nature.

Suarez still must account for why this power of civil punishment is necessary to the existence of the commonwealth and therefore a power intrinsic to this entity. Suarez invokes Aristotle, Aquinas, and St. Chrysostom in doing so. The existence of such "perfect"[26] political communities is itself necessary, for three reasons: first, man is naturally social and therefore requires a form in which to express and engage in this sociability; second, human needs require a materially or economically self-sufficient form of social organization; and finally, the maintenance of peace among men requires such authority, not least so that "wrongs be duly averted or avenged."[27] In this "perfect community, there must necessarily exist a power to which the government of that community pertains. This principle, indeed, would seem by its very terms to be a self-evident truth."[28] As in Vitoria's account, because such a perfect community is agreeable to (men's) nature, the power to govern that community must be both divinely mandated and intrinsic to the community itself. Thus, political power has its immediate source and purpose in the specifically human political community, but the necessity of this community—and as a result, the force of the law that governs it—derives from divine reason. The civil power is thus divine in origin but tied to a specific, temporal, human thing—the commonwealth.[29]

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[25] Suarez, *De Legibus*, 380.

[26] That is, possessing its own *telos*, self-sufficient (in the meaning of Aristotle-usually-translated), existing "for its own sake."

[27] Suarez, *De Legibus*, 365.

[28] Suarez, *De Legibus*, 366.

[29] This solution is not without its logical difficulties, as Annabel Brett argues. For one, the necessity of the civil power to maintain order does not imply that individuals have the obligation to obey commands by that power—only that the magistrate is empowered to enforce them. Suarez, nevertheless, derives this obligation from the analytical claim that coercion presupposes guilt. (Brett, *Changes of State*, 150.) Moreover, Brett points out, Suarez invokes a number of unconvincing and not particularly commensurate reasons to make his case that civil legislation binds divinely besides the reasoning I have outlined above, including citing Romans 13 to argue that the civil legislator is a "minister of God" and claiming that it is a precept of natural law that individuals obey the civil law. The most significant difficulty, as identified by Brett, is that Suarez wishes to establish the political as a realm of moral obligation distinct from the divine jurisdiction in which it is embedded, but Suarez's account of civil authority cannot support such a distinction. Brett argues that the mediation of the commonwealth does not alter the source of the moral obligation of the civil law: Civil obligation, on Suarez's account, remains a secondary consequence of the obligation to obey natural law via membership in the commonwealth. (Brett, *Changes of State*, 150). This problem is of especial concern because Suarez and Vitoria want to insist that political authority has its origins in the commonwealth but that, once transferred to the prince, cannot be taken back.

What, then, keeps the commonwealth as a whole from retracting this donation, if it has its source in the commonwealth itself? If positive law has no independent obligatory force, why does conflict between ruler and ruled not revert to natural law? Brett cites Rodrigo de Arriaga (1592-1667) as attempting to resolve the rather messy effort by Suarez to sustain both an obligation in conscience to obey civil law and the claim that this source of obligation lies with the commonwealth and not merely natural law. Although Arriaga presents an analogy for civil power that suggests obligation to obey that power derives directly from the purely natural right to respect one's own promises, "Arriaga's unwillingness to concede that subjection to authority is morally comparable to any contractual obligation demonstrates the

There are two analytical similarities between civil punishment as conceived by Vitoria and Suarez and just war. First, both Vitoria and Suarez readily equate internal and external enemies; the commonwealth exercises the same right of self-defense against external enemies and lawbreaking citizens alike. Second, both the right of war and the civil power are emergent properties, naturally necessary and characteristic of "perfect" communities: the commonwealth itself and the global community of humanity. As Suarez puts it: "You may say that the *ius gentium* and civil law differ in that the latter is the law of one state or kingdom, while the former is common to all peoples. One objection to this reply is that the difference pointed out is merely a difference between the greater and the less, and far from essential."[30] The power to punish—which is the right of just war in the international context—emerges as a necessary consequence of the existence of these communities.

Vitoria invokes the same natural law reasoning to account for the power to punish bad members of the commonwealth and to justify the use of military force to defend the commonwealth against attacks by other political units: "When enemies upset the tranquility of the commonwealth, therefore, it is lawful to take vengeance upon them. Likewise against internal enemies, that is, bad members of the commonwealth, it is lawful to do all these things, and therefore it is lawful against external enemies."[31] This power of self-defense does not exhaust the prince's authority to do violence *outside* his commonwealth's borders. The prince may also act *after* harm has been done to engage in both specific and general deterrence. This second capacity is necessary because without it, a commonwealth could not survive—it would be at the mercy of those who injure without fear of revenge: "The commonwealth cannot sufficiently guard the public good and its own stability unless it is able to avenge injuries and teach its enemies a lesson."[32] Thus, even though princes may engage in general deterrence outside the commonwealth's boundaries (which they may not with respect to their own subjects), the power of princes to carry out punishment both of their own citizens and of foreign enemies derives from the same principle: the self-sufficiency of the commonwealth.

Moreover, in carrying out a war, the prince acts with the same authority toward his opponent as he does toward his subjects. A prince carrying out a legitimate war "has the same authority over the enemy as a judge or legitimate prince."[33] Rather than a contest between equals, war was conceived by Vitoria as an exercise of legal jurisdiction over a wayward enemy. In such cases, the prince is not limited to acting on behalf of the commonwealth, either to prevent or revenge injuries. Although the authority is "the same" as the juridical or political authority exercised against a subject, the community whose existence justifies this authority and from which it derives is not the prince's political community. A legitimate prince may also by "the authority of the whole world" "force [the enemy] to abstain from harming others."[34] Rather

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continuing gulf between Jesuit political thought and any purely contractarian theories of political obligation." (Brett, *Changes of State*, 151.).

[30] Suarez, *De Legibus*, 345.

[31] Vitoria, "On the Law of War." *Political Writings*, 305 n. 20 (LS addition).

[32] Vitoria, "On the Law of War," 300.

[33] Vitoria, "On the Law of War," 320. This justificatory framework permits violence that is not in self-defense. Though princes may go beyond restoring the *status quo ante* through war, such violence is still limited by retributive principles: The exercise of this self-protective power is limited in backward-looking ways; "the scale of our revenge" should be determined based on "the scale of the injury inflicted by the enemy, of our losses, and of their other crimes." (*Id.* 301.)

[34] Vitoria, "On the Law of War," 305.

than act in self-defense, when that commonwealth's prince seeks to "teach a lesson" he does so on behalf of humanity rather than the commonwealth.

This authority to "teach a lesson" extends beyond those who have harmed the prince's own commonwealth, to those who threaten third parties. Although in *On the Law of War* Vitoria limits this argument to the case of enemies of the injured commonwealth, in *De Indis* he admits that a commonwealth might declare war on another commonwealth that practices anthropophagy, not because this practice presents a threat to the party declaring war, but because the belligerent may act on behalf of those being eaten. While war is not permissible on the grounds of natural law violations *per se*, it is permissible in those cases that "involve injustice (*inuria*) to other men."[35]

But from where does the authority of *civil* princes to carry out war on behalf of third parties derive, if the justifications for war and civil punishment alike are derived from the self-sufficiency of a commonwealth that is not in this instance threatened? Humankind itself forms a community within which princes must, temporarily or incidentally, assume the same role as they do within their own commonwealths. Like the commonwealth, this human community is itself naturally necessary and therefore also requires a power by which those who threaten it may be punished. There must exist "some men [who have] the power and authority to deter the wicked by force from doing harm to the good and the innocent"; otherwise, Vitoria suggests, the world could not exist—wrongdoers would run rampant, destroying the innocent and good.[36] Although "the whole world" has this punitive power "against harmful and evil men," the exercise of this power requires that certain men have authority to exercise both judgment and force against those individuals who would threaten the well-being not just of a particular commonwealth, but the existence of the world itself. Besides the right to protect the commonwealth from those who threaten it as a community, each magistrate has the right to protect individuals as members of the shared human community by punishing violations of the *ius gentium*.

Here we have an isomorphism between the civil and global communities and their respective characteristic punitive power. The reasoning in Vitoria's *relection* on the right of war closely resembles that put forth in support of the civil power in a *relection* delivered by Vitoria over a decade earlier. The right of vengeance through just war, Vitoria argues, must be a "right by natural law" because, we have seen, such a right is necessary to protect the innocent. Yet this is precisely the same argument from natural necessity that justifies civil power—as Vitoria himself points out. The whole world "has the same powers against any harmful and evil men" as does the commonwealth "against its own members."[37] Although Vitoria speaks of "the whole world" having this power of vengeance, he does not explain how each prince—whose authority derives from but one of many commonwealths—comes to have the authority to execute the natural law by way of a punitive war, and to act as a judge against foreign individuals and states. For an explanation of how this authority comes to be invested in individual princes, we must turn to Suarez.

Suarez too saw this problem of punitive jurisdiction as continuous within and outside of the commonwealth. Suarez is more explicit than Vitoria in identifying just war as punishment carried out on behalf of the community of mankind but admits greater ambivalence as to the analogy between this global community and the political commonwealth. According to Suarez, punitive war is governed by the *ius gentium*, a permissive law that recognizes certain sovereign

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[35] Vitoria, "Dietary Laws, or Self-Restraint," 225.

[36] Vitoria, "On the Law of War," 305.

[37] Vitoria, "On the Law of War," 305-06.

authorities as having the power to punish violations of the natural law.[38] This power to punish emerges in precisely the same way as it does in the commonwealth—a natural-law or divinely mandated community (in this case, all mankind), by necessity gives rise to an ordering force that may be exercised to organize and maintain that community. There is "a natural form of community, brought about solely through the conformity [of its members] in rational nature…The natural law relates to [this] type of community, this law being revealed to every man by the light of reason."[39] Just war is a form of legitimate form of judicial execution within this community.

For Suarez, unlike Vitoria, political community is a product not simply of natural necessity but comes into being by way of human consent. Although the *existence* of this body is a mandate of natural law and the *telos* of human co-existence, the establishment of any given commonwealth happens by way of the consent of its membership. The power to govern others arises only inasmuch as there exists a "unified political body" that both requires and is the object of this governance.[40] The same requirements apply to the governance of the global community; the "multitude of mankind…should...be viewed…with regard to the special volition, or common consent, by which they are gathered together into one political body through the bond of fellowship and for the purpose of aiding one another in the attainment of a single political end."[41] This, however, raises a problem: How can a government form despite the practical impossibility of gaining consent or, for that matter, universal subjection?

Suarez acknowledges the apparent contradiction between his requirement of common consent as the basis for legal authority, and his claim that there exists a community of all mankind. However, he insists, individual human communities depend upon each other for commerce, aid, and "to remain in a state of mutual justice and peace (which is essential to the universal welfare)."[42] The community of all mankind is self-sufficient in the same way in which a civil political community is. Thus, government arises as a necessary characteristic of this body, and subjection to this government part of what constitutes political unity: "For it is impossible to conceive of a unified political body without political government or disposition thereto."[43] The power to govern others arises as a necessary condition with respect to the existence of a "unified political body" that both requires and is the object of this governance.[44] In describing the rule that governs this community, however, Suarez characterizes the consent that founds the unity necessary for a political body as metaphorical, rather than actual: "[It is] fitting that [all mankind] should observe certain common laws, as if in accordance with a common pact and mutual agreement. These are the laws called *iura gentium*."[45] The *ius gentium* is "the law which all the various peoples and nations ought to observe in their relations with each other," as established by unwritten custom. The *ius gentium* is to this "multitude of mankind" what the civil

[38] The *ius gentium* is not identified with natural law, as it is neither necessary (that is, describes the intrinsic good or evil of particular acts), nor of divine origin. Nor is it a mere convergence of local customary practices and obligations. (Suarez, *De Legibus*, 347.) *Cf. De Legibus*, 349 (Book II, Chapter xix), where Suarez does acknowledge a "second kind of *ius gentium*" that consists of this convergence.

[39] Suarez, *De Legibus*, 85.

[40] Suarez, *De Legibus*, 376, 378-80.

[41] Suarez, *De Legibus*, 376, 378-80.

[42] Suarez, *De Legibus*, 377.

[43] Suarez, *De Legibus*, 375.

[44] Suarez, *De Legibus*, 376, 378-80.

[45] Suarez, *De Legibus*, 377.

law is to a particular state or kingdom.[46] It is the *ius gentium* that authorizes political leaders have to carry out punishment of others for violating the dictates of either natural law or the *ius gentium* itself.[47]

War, on Suarez's account, is governed by the *ius gentium*: "Similarly, in my judgment, the law of war—in so far as that law rests upon the power possessed by a given state or a supreme monarchy for the punishment, avenging, or reparation of any injury inflicted upon it by another state—would seem to pertain properly to the law of nations."[48] War may be carried out only in response to injury, but may serve retributive or reparative purposes. The laws of war, like the *ius gentium* more generally, takes political units or communities as its relevant units, participants, or members. "War" is therefore defined only to include conflicts between princes or commonwealths; if a conflict is between prince and the commonwealth or subjects and the commonwealth, it is sedition. A conflict between private individuals is termed a duel.[49] This status requirement of participants in a war is both descriptive and normative. A just war "must be waged by a legitimate power. For a war to be just, the cause itself must also be just and the method of its conduct must be proper."[50]

This definition of just war, however, raises a dilemma. According to Suarez, "The imposition of punishment is...an act of jurisdiction, to be performed by a superior."[51] Although punishment may be necessary to ensure the existence of human community, as we saw in the account of civil punishment, this does not explain how or why certain individuals come to have this authority. Gentili, as we shall see, emphasized equality among political authorities; it is this equality in the *absence* of shared authority that justifies princes' power to make war. Grotius's methodological innovation (adopted by Hobbes and Locke) was to hypothesize the same absence of human authority among individuals in a pre-political state of nature, and to derive an account of the present right to punish from a state of absolute *individual* equality. But neither Vitoria nor Suarez emphasize, or indeed even discuss, the problem of moral equality among individuals—either how some people can come to rule others or the identity of those rulers. Subjection is

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[46] "You may say that the *ius gentium* and civil law differ in that the latter is the law of one state or kingdom, while the former is common to all peoples. One objection to this reply is that the difference pointed out is merely a difference between the greater and the less, and far from essential." (Suarez, *De Legibus*, 345.)

[47] "Similarly, in my judgment, the law of war - in so far as that law rests upon the power possessed by a given state or a supreme monarchy for the punishment, avenging, or reparation of any injury inflicted upon it by another state - would seem to pertain properly to the law of nations." (Suarez, *De Legibus*, 348.)

[48] Suarez, *De Legibus*, 348.

[49] Suarez, "Disputation XIII: On War," *Selections from Three Works*, 800.

[50] Suarez, "On War," 805. Although, as noted above at note 38, Suarez uses "ius gentium" in two senses, he attributes both to human nature. This dual usage was, as Brett argues, an innovation, and there is some tension in his notion of the ius gentium as "the law that all peoples and the various nations ought to keep between themselves." (Brett, *Changes of State*, 85.) The *ius gentium* emerges from customary practices among commonwealths, but is justified not with respect to the consent of these communities or their representatives, but the shared humanity of their members—something of a mismatch. As I argue below, Grotius breaks with the Scholastic account by grounding moral obligation in the international community solely on human nature, a move which has the effect of permitting private wars under international law.

[51] Suarez, "A Defence of the Catholic and Apostolic Faith." *Selections from Three Works,* 715.

presumed legitimate; the naturally necessary commonwealth requires some form of political leadership.

Instead (for Suarez and Vitoria) the problem of authority, i.e. who is a "superior," is one of membership: When is a wrongdoer a member of the relevant community over which the putative punisher has authority? According to Vitoria, those who do not accept papal authority cannot be made subject to Christian kings acting on the Pope's behalf, because the Pope has no jurisdiction over such communities.[52] Those who are not Christian "cannot be punished because they do not accept the judgment of the pope; the latter presupposes the former."[53] Suarez, like Vitoria, was suspicious of attempts to justify aggression on the basis of authority assumed on the basis of the crime, rather than a pre-existing jurisdictional status. Elsewhere in *De Legibus* Suarez argues that if excommunication is the punishment for a given crime, one must be a member of the church in question *before* one had committed the crime to suffer that punishment. "[A] condition of subjection existing before the commission of the offense must consequently be assumed, from which subjection arises the obligation of obeying a law."[54] With respect to the case of civil punishment, both Vitoria and Suarez are concerned with the question of when a traveler (either to or from the commonwealth) or temporary resident is under the jurisdiction of a particular civil authority, and therefore is liable for punishment. The problem is more fundamental with respect to the community of mankind: How can a prince punish another ruler or commonwealth, in the absence of jurisdiction or political authority over those persons?

Suarez acknowledges this problem and suggests that the basis of this jurisdiction in the interstate field is the injury itself. In doing so, he reaffirms the direct analogy between civil and interstate punishment: "[J]ust as the sovereign prince may punish his own subjects when they offend others, so may he avenge himself on another prince or state which by reason of some offense becomes subject to him." [55] Suarez, seeking to justify war with reference to a global community, posits that the victim gains a temporary authority over the wrongdoer.[56] Whereas the prince is the sole possessor of *auctoritas* and the singular agent of *potestas* within the commonwealth, it would be blasphemy to suggest a single mortal possessed unitary power vis-à-vis the community of all mankind. Vitoria, in sharp (albeit unacknowledged) contrast, posits that *all* princes may execute the *ius gentium* on behalf of the global community; thus, the Spanish have the right to pursue conquest to put a stop to practices such as anthropophagy that are both violations of natural law and cause harm to innocent parties.[57]

Although the victim has this power to punish, the power does not arise from the injury itself—there is some other source. "An act of punitive justice, indeed, is an exercise of that jurisdiction which private individuals do not possess and cannot obtain through an offence committed by another."[58] One prince may have the authority to punish another on the basis of an injury, but injury alone can never justify punishment, which is an expression of political authority and requires subjection such that the offense is a violation of an obligation. These two apparently contradictory assertions can be reconciled by Suarez's understanding of the *ius gentium* as a kind of custom. As in the domestic case, the power to punish emerges from the

[52] Vitoria, "On the American Indians," 275.
[53] Vitoria, "On the American Indians," 275.
[54] Suarez, *De Legibus*, 407.
[55] Suarez, "On War," 806.
[56] Suarez, "On War," 817.
[57] Vitoria, "On the American Indians," 288.
[58] Suarez, "On War," 806.

natural necessity of the community and its need for self-regulation; the world community of mankind shares this need for punishment.[59] Because no one political authority exists with respect to all commonwealths, however, it is a matter of custom that the injured party be assigned the authority to carry out this punishment.[60] "[V]engeance cannot be sought at the hands of another judge, because the prince of whom we are speaking has no superior in temporal affairs." In the absence of such a judge, a prince may avenge his commonwealth's own injury.[61] Because the *ius gentium* has no supreme magistrate to enforce it, any prince without a superior may act as a judge vis-à-vis this law in cases of its violation.[62] Like Gentili (as we shall see), the absence of a global judge is an important principle or assumption in Suarez's account of just war; *unlike* Suarez, however, war is not justified by the absence of such authority, rather, a naturally necessary global community governed by a customary, but binding, *ius gentium* provides the basis on which princes may act as a temporary, contingent political authority over other princes who have injured his commonwealth.

To summarize: For Vitoria and Suarez, war and civil punishment shared a justificatory account that relied upon the natural necessity of the commonwealth for human beings. Punishment applied for Vitoria and Suarez equally and with the same conceptual vocabulary inside and outside the commonwealth. This is not to say these theorists made no distinction between inside and out; the question of how civil power or domestic political authority were to be justified, and who was considered a legitimate possessor of these powers, were certainly political concerns distinct from the problem of war or relations between political communities. However, these theorists did not oppose an international field of sovereign states to an internal form of political order. Instead, relations of authority were conceived as overlapping jurisdictional spheres, all of which were subsumed under divinely ordered natural law. The distinction between war and punishment for the Vitoria and Suarez was not one of scope or of

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[59] "The reason in support of this same conclusion is that, just as in a state some lawful power to punish crimes is necessary to the preservation of the domestic peace; so in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another, and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power in question must reside in the sovereign prince of the injured state, to whom, by reason of that injury, the opposing prince is made subject; and consequently, war of the kind in question has been instituted in place of a tribunal administering just punishment." (Suarez, "On War," 818.)

[60] "For it was not indispensable by virtue of natural reason alone that the power [of war] should exist within an injured state, since men could have established some other mode of inflicting vengeance, or entrusted that power to some third prince and quasi arbitrator with coercive power. Nevertheless, since the mode in question, which is at present practice, is easier and more in conformity with nature, it has been adopted by custom and is just to the extent that it may not rightfully resisted." (Suarez, "On War," 348)

[61] Suarez, "On War," 806.

[62] Such a solution is not without its concerns; a prince pursuing his own revenge would seem to be judging his own case and therefore violating the prohibition in *Romans* against taking up the sword for private vengeance. (Suarez, "On War," 818-9.) However, the danger of being both plaintiff and judge derives from overestimating one's injury or of letting self-interest interfere with one's ability to carry out justice impartially. This concern is mitigated by the existence of counsel who guide the decisions of a warring public authority, and the fact that wars are pursued for the public good of the commonwealth—a good that is less likely to admit the sort of bias seen in cases of injured individuals pursuing private ends. (Suarez, "On War," 819-20.)

the source or nature of the right that made either action just or permissible. War was differentiated from civil punishment only in the temporary and contingent quality of the jurisdiction that made it permissible. Civil punishment served the same ends as war but was carried out against those in a position of permanent subjection.

IV. Gentili: War as a Civil Suit Without a Judge

This section and the next identify two interventions into just war theory that present justificatory accounts of political violence tied not to divine reason but subjective right. Their authors, Alberico Gentili and Hugo Grotius, responded to, and incorporated, elements of both the natural law tradition dominated by Thomist writers and of which Suarez and Vitoria are two exemplars, and of the humanist or *raison d'etat* authors of the sixteenth century. This section describes' Gentili's theory of interstate war as not only non-punitive, but as grounded in wholly different normative framework from that of civil punishment. Gentili's dramatic reconceptualization of war vis-à-vis his predecessors can be attributed to two major shifts in how Gentili understood the analogy between domestic exercises of political authority and war: For Gentili, wars were to be treated under international law in the same manner as civil or private suits—*not* punishment—were within a commonwealth. At the same time, Gentili eschewed the notion of a world commonwealth or global jurisdiction in favor of a theory of war as just only in the *absence* of jurisdiction.

Carl Schmitt argues in *Nomos of the Earth* that Gentili's embrace of first, the notion of just enemies, and second, the legitimacy of preemptive war, herald the development of the *ius publicium European*. Within this new international ordering within which states were conceived of as self-interested and sovereign equals, war could be "bracketed" as taking place in a morally neutral field whose boundaries were set by a basic respect for the internal authority of military actors. Schmitt argues that what makes this turn within humanist accounts of just war possible is the conception of sovereignty put forth by Bodin in *Six Books of the Republic* (1576). On Schmitt's account, the equality between opponents that Gentili uses to define war in contradistinction to other unauthorized and therefore unjust forms of violence depends on a conception of sovereigns as autonomous actors in the international field. By the eighteenth century and the writings of Vattel, war—according to Schmitt—has come to be understood as a distinct, legally circumscribed field of human conduct, and interactions within this realm respected the basic spatial ordering of European states within a global *nomos*, or land-division.

Schmitt is certainly correct that sovereign status was essential to Gentili's account of just war. Gentili is quite clear that war as a category includes only those conflicts between two equals, and that what makes these two parties equal is their supremacy within the civil sphere of both politics and law. Gentili characterizes a war as "public" if carried out by a supreme civil authority. To qualify as a just war, a "strife must be public; for war is not a broil, a fight, the hostility of individuals. And the arms on both sides should be public, for *bellum*, 'war', derives its name from the fact that there is a contest for victory between two equal parties" that is, from the Latin *duellum*.[63] Gentili relies on Roman etymology to make this categorical definition. *Hostis*, the Roman term for strangers who had equal rights, has since come to mean an equal opponent (and from which we can derive the English "hostility").[64] "Enemies," according to

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[63] Gentili, Alberico, *De Iure Belli Libri Tres*. 1598. Translated by John C. Rolfe, The Clarendon Press, 1933, at 12.

[64] Gentili, *De Iure Belli Libri Tres*, 12.

Gentili, have shared a title with "strangers" among the Greeks, Hebrews, and Romans. This dual usage suggests that the ethical significance of the designation is the relative equality of standing in the interstate sphere—enemies are outsiders, not wrongdoers. Aggression or lack thereof between two *hostes* was a temporary condition.[65]

Suarez also viewed just war as limited to political figures of equal status without superiors. Princes must have "jurisdiction." Suarez defined war as including only those conflicts between princes or commonwealths; if a conflict is between prince and state or subjects and state, it is sedition. A conflict between private individuals is termed a duel.[66] Gentili acknowledges this continuity with Suarez's thought and attempts to turn it to his rhetorical advantage, arguing that his requirement of publicity reflects standard theological accounts. Such comparison is (likely self-consciously) misleading, however: For Suarez, the publicity requirement is meant to ensure war is carried out by a political authority; for Gentili, it is the *absence* of jurisdictional authority that makes war necessary. Gentili begins from the premise that because war always entails a certain degree of suffering, it is only just when "necessary" for the resolution of a potential wrong.[67] In limiting war to "necessary" cases, however, Gentili is speaking in practical, not Aristotelian terms. Where there is no authority that could mediate between the combatants' claim, war is the only means by which such conflict can be resolved. Where a shared legal authority exists, war is unjust because there exists another means of resolution that does not entail violence and suffering.

Thus, whereas the requirement of authority on Vitoria's and Suarez's account was related to a conception of war as punishment internal to a (world) community, it has an entirely different significance for Gentili. This is made evident by Gentili's assertion that in those cases where a private individual cannot make appeal to public authority either due to exigency or in the absence of such authority, that individual may carry out a just war on his own behalf.[68] Such permission is never granted to private individuals in Suarez's account, because just war, like domestic punishment, is conceived as an act of authority rather than the exercise of one's subjective right. Gentili's account therefore presents a move toward distinguishing punishment and war, but also toward an understanding of justified violence conceptually or morally untethered to the existence of a political community.

Schmitt argues that Gentili's account elevates political authorities, such as princes, to co-equals in an international sphere of mutual respect; one must recognize a *jus hostis* ("just enemy") as like oneself and worthy of existence. Schmitt is correct that Gentili's use of the Roman term *hostes* is both novel and central to Gentili's account of just war, but this innovation is as much tied to a shift in how Gentili understood rights as it is (as Schmitt argues) to a modern notion of sovereignty. Certainly, the category of a "just enemy" would have struck Vitoria or Suarez as paradoxical or at least exceptional, although the possibility of a war where both sides acted in good faith was not unknown to Vitoria, Suarez, and other Scholastic theologians. Suarez's contemporary Luis de Molina argued for the possibility that one commonwealth might injure another without consciousness of that fault. The injured side would therefore have the

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[65] Gentili, *De Iure Belli Libri Tres*, 12-13.

[66] Suarez, "On War," 800.

[67] Gentili, *De Iure Belli Libri Tres*, 20.

[68] "A private citizen may thus prepare arms and armed men to recover after an interval of time property which he has lost, provided the protection of the public law is not sufficient, or is too tardy. In fact, many concessions are made in view of the danger of delay, which could not be made under other circumstances." (Gentili, *De Iure Belli Libri Tres*, 126.).

right to recover that property, but since their opponent was not guilty of sin, there would be no right of punishment.[69] Vitoria also suggests that there might be cases where material injury is not the product of sin and thereby subject to restitution but not punishment.[70] Suarez shared Molina's position on "invincible ignorance" as well as said terminology to describe the condition of the wronging (but not sinning) party in his disputation on war.[71]

Unlike Suarez, Vitoria, and Molina, however, for whom war was a form of international punishment, Gentili describes princes and commonwealths as plaintiffs and defendants in an international legal order (the *ius gentium*) where war constituted a kind of *civil*[72] trial, necessitated by the absence of an earthly political authority to adjudicate disputes. The force of the analogy is not (as in Suarez's comparison of domestic punishment and war) to compare the commonwealth and the global community, but to contrast *hostes* and wrongdoers: "Those who contend in the litigation of the Forum justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case and the verdict, are not judged guilty of injustice….Why should the decision be different in this kind of dispute and in a contest of arms?"[73] Within this analogy, the physical battle itself serves an adjudicatory role; the "sentence" is the outcome of this clash of arms.[74] War is a means of determining the rightness of respective causes in the absence of a shared authority to make such a determination. Gentili acknowledges that there is no guarantee that the right party will prevail in military action: "But if the unjust man gain the victory, neither in a contention in arms nor in the strife carried on in the garb of peace is there any help for it. Yet it is not the law which is at fault, but the execution of it."[75] Just as the loser at a civil trial must live with the outcome in accordance with the law by which he brought the suit in the first place, so does the law of war—where force is the final authority—hold, despite the occasional unjust result in its application via battle.[76]

Gentili shares with Suarez an understanding of international relations as embedded in a legal order, but by shifting the role of the warring party from one of authority vis-a-vis the natural law to that of the plaintiff pursuing what he believes to be his subjective right, Gentili

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[69] Molina, Luis de. *De iustitia et iure*, tract II, disputation 102. Translated by Robert Andrews and Peter Haggenmacher. *The Ethics of War*. Edited by Gregory M. Reichberg et al., Blackwell, 2006, pp. 333-338.

[70] Vitoria, "On the American Indians," 313.

[71] Suarez, "On War," 861.

[72] Gentili uses the term "civil" to describe Roman law (as opposed to the *ius gentium* or the *ius natural*); I use the term to describe civil as opposed to criminal legal proceedings, i.e. a conflict between two private individuals where the state serves as an impartial adjudicator

[73] Gentili, *De Iure Belli Libri Tres*, 32. Besides such direct comparisons, Gentili uses language or imagery of civil suits throughout *De Iure Belli Libri Tres* in his explication of the laws of war. See, e.g. "Moreover, our interpreters of the law, referring to the contests of the Forum, state that the loser must refund the costs to the victor, not only in civil but also in criminal cases, if he did not have a just cause; this is especially true in case the plaintiff is defeated, since he might have made better preparations and ought to have done so." (*Id.* 298.)

[74] *See* Whitman, James Q. *The Verdict of Battle*. Harvard University Press, 2012.

[75] Gentili, *De Iure Belli Libri Tres*, 33.

[76] The rules and moral intuitions associated with civil procedure provide a model of the laws of war in each of Gentili's major works, though I have only cited examples from *De Iure Belli Libri Tres*. For example, in *De armis Romanis*, Gentili "compares what it means to be defeated in war with what it means to be defeated in a court of law, with the outcome of war being comparable to the decision of the judge on the merits. (Blane and Kingsbury, "Punishment and the Jus Post Bellum," 257.)

recasts the relations between commonwealths as contests between coequals. War is still a juridical phenomenon, a means of vindicating legal rights; however, the civil suit metaphor serves to affirm both the absence of a legal authority to rule on these rights and, correspondingly, the relative moral equality of the warring states. As we have seen, Suarez compares the justly warring prince to the judge, albeit in his own case. In a civil suit, in contrast, there is no presumption of past wrong.

Though "war may be waged justly by both sides," according to Gentili, once the question has been resolved through military action, the parties' relative standing changes. Gentili, as Blane and Kingsbury point out, still views the *ius gentium* as a genuine constraint on what he embraces as legitimately self-interested military action. While a party may legitimately pursue *vengeance* on behalf of their own wrongs, once victory is achieved, states ought to limit themselves to a reasonable assessment of the magnitude of their own wrong and the violence necessary to effectively deter—in other words, to punishment.[77] Once victorious, a prince ought to "assume the character of a just judge and…not merely a partisan," and to enforce his claim only within the bounds of the law. Accordingly, a successful warring state has a "twofold character."[78]

War has not, therefore, *contra* Schmitt, been entirely stripped of its punitive aspect on Gentili's account, in at least two respects. First, though the rules of engagement between parties respect an epistemological uncertainty as to the relative value of the subjective rights at stake, once victory (and thus, presumed legal validation) has been established, the losing side may be punished. "Just as in the contests of the Forum the law is impartial toward each of the litigants, until sentence has been pronounced in favor of one or the other of them. And then the defeated party, who contended unjustly, will suffer severe punishment at the hands of the victor because of his injustice."[79] Second, although Gentili sometimes uses "war" to apply only to a contest between public powers, he also uses it to describe the legitimate acts of force by one public power against a group or individuals who are acting unjustly or without authority.[80] Gentili invokes not just the punitive purpose of war, but the precondition of membership for punishment in rejecting war for the sake of conversion; in this, Gentili's view closely resembles Vitoria's.[81] Rather than reject the punitive model for interstate war, Gentili expands the category of permissible justifications beyond punishment. Forward-looking self-interest, and not just past injury, could justify war on Gentili's account, but so could deviation from norms of dispute resolution, or the pursuit of causes that could not reasonably be construed as just—and in these latter cases, war was punitive.

Vitoria and Suarez do not simply describe an international order where legitimate interstate violence is limited to punishment, but (I have argued) characterize the prince's authority to use interstate violence as isomorphic to the power to punish subjects. Gentili, in contrast, views war not as the exercise of authority or the vindication of objective right, but the resolution of a conflict between two claims of subjective right by entities who do not share a

[77] Gentili, *De Iure Belli Libri Tres*, 293.

[78] Gentili, *De Iure Belli Libri Tres*, 299.

[79] Gentili, *De Iure Belli Libri Tres,* 33.

[80] Gentili, *De Iure Belli Libri Tres*, 298.

[81] "Therefore, since war against [those of another commonwealth who practice a different religion] will be either vindictive or punitive, it can in neither event be just; for we have not been injured, so that we can justly take vengeance, nor are they our subjects, so that it is our part to chastise them, as Covarrubias says." (Gentili, *De Iure Belli Libri Tres*, 41.)

judge or jurisdiction. While the *ius post bellum*, in Gentili's account, may entail punishment by the victorious side, it is only *after* the war that one side can claim that the other party contended unjustly. Because both sides can be "just enemies," war is, at its onset at least, substantively morally neutral (even if circumscribed in its extent and nature by moral dictates).[82] War is therefore wholly distinct from *civil* punishment, which is carried out by a political authority. Gentili is, accordingly, largely unconcerned with civil punishment as a matter of separate inquiry: "It does not appear to be the function either of the moral or of the political philosopher to give an account of the laws which we have in common with our enemies and with foreigners."[83] Moral and political philosophers, Gentili goes on, limit themselves to the bounds of the city-state. It is Gentili's innovation, one that he asserts from the outset of *De Jure Belli Libri Tres*, to treat interstate conflict and the laws governing it as wholly distinct because they operate outside of any community.

V. Grotius: The Natural Right to Punish

Gentili, as Schmitt argues, treats war as a distinct, self-contained moral terrain limited to contests between equals. Grotius, in contrast, maintains the continuity between war and punishment asserted by Vitoria and Suarez, but instead of treating war as exclusively the domain of states (as does Gentili) or punishment as exclusive to political communities (as do Vitoria and Suarez), Grotius naturalizes and individualizes the right to punish, and with it, the right to engage in just war. Vitoria and Suarez argued violence was justified between political communities *either* as a form of collective self-defense and expression of the same power inherent in the commonwealth and directed by its ruler against internal wrongdoers, *or* as an analog of civil punishment, where the community of humankind forms a kind of transnational commonwealth. Grotius's theory of punishment, made explicit in *De Jure Praedae* and implicit in *De Jure Belli ac Pacis*, situates the power to punish in the individual, not the commonwealth. From this fundamental shift in first principles emerges a theory of just war as both punishment and the pursuit of subjective right in the absence of superior jurisdiction. A justly warring prince, in Grotius's view, does not execute a collective power on behalf of himself, but exercises a subjective right on behalf of an objective wrong.

Grotius is explicit that all individuals, as individuals, possess a natural right to punish in *De Jure Praedae*. *De Jure Praedae* (title in translation: *Commentary on the Law of Prize and Booty*) was completed in 1606, having been commissioned by the Directors of the VOC (Dutch East India Company) to justify the 1603 seizure of a Portuguese merchant ship by a Dutch captain. As *De Jure Praedae* makes clear, this seizure of a non-military ship was motivated by both the metropolitan rebellion of the Dutch against Spanish imperial rule and the ongoing battle for commercial dominance with respect to trade with the peoples of the East Indies. Intended by the Directors to be a polemical brief on Spanish naval abuses, the manuscript included several chapters setting forth a series of abstract principles, before turning to a historical account of Dutch-Spanish naval relations and a valorization of the VOC. A modified version of Chapter 12 was published as *Mare Liberum* in 1609, found a wide readership in Europe, and prompted several English responses, including John Selden's *Mare Clausum*, published in 1635. (The rest

[82] I shall return in greater detail to the nature of *jus hostes*—and to those who do not merit such status in much greater detail in a subsequent chapter.

[83] Gentili, *De Iure Belli Libri Tres*, 3.

of *De Jure Praedae* would remain in manuscript until 1864 when it was found among Grotius's personal papers and published.)

Grotius does not explicitly assert a natural right to punish in the later *De Jure Belli ac Pacis*. Like *De Jure Praedae*, *De Jure Belli* includes among the causes of just war a party's assertion of *dominium* or subjective right over its property or property to which it is entitled *and* the enforcement of natural law or the *ius gentium*; war may be justified as the pursuit of both what I have been calling "subjective" and "objective" right. In *De Jure Praedae*, Grotius outlines four causes of just war: self-defense, defense of one's property, debts arising from a contract, and punishment.[84] Punishment, Grotius says, "arises from wrongdoing, and from every injury – whether of word or deed – inflicted with unjust intent."[85] In *De Jure Belli* Grotius subsumes self-defense and defense of one's property under the same heading, identifying three just causes for war: "defense, recovery of what's our own, and *Punishment.*"[86] Although contractual obligations are no longer one of the major categories, the failure of another party to uphold a contract constitutes an "injury," and is thus a legitimate cause for war in *De Jure Belli* as well as *De Jure Praedae*.

Like Gentili, Grotius makes extensive use of the analogy between war and civil trials and describes war in terms borrowed from and with comparison to judicial proceedings. Wars and judicial trials are both concerned with the same subject matter in *De Jure Praedae*: "there should be precisely as many kinds of execution of warfare as there are kinds of legal action."[87] The seizure of the Santa Catarina, which *De Jure Praedae* was ostensibly written to justify, is described as a kind of legal damages, awarded to a wronged party after a suit.[88] Grotius makes this point more generally, as well: "For war, if it is supported by public authority, differs from execution of a judicial sentence only in the fact that it must be carried out by an armed force, owing to the power possessed by the opponent."[89] Where for Gentili offensive military action at its outset (though perhaps not after its conclusion) is analogous to a plaintiff pursuing a suit, for Grotius a just war is the *execution* of a judicial sentence—the awarding or enactment of a settled legal question. *De Jure Belli* includes an entire book (Book II) devoted to characterizing legal concepts such as property and contract as the subject of both domestic interpersonal and international interstate conflict.[90]

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[84] Straumann identifies in this taxonomy Grotius's use of Roman law to assert a new, subjective understanding of right: "Grotius casting subjective *iura* in actions and injunctions granted by the Roman lawyers of the *Digest*. Grotius's originality lies in the fact that he identified an already existing tradition of natural rights with Roman law remedies, internalizing these remedies by making them a subjective moral quality of each individual, or each individual group of people." (Straumann, Benjamin. "Natural Rights and Roman Law in Hugo Grotius." *Property, Piracy, and Punishment: Hugo Grotius on War and Booty in de iure praedae.* Edited by Hans Bloom. Brill, 2009, 351.)

[85] Grotius, Hugo. *Commentary on the Law of Prize and Booty*. Translated by Gwladys L. Williams, edited by Martine Julia van Ittersum, Liberty Fund, 2006, 103.

[86] Grotius, Hugo. *The Rights of War and Peace*. Translated by John Morrice, edited by Richard Tuck, vol. 2, Liberty Fund, 2005, at 394-5.

[87] Grotius, *Commentary on the Law of Prize and Booty*, 105.

[88] Grotius, *Commentary on the Law of Prize and Booty*, 461.

[89] Grotius, *Commentary on the Law of Prize and Booty*, 191.

[90] "Wars are undertaken; but yet certainly, to render Wars just, they are to be waged with no less Care and Integrity, than judicial Proceedings are usually carried on." (Grotius, *Rights of War and Peace*, vol. 1, 101-2.) A similarly structured passage can be found in *De Jure Praedae*, where Grotius applies

Unlike Gentili, however, Grotius argued that there could be just, private wars. The justness of private wars motivated Grotius's authorship of *De Jure Praedae*. Indeed, Grotius defines "war" itself in highly general terms: the use of force against another who responds with force.[91] "War" can describe acts of individual self-defense, conflicts between sovereign princes, violence by sovereigns against their own subjects as well as third-parties, and even acts we might now call "terrorist"—that of "private Men against Princes."[92] Private men are forbidden to make war against their own sovereigns, but even here Grotius forbids the act as unjust and not—as does Gentili—the use of the term "war" to describe such violence. Ironically, although a private just war is a contradiction in terms for Gentili, Grotius's defense of the concept grows out of an approach to war and jurisdiction that resembles Gentili's. Like Gentili, Grotius links the justness of war to its necessity in the absence of judicial authority and limits just war to those cases where no external authority exists to resolve the conflict in question. Thus defined, war admits both "private" and "public" varieties, depending on whether the participants act on behalf of a political community or solely on their own: "[I]n so far as judicial recourse is lacking, private individuals are not prohibited from undertaking a war.[93]

For Gentili the absence of third-party authority was treated as equivalent to the possession of supreme authority by each of the combatants. War was not simply permissible in the absence of a supervening political authority but, at least properly defined, required status to be just. In this respect Gentili's position, as Blane and Kingsbury argue, is consistent with that of Vitoria and Suarez. For Grotius, in contrast, the ethical capacity to make war is understood not as a characteristic of one's status vis-à-vis other powers or membership in an international community, but instead as a kind of reversion to the absence of positive legal norms. Where the absence of judicial recourse is a continuing condition (as in the East Indies of the late sixteenth and early seventeenth centuries), "everything that is permissible by the law of nature is permissible for private individuals," including "even the power to inflict punishment concordant with the rule of justice."[94]

This is not to say that Grotius makes no distinction between public and private wars, or even that he fails to award special status to those wars declared by lawful sovereigns against another (he terms such conflicts "solemn wars"). There is an important temporal distinction between public and private wars: "[I]n a private War, the Right of Defence is as it were, only momentary, and ceases as soon as one can apply to a Judge: Whereas a publick War, arising only between those that acknowledge no common Judge…the Right of Defence has here some Continuance, and is perpetually maintained, by fresh Injuries and Damages received."[95] However, the categories of public/private and of just/unjust are, for Grotius, orthogonal. "A war is said to be 'just' if it consists in the execution of a right, and 'unjust' if it consists in the

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reasoning about types of wrongdoing wholesale from civil to warfare as context. (*Commentary on the Law of Prize and Booty* 109-12.)

[91] Notably, Grotius cites the same Roman etymology of the term for war as did Gentili, to very different ends: "This agrees very well with the Etymology of the Word; for the *Latin* Word *Bellum* (*War*) comes from the old Word *Duellum* (a *Duel*) as *Bonus* from *Duonus*, and *Bis* from *Duis*. Now *Duellum* was derived from *Duo*, and thereby implied a Difference between *two* Persons, in the same Sense as we term Peace *Unity* (from *Unitas*) for a contrary reason." (*Rights of War and Peace*, vol. 1, 135.)

[92] Grotius, *The Rights of War and Peace,* 336.

[93] Grotius, *Commentary on the Law of Prize and Booty*, 380.

[94] Grotius, *Commentary on the Law of Prize and Booty*, 380.

[95] Grotius, *Rights of War and Peace*, vol. 2, 416-17.

execution of an injury. It is called 'public' when waged by the will of the state, and in this latter concept the will of magistrates (e.g. princes) is included." [96]

Grotius's focus in *De Jure Praedae* is on the case where the injured party (in this case, the Dutch) is also the aggressor. Thus, in this text the paradigmatic case of just war is the pursuit of one's *subjective* right against an *objective* wrongdoer, or punishment on one's own behalf. For Grotius—as for Vitoria and Suarez—punishment was a major and legitimate function of war, one that justified third-party intervention as well as attempts by the injured party to reclaim its land or goods. Thus, those who fought in self-defense against a just war or attack were in the wrong: Suspicion that the cause against them may be uncertain "gives no man a right to oppose force to a just attack, no more than a criminal can plead a right of defending himself against the publick officers of justice, who would apprehend him."[97] In *De Jure Belli*, in fact, Grotius subsumes *all* causes for war under the heading "injury"; he insists that "there is no other *reasonable* Cause of making War, but an *Injury* received."[98].

However, unlike Suarez and Vitoria, who limited the right of war to protect third parties to extreme cases (e.g. anthropophagy), Grotius envisioned a right of war that arose from *any* injury, regardless of who suffered it. Allowing third-party intervention makes the difference between such subjective and objective wrong a matter of semantics; if *any* party may intervene on behalf of one injured, then it is the fact of the wrong rather than the relationship between aggressor and victim that makes war legitimate. Certainly an "injury" is required for war to be just, but Grotius's position on humanitarian intervention undermines the insistence that it is the *reception* of the injury ("an *Injury* received") that can justify an aggressive war. Grotius explicitly rejects "the opinion of *Victoria, Vasquez, Azorius, Molina*" that a direct injury is required for a party to begin a war. These authors "assert, that the Power of Punishing is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature."[99]

Schmitt criticizes Grotius's embrace of private war as a throwback to an international order that had not yet accepted interstate war as a distinct legal and moral realm among actors of mutual sovereign status.[100] However, in so doing, Schmitt misses the significance of Grotius's just war theory for shaping subsequent theories of sovereignty: Though Grotius maintains that wars are a vehicle of *objective* right, he allows private wars because the right to carry out violence has become natural and individual. Although Vitoria (like other Scholastics) recognized that individuals possess the right to defend themselves against attackers and to meet force with force, Grotius's account makes this natural, individual power (rather than the natural necessity of the commonwealth), the central principle of just war. Not only is the use of force permissible in response to ongoing attacks where no jurisdiction exists, but individuals possess a natural right to mete out punishment in the absence of supervening political authority.[101]

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[96] Grotius, *Commentary on the Law of Prize and Booty*, 50.

[97] Grotius, *Rights of War and Peace,* vol. 2, 418.

[98] Grotius, *Rights of War and Peace*, vol. 2, 393

[99] Grotius, *Rights of War and Peace*, vol. 2, 1024-25 (John Morrice, et. al. trans., Richard Tuck, ed., Liberty Fund 2005).

[100] Schmitt, *Nomos*, 134-35 ("By no means" was Grotius a "pioneer[] in the sense of having formulated the fundamental concepts of the new international law among states, least of all the new concept of war…Grotius's method was a scientific regression…[he] was no trailblazer.").

[101] This universality can be understood two ways, either as the *absence* of a jurisdictional requirement for punishment, or as its universalization. Indeed, "*ius*" can be translated, and was used by

This is a dramatic innovation, one that is at the core of seventeenth century social contract theory. Whereas Vitoria and Suarez accounted for a right to punish in the international sphere by way of the supposed existence of an international human community, Grotius argued that this very difficulty in explaining how a given civil authority might punish foreigners in his territory demonstrated that there must be a natural right to punish. To quote at length:

> Is not the power to punish essentially a power that pertains to the state [*respublica*]? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement....Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state. The following argument, too, has great force in this connexion: the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question.[102]

Finding the right of political authorities to punish those outside the commonwealth necessary, Grotius makes the Scholastics' problem his solution: That political leaders can make war on foreigners is evidence of the fact that punishment is a natural right, not an attribute of political authority.

This move is made possible by a shift away from premising such rights in a posited human or international *community* and instead arguing for a natural, universal human *quality*. Recent scholarship has argued that Grotius's understanding of human sociability owes much to Stoicism and Cicero in particular. Where Richard Tuck emphasized the role of self-interest in Grotius's political theory, others contend Grotian natural law is driven by *oikeiosis* or *appetitus societatis*, which is neither a mere desire for self-preservation nor altruism, but a distinct and fundamental capacity.[103] Because we have both a natural tendency and a natural obligation to show some respect for others (although this respect is minimal), we ought to look to others' injuries on the basis of our alliance "by common Humanity."[104] Punishment is therefore both required and limited not by a particular actor's standing within the global human community but by his shared nature with the injured party; it is first and foremost a relation between individuals from which rules regarding judicial and inter-state punishment are developed, rather than an attribute of those political communities.

A second account of natural right of punishment elsewhere in *De Jure Praedae*, one that goes further in suggesting that pre-political rights provide the content and boundaries of political institutions. "The best method" for resolving the contested question of "whether or not a private individual may under any circumstances seek to impose punishment for a crime" or if, instead,

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Grotius and his contemporaries, both to mean "jurisdiction" (as the theorists' respective translators, and I, have used it) and "right." Grotius, however, specifically disavows the suggestion that jurisdiction (in the sense used by Suarez and Vitoria) is necessary. *See* Grotius, *Rights of War and Peace*, vol. 2, 1027-28.

[102] Grotius, *Commentary on the Law of Prize and Booty*, 136-37.

[103] *See* Brooke, Christopher. "Grotius, Stoicism, and 'Oikeiosis'" *Grotiana*, Vol. 29, No. 1, 2008, pp. 25-50, at 48-50.

[104] Grotius, *Rights of War and Peace*, vol. 2, 385.

“the power to punish has been granted to the state alone,” is to consider “what was permissible for individuals *prior to the establishment of states* [emphasis added].”[105] Understanding political authority requires that we begin by envisioning a world (hypothetical or historical) without political community. Grotius acknowledges that prior to political community, individuals must have had the power to punish. This private power soon proved impractical, however, and “a change was introduced in regard to that privilege [of punishing], owing to the fact that the bounds of moderation were easily overstepped either through love of self or through hatred of another.”[106] This is true not only of punishment, according to Grotius, but “developments relative to defense of property and collection of debts.”[107] Political community and its organization are characterized not by a new form of authority but rather by the pragmatic concentration of a natural right in institutions or persons.

Grotius, to be clear, does not have a theory or account of the “state of nature”; although he alludes to a time before the establishment of political authority, this is not characterized as a “state” or condition. Nevertheless, this is a dramatic move away from the Scholastics’ vision of punishment as a function of a cohesive, divinely-mandated commonwealth, toward an understanding of state punishment as the collectivization of what is essentially a series of individual relationships.

Tuck and Blane and Kingsbury note the striking convergence between this passage in *De Jure Praedae* and Locke’s in the *Second Treatise*.[108] With this assertion of a natural right to punish, Tuck remarks, “Grotius thus drew the blueprint according to which most of the interesting political theories of the next century were constructed.”[109] Tuck attributes this shift to Grotius’s reduction of the laws of nature to the four described at the outset of *De Jure Praedae* (it is permissible to defend one’s life; it is permissible to acquire and retain those things useful to life; do not let anyone inflict injury on a third party; do not steal).[110] This revision (relative to previous natural law theorists) is in turn a “straightforward” consequence of Grotius’s skepticism, which led him, according to Tuck, to limit natural law to those tendencies which were observable as a universal characteristic of all men: “indeed, the only genuinely universal human trait, and therefore the only one which a God could legitimately be thought of as instilling

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[105] Grotius, *Commentary on the Law of Prize and Booty*, 133.

[106] Grotius, *Commentary on the Law of Prize and Booty*, 133.

[107] Grotius, *Commentary on the Law of Prize and Booty*, 133.

[108] Blane and Kingsbury, “Punishment and the Jus Post Bellum,” 244. This is not the only striking similarity between *De Jure Praedae* and the *Second Treatise*; both contain nearly identical claims about the implications of divine ownership of the human body. Like Locke, Grotius insists that God’s ownership over our bodies both precludes our forfeiture of the same and justifies the loss of autonomy associated with violating God’s laws: “But the laws refuse to recognize the vicarious acceptance of corporal punishment, for the reason that no one can place under liability that which he does not own. God has given us ownership over things; ownership over ourselves, he has retained for Himself. Therefore, we may transfer our goods when it pleases us to do so, but we may not lay down our lives; just as private property, but not power over himself, is given to a slave.” (Grotius, *Commentary on the Law of Prize and Booty*, 154.) Again, Locke could not have read this particular passage. Knud Haakonssen, on the other hand, notes the continuity between Grotius’s positing a natural right to punishment and Adam Smith’s account of natural resentment. Haakonssen, Knud. “Hugo Grotius and the History of Political Thought” *Political Theory*, Vol. 13, No. 2, 1985, pp. 239-265.

[109] Tuck, Richard. “Grotius, Carneades, and Hobbes.” *Grotius, Pufendorf, and Modern Natural Law.* Edited by Knud Haakonssen, Ashgate Dartmouth, 1999, pp. 85-117, at 97.

[110] *See* Grotius, “Prolegomena,” *Commentary on the Law of Prize and Booty*, 23.

in all men, was self-interest."[111] That punishment is a natural right is, for Tuck, a secondary consequence of a more fundamental move toward an understanding of natural law grounded in empirically observable human behavior.

Blaine and Kingsbury are primarily concerned with how this naturalization of the right of punishment expands the possible justifications for war. No longer is a state limited to wreaking vengeance against those who have done injury directly to that commonwealth. A state may now make war against any actor that has violated the natural law, regardless of whether they suffered personal injury. The natural right of punishment, according to Blane and Kingsbury, is required to ensure that the laws of nature are enforced; all men therefore become executors of the natural law. "Grotius thus explicitly rejects what he regards as the view of Vitoria, that such a relationship is a necessary precondition for offensive war to be justified as punishment."[112] Grotius's rejection of a jurisdictional requirement for war, according to Blane and Kingsbury, correspondingly expands not only the reasons for war—to include humanitarian intervention—but also what is permitted to the victor. "The victor in such a circumstance punishes not to vindicate his own injury or to deter future injuries against himself. Instead, the victor punishes to deter all future similar violations of the law of nature, no matter to whom the injury might result." [113]

Neither Tuck nor Blane and Kingsbury consider in detail whether or how this naturalization of the right of punishment in *De Jure Praedae* persists in Grotius's later *De Jure Belli ac Pacis*.[114] Admittedly, Grotius is neither as explicit about the subjective right of punishment nor as consistent in *De Jure Belli* as in the quoted passage in *De Jure Praedae*. At times, he suggests that this right is not held individually, but exclusive to public authority: "Besides, in a private War we have only a Regard to our own Defence, but the supreme Powers have not only a Right of Self-Defence, but of revenging and punishing Injuries."[115] Grotius does not, however, identify this right with the self-sufficiency of the commonwealth, divine grant, or the absence of third-party authority, leaving open the question as to whether and why this right of punishment is exclusive to political or judicial authorities. Instead, he again situates this political power of punishment temporally. In *De Jure Belli ac Pacis* Grotius gives a similar account of the origins of civil punishment to the one described in *De Jure Praedae*. Suggesting by implication the existence of a "Liberty which Nature indulged [pre-political persons] of vindicating every Man his own Quarrel," Grotius explains that "because we are apt to be partial in our own Cases or of those that belong to us," judges were appointed to determine controversies."[116] Where jurisdiction ceases, "as upon the Sea", we are restored to this pre-

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[111] Grotius, *Commentary on the Law of Prize and Booty*, 94.

[112] Blaine and Kingsbury, "Punishment and the Jus Post Bellum," 244.

[113] Blaine and Kingsbury, "Punishment and the Jus Post Bellum," 260.

[114] Though I argue that Grotius endorsed a natural right to punish explicitly in *De Jure Praedae* and incidentally or at least implicitly in *De Jure Belli*, Straumann has pointed out that in texts written between these two monographs Grotius denies such a right exists. In *Theses LVI*, written around 1615 there is a marginal note: "Ergo non habet ius puniendi" (the "ergo" follows form the proposition "Human beings do not have a natural right to the life, body, actions, and possessions of another man, insofar as the other's life, body, actions or possessions are ordinary means to the self-interested [*ad bonum suum*] pursuit of the right to life, body, actions, and possessions [*res*] that everybody has." Straumann, "Natural Rights and Roman Law in Hugo Grotius," 350-51.

[115] Grotius, *Rights of War and Peace*, vol. 2, 416-7.

[116] Grotius, *Rights of War and Peace*, vol. 2, 968.

political state it, and with it, our "antient Liberty"—the authority to seek vengeance against those who have wronged us directly.[117]

In contrast to *De Jure Praedae*, where the right is treated as a kind of subjective claim or *dominium*, *De Jure Belli* describes the authority to privately punish as a permission, a "Liberty." On this account punishment is hierarchical but not exclusive. Two different types of hierarchies are introduced to account for a universal capacity for punishment. First, Grotius remarks in passing that, "to have a Right to punish any one that has rendered himself guilty, it is sufficient that one is not subject to him."[118] Kings do not exercise a new, distinctively political power of punishment, but simply exercise their natural right on the absence of others':

> "For the Liberty of consulting the Benefit of human society, by Punishments, which at first, as we have said, was in every particular Person, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For as for others, their Subjection has taken from them this Right."[119]

Hobbes, as I argue in the next chapter, offers a similar account of punishment as violence in the absence of community, but grounded punishment in *individual* self-preservation and asserted a state of nature defined by radical equality. Grotius still invokes hierarchy as the basis for punishment but one that is founded not on consent-based political authority but moral standing:

> For natural Reason informs us, that a Malefactor may be punished, but not who ought to punish him. It suggests indeed so much, that it is the fittest to be done by a Superior, but yet does not shew that to be absolutely necessary, unless by Superior we mean him who is innocent, and detrude the Guilty below the Rank of Men, and place them among the Beasts that are subject to Men, which is the Doctrine of some Divines.[120]

Like Suarez, who as we have seen, struggled to situate a naturally necessary right of punishment in a contingent human authority, Grotius distinguishes between the (natural) fact that one deserves punishment and the (positive) problem of who is entitled to do so. Unlike Suarez, however, Grotius locates the corresponding right in the relative moral standing of the punisher rather than a determination made via consent and the *ius gentium*. In support of this claim, Grotius cites the teleological principles of Democritus and Aristotle; not only are malefactors subject to the innocent, but they may be *used* by "nobler" for his purposes.[121] This account of punishment does not assert a natural, personal right to do so, nevertheless, it still presents a break from the requirement that punishment be carried out by *political* authorities.

According to Grotius's more social contract inflected explanation, the right of vengeance belongs to the injured party in virtue of that injury and is limited in a political community where there exists an authority to carry out the right. In its more theological valence, the right to punish

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[117] Grotius, *Rights of War and Peace*, vol. 2, 970. Grotius cites, as his primary example, Julius Caesar's action against pirates when Caesar was still a private citizen; the significance of this choice of example will be addressed in a subsequent chapter.

[118] Grotius, *Rights of War and Peace*, vol. 1, 325.

[119] Grotius, *Rights of War and Peace*, vol. 2, 1021.

[120] Grotius, *Rights of War and Peace*, 955.

[121] Grotius, *Rights of War and Peace*, 955.

seemingly obtains to all innocent persons and is premised upon the wrongdoer's nature, rather than his act or unlawful gain. Within *De Jure Praedae* Grotius equivocates between an account of punishment that associates the punitive power with an individual's efforts to maintain his *dominium* (i.e., the defense of one's property) and one that defines punishment as objectively necessary, made so by qualities of the wrongdoer rather than victim. We see the former in the Grotius's comparison of the institutionalization of the right to punish with the establishment of all kinds of judicial authority for the resolution of conflicts, where the historical development of constraints on the exercise of the right of vengeance parallels that of enforcing contractual agreements. Yet Grotius almost immediately offers another explanation besides the reference to a pre-political condition. He cites Scripture to attribute the right of punishment to an inherent quality of the wrongdoer—a relationship between the wrongdoer and natural law, rather than between the wrongdoer and punisher. "Accordingly, that precept of law which demands the punishment of evildoers is older than civil society and civil law, since it is derived from the law of nature, or law of nations"; Grotius is here referring to the Scriptural admonition that he who sheds man's blood, by man shall his blood be shed.[122]

Between *De Jure Praedae* and *De Jure Belli* we have three ways of describing punishment: As a permissive right by the injured party, as retribution justified by a loss of status, or as a mandated act against the wrongdoer (the agent of which is left undefined, at least by natural law). We can see at least one consequence of this ambivalence in the above discussion of injury as a cause of war. Recall that while Grotius insists that war is only just if carried out in response to injury, but also explicitly rejects the Scholastic requirement that the aggressor be the injured party.[123] "Injury," typically understood in relational terms, is ambiguously broadened to include *any* wrong, even without a clear victim. Because war is a means of punishment among those who do not share membership in the same political community (or at least those who do not share a legal authority), whether third parties may pursue punishment of a commonwealth depends on which understanding of punishment we choose. If punishment is a subjective, relational right against a wrongdoer—the understanding implied in Grotius's suggestion that courts of justice were established to rein in the excesses of the exercise of this privilege—then only the injured party may pursue punishment. If punishment is either mandated by natural law as a necessary desert for the trespasser *or* if it puts the wrongdoer in a condition whereby others may make use of him (or it) for the sake of the common good, then any legal authority might engage in aggressive war against the violator.

In a later chapter I will argue that these two conceptions are not so far apart as they initially appear and are indeed bridged by a notion of dangerousness and a humanist conception of self-defense that Grotius shares with Gentili. For now, however, I wish to emphasize how this conception of punishment alters how the relationship between civil punishment and war could be understood. This alteration is clearest in *De Jure Praedae*, where Grotius responds to the possible objection—one easily attributable to Gentili—against "designating the person who attacks us privately as an enemy [*hostem*] and the property seized in such circumstances as 'prize or booty.'" Grotius responds: "I regard it as extremely important for the clarification of the whole question, that different terms should not be employed in the discussion of a single right."[124] The right—whether of self-defense or punishment—of responding to injury is identical regardless of the jurisdictional status of the wrongdoer. Blane and Kingsbury highlight this

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[122] Grotius, *Commentary on the Law of Prize and Booty*, 134-35.
[123] Grotius, *The Rights of War and Peace*, vol. 2, 1024-25.
[124] Grotius, *Commentary on the Law of Prize and Booty*, 194

rejection of Scholastic thought, and with it the requirement that punishment be an exercise of pre-existing jurisdiction and its implications for the permissibility of humanitarian intervention.[125] Grotius's substantive conclusions as to the permissibility of war are, like Gentili's, relatively expansive as compared to his Scholastic precursors. This is due not to the permissibility of pre-emptive attacks,[126] but rather from this radical move away from both Gentili's and the Scholastics' requirement of public authority to carry out acts of punishment in the international sphere. Once the right to do violence is understood as fundamentally individual, rather than a characteristic of a political community, individuals' relations to one another, rather than the ends of the commonwealth, come to dictate the norms limiting and authorizing the deployment of that violence.

Grotius and Gentili both pull apart war and civil punishment as normatively and conceptually distinct forms of violence. They do so, however, by treating conflicts between states as analogous to individual conflicts, and the rights of those states as equivalent to (in Gentili's case) or derivative of (in Grotius's) rights held by individuals. Both reject the Aristotelian account of the state, and with it, the Scholastic account of legitimate political violence as a naturally necessary characteristic of political community. Gentili elevates the status of states, carving out war between equals in a juridical, but non-authoritative international space as a subset of legitimate violence. For Gentili, war was analogous to a civil suit; the source of limitations on the use of violence derived from the sovereignty of the suitors (i.e. warring states) and the *ius gentium*. War—a conflict between two commonwealths or kingdoms—occupied normative terrain distinct from other forms of state violence. Grotius reached the opposite conclusion with respect to the relationship between punishment and violence: *All* sustained violence of a certain scale was justified with respect to the same underlying right, which was a natural right of punishment. Grotius agrees with Gentili that war is the recourse to force in the absence of shared political authority, but instead of a distinct right of political communities, it is a natural, pre-political right. Where Suarez and Vitoria attributed this right to a political community and, significantly, denied that this right could be personal, for Grotius it was originally an individual right, and could still be one in the absence of political authority.

V. The *Ius Gladii*, *Merum Imperium*, Punishment and Authority

In this section I describe a second way in which Grotius's *De Jure Praedae* and *De Iure Belli ac Pacis* contain an abrupt shift in how war was understood in contrast to Suarez and Vitoria. For Grotius, and the English social contract theorists who were influenced by him, the *ius gladii* was primarily addressed as a horizontal problem (that is, with respect to human equality) rather than a vertical one (that is, with respect to the divine monopoly on violence). For Vitoria and Suarez, war was differentiated from civil punishment only in the temporary and contingent quality of the jurisdiction that made it permissible; civil punishment was carried out

[125] Blane and Kingsbury, "Punishment and the Jus Post Bellum," 253.

[126] Grotius does not view an imbalance of power as sufficient threat to justify war, but nor does he require one's opponent to strike first to make a war just. Necessity may be established by intention *along with* power: "First, therefore, the Dread of our Neighbor's increasing Strength, is not a warrantable Ground for making War upon him. To justify taking up Arms in our own Defence, there ought to be a Necessity for so doing, which there is not, unless we are sure, with a moral Certainty, that he has not only Forces sufficient, but a full Intention to injure us." (*Rights of War and Peace*, vol. 2, 1102.)

against those in a position of permanent subjection. Justifying both war and punishment required addressing the same theological problem: How do some persons come to have the *ius gladii* (literally "right of the sword"), the right to kill others blamelessly, when the right over life and death is primarily reserved to God? For Grotius, and Hobbes and Locke after him, the problem was not one of justifying men's right to kill others vis-à-vis the divine monopoly violence—that was assumed—but of determining *how* some men came to possess an earthly monopoly on this violence in the absence of the natural necessity of the commonwealth and authority as such.

For Vitoria, the divine exclusivity of the power over life and death is the reason civil power must have a divine source. Once the commonwealth comes into existence it has the right of self-defense, which entails (at least sometimes) killing persons. Because killing a fellow man is prohibited to all individuals, the *ius gladii* must derive not from positive law, which has its origin in men's will, but rather "exists in the commonwealth by divine and natural law."[127] Private men, Vitoria insists, cannot lawfully kill even a guilty man; punishment is only permissible as an act of authority.[128] Citizens cannot give to their sovereign or prince that which they do not possess. Therefore, since none of them could possibly have the right of killing even a guilty man—such a right being reserved to God—the *necessary* power of capital punishment within the commonwealth must derive from God.

The commonwealth has the *ius gladii* "by divine law." But this power is made necessary, and thus divinely mandated, by the commonwealth's telos: such "assemblies and associations of men are necessary to the safety of mankind." [129] Thus, in the *relection De potestate civili*, Vitoria argues that while the "final and necessary cause of public powers" is natural, the "efficient cause of this power" inheres in the commonwealth. For Vitoria the *ius gladii* is associated with the *potestas* of the political community. Civil power is an emergent property of the self-sufficient political community. It is, however, intrinsic to the character of the commonwealth and not a subjective right over which this community had *dominium*.

Because the *ius gladii* is tied to the natural necessity of the commonwealth, it continues to inhere in that community. The sovereign and his magistrates do not have this *potestas* (power), but instead have *auctoritas* (authority). This *auctoritas* is a kind of delegated power, distinct from but derivative of the commonwealth's *potestas*, made necessary because the multitude of the commonwealth cannot carry out self-governance as such. Lest we suspect that the community may retract this delegation, however, Vitoria insists, "public power is of God" and "cannot be abolished even by the consensus of men."[130] Here we confront a tension within Vitoria's account. While he generally insists that *potestas* is inalienable from the commonwealth, he also speaks of a "royal power" (*regia potestas*) that derives "not from the commonwealth, but from God himself."[131] The execution of this power by the prince and magistrates through their delegated *auctoritas* is distinct from the "royal power" that allows them to command - make law for - the members of the commonwealth. The relation between this *regia potestas* to the civil power inhering in the commonwealth is unclear. Vitoria's account leaves ambiguous what, precisely, is the relation between this royal power—derived directly from God—and the civil power that the sovereign may execute or direct, but not possess outright; it is difficult to give an

[127] Vitoria, "On Civil Power," *Political Writings*, 12.
[128] Vitoria, "On Civil Power," 11-12.
[129] Vitoria, "On Civil Power," 9.
[130] Vitoria, "On Civil Power," 18-19.
[131] Vitoria, "On Civil Power," 16.

account of this royal power that does not either seem superfluous or undermine the notion that the power of self-ordering remains with the commonwealth.[132]

What is clear is that Vitoria is concerned to defend against two undesirable conclusions. The first is that the commonwealth, acting individually or collectively, may revoke this royal power at its will; such a conclusion would justify rebellion. The second is that a royal power derived directly and solely from divine designation could act without respect for the intrinsic purposes and limits of the commonwealth. There is no inherent contradiction between these two goals, since natural law reveals divine reason, and therefore God's will is manifest in the existence of the political community. The *ius gladii*, as a divine right that is also characteristic of the commonwealth itself, resolves both these problems: Because the "public power is of God" and "cannot be abolished even by the consensus of men,"[133] subjects may not challenge the authority of their princes; on the other hand, princes are intrinsically limited in their exercise of *auctoritas*, derived as it is from the character and needs of the commonwealth itself

Suarez, like Vitoria, explains that the civil power must have a divine origin because it includes the power to impose the death penalty. "[Civil] power embraces several acts which appear to transcend human authority as it exists in individual men…. The first of these acts is the punishment of malefactors, extending even to the death penalty. For since God alone is the Lord of life, it would seem that He alone could have granted the power." [134] For Suarez, unlike Vitoria, the problem is broader than the *ius gladii* and extends to the infliction of all punitive harms: Romans xii is explicit that *all* vengeance is the exclusive domain of God, and thus, any "infliction of punishment for injuries done to individuals" must also be a divinely delegated power from God. [135]

Again, for Suarez as for Vitoria, the *ius gladii*, though divine in origin, may only inhere in the community, and not individuals. If individuals could possess jurisdiction, and thereby exercise "punitive justice," Suarez reasons, "there would be no need to employ the public power of jurisdiction; or at least, since this power is derived from men themselves, each one would have the power to refrain from transferring it to the state official, retaining it, on the contrary, for himself; a conclusion which would be opposed to the natural law, and to the good governance of the human race."[136] Suarez is thus pre-emptively critical of Grotius's and Locke's assertion of a natural, individual right of punishment that citizens must give up or transfer to a political authority. Suarez could not see why any individual would give up such a right and hence how communities could exist, if we assumed such right was natural and located in the individual. If injury itself could form the basis of punishment, then political authority would be unnecessary.

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[132] This tension did not go unnoticed by Hobbes, who would "ridicule to such good effect" this neo-Thomist distinction between authority and power, to quote Pagden and Lawrance, and instead offer an account of civil power derived from human will that nevertheless did not admit revocation. Pagden, Anthony, and Lawrance, Jeremy. Introduction. *Political Writings*, by Francisco de Vitoria, Cambridge University Press, 1991, at xix. This is not to say that Hobbes and Locke do not struggle with the problem of transforming what, in their cases, are natural individualized rights of Both acknowledge that it is not possible for the people to *physically* donate their strength to the sovereign and both instead tell a story about how the sovereign could come to act on the people's behalf.

[133] Vitoria, "On Civil Power," 18-19.

[134] Suarez, *De Legibus, Selections from Three Works*, 378-9.

[135] Suarez, *De Legibus,* 378-9.

[136] Suarez, "On War," 820.

For both Vitoria and Suarez, then, accounting for the power of capital punishment is a primarily theological problem. What is troubling about punishment is that it requires, at least sometimes, a human to act as if he were divine by destroying one of God's creation. What needs to be justified is the human exercise of what otherwise seems to be a divine right; the source of this human power is unquestionably divine. It is the Aristotelian conception of the state that mediates this apparently insurmountable gap between the divine and the human. No individual can simply assume the divine power of blameless killing; rather, it inheres in the divinely-mandated political community. Hence Vitoria's and Suarez's concern with membership as a precondition of punishment: only if a person is part of this superseding, naturally necessary political entity that his life becomes subject to this divine power.

James Johnson has argued this account of the *ius gladii* was already relatively secularized as compared to Vitoria's and Suarez's Scholastic predecessors, as Vitoria and Suarez ground this right in a human community rather than direct, divine grant. Thomas Aquinas characterized the prince carrying out a just war as a "minister of God to execute his vengeance against the evildoer."[137] Beginning with Bellarmine and Cajetan, this purely ministerial function came to be limited by the prince's earthly jurisdiction; while the ultimate right still rested with divine authorization, its efficient cause and contours were dictated by human, political relationships. According to Bellarmine, princes could punish "only those that prejudice the people who submit to him."[138] Cajetan presents a view similar to that we have seen espoused by Vitoria and Suarez: "[The prince] can *of his own authority* use the sword against internal or external disturbers of order," but his "reason is the perfection of the State. It would not in fact be a perfect state which did not have the power to punish, according to justice, those who trouble its tranquility, whether they are citizens or foreigners."[139] Thus, Johnson argues, by the time Suarez and Vitoria wrote, Scholastic just war theory has already moved significantly from that espoused by Aquinas, no longer exclusively about the execution of God's judgment "but a description of the right of princes to retaliate against troublers of their own domains."[140]

Moreover, because this power over life and death inhered in the commonwealth, it was not exclusively the power of the law-maker. Suarez uses the term *merum imperium* ("bare sovereignty," though often translated simply as "sovereignty"), originally a Roman concept used to describe the exercise of judicial decision-making at the edges of the Roman Empire, a *delegated* power of executing laws in the absence of direct imperial authority. [141] *Merum imperium* had connotations not of supremacy or unity but was instead associated with the execution of law or deployment of force. Thus, it could be located not simply in the prince or highest legislative or decision-making body, but in every magistrate with the power to carry out a judicial sentence:

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[137] *See* Johnson, James Turner. *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740.* Princeton University Press, 1975, at 39.

[138] Johnson 54, quoting from Bellarmine, *De Controv. Chris. Fidei*, II, cont. II, lib. III, *de laicis*, cap. xv.

[139] Johnson 53-54, quoting Cajetan, *Summula*, v, "Bellum." Emphasis added by Johnson.

[140] Johnson 55.

[141] Richardson, John. "The Meaning of *Imperium* in the Last Century BC and the First AD." *The Roman Foundations of the Law of Nations*. Edited by Benedict Kingsbury and Benjamin Straumann, Oxford University Press, 2011. Peter Garnsey attributes this understanding to Theodor Mommsen, a nineteenth century German classical scholar. (Garnsey, Peter. "The Criminal Jurisdiction of Governors," *Journal of Roman Studies*, Vol. 58, 1968, pp. 51-59.)

> Thus it is that, on the other hand, the power given to the magistrate for the punishment of crimes and extending even to the death penalty [i.e., the *ius gladii*], is ordinarily spoken of in the civil law simply as sovereignty, and is apparently so treated in the laws above mentioned, as well as in another law of the *Digest* (L. xvi. 215). In such cases, moreover, it is customary to give this power the name of 'unmixed sovereignty' (*merum imperium*), as may be seen by consulting the Digest (II. iv. 2) and the Gloss. [142]

Merum imperium was closely associated with the *ius gladii*. In contrast, the power to make laws derived from one's relationship to the object of those laws rather than a source of delegation and was properly termed "jurisdiction": "The term 'jurisdiction' in the full and proper sense refers to political—that is, governmental—power of dominion, the sense in which we are here using the word."[143]

Proper political authority always entailed both these powers. Sovereignty, according to Suarez, should always be exercised on behalf of legitimate laws, and those laws (conversely) required execution: "[I]n point of fact, it is impossible that such sovereignty should exist apart from the power of jurisdiction, just as, conversely, it is impossible for jurisdiction to exist apart from every element of sovereignty [*imperium*]."[144] Sovereignty without jurisdiction is tyranny, and jurisdiction without sovereignty impotent. Not only the prince but even lower-level magistrates must possess both powers to some degree, as the passing of a sentence, as Suarez acknowledges, always entails the declaration of law, which properly speaking belongs to jurisdiction. "Relatively speaking, then, these two attributes are separated, not in actual fact, but only in a certain usage of the terms; so that the legislative power, being—as it is—a power of sovereign command [*potestas imperandi*], is accordingly one of jurisdiction." [145]

The relationship between jurisdiction and *merum imperium* is more complicated outside the bounds of the commonwealth. Recall that for Suarez, punishment presupposed jurisdiction but injury could, in the international context, justify offensive war on the part of a prince against another over whom he did not have political authority. Because "vengeance cannot be sought at the hands of another judge, because the prince of whom we are speaking has no superior in temporal affairs," a prince may avenge his commonwealth's own injury.[146] In *De Legibus* Suarez distinguishes between *jus* (jurisdiction) and *imperium* (sovereignty); it is the latter, and not the former, that he identifies with the power of the magistrate to punish within the commonwealth. However, in his Disputation on War (published nine years after *De Legibus*), Suarez limits the right of punishment via just war to those with jurisdiction. This requirement, as we have seen, is meant to forestall the suggestion that punishment is a natural right. In considering the question of how a king can come to make law for another nation by winning a just war, Suarez attributes this capacity ultimately to the king's original domestic or civil authority. The "royal power" to make war "is simply a just extension (so to speak) of the power of his kingdom; so that such kingly power is always to be traced back to some individual who attained it, not through war, but through just election or the consent of the people." [147] Though princes and kings cannot be said to have the power to make law in the interstate sphere, their right to make war is identified with

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[142] Suarez, *De Legibus*, 370.
[143] Suarez, *De Legibus*, 370.
[144] Suarez, *De Legibus*, 370.
[145] Suarez, *De Legibus*, 370.
[146] Suarez, "On War," 806.
[147] Suarez, *De Legibus*, 386.

the royal power that is of divine origin. Thus, *merum imperium* and jurisdiction are linked in the international context by the requirement that an individual have the latter, as a status, as a precondition to gaining the right (through the *ius gentium*) to exercise the former. Though princes and kings cannot be said to have the power to make law in the interstate sphere, their right to make war is identified with the royal power that is of divine origin.

Notably, this distinction between political authority and the right to political violence was not unique to Suarez. Jean Bodin, who is generally credited with the first articulation of the contemporary meaning of sovereignty as the supreme power under which a political community was unified, shared it as well.[148] The first and essential marque of *souveraineté*, according to Bodin's *Six Livres*,[149] was the power of command, that is, to "give law to all in general and each in particular."[150] But, as Julian Franklin points out, Bodin specifically rejected the suggestion (made by Italian humanist Andrea Alciato) that the *merum imperium* was simply a delegation of princely authority and not a separate power.[151] Instead, Bodin like Suarez drew on the Justinian code, and Ulpian's identification of the *ius gladii* with *merum imperium*, to distinguish this power over life and death from legislative capacity. It was a question of some significance for Bodin whether "the power of the sword (which the law calleth *merum imperium*, or mere power) be proper unto the sovereign prince, and inseparable from them…or that such power is also common unto the Magistrate, to whom the prince hath communicated the same."[152] It is, Bodin concludes, the latter. *Merum imperium* was, for Bodin, specifically a power over life and not necessarily one of political command or authority. This *imperium* could be possessed by relatively minor political or legal authorities, including those responsible for military discipline as well as those with discretion to judge capital crimes.[153] The giving of punishment or reward "itself is not a mark of sovereignty" because magistrates and captains may also do so.[154]

For Hobbes and Locke, however, unifying the power over life and death in a single sovereign entity *was* the project of forming the commonwealth. As Annabel Brett has argued, the

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[148] Annabel Brett challenges this perception somewhat, arguing that the German Calvinist Johannes Althusius, like his monarchomach contemporaries, located the unifying force of the commonwealth in the command of a ruler, the "superior *imperium* rather than the *potestas* of the scholastic," even as the *civitas*, or moral body of the state retained its *potestas*, or power of retraction. (Brett, *Changes of State*, 130-31.)

[149] Although not in Bodin's discussion of sovereignty in the earlier *Methodus ad facilem historiarum cognitionem*, Parisiis, apud Martinum Juvenem, 1566.

[150] Bodin, Jean. *On Sovereignty*. Edited by Julius H. Franklin, Cambridge University Press, 1992, at 51-56.

[151] Franklin, Julian, "Introduction." Bodin, Jean. *On Sovereignty*. Edited by Julian H. Franklin, Cambridge University Press, 1992.

[152] Bodin, Jean, *The Six Bookes of a Commonweale.* 1606. Anonymous translation, edited by Kenneth Douglas McRae, Harvard University Press, 1962, 327. (This edition is from an anonymous English translation published in 1606; the original *Les Six Livres de la République* was published in 1576.)

[153] "In like manner the Constable of France by his letters of commission has not the power of the sword, or of life and death granted unto him: but having the managing of the wars, and conducting of the armies, as in his absence the Marshals of France have: the power of the sword is also left unto them, as without which military discipline cannot possibly be maintained: which martial power the simple captains abused also, putting their soldiers to death, without any form or fashion of just trial." (Bodin, *Six Bookes*, 332.)

[154] Bodin, *Six Bookes*, 56.

"revolutionary strength" of Hobbes's conception of the state is the power of the social contract to "create the power without creating the body," that is, to create an artificial unity that exists *because* of this power of command rather than giving rise to that power.[155] The *ius gladii* is no longer an emergent or diffuse power viewed as a necessary corollary to political authority, or a divine right shared with kings but becomes is both the mark of human equality in the state of nature and constitutive of political authority itself.

Grotius is a transitional figure in this respect. Grotius offers a secular account of the *ius gladii* in two senses: First, at least according to some readers, rejected a divine basis for natural law and instead founded the *ius naturale* in human psychology. Richard Tuck emphasizes Grotius's remark in the introduction to *De Jure Belli* that such natural laws would hold "even if God did not exist."[156] At stake in Tuck's interpretation is whether we can see in Grotius's work a forerunner of Hobbes's reliance on an empirical account on human self-interest to build a political theory of the statea.[157] Grotius's account of the *ius gladii* is secular in a second sense. Grotius conceived of the problem of punishment as one of justifying violence between humans, not of the human assumption of a divine power. This move to ground the right to punish in human nature, rather than divine authorization by way of the commonwealth, also solves what was for the Scholastics a major problem of justifying war outside of a state's political jurisdiction. If the right to punish is a general permission, then the problem of political obligation is not justifying punishment but limiting it to certain duly appointed authorities. By approaching the *ius gladii* in terms of permission, rather than authorization, Grotius begins a fundamental shift in how political theorists approach the problem of political violence more generally: Not as a right to be understood or explicated in terms of man's relationship to God, but against other humans—and thus, as a problem of how some, and not others, come to possess this right.

Grotius initially addresses the problem of the *ius gladii* as a theological one, that is, he is concerned with the apparent incommensurability of a human right to kill with divine law. Grotius begins *De jure belli ac pacis* (Chapter 2 of Book I) with the question as to whether it is ever lawful to make war. The first objection he considers against the conclusion that yes, it is, is that God prohibits killing in Genesis.[158] In moving so quickly from the problem of war to that of justified killing more generally, and in taking up a series of counterarguments derived from theological texts, Grotius frames the problem as a theological one. Unlike Vitoria or Suarez, however, Grotius does not view the problem as how man comes to possess that which is uniquely divine; the key Biblical citation is not God's claim of an exclusive right to punish (Romans xii) as for Suarez, but God's *prohibition* that men do so. The solution is thus not a story about how man comes to possess a divine right—through the natural necessity of a commonwealth—but an implicit caveat to the prohibition: "For the forbidding to shed Blood, reaches no further than that in the Law, *Thou shalt not kill*; which neither disproves Capital

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[155] Brett, *Changes of State*, 138-41.

[156] Tuck, "Grotius, Carneades, and Hobbes," 94-97.

[157] *See, e.g.*, Shaver, Robert. "Grotius on Scepticism and Self-Interest." *Grotius, Pufendorf, and Modern Natural Law.* Edited by Knud Haakonssen, Ashgate Dartmouth, 1999, pp. 63-80. Shaver argues that Tuck overemphasizes self-interest and underemphasizes the role of natural sociability in Grotius's natural law account and that seventeenth and eighteenth century readers did not see in Grotius's account, as does Tuck, the sort of skepticism that is later clear in Hobbes's work.

[158] Grotius, *Rights of War and Peace*, vol. 1, 190.

Punishments inflicted on Criminals, nor Wars undertaken by publick Authority."[159] Moreover, this divine law is a renewal and restatement of the law of nature, which prohibits only "the premeditated killing of an innocent Person."[160] Right reason and natural law only prohibit violence that "invades another's right."[161] But a murderer has lost the right not to be killed; like Cain, he "should suffer himself as much Evil, as he has caused (to others)."[162] God's initial prohibition against killing murder was purely pragmatic in nature; following the Flood God "put Men in Possession of their natural Right" to kill those who have killed.[163] Even as Grotius ostensibly follows Suarez in foregrounding Biblical prohibitions on killing as hurdles to justifying war, he immediately subverts this framing. The Biblical law is a restatement of a natural law grounded in subjective right, and—even more strikingly—God's apparent authorization of capital punishment by men is a *restoration* of their natural right.

In the earlier *De Iure Praedae*, as Mark Somos has noted, Grotius had addressed the problem of capital punishment is addressed in even more secular terms. There, as in *De Iure Belli ac Pacis*, Grotius quotes the same passage from Genesis ("Whoso sheddeth man's blood, by man shall his blood be shed") to support the proposition that punishment is a necessary consequence of wrongdoing. However, he leaves out of the final clause: "for in the image of God made he man."[164] The omission is a strategic one, argues Somos; "in the next sentence" Grotius states that the retributive law "is subordinate to another, also laid down in Gen. 9, which 'delivers beasts into man's service' and begins to discuss the idea that wicked men are 'stripped, as it were, of all likeness to God or humanity.' Grotius practically cites the other half of the biblical verse in a context that gives it the opposite meaning." Rather than acting as a minister from God, that is, in his image, the possessor of the *ius gladii* now acts in "man's service." Somos argues Grotius misquoted Genesis 9.6 "for a purposefully secularizing purpose," namely, grounding man's right to punish in self-interest and the necessity of dealing with wicked men instead of a divine authorization that "would become open to every theological debate." Whereas the original Biblical quotation, as interpolated by Suarez, identified the right to shed blood with a divine power, Grotius instead views the right of shedding blood as an exercise of self-interest made both necessary and permissible by the *loss* of status of the wrongdoer. It is this loss in status that I explore in greater depth in the next two chapters.

For now, I aim only to elucidate the not-very-surprising conclusion that Hobbes and Locke, like Grotius, viewed the *ius gladii* as a human rather than divine power, and viewed it as the basis, rather than an attribute, of sovereignty. (I discuss the two English theorists' account of the right to punish in much greater detail in the next chapter.)

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[159] Grotius, *Rights of War and Peace*, 190. Capital punishment, moreover, is the *only* exception to this prohibition on killing: "But no Masters, (if we judge by the Rules of full and compleat Justice, or before the Tribunal of Conscience) have the Power of Life and Death over their Slaves: Nor can one Man have any Right to kill another, unless he has committed some capital Crime." (Grotius, *Rights of War and Peace*, 558.)

[160] Grotius, *Rights of War and Peace*, 190.

[161] Grotius, *Rights of War and Peace*, vol. 1, 184.

[162] Grotius, *Rights of War and Peace*, 191.

[163] Grotius, *Rights of War and Peace*, 192-93.

[164] Somos, Mark. "Secularization in *De Iure Praedae.*" *Property, Piracy, and Punishment*. Edited by Hans Blom, Brill, 2009, at 182. In *De Jure ac Pacis*, Grotius *does* quote "for in the Image of GOD made he man."

Hobbes is at great pains to rebut the Aristotelian thesis that humans, like bees and ants, are naturally social.[165] It is human (material, not moral) equality which makes "the life of man solitary, poor, nasty, brutish, and short," because where men are equally powerful, they are equally willing to seek dominion over others and take what they wish.[166] Human equality is both explicitly a problem inasmuch as it makes peaceable living impossible and *implicitly* a problem as the rule of some over others is not natural but must be justified in the absence of either natural inequality or a natural impulse toward community. Moreover, there is nothing intrinsically wrong with this condition; violence is "no Sin" where it does not violate any law.[167] Creating the commonwealth consists of finding a way to unify this violence in a single person or institution—the sovereign. In *De Cive* Hobbes describes the foundation of the commonwealth as follows:

> Thus the security of individuals, and consequently the common peace, *necessarily* require that the *right* of using the *sword* to punish be transferred to some man or some assembly; that man or that assembly therefore is necessarily understood to hold *sovereign power* (*summum imperium*) in the commonwealth by right. For whoever has the right to inflict penalties at his discretion, has the right to compel anyone to do anything he wants.[168]

It is not simply that political authority is the product of a transfer of previously individual rights—a move that is made more clearly elsewhere—but that the characteristic unity of the commonwealth is this right to kill. "Mere command" (*merum imperium*), has become united in the "supreme command" (*summum imperium*). In *Leviathan* this account is modified by Hobbes's new theory of representation, and Hobbes no longer speaks explicitly of the right of the sword in his account of the formation of the commonwealth.[169] The "real unity" of the commonwealth is established by every individual "confer[ring] all [his] power and strength upon one man, or upon one assembly of men" along with his "right of governing myself."[170]

The power to make war outside the commonwealth, like the power to kill within it, is also an agglomeration of individuals' powers. There is a shift from *The Elements* to *De Cive* in how Hobbes describes the relationship between the "sword of war"—the authority to direct citizens in the defense of the commonwealth[171]—and the sword of justice (or *ius gladii*). In *The Elements,* the *ius gladii* is the (logically) prior right: It is because the strength of individual citizens has

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[165] Hobbes, Thomas. *Leviathan*. Edited by Edwin Curley, Hackett, 1994, at II.xvii.6-12.

[166] Hobbes, *Leviathan*, I.xiii.

[167] Hobbes, *Leviathan*, I.xiii.10.

[168] Hobbes, Thomas. *On the Citizen.* Edited and translated by Richard Tuck, Cambridge University Press, 1998, at vi.6.

[169] *See* Chapter 2 of Pitkin, Hanna. *The Concept of Representation*. University of California Press, 1967.

[170] Hobbes, *Leviathan*, II.xvii.13.

[171] The "sword of war" is not *just* the right to attack those who one understands as a threat to one's well-being, but specifically the right to mount an organized defense of a collective entity—the commonwealth. "The right of war" is a consequence of the basic natural right of self-defense and applies to all persons inasmuch as they are not in a contractual relationship with others. "The sword of war" is a specifically political capacity that presupposes the existence of a commonwealth whose well-being is at stake. While Hobbes famously identified the condition of sovereign states to that of individuals in the state of nature (and thus in the international context the sword of war with the natural right of all against all), the sword of war is characterized as a right of first, self-defense, and second, as necessarily invoking the strength and obligation of individual citizens.

already been invested in the man who has the sword of justice that this same person should hold the sword of war as well. On Hobbes's description, the formation of the commonwealth is first driven by the need for internal peace, but because defense from external enemies is equally necessary to the citizens' security, the civil covenant is understood to include a requirement that individuals "contribute their several forces for the defense of the whole."[172] Hobbes continues: "Now seeing that every man hath already transferred the use of his strength to him or them, that have the sword of justice; it followeth that the power of defense, that is to say the sword of war, be in the same hands wherein is the sword of justice: and consequently those two swords are but one, and that inseparable and essentially annexed to the sovereign power."[173] In *The Elements*, it is the fact that one individual (the sovereign) *already* has the right to deploy the strength of individual citizens in the context of keeping internal peace that gives that same individual the right to use that strength against external enemies. Individuals cannot transfer their strength twice, so the same person has the right to direct this strength in whatever contexts it may be necessary.

The reader receives a slightly different but commensurate explanation of this association between the two swords in Hobbes's later works. In both *De Cive* and *Leviathan*, the right of punishment is listed separately from the right of war in Hobbes's catalogue of the rights of sovereignty.[174] In *De Cive* the two rights are linked logically: The ability of the sovereign to muster a defense of the commonwealth depends on his ability to threaten those who refuse cooperation; without the capacity to punish those who refuse to go to war, a sovereign's orders (in war as in anything else) are meaningless.[175] Although Hobbes's sees the two distinct functions as tied, they are not *a priori* identified as in *The Elements*. Nevertheless, it is the threat of death, and its necessity to producing political unity, that characterizes both the authority to make war on behalf of the commonwealth and the authority to punish wayward members.

Locke also begins his account of the commonwealth from "a State…of Equality," and explicitly grounds the existence of political society in the right to punish.[176] "[T]here is only *political society,*" he states in the *Second Treatise*, "where every one of the members hath quitted this natural power [to punish], resigned it up into the hands of the community."[177] Where for Hobbes the natural right individuals grant the commonwealth is purely self-interest, for Locke it is explicitly the *ius gladii*, inherent in all individuals (Locke's "strange doctrine"), that *constitutes* political authority. Not simply the right of the commonwealth to use force against its own members, but the commonwealth's legislative authority, is a function of this collective authorization of the individual capacity to judge and punish offenses.

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[172] Hobbes, Thomas. *The Elements of Law Natural and Politic*. Edited and translated by J.C.A. Gaskin, Oxford University Press, 1994, at XX.8.

[173] Hobbes, *The Elements*, XX.8.

[174] The "right of making war and peace" is the ninth power listed and that of punishment and reward (again considered part of the same power) is eleventh in Chapter XVIII of *Leviathan*. The right of general judgment as to what tends to peace and defense, both internal and external, is listed as part of the fifth right (not to be punished by one's own subjects) but Hobbes's marginal summaries suggest that this general right of determining what will maintain order and acting on it constitutes the sixth right of sovereigns.

[175] Hobbes, *On the Citizen*, VI.5-7.

[176] Locke, John. *Two Treatises of Government*. Edited by Peter Laslett, Cambridge University Press, 1988, *Second Treatise*, § 4.

[177] Locke*, Second Treatise*, § 87.

> But though every man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offenses, against the law of nature, in prosecution of his own private judgment, yet with the judgment of offenses…he has he has given a right to the common-wealth to employ his force, for the execution of the judgments of the common-wealth…And herein we have the original of the *legislative* and *executive power* of civil society.

Though Locke will go in the *Second Treatise* to argue that the legislative and executive powers ought to be kept separate in the commonwealth to avoid the danger of the executor becoming the judge in his own case,[178] the origin of both powers is the same natural power to punish.

Although in the *Second Treatise*, written to justify resistance against the king, Locke emphasizes the dangers of co-locating the executive and legislative power, in his earlier writings Locke identifies punishment with lawmaking. In his 1676 text, *The Obligation of Penal Laws*, Locke asserts, "[A]ll human laws are penal, for where the penalty is not expressed, it is by the judge to be proportioned to the consequence and circumstances of the fault…. Penalties are so necessary to civil laws, that God found it necessary to annex them even to the civil laws he gave the Jews."[179] In an unpublished manuscript from 1674 on the ecclesiastical and civil laws, Locke wrote "The means to procure obedience to the laws of this society, and thereby preserve it, is force or punishment; i.e. the abridgement of anyone's share of the good things of the world within the reach of the society, and sometimes a total deprivation, as in capital punishments. And this, I think, is the whole end, latitude, and extent of civil power and society."[180] In his earlier writings on toleration, where Locke was concerned to distinguish political authority from religious authority, it is the *ius gladii*, the power to inflict harm on individuals in accordance with human-made law, that characterizes the distinct domain of civil society.

Although the "state of war" plays an important analytical role in Locke's construction of the commonwealth and defense of revolution, there are only two brief discussions of the *power* to make war and peace in the *Second Treatise*. It is by each member giving up his "natural Power" to "punish the breaches of that Law in others, as he is perswaded the Offence deserves, even with Death itself," that the Lockean commonwealth is formed.[181] This Power is the source of both the commonwealth's power "to punish any Injury done unto any of its Members by any one that is not of it, (which is the power of War and Peace)," and the "right [of] the Commonwealth to imploy [a member's] force, for the Execution of the Judgments of the Commonwealth."[182] The "power of War and Peace" has again become the right to *punish* those outside of the commonwealth, and has the same source—the unified, natural power of individual members—as the power to punish internally. Locke focuses not on the universal power to punish wrongdoing as such (which all men possessed in the state of nature), but the need of the state to protect its individual members from external threats.

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[178] "For he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, no appeal lies open to any one, who may fairly, and indifferently, and with authority decide, and from whose decision relief and redress may be expected of any injury or inconviency, that may be suffered from the prince." (Locke*, Second Treatise*, Ch. VII § 91.)

[179] Locke, *Political Essays*, 237.

[180] Locke, "Of the difference between civil and ecclesiastical power" MS Locke, c. 27, fo. 29, *Political Essays*, 217.

[181] Locke, *Second Treatise*, § 87.

[182] Locke, *Second Treatise*, § 88.

In Chapter XII, Locke describes the "*Federative*" power (though he is "indifferent as to the Name"), which includes the power to conduct international relations more broadly, including the power of war and peace.[183] This power is "natural, because it is that which answers to the Power every Man naturally had before he entered into Society." The whole commonwealth, according to Locke, acts as "one Body in the State of Nature" with respect to all states and persons outside the commonwealth. Conflicts between one member and a non-member are therefore managed by society as a whole.[184] This Federative power is distinct from the Executive power, because the Executive is limited to the effectuation of the civil laws, which are determined by the Legislative Power, whereas the Federative is guided by "Prudence and Wisdom."[185] But because both require the "the force of the Society for their exercise," it is almost always a practical necessity that they be held by the same persons. For wrongs committed against members by outsiders, however, Locke states that "an injury done to one member of their body, engages the whole *in reparation* of it."[186] The right to seek reparation is distinct from the right to punish and, unlike the right to punish (which is possessed universally), held only by the individual who is injured.

Locke, unlike Hobbes, does not have an account of representation to explain this unity, or an account of sovereignty whereby a single person's right of self-defense comes to stand in for the commonwealth in its entirety. Where for the Scholastics, this metaphysical unity of the political body was crucial to justifying political violence, Locke dispenses with the problem in less than a sentence: "[I]n reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind."[187] The injuries giving rise to international war are not injuries to the commonwealth but "between any man of that society with those that are out of it."[188] Locke views war, like civil punishment, as a coordination problem. Just as individuals got *into* the commonwealth because a single authority was required to resolve the inconveniences of each man acting as a judge in his own case, so is the outward-facing Federative power grounded in the commonwealth's role as a coordinating power for individual members' conflicts with the outside.

To be sure, theological concern with the *ius gladii* persisted well into the seventeenth century among Hobbes's and Locke's contemporaries. Locke himself was agnostic about the origins of political power in his earlier texts on toleration. In the *Second Tract on Government* (published in 1662), which addressed whether civil government could mandate certain "indifferent" religious practices, Locke identified three possible accounts of the origin of the state: First, men might be born into subjection to their fathers; second, men "enjoy a right to equal liberty" but may form a union if "every individual surrenders the whole of this natural liberty of his…to the legislator"; and third, authority may come directly from God through the "nomination and appointment of the person bearing that power is thought to be made by the people."[189] Locke "offer[ed] no conclusion about these theories," only observing that "God wished there to be order, society, and government among men." [190] Dudley Digges, although a

[183] Locke, *Second Treatise*, § 145.
[184] Locke, *Second Treatise*, § 145.
[185] Locke, *Second Treatise*, § 147.
[186] Locke, *Second Treatise*, § 145.
[187] Locke, *Second Treatise*, § 145.
[188] Locke, *Second Treatise*, § 145.
[189] Locke, *Second Tract on Government*, *Political Writings*, 70.
[190] Locke, *Second Tract on Government*, *Political Writings*, 70.

sympathetic reader of Hobbes, rehearsed with admirable efficiency an argument for absolute kingship on the basis of the divine exclusivity of this right in his own defense of Charles's rule:

> It was not possible for any man to give away a greater right over his owne life then hee had, *Nemo plus juris ad alium transferre potest, auam ipse habet*; and hee had nothing to doe in the disposall of any others, and therefore except killing a mans selfe bee lawfull, the people cannot enable the Magistrate to take away their lives…Because *ius gladii* (to beare the sword innocently, and to cut off offenders without deserving greater punishment then they inflict by transgressing against Gods known will...Vengeance is mine, I will repay saith the Lord) must referre to God as the author. Magistrates are God's Delegates, and not the peoples; God's ministers, his revengers [sic].[191]

English political writers throughout the seventeenth century would continue to invoke Romans 12.19 ("Vengeance is mine…"), and the divine character of the *ius gladii* as evidence of the divine nature of political rule and against claims that political power originated in the will of the governed.

The force of this claim in the debates of the English Civil War, however, depended on an equation of the *ius gladii* with the power to rule more generally. Implicit in Digges's argument quoted above is the centrality of the *ius gladii* to political rule. Indeed, earlier in the same text Digges gives an account of the origins of political authority that closely resembles Grotius's: "For whilest everyone had a right to all, no body could with safety make use of anything; since when some would take to themselves what others delighted in, their desires and right being equall; there was no title but that of greater force…."[192]

It is striking just how widely adopted this basic framework is among the various sides of the Civil War debates.[193] For example, Milton, a Parliamentarian deeply opposed to Charles I's rule, locates the origins of political authority in the power of individuals to do violence for the sake of their own self-preservation:

> This authority and power of self-defense and preservation being originally and naturally in every one of them, and unitedly in them all, for ease, for order, and lest each man should be his own partial Judge, they communicated and deriv'd either to one, whom for the eminence of his wisdom and integrity they chose about the rest, or to more than one whom they thought of equal deserving…to execute, by virtue of their entrusted power, that justice which else every man by the bond of nature and of Covenant must have executed for himself, and for one another. [194]

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[191] Digges, Dudley. *The unlawfulnesse of subjects taking up armes against their soveraigne, in what case soever*. London, 1644, at 34.

[192] Digges, *The unlawfulness of subjects*, 3.

[193] That is not to say it was universal. George Lawson, in *Politica Sacra et Civilis* (initially published in 1660 and republished in 1689) offers an Aristotelian account of the commonwealth similar to that of Suarez or Vitoria: The commonwealth has a natural source in man's sociability and need for economic exchange. Political authority is a *potestas*, derived from God, and is a right *to* imperium, or command, which acts on the will and is distinguished from the "coactive force" to effectuate it. Lawson, George. *Politica Sacra et Civilis*. Edited by Conal Condren, Cambridge University Press, 1992, at 28, 43-44.

[194] Milton, John, *The Tenure of Kings and Magistrates*. London, Matthew Simmons, 1649, 8-9.

Milton was dismissive of the notion that political legitimacy could be attributed to a divine power to punish. A tyrant may be called a "Magistrate" in the limited sense that "he has Power in his hands, which perhaps God may have invested him with for punishment," but by this standard, "the Devil may be called a Magistrate."[195] There is, of course, much variation in *how* a king comes to possess this power and the consequences of this origin story for the present political crisis. But by the 1640s political thinkers of starkly different ideological positions and allegiances in the ongoing civil war shared the presumption that singular executive power is not necessary because the commonwealth is divinely ordained, but rather is the practical *precondition* of political unity and authority. The problem is how the horizontal use of violence becomes not just permissible, but binding; as Samuel Rutherford put it in 1644, nature "doth not teach a man, nor incline his spirit to yield that his life shall be taken away by the sword."[196] But it is the sword that is increasingly characteristic of political power or such.

VI. Conclusion

As I hope this lengthy exegesis has demonstrated, several radically different views of the relationship between civil punishment and just war were in circulation in the early seventeenth century. Vitoria and Suarez, writing from within a Thomist or Scholastic tradition, viewed military violence as a form of punishment, carried out by one who had jurisdiction in virtue of an international community, and punishment (civil or otherwise) as a naturally necessary power of a divinely-mandated commonwealth. Gentili and Grotius rejected this Aristotelian notion of the commonwealth and instead posited an order-less, authority-less realm (international for Gentili, pre-political for Grotius), from which the authority to punish had to be derived, but the right of self-defense, including via war, was inherent. For Gentili, war (though it could be done *to* punish) took on the opposite relationship to authority as Vitoria and Suarez: To make war was to acknowledge the lack of shared authority with one's opponent rather than to, on the presumption of shared membership in an international community, act *as* the enforcer of that community's laws. Grotius, although sharing Gentili's view of justified violence as a subjective right, instead grounded all such violence in a natural right to punish that emerged not from a political community but human character.

A second major difference in the understanding of punishment among natural rights theorists hinged on Grotius's innovation. For Suarez and Vitoria (and even some of their humanist contemporaries, such as Bodin), punishment was understood as a problem of theology and as analytically distinct from the power to make law for others. Grotius, while still posing the problem of justifying the *ius gladii* in theological terms, asserted that it is a *human*, rather than divine power. He also gestured at an account of political authority as grounded in the transfer or collectivization of a right to punish or *ius gladii*. For both Hobbes and Locke, the natural right of individuals to do violence to one another *is* the core right held by the sovereign and the problem of establishing sovereignty is accounting for how some individuals come to have (or retain) the power of blameless violence over others. What once was basically a power to execute, derived from Roman authority at the margins of empire, came to be characterized as central concept and foundation of political authority.

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[195] Milton, John, *A Defence of the People of England; in answer to Salmasius's Defence of the King*. 1651. Translated by Joseph Washington. Amsterdam?, s.n., 1692, at 68.

[196] Rutherford, Samuel. *Lex, Rex*. 1644. Edinburg, Robert Ogle and Oliver & Boyd, 1843, at 3.

The next chapter explores how Hobbes and Locke, the two leading English natural law theorists of the seventeenth century, grappled with the problem of punishment in their respective social contract-based states. If Suarez and Vitoria viewed war as a form of punishment carried out between states, as I have argued here, Hobbes and Locke ultimately viewed punishment as a form of war within the state.

Chapter Two: Hobbes, Locke, and Punishment as War

I. Introduction

Suarez and Vitoria viewed political membership as a precondition of punishment; where a civil political order did not exist, they hypothesized an international humanitarian order to justify war as a form of punishment. In this chapter, I examine the nature of "punishment" and its relationship to "war" in Hobbes's and Locke's account of the commonwealth. I argue that Hobbes's account of the state reveals a tension between an ontological account of the state that identifies the grounds of membership in obedience, and an account of punishment that attempts to delimit the exercise of sovereign power in accordance with *civil* law.

Hobbes's three major political theoretical texts, *Elements of Law*, *De Cive*, and *Leviathan*, contain two accounts of punishment. On the one hand, Hobbes characterizes criminal punishment in both *De Cive* and the master metaphor of *Leviathan* as a regulatory function of the state. Punishment is distinct from the existential crisis of rebellion or war; it is a normal, indeed necessary, means of producing the social order. Hobbes was at pains to set forth legalistic norms governing punishment and was clear that sovereign violence that did not respect these norms was not punishment at all but hostility and, in *De Cive*, a violation of the natural law. In the same texts, however, when Hobbes addresses the problem of *justifying* punitive violence by the sovereign, he relies not on the sovereign's regulatory power, or any emergent quality of political authority, but on the natural right of all against all. Framed as a bilateral relation between sovereign and wrongdoer, punishment appears to be a return to the state of nature. The difficulty in reconciling these two accounts is evident in what I argue are Hobbes's unsuccessful efforts to analytically distinguish ordinary crimes from treason or rebellion. Hobbes clearly does not think of criminals as enemies of the commonwealth, but the logic of his justification of punishment makes them so—and puts them outside the *horizontal* social bounds of the commonwealth altogether. That Locke's *Second Treatise*—which incorporates a much thicker account of natural law and endorses a natural right to punish—shares this failure to distinguish punishment from war, suggests this duality is a characteristic of English contractualist or natural law theories of the state more generally, and not Hobbes's absolutism.

II. Punishment as a System of Deterrence

What I term Hobbes's "regulatory" account describes punishment as a political function of the commonwealth, with limits determined by this purpose of maintenance of civil order. This account is exemplified in two places in *Leviathan*: First, in its opening metaphor and the identification of "punishment and rewards" with the civil body's nervous system, and second, in Chapter 28, where Hobbes differentiates punishment from hostility.

In the master-metaphor of *Leviathan,* Hobbes analogizes "*reward* and *punishment*" to the nerves of the body politic. By reward and punishment "fastened to the seat of the sovereignty every joint and member is moved to perform his duty."[1] Punishment in this analogy, is the application of force to various parts of the body. Anchoring and giving form to these movements are joints, magistrates and judicial officials. At the time of *Leviathan*'s composition, the

[1] Hobbes, Thomas. *Leviathan*. 1651. Hackett, 1994, at Introduction, §1.

predominant view of the nervous system transmitted pressure or tension rather than electrical impulse.[2] By the mid-seventeenth century English anatomists and natural philosophers had largely rejected the Aristotelian view of the nervous system as linked to the heart, rather than the brain, and unconnected with human perception.[3] Drawing from William Harvey's study of circulation, natural philosophers increasingly viewed the nervous system in hydraulic terms. At the time Hobbes wrote *Leviathan* the dominant view among English natural philosophers was that the brain operated as a kind of bellows, pushing and pulling "vital spirits" that might be described as a fluid, an ether, or a fire.[4] Punishment and reward were not, on this analogy, a signal but a kind of substance that operated by means of pressure or tension on the mechanical parts of the body.

The nature of this relation between the soul (which Hobbes analogizes to sovereignty) and the nervous system was a matter of significant debate. Pierre Gassendi, whose work Hobbes read during his time with the Mersenne group in 1634-37, and with whom Hobbes later became close friends while in exile in Paris, theorized two souls: a sensitive and a rational. The latter only belongs to humans; the former is located in the nervous system and directs animal movements.[5] Descartes, another member of the Mersenne group, denied the existence of a sensitive soul, instead characterizing animals as living machines. Hobbes, an intellectual ally of Gassendi against Descartes in other contexts,[6] can be read to adopt Gassendi's position here, as the nervous system of the Leviathan could be "fastened" to a sensitive soul that operated on the body.

On this analogy, punishment is a force exercised in the normal operation of the body. "A punishment is an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience."[7] Significantly, punishment and reward are treated as counterparts which serve the same function. Later in *Leviathan* Hobbes will also link punishment and reward in enumerating the rights of the sovereign, committing to the sovereign

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[2] The latter half of the seventeenth century—well after *Leviathan*'s publication—would see major innovations in the anatomical understanding of the nervous system, between Newton's rejection of the Cartesian pressure model in favor of a vibration model of nervous transmission that linked the mind to the body via electrical impulse, and Thomas Willis's empirical observations. *See* Wallace, Wes. "The vibrating nerve impulse in Newton, Willis, and Gassendi: First steps in a mechanical theory of communication," *Brain and Cognition*, Vol. 51, No. 1, 2003, pp. 66-94.

[3] Knoeff, Rina. "The Reins of the Soul: The Centrality of the Intercostal Nerves to the Neurology of Thomas Willis and to Samuel Parker's Theology," *Journal of the History of Medicine and Allied Sceinces*, Vol. 59, No. 3, July 2004, pp. 413-440, at 418.

[4] Cole, Lucinda. *Imperfect Creatures: Vermin, Literature, & the Science of Life, 1600-1740*. University of Michigan Press, 2016, at 87; *see also* Jaynes, Julian. "The Problem of Animate Motion in the Seventeenth Century." *Journal of the History of Ideas*, Vol. 31, No. 2, 1970, pp. 219-234; and Sarasohn, Lisa T. "Motion and Morality: Pierre Gassendi, Thomas Hobbes, and the Mechanical World-View." *Journal of the History of Ideas*, Vol. 46, No. 3, 1985, pp. 363-379.

[5] *See* Knoeff at 424, Bynum, W.F. "The Anatomical Method, Natural Theology, and Functions of the Brain." *Isis*, Vol. 64, No. 4, 1973, pp. 444-468, at 459.

[6] *See* Sarasohn 370.

[7] Hobbes, *Leviathan*, II.xxvii. In the Latin edition of 1668, Hobbes describes punishment as "an evil inflicted on a transgressor of the law by public authority, to the end that the wills of the subjects may be conformed to obedience by fear of this evil."

"the power of rewarding with riches or honor, and of punishing with corporal or pecuniary punishment and ignominy."[8]

In emphasizing honor and ignominy, Hobbes here evinces some continuity with Bodin and Machiavelli, whose studies of political leadership emphasized managing the behavior (and ambition) of factions within the commonwealth. Bodin lists the power of punishment as a *marque* of sovereignty but takes up the topic at length only in the final book of *Six Libres.* There, he emphasizes not political authority or obligation, but the pragmatic problem of ensuring individual subjects are given their due, for better or worse.[9] Punishments and rewards were not an expression of the sovereign's power so much as goods, whose proper distribution was essential to the commonwealth's survival.[10] Grotius, too, at times discusses punishment and rewards as a means of inducing appropriate behavior.[11] Punishment is defined in each of these accounts not by its violent nature, or in terms of the subject's rights, but as one strategy among many for ensuring social control.

This is true of Hobbes's discussion of punishment in earlier texts, even when not explicitly linked to reward. Both *De Cive* and *Elements* contain passages that emphasize punishment as primarily a form of deterrence necessary to ensure social order. Punishment is significant because it is a means of deterrence and thus (when applied against others of course), a carrot by which individuals may be induced to give up their absolute right of self-defense in favor of the commonwealth. Successful deterrence "by the power of the sovereign" is, in the *Elements*, characteristic of "the estate of security." [12] Similarly, in *De Cive*, penalties, and not the agreement to form the social contract itself, provide the guarantor of social order under a sovereign.[13] The existence of sufficient force to threaten individuals who would break their promises or interfere with others' property makes commodious living within the commonwealth possible. Crucially, what enables punishment to serve this function is its effects on subjects who are threatened by is its *deterrent* capacity.

The choice of nerves as the analogy for punishment makes punishment both part of the normal operation of the body politic and a means of controlling parts of the body—that is, members. In contrast, Hobbes characterizes rebellions and other problems in *Leviathan* and *De*

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[8] Hobbes, *Leviathan*, II.xviii.14.

[9] Bodin, Jean, *The Six Bookes of a Commonweale.* 1606. Anonymous translation, edited by Kenneth Douglas McRae, Harvard University Press, 1962, Book VI, Chapter vi.

[10] Bodin, *Six Bookes*, 584-585.

[11] Grotius, Hugo. *Commentary on the Law of Prize and Booty*. Translated by Gwladys Williams, edited by Martine Julia van Ittersum, Liberty Fund, 2006, at 29-32.

[12] "The end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defense from those to whom he doth so relinquish it. And a man may then account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves." (Hobbes, Thomas. *The Elements of Law Natural and Politic*. Edited and translated by J.C.A. Gaskin, Oxford University Press, 1994, at XX.5.)

[13] Hobbes, Thomas. *On the Citizen.* Edited and translated by Richard Tuck, Cambridge University Press, 1998, at VI.4 ("Hence security is to be assured not by *agreements* but by *penalties*; and the assurance is adequate only when the penalties for particular wrongs have been set so high that the consequences of doing them are manifestly worse than of not doing them.").

Cive as "infirmities."[14] A faction is like a tumor, "a commonwealth within the commonwealth."[15] Opposition between civil and spiritual authority is like a wind "in the head that obstructeth the roots of the nerves and, moving them violently, taketh away the motion which naturally they should have from the power of the soul in the brain, and thereby causeth violent and irregular motions."[16] Monopolies are pleurisy, breeding an inflammation, an over-appetite for conquest is like bulimia, and the liberty of disputation is like an infection of worms.[17] That punishment is part of the normal operation of the commonwealth and not a response to disease suggests the criminal is not an existential threat to the commonwealth.

Hobbes does not discuss cures for the diseases he identifies in Chapter XXIX of *Leviathan*, focusing instead on threats that derive from the architecture of the state itself.[18] But metaphors of disease and excision were popular among his contemporaries. Parliamentarians and Royalists alike referred to struggles of the Civil War as kinds of disease.[19] As part of a series of responses to Royalist claims, Herbert Palmer took up the accusation that the Parliamentarians were setting the body of the English commonwealth against its head (the King)—an unnatural act "that tends to the dissolution of the Whole."[20] Palmer begins by insisting on the *dis*analogy between the human body and the body politic; as each individual member of the political body has reason of his own, citizens' actions "may be divided from their politic head, and yet be rational and regular." Yet Palmer returns to the bodily metaphor to suggest that Charles or his advisors were perhaps best compared to a toothache:

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[14] These infirmities "arise from an imperfect institution, and resemble the diseases of a natural body which proceed from a defectuous procreation." (Hobbes, *Leviathan*, II.xxix.2.) These doctrines "weaken or tend to the dissolution of a commonwealth." (Hobbes, *Leviathan*, II.xxix.)

[15] Hobbes, *On the Citizen*, XIII.13.

[16] Hobbes, *Leviathan*, II.xxix.16. This opposition is a problem precisely *because* it interferes with the ability of the soul "by the terror of punishment and hope of rewards" to control the behavior of subjects.

[17] Hobbes, *Leviathan*, II.xixx.20-22.

[18] Rebellion is listed among these conditions as the possible result of the great popularity of ambitious men, and in this context compared to "the effects of witchcraft." (Hobbes, *Leviathan*, II.xxix.20.)

[19] To cite two examples: Dudley Digges suggests that the current condition of England resembles that of a mostly healthy person who, by "tampering with the Body to reduce it to perfect health, hath overthrown many excellent constitutions, and such kind of physicke proves the most dangerous disease." (Digges, Dudley *The unlawfulnesse of subjects taking up armes against their soveraigne, in what case soever*. London, 1644, 19.) William Prynne invokes the medical profession but speaks of wounds, not disease: "They are *Tormentors*, not *Surgeons*, *Executioners*, not true *Soldiers*, who desire, endeavor not speedily to close up and heal their dearest country's bleeding, festering *wounds*; for which I have prepared this *Treatise*, as a *Sovereign Balm*." (Prynne, William, *The soveraigne povver of parliaments & kingdomes. Or Second part of the Treachery and disloialty of papists to their soveraignes*. London, J. D. Sparke, Senior, 1643, at 2.) James Harrington's identification of moral corruption (rather than faction) with disease in *A System of Politics* is an instructive contrast, as Harrington explicitly invokes Machiavelli and the republican tradition. While it is beyond the scope of this work to address the debates regarding the republican tendencies (or lack thereof) of the Roundheads and their supporters, it is worth noting that Hobbes, and his contemporaries, had alternative analogs of disease available to them when discussing the body politic. (*See* Harrington, James. *A System of Politics.* Edited by J.G.A. Pocock, 2012, at X.22.)

[20] Palmer, Herbert. *Scripture and reason pleaded for defensive arms*. London, John Bellamy and Ralph Smith, 1643.

> As the natural body may defend itself against outside force, so against the malignity of any disease, or pain in any member of the body, even resident in the very head, and so the hand may pull out a tooth, even for the painfulness of it, though seated in the very head, and perhaps one eye for some disease, thereby to save the other, and lance and cut the flesh, and even cut-off a limb, leg and arm, to stop a Gangrene, yet is this no making of a schism, or unnatural contention within itself.

Here the cure is not medicine, but extraction. Palmer relies on the same anatomical metaphor of Hobbes to argue for the necessity of *internal* violence to preserve the body politic.

In a treatise originally published in 1549 in the context of Kett's rebellion, an anti-enclosure rebellion in Norfolk and re-published in 1641, Sir John Cheke advised that "order must be kept in the Commonwealth like health in the body."[21] Once distemper has spread, the nature of *punishment* itself must change: "Then must yee be contented to bide punishment without process, condemnation without witness, suspicion is then taken for judgment, and displeasure may be just cause of your execution, and so without favor you find straightness, which without rule seek violence."[22] Violence, ostensibly tied to punishment but operating without its normal rules, is the necessary but "desperate remed[y]" for the widespread deterioriation of order. [23] For Hobbes as for his contemporaries, metaphors of disease and cure were invoked to describe conditions of rebellion and civil war, not the ordinary processes of criminal justice.

Hobbes's lengthiest discussion of punishment in *Leviathan* is Chapter 28, entitled "Of Punishments and Rewards." Although here, as in the Introduction, punishment is linked with reward, "rewards" occupy a mere three paragraphs of the chapter. (This is a reversal from the similarly titled chapter of Bodin's *Six Libres*, which is almost entirely devoted to the discussion of rewards.) Chapter 28 is largely concerned with distinguishing punishment from hostility. In the state of nature, an individual, subjective assessment of danger is sufficient to merit violence. Punishment, however, requires a trial, i.e. a determination of wrongdoing in accordance with certain norms.[24] Violence directed against an alleged wrongdoer without trial is not punishment but "an hostile act [sic]."[25] Moreover, trial was to be by a jury selected by the defendant, and that jury was to be immune from punishment for a verdict that ran counter to the sovereign's wishes.[26] Unlike in the state of nature, where each person is the sole judge of the magnitude of danger against him and thus the necessity (or not) of violence, criminal punishment in the commonwealth required the concurrence of a group of citizens that violence was warranted against a particular defendant. Punishment cannot be *ex post facto*, nor can greater punishments

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[21] Cheke, John, Sir. *The true subject to the rebel, or, The hurt of sedition, how grievous it is to a common-wealth written by Sir John Cheeke…; whereuponto is newly added by way of preface a briefe discourse of those times, as they may relate to the present, with the author's life*. Republished by Langbaine, Gerard, 1641, at 45.

[22] Cheke 52.

[23] Cheke 52.

[24] Hobbes was an advocate for not just the jury trial, but of the right of juries to decide on matters of law as well as fact (a much more controversial position in his own time as in ours). *See* Andrew, Edward G. "Hobbes on Conscience within the Law and Without." *Canadian Journal of Political Science*, Vol. 32, No. 2, 1999, pp. 203-225.

[25] Hobbes, *Leviathan*, II.xxviii.5.

[26] *See* Andrew, "Hobbes on Conscience Within the Law and Without."

be imposed after the fact: "But when a penalty is either annexed to the crime in the law itself, or hath been usually inflicted in the like cases, there the delinquent is excused from a greater penalty."[27]

Punishment, in Chapter 28, is the infliction of violence, in accordance with legally prescribed penalties after a determination of guilt by one's peers, to alter behavior. Any harm inflicted by the sovereign that does not abide these rules is "hostility." Moreover, even if the harm is imposed in response to a violation of civil laws, after a duly conducted trial, if the amount of harm exceeds the quantity of punishment set forth by law punishment becomes "an act of hostility."[28]

"Hostility" is an expansive category. Any "hurt inflicted" by those not in public authority is hostility, because punishment is an act of authority.[29] Conversely, only those subject to an authority may be "punished" by that authority; violence against "declared enemies" is hostility:

> [H]arm inflicted upon one that is a declared enemy falls not under the name of punishment, because seeing they were either never subject to the law, and therefore cannot transgress it, or having been subject to it and professing to be no longer so, by consequence deny they can transgress it, all the harms that can be done them must be taken as acts of hostility.[30]

Notably, this passage shares with Suarez's and Vitoria's accounts of just war a precondition of membership for punishment, properly understood. However, where Vitoria and Suarez justified violence against "declared enem[ies]" as punishment for the violation of natural law, Hobbes contrasts punishment and hostility. Moreover, that the enemy is "declared," either because of his status (*pace* Gentili) or past violation of international law (*pace* Grotius) is not the crucial distinction. Rather, what matters is whether the enemy is subject to the laws he is accused of violating. Hostility is unlawful violence; it either goes beyond what is permitted by *civil* law or the violence that is itself ungoverned civil law.

Hobbes nowhere suggests that hostility is illegitimate, either generally in or specific cases. Hobbes is not saying punishment is justified and acts of hostility are not; the distinction is not a straightforwardly normative one. But the difference is nevertheless significant. According to Hobbes, debates about the true meanings of words were a major cause of the civil violence that Hobbes so feared. Hobbes offered a nominalist solution to this problem: The determination of what is right and what is wrong, Hobbes tells us, is an act of sovereignty. However arbitrary, this act of definition—and recognition of its legitimacy—forestalls, in Hobbes's account, the irresolvable controversies born of fundamentally different moral understandings. Despite their arbitrariness, names (and definitions) are enormously powerful; syllogistic deduction from such definitions (Hobbes's "scientific" method) would result in incontrovertible conclusions. However, this conventionalist account is complicated, as Hoekstra has pointed out, by both the role of the philosopher in assisting the sovereign in this task and the necessity of such definitions

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[27] Hobbes, *Leviathan*, II.xxvii.8.

[28] Hobbes, *Leviathan*, II.XXVIII.10.

[29] Hobbes, *Leviathan*, II.xxviii.12.

[30] Hobbes, *Leviathan*, II.XXVIII.13.

gaining "common use and consent." [31] Given this background, it is striking that a detailed and somewhat practical distinction between punishment and hostility is not left for the sovereign but made by Hobbes himself.

Hobbes, both in *Leviathan* and elsewhere, suggests the distinction between punishment and hostility is recognized in natural law. Hostility, as described in Chapter 28, is exactly that which is counterproductive or useless from the perspective of inducing lawful behavior. If evil inflicted on citizen does *not* serve the regulatory function punishment has within the commonwealth, it becomes hostility. This is evident from those aspects of "punishment" that Hobbes identifies as disqualifying it as such: if done "without intention or possibility of disposing the delinquent [or, by his example, other men] to obey the law" or if it exceeds the punishment determined by law and thus its deterrent capacities.[32] This understanding of punishment is consistent with Hobbes's position in his earlier major works. In *The Elements*, Hobbes argues that "all revenge should tend to amendment, either of the person offending, or of others, by the example of his punishment."[33] The legislator's will – and not just its application – should be directed by this forward-looking purpose. It is the legislator's mistake to fail to make punishment significant enough to deter crime in equation and criminals should not be punished for this mistake by being punished more than the law specifies.[34] Hobbes reiterates this reformative purpose of punishment in *De Cive*, but also invokes a notion of fairness to explain why any individual should not be punished beyond that set forth by law: "For the purpose of punishment is not to force a man's will to but to form it, and to make it what he who fixed the penalty desires it to be." [35] In *De Cive* Hobbes makes generalized deterrence the *only* permissible basis for punishment; the application of retributive justice (what Hobbes calls revenge) is called cruelty and violates the laws of nature.[36] Natural law requires that violence serve peace; violence that is not *civilly* lawful, i.e. not predictable for its objects and limited in who may carry it out, tends to undermine peace.

In the Introduction and Chapter 28 of *Leviathan* and Hobbes's earlier writings, Hobbes describes punishment as fundamentally regulatory and as serving a primarily deterrent purpose. Violence that does not serve this purpose—either because it is conducted without notice or fair procedure, undertaken by those without authority, or leveraged against non-citizens who have no reason to expect it—is hostility. However, while the sovereign ought to respect these limits in the interest of maintaining peace, subjects cannot have claims against the sovereign should he go too far. Natural law is to be understood as prudential or obligating only *in foro interno*, and to God. Hobbes is quite explicit and consistent on this point: Though natural law may oblige the sovereign vis-à-vis divine law, the citizens taken individual and collectively may never exercise jurisdiction over him, and the sovereign can never *injure* his citizens.[37]

III. Punishment as Self-Defense

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[31] Hoekstra, Kinch. "The End of Philosophy (The Case of Hobbes)" *Proceedings of the Aristotelian Society*, New Series, Vol. 106 (2006), pp. 25-62.

[32] Hobbes, *Leviathan*, II.xxviii.7, 10.

[33] Hobbes, *Elements*, XVI.10.

[34] Hobbes, *On the Citizen*, XIII.16.

[35] Hobbes, *On the Citizen*, XIII.16.

[36] Hobbes, *On the Citizen*, II.11.

[37] Hobbes, *Leviathan*, II.xviii.4.

Hobbes seems to say the following: The sovereign is authorized to do violence to criminals for the sake of maintaining peace; the threat of this violence will, for the most part, ensure people behave themselves—and thus forms the necessary framework for social cooperation. For those outside the commonwealth the sovereign and those individuals remain in a state of nature, and thus of war; any violence the sovereign representative subjectively feels is necessary to protect himself or the commonwealth may be carried out without ethical prejudice; this violence is termed "hostility." However, when we turn to Hobbes's efforts to *justify* punishment, and not simply define it, a very different account of punishment and its limits emerges. Punishment is the state of war continued; it *is* hostility.

Although the purpose of punishment may be deterrence, individuals have an obligation, and not merely an incentive, to obey the law. Laws, for Hobbes, are commands—and thus not conditional.[38] As Thomas White—whose *De Mundo* Hobbes wrote about in 1642—would argue in 1655, a conception of penal laws as a set of threats allows troublemakers to "teach disobedience to certain Laws, persuading us the Law-givers intention is indefinite, that either a man should do such a thing, or suffer a punishment if he be discovered to have committed the fault."[39] The Hobbesian subject may understand the penal law as structuring their incentives for behavior, but Hobbes did not just want to convince his readers that obedience to the sovereign is in their self-interest, but to establish that men have an *obligation* to obey. Political obligation and punishment for the transgression thereof must therefore be justified with reference to this political authority.

The commonwealth is produced, according to Hobbes, when each individual agrees with every other to "confer all their power and strength upon one man…[and] reduce all their wills, by plurality of voices, unto one will."[40] Mandating our participation in this contract is the law of nature, which requires us to seek peace as the only means by which we can escape a natural condition of anarchy and danger. This general dictate to seek political membership when possible, however, is not the basis of our obligation to obey a specific sovereign or the civil law of a specific commonwealth. This obligation is the result of our voluntary agreement, a contract we have made with either our fellow citizens (in the case of a commonwealth by institution) or by an implicit contract with a sovereign who offers to stay his hand in exchange for obedience (in the case of commonwealth by acquisition).[41]

Because the commonwealth is founded in the agreement of all with all, the political authority that proceeds from it must have its origins in rights that obtained to the individual in

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[38] Hobbes is careful to distinguish between commands and threats in *The Elements of Law*: Whereas "threatening…is the promise of evil; and COMMANDING, which is that speech by which we signify to another our appetite or desire to have any thing done, or left undone, for reason contained in the will itself." (Hobbes, *Elements*, XIII.6.) Law is a form of command. (*Elements* XXIX.2-4.)

[39] White, Thomas. *The Grounds of Obedience and Government.* 1655. Gregg International Publishers Limited, 1968, at 106-7. White was not the only Royalist supporter to distinguish between the penal and directive aspects of the law to buttress the absolutist claims of Charles I. Dudley Digges does as well, albeit to a different end—the ability to insist upon lawful restraints on the King (largely considered an axiom of English legal and political thought of the 17th century) while denouncing the right of the Parliamentarians to punish the King for apparently transgressing these legal restraints. "By our constitutions Regia *majestas est armis decorata*, and *legibus armata*, the directive part of the Law concerns the King, the penal doth not; he ought to square his actions according to the rule, but if they should swerve from it, they cannot fall within the cognizance of his Subjects." (White 84.)

[40] Hobbes, *Leviathan*, I.xvii.

[41] Hobbes, *Leviathan,* II.xvii.13, II.xx.1.

the state of nature. Moreover, at least where the commonwealth is formed by institution,[42] the sovereign himself is not party to the social contract. Hobbes is quite clear that the members of the commonwealth do not transfer their right of self-defense to the sovereign: "For the subjects did not give the sovereign that right, but only (in laying down theirs) strengthened him to use his own as he should think fit, for the preservation of them all; so that it was not given, but left to him, and to him only, and (excepting the limits set him by natural law) as entire in the condition of mere nature, of war of every one against his neighbor."[43] Hobbes is consistent on this point in *The Elements* and *De Cive* as well: The "transfer" of right to the sovereign is merely an agreement not to resist, because "the recipient already had a right to all things *before the transfer of the right*."[44] Thus, because there is no natural right of punishment, the sovereign's violence against any individual trespasser is justified by his natural right to pursue his safety.[45]

But this right is "for the preservation of [an individual's] own nature." It is not a right to protect *others*. This right extends as widely as it does (even to others' bodies) in the state of nature because, without political authority, each individual may privately judge how far this right extends.[46] Moreover, one can only exercise this right for certain reasons: "[F]or nothing but fear can justify the taking away of another's life."[47] What turns the state of nature into a state of war is the radical insecurity that individuals experience and the impossibility of categorically saying anything is not a rational fear. Within the commonwealth, however, the sovereign may punish any violation of the law and has absolute discretion to determine what is a threat to the peace of the commonwealth.[48]

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[42] There is an apparent contradiction in Hobbes's definition of a commonwealth by conquest. In Chapter 28 (§4) of Leviathan, he insists that in a commonwealth by institution there is no covenant between individuals and the sovereign representative; in Chapter 20 (§3) he states that there is no difference between a commonwealth by acquisition and by conquest, except the events that precipitated their respective founding. Yet Hobbes suggests in both *Leviathan* (II.xviii.10-14) and in *De Cive* (VIII.8), that a commonwealth by conquest originates in the agreement of the conqueror to hold back is sword in exchange for obedience (a relationship that closely resembles the Lockean conception of slavery). Moreover an act of rebellion is frequently understood, according to Hobbes, as an injury to the sovereign representative—implying that the sovereign representative himself has covenanted for a particular set of powers: "...and therefore if they depose him, they take from him that which is his own, and so again it is injustice." (Hobbes, *Leviathan*, II.xviii.3.)

[43] Hobbes, *Leviathan*, II.xxviii.2.

[44] Hobbes, *On the Citizen*, ii.4; *see also Elements* XIX.10. In *Leviathan* the subject is said to be the "author" of the sovereign's actions—this makes citizens the owners and thus incapable of rightfully resisting the sovereign's actions—but does not entail any *new* rights (other than vis-à-vis the subject) on the part of the sovereign as actor.

[45] Notably, this reading of *Leviathan* (as well as *De Cive*), places Hobbes in the company of Grotius and Locke, who also insisted that the right of punishment was pre-political. Locke's right of punishment was just that—a God-given positive right *to* punish rather than the specific application (in response to a criminal act) of a universal natural right, as I have characterized Hobbes's. Richard Tuck has noted this "striking example of intellectual convergence" between Grotius and Locke and emphasized how both thinkers deny the specifically political quality of the power to punish—a denial that enables political authorities to punish those not subject to the civil law. (Tuck, Richard. *The Rights of War and Peace*. Oxford University Press, 2001, at 82.) This convergence – and its implications – will be explored at much greater length in the subsequent chapter.

[46] Hobbes, *Leviathan*, I.xiv.1.

[47] Hobbes, *Elements*, XIX.2.

[48] Hobbes, *Leviathan*, II.xviii.8.

Although Hobbes insists that there are not laws of war, he nevertheless allows that the law of nature imposes some restrictions on men's behavior, even when their lives are at stake: "Yet thus much the law of nature commandeth in war: that men satiate not the cruelty of their present passions, whereby in their own conscience they foresee no benefit to come. For that betrayeth not a necessity, but a disposition of the mind to war, which is against the law of nature."[49] The right of all against all, we must recall, is a result of the absence of limits upon men's right of self-defense. An act against one's own long-term interest in survival can never be justified by this right, though one may never challenge (in the state of nature), an individual's judgment as to the necessity of an action. Thus, the limits on the sovereign's right of punishment have the same logic as the limits on his right to carry out military actions: Natural law cannot justify actions that do not tend to the actor's survival, and vengeance against individuals or foreign states alike threatens one's future well-being.

One possible explanation for the radically expanded jurisdiction of the sovereign's natural right *after* the formation of the commonwealth is that the safety of the commonwealth and the sovereign's person are linked. The unity of the commonwealth requires a unity of will (*De Cive*) or personation (*Leviathan*); the sovereign representative is necessary to understand the multitude of persons as constituting a single political body.[50] Thus, "the safety of the People of a Kingdom consisteth in the safety of the King"[51] not just because the sovereign is instrumentally responsible for the material tasks entailed in keeping the people safe, but because the very possibility of a peaceful order requires that unity – without it, as Hobbes makes clear in both *De Cive* and *Leviathan*, discord and destruction is inevitable. Although the sovereign remains unbound by contractual obligations to his subjects, it is in his best interest to maintain the well-being of the commonwealth. Hobbes even goes so far in *The Elements* as to suggest that rebellion – although an imprudent violation of natural law—often arises from a string of perceived abuses that Hobbes argues the sovereign can and should avoid.[52] Thus, while the sovereign has no responsibility to an individual subject to protect him or her from others' crimes, it is most decidedly in the sovereign's interest to do so, and is arguably acting in self-defense (i.e., to prevent rebellion) by punishing those who commit unlawful acts against their neighbors. This expansion from self-defense to *salus populi* comes not via the institution of a new political power, or even the subjects' authorization, but rather the original permissiveness of the law of nature. More significantly, it is a purely prudential obligation on the part of the sovereign and not a dictate of the social contract itself.

Though it is the sovereign who acts in defense of the commonwealth or its citizens, the violation of criminal laws has implications for how subjects may act with respect to one another. What distinguishes the political response to crime from the natural hostility between two parties is precisely that the criminal's fellow citizens abandon him to the violence of the sovereign. At least in the case of commonwealth by institution, the social contract is a multilateral one between all subjects. In founding the commonwealth, each man "obligeth himself to assist him that has

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[49] Hobbes, *Elements*, XIX.2.

[50] Hobbes, *Leviathan*, II.xvii.13; *On the Citizen* v.7.

[51] Hobbes, Thomas. *A Dialogue between a Philosopher and a Student of the Common Law of England*. Edited by Joseph Cropsey. University of Chicago Press, 1971, at 102.

[52] Hobbes, *Elements*, XXVIII.6. Bodin also makes this observation, which seems to be a relatively common-sense notion amongst the *raison d'etat* theorists of the sixteenth century—Hobbes's a comment may be an artifact of Hobbes's reading of such authors that was later overridden by his concern for maintaining the civil peace in the wake of the Civil War. Bodin, (*Six Bookes*, 532-33.)

the sovereignty in the punishing of another"; punishment is done by the entirety of the commonwealth, and every individual within that commonwealth is bound to participate.[53] Each of the criminal's fellow citizens is obligated to permit the sovereign to exercise his natural right of self-defense against the criminal. This is not, however, a return to the state of nature between citizens and criminals; the obligation to assist in punishing arises from the individual authorization of the sovereign's actions. The criminal is thus worse off than the enemy—not only must he contend against the personal and natural force of the sovereign, but he is deprived of any assistance that might come to her from other parties.

Punishment, Hobbes insists, is "not grounded on any concession or gift of the subjects"; rather, it is the re-initiation of hostility between the individual and the sovereign:

> I have also showed formerly that before the institution of a commonwealth, every man had a right to everything, and to do whatsoever he thought necessary to his own preservation, subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing which is exercised in every commonwealth.[54]

The punitive act of violence by the sovereign against the criminal is merely the sovereign's exercise of his natural right of self-protection. What distinguishes the political response to crime from the natural hostility between two parties is precisely that the criminal's fellow citizens abandon him to the violence of the sovereign.

That punishment, on this account, is a return to a state of war between sovereign a criminal, is evident from Hobbes's discussion of the criminal's perspective. Where a criminal faces execution, according to Hobbes, that criminal is within his rights to resist his punishment up to the foot of the gallows, even if he has consented to the law by which he is executed. "[N]o man can transfer or lay down his right to save himself from death, wounds, and imprisonment (the avoiding whereof is the only end of laying down any right)…And this is granted to be true by all men, in that they lead criminals to execution and prison with armed men, notwithstanding that such criminals have consented to the law by which they are condemned." [55] This admission would seem at odds with Hobbes's consistent (from *Elements* through the 1668 Latin *Leviathan*) description of the social contract as founded in a covenant of non-resistance on the part of subjects. The subject's supposedly unconditional promise of obedience as the grounding of the social contract is apparently contradicted by Hobbes's permission that a criminal defend himself by force against the sovereign's attempt to punish him.

Moreover, in *Leviathan*, individuals do not just agree to obey the sovereign, as they do in *The Elements* and *De Cive*[56] but also agree to *authorize* the sovereign's actions. Given this authorization on the part of each subject, then, Hobbes's account of punishment presupposes a divided will on the part of the criminal. Because no individual can be expected to permit himself to be killed, the criminal retains the right to resist punishment; it is our implicit recognition of this right, Hobbes suggests, that explains why we lead the criminal to the gallows in chains.[57] Yet the criminal is also "author of his own punishment, as being by institution, author of all his

[53] Hobbes, *Leviathan*, II.xxviii.2.
[54] Hobbes, *Leviathan*, II.xxviii.2.
[55] Hobbes, *Leviathan*, I.xiv.29.
[56] Hobbes, *Elements*, XIX.7.
[57] Hobbes, *Leviathan*, I.xiv.29.

sovereign shall do."[58] Combined, these two statements by Hobbes suggest that the criminal has the right to resist an act of which he is the author – which would seem impossible, given Hobbes's understanding of authorship.

This apparent contradiction caught the eye of *Leviathan*'s earliest readers and continues to be debated within the secondary literature. Contemporary commentators Mario Cattaneo, Alan Norrie, and Thomas Schrock each conclude that Hobbes seemingly grants both the sovereign and the criminal absolute right in any instance of punitive violence.[59] Robert Filmer[60] and Jean Hampton[61] have argued that the *Leviathan* is "stillborn" due to this persistent right of self-defense. Other readers have attempted to explain or reconcile this apparent paradox. Norrie, for example, argues the contradiction is real, and attributes it to Hobbes's understanding of natural law as both descriptive *and* prescriptive. According to Norrie, natural law must be consistent with man's natural impulses (including to self-preservation) but it must also, within Hobbes's schema, determine whether an act is just or unjust based on ascribed individual responsibility. Natural law thus both obliges the individual to follow through on his promise to obey and respects his desire to stay alive at all costs.

Susanne Sreedhar, in contrast, has argued that there is no contradiction, rather, readers who see one misunderstand Hobbes's view of political authority. According to Sreedhar, Hobbes has a Razian account of political authority; sovereign commands provide pre-emptive first-order reasons for a person to perform a given act. Resistance is permissible not because the social contract is undone in the moment of punishment, but because the contract itself must be interpreted as permitting resistance on the part of individual citizen to certain kinds of actions undertaken by the sovereign. Such actions meet two overlapping criteria: They do not materially affect the ability of the sovereign to maintain peace, and they undermine the reasons the individual in question had for joining the commonwealth in the first place. Punishment is not carried out according to subjects' authorization; it is an exercise of the sovereign's right of self-defense.[62] Thus, the criminal who resists punishment neither contradicts himself (because he has neither obliged himself to be killed nor authorized his execution) nor undermines the commonwealth (because the obligation to obey in all cases *but* capital punishment suffices to sustain the peace). According to Sreedhar, then, protections against excessive violence on the part of the sovereign are not the *consequence* of the social contract, they are built into the terms of the contract itself. This is not to say that excessive violence by the sovereign breaches the contract à la Locke. Rather, on Sreedhar's account, the contract simply does not apply in certain cases—it leaves such interactions in the state of nature, *sans* consensual obligation, rather than undoing an obligation.

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[58] Hobbes, *Leviathan*, II.xviii.3.

[59] Norrie, Alan. "Thomas Hobbes and the Philosophy of Punishment." *Law and Philosophy*, Vol. 3, No. 2, 1984, pp. 299-320.; Cattaneo, M. "Hobbes's Theory of Punishment." *Hobbes Studies*. Edited by K. C. Brown, Blackwell, 1965; Schrock, Thomas S. "The Rights to Punish and Resist Punishment in Hobbes's Leviathan." *The Western Political Quarterly*, Vol. 44, No. 4, 1991, pp. 853-890.

[60] Filmer, Robert. "Observations on Mr. Hobbes's Leviathan." *Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes.* Edited by G.A.J. Rogerson, Thoemmes Press, 1995, at 10-12.

[61] Hampton, Jean. *Hobbes and the Social Contract Tradition*. Cambridge University Press, 1987, at 189-207.

[62] Sreedhar, Susanne. *Hobbes on Resistance: Defying the Leviathan*. Cambridge, 2010, at 98.

This thesis is consistent with Hobbes's remarks in *De Cive* on the nature of injuries. "No wrong is done to a consenting party": If a man thinks something is a wrong to him, but is done with his consent, "[t]his means that something which is not allowed by the agreement is being done with his consent. But since he consents to the doing of what was not allowed by the agreement, the *agreement* itself…becomes void; and thus the right to act returns."[63] Although subjects do not authorize sovereign action in *De Cive* (Hobbes's theory of personification would emerge only in the later *Leviathan*), this reasoning tracks Hobbes's account of punishment in the later work nicely. The criminal protests he entered into the social contract for the sake of self-preservation,[64] and so his fellow subjects' participation in his punishment must be a wrong; but, because he authorizes and therefore necessarily consents (by means of the social contract) to the sovereign's efforts to hang him, the agreement has become void. Thus, while the criminal need not submit to his execution, his right to resist it heralds a return to the natural condition. Notably, however, and *contra* Sreedhar, Hobbes does not say the contract must necessarily have admitted the possibility of the supposed wrongful action—rather, it is voided.

Moreover, Sreedhar's reconciliation sits uneasily with the account of the social contract Hobbes's earlier texts, which emphasizes individuals' relinquishment of the right of resistance. In *The Elements*, Hobbes's earliest published explication of the social contract, he suggests that individuals agree to do as the sovereign tells them—effectively transferring their strength to him by way of obedience.[65] Three paragraphs later, however, Hobbes immediately modifies this statement: "And because it is impossible for any man really to transfer his own strength to another, or for that other to receive it; it is understood: that to transfer a man's power and strength, is no more but to lay by or relinquish his own right of resisting him to whom he so transferreth it."[66] In the next chapter Hobbes reaffirms this definition of the covenant as the relinquishment of the right of resistance and recalls his definition of rights transfer from Chapter XV, where to transfer is to, "by sufficient signs to declare to that other accepting thereof, that it is his will not to resist, or hinder him, according to that right he had thereto before he transferred it."[67] The transfer of right is also defined in *De Cive* as eschewing right of justified resistance; because in the state of nature we all have the right to everything, one cannot give a person a right she does not already have.[68] But here the contradiction again rears its head: Hobbes insists in *De Cive* that one cannot agree *not* to resist an attempt at one's life. One may however say: "If I do not do such-and-such by a certain date, kill me."[69] The basic contract that constitutes the

[63] Hobbes, *On the Citizen*, iii.7.

[64] Admittedly, the sovereign, who is not a party to the social contract, does not agree to preserve his subject's lives, but the "end" of the multilateral social contract is that the sovereign "may use the strength and means of them all…for their peace and common defence." (Hobbes, *Leviathan*, II.xvii.13.)

[65] It is necessary, for the commonwealth to come into being, "that [each subject] resign his strength and means to him, whom he covenanteth to obey; and hereby, he that is to command may by the use of all their means and strength, be able by the terror thereof, to frame the will of them all to unity and concord amongst themselves." (Hobbes, *Elements*, XIX.7.)

[66] Hobbes, *Elements*, XIX.10.

[67] Hobbes, *Elements*, XV.3.

[68] Hobbes, *On the Citizen*, II.4. Hobbes attributes this impossibility of inventing new rights to the totality of the right of nature in *De Cive*, but he gives the same denial that there are no *new* political rights almost word for word in *The Elements*: "For seeing that by nature every man hath right to everything, it is impossible for a man to transfer unto another any right that he had not before." (Hobbes, *The Elements*, XV.3.)

[69] Hobbes, *On the Citizen*, II.18.

commonwealth would seem to be founded in an authorization (to use the conceptual language of *Leviathan*) of actions that individual citizens might always resist.

Sreedhar would write implicit limits into the social contract, but the logic of *De Cive*, applied to *Leviathan*, suggests a simpler explanation: Resistance in the face of capital punishment is permissible because in that moment, the criminal's contractual agreement with his fellow subjects has become void, and the criminal and sovereign (now invoking the physical strength of all the criminal's fellow subjects) have reverted to a state of war. The paradox of Hobbes's right of resistance is not that both the executioner and the man struggling to avoid his grasp are in the right, it is that punishment, which Hobbes elsewhere describes as a quintessential function of the commonwealth, is a reinscription of the state of nature within the commonwealth that operates outside of the commonwealth's normative bounds.

The structure of *Leviathan* lends further support to this interpretation. *Leviathan* is broken into four parts: The first book describes man in his natural state, the second the construction and aspects of political power. Chapter XVII, describing the social contract, opens Book II and moves both the reader and natural man into the civil world. But Hobbes's discussion of the right of criminals to resist their execution by a *civil* power comes not in his discussion of civil punishment in Book II. Rather, it is found in Chapter XIV of Book I, as part of Hobbes's discussion of the First and Second Natural Laws. Civil punishment, and the rights relations of the criminal and sovereign at the moment of execution, are properly understood in reference to the state of nature.[70]

This hypothesis can explain the dichotomous furor surrounding Hobbes's *Leviathan* at its publication. Despite Hobbes's avowed effort to "pass between the points unwounded" of "too great liberty" and "too much authority",[71] the work was criticized both as a "rebel's catechism" *and* as an apologia for absolutism. Hobbes's rebelliousness lay primarily with his apparently *de factoist* "Summary and Conclusion" and his materialism, nominalism, and (alleged) atheism. But this account of punishment could give Hobbes's more authoritarian readers pause as well. If sovereign violence happens outside the bounds of the commonwealth—even if part of the "normal" operation of criminal punishment—then a Roundhead might read into this interaction his anxiety about an unimpeded sovereign while a Cavalier sees the specter of a subject resisting without restraint.

[70] There is an interesting convergence here between Hobbes and the Scholastics. As described by Brett, both Aquinas and Soto were struck by the problem of the condemned criminal's right to self-defense: "Aquinas had handled this question explicitly in the *Secunda secundae*, stipulating that the criminal cannot be obliged to cooperate in his death, but he *is* obliged not actively to resist the magistrate. This demand is put in terms of just war: if a criminal actively resisted the magistrate, the magistrate would have a just war against the criminal; therefore the criminal cannot have a just war against the magistrate, since it is impossible for there to be a war that is just on both sides. Soto broadly followed Aquinas here, but put it in his own language of natural rights. if a person is condemned to a corporal punishment, 'he is only obliged to suffer, but not to do anything himself….For the right of nature granted us to defend our own lives, excuses us from any obedience forcing us to lay hands upon ourselves'; therefore, 'although in this case no one can resist by force, he cannot be constrained not to evade death by flight or by other means.'" (Brett, Annabel, *Changes Of State: Nature And The Limits Of The City In Early Modern Law*. Princeton University Press, 2011, at 164.) As I have argued in a previous chapter, Vitoria and Suarez, e.g., would not have been struck by an argument describing punishment as a form of just war, as war (in the sense of international military conflict) was always, in their view, a form of punishment. For Hobbes, however, the *reason* to form the commonwealth is to exit a condition of war.

[71] Hobbes, "Introductory letter," *Leviathan*.

Royalist and conservative John Bramhall, who engaged in sustained debate on metaphysics with Hobbes following the publication of *Leviathan*, observed both these dangers. Bramhall characterized *Leviathan* as a "rebel's catechism," but he also criticized it from what we might now call a "rule of law" perspective. Bramhall notes that Hobbes justifies punishment by stating that the sovereign "is the only private man who hath not laid down his natural right to kill any man at his own discretion."[72] This right, he goes on to say, is repugnant, precisely because it would seemingly allow the sovereign to harm his own subjects without trial. Hobbes "makes no difference between a Christian and a wolf," thus "this is a Common-wealth of fishes, where the great ones eat the lesser."[73] The criminal, according to Bramhall, is treated like a beast because the rules that apply to the sovereign's conduct toward him are the same as those that apply in the state of nature. Bramhall is not exaggerating; in *The Elements* Hobbes reasons that "if a man in the state of nature, be in hostility with men, and thereby have lawful title to subdue or kill, according as his own conscience and discretion shall suggest unto him for his safety and benefit; much more may he do the same to beasts," that is, use those who are "apt to obey, and commodious for use" and destroy those who are "noisome."[74]

To claim that Hobbes permits the sovereign unfettered discretion is to say little beyond what Hobbes himself says. However, Bramhall goes on to attribute this error to Hobbes's unwillingness to ground political authority in anything but the social contract itself: "[H]e fancieth no reality of any natural justice or honesty, nor any relation to the Law of God or nature, but only to the Laws of the Common-wealth. So from one absurdity being admitted, many others are apt to follow."[75] This is not correct; as we have seen, what limits Hobbes does place on the sovereign's actions proceed from the law of nature, and not civil laws. Bramhall is right about the consequences of Hobbes's account of the social contract, but fails to acknowledge that Hobbes himself attempts to avoid this outcome not just generally, but with respect to the criminal.

IV. Crime, Hostility, and Treason

I have argued that there are two accounts of punishment to be found in Hobbes's theory of the state. The first treats punishment as a regulatory means for sustaining the social order, one that is intrinsic to the operation of the state and that is limited by certain procedural requirements on the part of the sovereign. The second instead justifies punishment as an exercise of the sovereign's natural right, albeit a right that is no longer strictly reserved for self-defense but can be exercised on behalf of the commonwealth or its members. On this account, the moment just before punishment resembles a return to the state of nature between the sovereign (or his agents) and the criminal. In Chapter 28 Hobbes defines punishment *in opposition to* hostility. Yet in justifying the sovereign's use of violence in the rights framework of the social contract, Hobbes has posited something very much like a state of hostility between sovereign and criminal. Does Hobbes's account of the commonwealth in *Leviathan* admit a distinction between punishment

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[72] Bramhall, John. "The Catching of Leviathan, or The Great Whale." *Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes.* Edited by G.A.J. Rogerson. Thoemmes Press, 1995, at 151.

[73] Bramhall 151.

[74] Hobbes, *Elements*, XXII.9.

[75] Bramhall 154.

and war or between criminal and enemy? And what (if any) are the stakes of such a distinction for the Hobbesian subject?

In all three of his major explications of the social contract, Hobbes distinguishes between the sovereign's public power to make war ("the sword of war") and his power to punish (the *ius gladii*). There is a shift from *The Elements* to *De Cive* in how Hobbes describes the relationship between the "sword of war"—the authority to direct citizens in the defense of the commonwealth—and the sword of justice (or *ius gladii*). In *The Elements,* the *ius gladii* is the (logically) prior right: It is because the strength of individual citizens has already been invested in the man who has the sword of justice that this same person should hold the sword of war as well. On Hobbes's description, the formation of the commonwealth is first driven by the need for internal peace, but because defense from external enemies is equally necessary to the citizens' security, the civil covenant is understood to include a requirement that individuals "contribute their several forces for the defense of the whole."[76] Hobbes continues: "Now seeing that every man hath already transferred the use of his strength to him or them, that have the sword of justice; it followeth that the power of defense, that is to say the sword of war, be in the same hands wherein is the sword of justice: and consequently those two swords are but one, and that inseparable and essentially annexed to the sovereign power."[77] In *The Elements*, then, it is the fact that one individual (the sovereign) *already* has the right to deploy the strength of individual citizens in the context of keeping internal peace that gives that same individual the right to use that strength against external enemies. Individuals cannot transfer their strength twice, so the same person has the right to direct this strength in whatever contexts it may be necessary.

Hobbes's later works contain a slightly different but commensurate explanation of this association between the two swords. In both *De Cive* and *Leviathan*, the right of punishment is listed separately from the right of war in Hobbes's catalogue of the rights of sovereignty.[78] In *De Cive* the two rights are linked logically: The ability of the sovereign to muster a defense of the commonwealth depends on his ability to threaten those who refuse cooperation; without the capacity to punish those who refuse to go to war, a sovereign's orders (in war as in anything else) are meaningless.[79] The authority to marshal a defense of the commonwealth depends upon the *ur*-capacity of the commonwealth: the right of blameless violence against individual subjects, justified by covenant. Although Hobbes's sees the two distinct functions as tied, they are not *a priori* identified as in *The Elements*.

It is important to distinguish the sword of war from "hostility" toward enemies. The "sword of war" is not *just* the right to attack those who one understands as a threat to one's well-being, but specifically the right to mount an organized defense of a collective entity, *i.e.*, the commonwealth. "The right of war" is a consequence of the basic natural right of self-defense and applies to all persons inasmuch as they are not in a contractual relationship with others. "The sword of war" is a specifically political capacity that presupposes the existence of a

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[76] Hobbes, *Elements*, XX.8.

[77] Hobbes, *Elements*, XX.8.

[78] The "right of making war and peace" is the ninth power listed and that of punishment and reward (again considered part of the same power) is eleventh in Chapter XVIII of *Leviathan*. The right of general judgment as to what tends to peace and defense, both internal and external, is listed as part of the fifth right (not to be punished by one's own subjects) but Hobbes's marginal summaries suggest that this general right of determining what will maintain order and acting on it constitutes the sixth right of sovereigns.

[79] Hobbes, *On the Citizen*, VI.5-7.

commonwealth whose well-being is at stake. The sword of war is characterized as a right of first, self-defense, and second, as necessarily invoking the strength and obligation of individual citizens.

That said, the moral rules governing war are the same as those governing the state of nature. Hobbes, *contra* some of his contemporaries,[80] did not see international war as a distinct domain of human political interaction with its own norms—it was merely the state of nature continued. Hobbes insists that there are not laws of war, but he nevertheless allows that the law of nature does impose some restrictions on men's behavior, even when their lives are at stake: "Yet thus much the law of nature commandeth in war: that men satiate not the cruelty of their present passions, whereby in their own conscience they foresee no benefit to come. For that betrayeth not a necessity, but a disposition of the mind to war, which is against the law of nature."[81] The right of all against all is a result of the absence of limits upon men's right of self-defense. An act against one's own long-term interest in survival can never be justified by this right, though in the state of nature there is no check on any given individual's judgment as to the necessity of an action. Thus, the limits on the sovereign's right of punishment have the same logic as the limits on his right to carry out military actions: Natural law cannot justify actions that do not tend to the actor's survival, and vengeance against individuals or foreign states alike threatens one's future well-being.

When setting forth what I have called his "regulatory" account of punishment in Chapter 28 of *Leviathan*, Hobbes appears to distinguish punishment from "hostility," or the violence of the state of nature. Anything that does not respect the prudential limits Hobbes sets forth in that chapter is, by definition, an act of hostility. But hostility is also used throughout *Leviathan*, including Chapter 28, to describe a relationship or status. For example, in the same paragraph in which Hobbes explains that any actions against one who is not subject to the law "must be taken as acts of hostility," he then describes the moral consequences once such acts have occurred: "[I]in declared hostility all infliction of evil is lawful."[82] Moreover, hostility is the default setting outside the commonwealth. Thus, all men not in a contractual relationship with the commonwealth are enemies.[83]

Whether one is in a state of hostility vis-à-vis the commonwealth (and sovereign) and thus is an enemy does seem to have moral consequences. None of the limits on punishment apply to acts of hostility against enemies. "But against enemies, whom the commonwealth judgeth capable to do them hurt, it is lawful by the original right of nature to make war, wherein the sword judgeth not, nor doth the victor make distinction of nocent and innocent as to the time past, nor has other respect of mercy than as it conduceth to the good of his own people."[84] In other words: Once an individual has been judged by the sovereign to threaten the

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[80] *Cf., e.g.* Lewes, Roberts. *Warrefare epitomized*. London, Printed by Richard Oulton, for Ralph Mabb, 1640. ("Most Certaine it is, that *Warre* hath had its *Originall* from the very foundation of *Soveraignety*, and thence was reduced to an *Art*, confined within limited *rules*, and *principles*, and may (in these our times) be said to be either *forraign* or *Domestique*, and that either *offensive* or *defensive*, preserving, and upholding some Nations, and Countries, and destroying, and ruining others; but still the rule, and true scope of a *just Warre* amongst all Nations, is held to be a *firme Peace*, which as it is best obtained with the *Sword* in hand, so is it best confirmed, by a *prevalent Victory*…"

[81] Hobbes, *Elements*, XIX.2.

[82] Hobbes, *Leviathan*, II.xxviii.13.

[83] Hobbes, *Leviathan*, II.xxviii.23.

[84] Hobbes, *Leviathan*, II.xxviii.23.

commonwealth, he is considered an enemy and may be rightfully killed without reference to any prior bad acts. And because all non-subjects are enemies, "the infliction of what evil soever on an innocent man that is not a subject, if it be for the benefit of the commonwealth, …is no breach of the law of nature."[85]

"A crime," in contrast, "is a sin consisting in the committing (by deed or word) of that which the law forbiddeth, or the omission of what it hath commanded."[86] Hobbes offered a similar definition in the posthumously published *Dialogue Between a Philosopher and a Student of the Common Laws of England*: Crime is the violation of a law for which a penalty is ordained. Hobbes here is critiquing Coke's definition of crimes as acts "against the Crown or Church."[87] Crime is defined not in terms of who it hurts and how, but as the violation of obligatory laws. At first glance this may appear to be a purely nominalist account of crime: it is simply anything the sovereign forbids. However, the *injury* associated with criminal acts is distinct from the harm suffered as a result. Whereas Hobbes uses "harm" to signify a negative experience (a broken arm, lost possession), injury is properly limited only to cases where an individual has broken a promise. Injustice is understood as the violation of an agreement or covenant; thus, while anyone may suffer harm as a result of crime, the relevant injury for the justification of punishment is that suffered by the commonwealth: "So too in a commonwealth, if one harms anyone with whom he has no agreement, he causes *loss* to the person he maltreats, but does a *wrong* only to the holder of authority over the whole commonwealth."[88] Hobbes illustrates this distinction with the example of the master who asks that his servant deliver a gift to a third party. If the servant does not fulfill his promise to deliver, the harm has come to the third party who does not get the gift but the injury is to the master. Crime is understood to be an injury to the "person of the commonwealth" though the harm or damage may come to somebody else.

Only injury, and not harm, constitutes an injustice and thus changes one's ethical obligations with respect to the person who committed it.[89] The immediate victim of a crime has no claim against the person who committed the crime "since there has been no agreement."[90] In *Leviathan* and the *Dialogue* (where the question is explicitly discussed) crime always entails injury to the commonwealth, but not exclusively so; a particular crime may also include a violation of an agreement between individuals.[91] Hobbes argues this dual quality of crimes—threatening both individuals' well-being and the foundational contract of the commonwealth as a

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[85] Hobbes, *Leviathan*, II.xxviii.23.

[86] Hobbes, *Leviathan*, II.xxvii.2.

[87] Hobbes, *Dialogue Between A Philosopher and A Student of The Common Laws of England*, 78.

[88] Hobbes, *On the Citizen*, III.4. Hobbes says much the same in *The Elements of Law* at XVI.3: "For he could violate no covenant with him, with whom none was made, and therefore doth him no injury: for injury consisteth in violation of covenant, by the definition thereof."

[89] Hobbes, *Leviathan*, I.xv.12.

[90] Hobbes, *On the Citizen*, III.4.

[91] The notion that a crime is an offense against the sovereign is emphasized in the Philosopher's and Lawyer's discussion of pardon. The King has exclusive right to pardon "Treason, and other Offences against the Peace and against the Right of the Sovereign," but restitution ought to be made before the King may pardon injuries to other subjects. (Hobbes, Thomas. *A dialogue between philosopher and a student, of the common Laws of England*. *Writings on Common Law and Hereditary Right.* Edited by Alan Cromartie and Quentin Skinner, 2005, at 39.) However, Hobbes insists that such restitution "has nothing in common with the nature of a penalty" in discussing crimes in the subsequent section. (*Id.* 41.) Like many of the "rules" governing sovereign behavior, then, it would seem that this dictate is advisory: Restitution should be accomplished before the injury to the sovereign is pardoned.

whole—is consistent with contemporaneous legal practice: “Lastly, because in almost all crimes there is an injury done, not only to some private men, but also to the commonwealth, the same crime, when the accusation is in the name of the commonwealth, is called public crime, and when in the name of a private man, a private crime; and the pleas according thereunto called public (*judicata publica*, Pleas of the Crown) or Private Pleas” depending on who the accuser is.[92]

Already, however, we confront a difficulty with Hobbes’s definition. Although Hobbes insists that crime only entails *injury* to the commonwealth (and not the victim), his reasoning for this claim runs up against a rather significant change from *The Elements* to *Leviathan* in how the social contract is described. In *The Elements* Hobbes suggests that the contract is made amongst all citizens *before* their agreement to recognize a particular individual as sovereign.[93] In *De Cive* and *Leviathan* Hobbes’s account of social contract formation bypasses this initial step; it is the submission of all individuals’ will to a single will in *De Cive*[94] and the authorization of a single sovereign representative in *Leviathan*[95] that accomplishes the necessary unity. It is the absence of a contract *with* the sovereign that ensures individuals cannot have a claim-right against him. How, then, are we to understand the injury against the commonwealth supposedly entailed by the criminal act in the absence of a contract between wrongdoer and sovereign? Moreover, given the account in *Leviathan*, it would seem the violation is of the criminal’s covenant with his fellow citizens (including, but not limited to, the victim), rather than the sovereign representative who is authorized to punish him. Hobbes, in his later explanations of crime, seems to silently substitute the sovereign as the person or representative of the commonwealth for the entity itself, or to fall back upon a notion of the commonwealth as an ontological entity distinct from the sovereign. In either case, his characterization of crime seemingly presupposes a contractual obligation to the commonwealth that would not otherwise to exist.

Given that crime necessarily entails public injury, the basis for the distinction between hostility and crime might be still its object: Crime, while it may be an injury to the commonwealth (as already established), merely harms individuals, whereas hostility harms the commonwealth (and may *injure* no one at all). The response (punishment or hostility) depends not on the violation that justifies the use of force, but the nature and object of the harm caused. To quote Hobbes:

> Also acts of hostility against the present state of the commonwealth are greater crimes than the same acts done to private men; for the damage extends itself to all; such are the betraying of the strengths or revealing of the secrets of the commonwealth to an enemy; also all attempts upon the representative of the commonwealth, be it a monarch or an

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[92] Hobbes, *Leviathan*, II.xxvii.54. Hobbes’s use of “almost” suggests a distinction between the injury done by violation of the basic social contract—the violation inherent in any legal trespass and the grounds on which punishment is justified—and a separate sort of injury, one done to the commonwealth. Given Hobbes’s care in distinguishing between harm and injury, a distinction he reiterates in much the same terms in *Leviathan* as he did in *De Cive* (*see* Hobbes, *Leviathan*, I.xv.12), we should not assume his use of “injury” is infelicitous here. Rather, given that Hobbes is speaking here of contemporary legal practice, this hesitation may be empirical—it may not have been the case, according to Hobbes, that all proscribed acts in England in 1651 did in fact constitute an injury to the commonwealth.

[93] Hobbes, *Elements*, XX.3.

[94] Hobbes, *On the Citizen*, v.6.

[95] Hobbes, *Leviathan*, II.xviii.1.

> assembly, and all endeavors by word or deed to diminish the authority of the same, either in the present time or in succession, which crimes the Latins understand by *crimina laesae majestatis* and consist in design or act contrary to a fundamental law.[96]

We should read this claim—and the list of aggravating factors from which it is drawn—alongside Hobbes's insistence upon distinguishing the commonwealth in its representative capacity from the individuals that constitute it. According to Hobbes, it is a grave error amongst potential rebels or revolutionaries to confuse the properly constituted commonwealth and a mere "multitude" of private men with private opinions. Hobbes's list of aggravating and mitigating factors for the punishment of crime in Chapter 27 of *Leviathan* move from the unity of the commonwealth as the object of harm to that of the multitude; because harm done to the commonwealth "extends itself to all," it is a greater *crime*. This tendency is also evident in his discussion of counterfeiting (an act of treason under English law at the time): "...to rob the public is to rob many at once"; "the fraud thereof [in the case of counterfeiting] extendeth to the damage of many...."[97] What may be inferred from Hobbes's concern here with numbers (as opposed to the sovereign or commonwealth as such) is an implicit association of crime with harm to individuals, rather than the political existence of the commonwealth or sovereign.[98]

The above quote is striking for another reason: Hobbes is describing treason as "hostility." *Crimina laesae majestatis* was, in the seventeenth century, a rough synonym for treason, and the specific acts he describes were encompassed by 25 Edward III, England's treason statute. As I argue in depth in a subsequent chapter, Hobbes is not unique among seventeenth century English theorists in his equivocation about whether acts of treason are crimes, the worst crimes, or somehow more existential and therefore *worse* than crimes. Hobbes's description of various acts of treason as both "facts of hostility" and "greater crimes" reflects the same ambivalence as his contemporary opponents. Indeed, in the *Dialogue*, the Philosopher (Hobbes) and Lawyer (Coke) agree that treason is a crime. This is a difficult conclusion to disagree with, given that 25 Edward 3, enacted in 1351, made treason a criminal offense. Elsewhere in *Leviathan*, however, Hobbes instead states that rebellion or an attack on the rights of the sovereign cannot, by definition, be compassed by the civil law. Rather, rebellion is a violation of the natural duty to obedience in the interest of peace: "For a civil law shall forbid rebellion (and such is all resistance to the essential rights of sovereignty) is not (as a civil war) any obligation but by virtue only of the law of nature that forbiddeth the violation of faith."[99] Hobbes would emphasize this point further in the Latin *Leviathan* of 1668; a civil law forbidding the citizen to impugn or impede the sovereign would be a contradiction in terms, since recognition of this sovereign right is the basis of the social contract and the basis of obedience of any particular law. "For [transgression of these rights] involve rebellion, i.e. the transgression (or rather repudiation) of all civil laws at once, and for that reason, they would be prohibited in vain by civil law."[100] Thus treason or rebellion is prohibited by natural law,

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[96] Hobbes, *Leviathan*, II.xxvii.37.

[97] Hobbes, *Leviathan*, II.xxvii.37.

[98] As I shall argue below, *crimina laesae majestatis* or treason may be understood as both a crime and hostility; it is a grave crime, the above quotation seems to suggest, only inasmuch as undermining the commonwealth "damages" a large group of individuals.

[99] Hobbes, *Leviathan* II.xxx.4.

[100] Hobbes, *Leviathan* II.xxx.4.

specifically the imperative to seek peace by creating and sustaining a sovereign representative capable of guaranteeing security for all.[101]

How are we to know whether a specific act threatens the commonwealth as such? For Hobbes, it depends on whether the given act violates a fundamental law. Fundamental laws are those laws,

> which, being taken away, the commonwealth faileth and is utterly dissolved, as a building whose foundation is destroyed. And therefore, a fundamental law is that by which subjects are bound to uphold whatsoever power is given to the sovereign, whether a monarch or a sovereign assembly, without which the commonwealth cannot stand, such as is the power of war and peace, of judicature, of election of officers, and of doing whatsoever he shall think necessary for the public good.[102]

One might identify the distinction between rebellion and ordinary criminal activity as that between actions aimed at undermining the power of the sovereign as opposed to those acts that merely harm one's fellow citizens. In this, Hobbes's thought converges with the English law of treason. What threatens the corporate body politic is exactly that which tends to undermine the sovereign power with which it is identified.[103]

"The fundamental laws" was an important, and hotly contested, phrase in the 1640s. J.W. Gough, who has traced the history of "fundamental law" from the late sixteenth century to the Restoration, argues that "fundamental law" had more than one meaning and, like much of the rhetoric of the Civil War period, could be invoked by ideologically opposed individuals to cross purposes. Fundamental laws might be conceived as limits on political authority or more ordinary laws: Strafford was accused of subverting "fundamental laws" to establish arbitrary power; MPs might also argue that certain criminal acts were repugnant to fundamental law.[104] In the same period, "the fundamental laws" were equated to the ancient English constitution and described as defining the relationship between the King and Parliament. For Harrington, who founded political authority on property ownership, fundamental laws "are such as state what it is that a man may call his own, that is to say property, and what the means be whereby a man may enjoy his own, that is to say protection."[105] Fundamental laws could be described as an organic

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[101] Hobbes states something similar in *De Cive*: "The sin which is the crime of treason by natural law is a transgression of natural, not civil, law. For since the obligation to civil obedience, by force of which all civil laws are valid, is prior to every civil law, and the crime of treason is by nature simply violation of that obligation, it follows that it is the law which preceded civil law which is violated by the crime of treason...If a sovereign prince made a civil law in the form: *do not rebel!,* he would achieve nothing. For unless the citizens are previously obligated to obedience…every law is invalid…." (Hobbes, *On the Citizen*, XIV.21.)

[102] Hobbes, *Leviathan*, II.xxvi.42-3.

[103] Alan Orr characterizes Hobbes's definition of treason as "in many respects a garden-variety Roman law concoction. Hobbes was in this respect very much a product of his time." Orr, D. Alan, *Treason and the State*. Cambridge University Press, 2007, 56.

[104] Gough, J.W. *Fundamental Law in English Constitutional History.* The Clarendon Press (1955), at 80 and 61.

[105] Harrington, James. "The Commonwealth of Oceana." *The Commonwealth of Oceana and A System of Politics*. Edited by J.G.A. Pocock, Cambridge University Press, 1992, at 100.

relationship between King and subjects,[106] or identified with a social or original contract.[107] Moreover, they could be (even within the same sentence) identified as an application of the laws or nature or premised on the consent of individuals: "But the fundamental law or laws is a settling of the laws of nature and common equity (by common consent) in such a form of Polity and Government, as that they may be administered among us with honor and safety."[108] For Hobbes, the "fundamental laws" were the necessary precondition for sustaining the relationship between citizen and citizen and sovereign and sovereign. Because Hobbes founds the commonwealth in obedience for the sake of safety, the basis of this relationship consists entirely in the sovereign's right to carry out his will, i.e. the list of *marques* (to use Bodin's term) in Chapter XVIII of *Leviathan* and Chapter VI of *De Cive*.

Just as treason is both a crime and worse-than-a-crime, the traitor is both an enemy to the commonwealth and nevertheless remains under its jurisdictional purview. Again, in Chapter 28, Hobbes offers an account of punishment and hostility as starkly opposed; only subjects may be punished. The traitor, because he has renounced obedience to the sovereign and thus membership in the commonwealth, has put him outside the protection of the law and is not punished as a subject but "suffers as an enemy":

> If a subject shall, by fact or word, wittingly and deliberately deny the authority of the representative of the commonwealth, (whatsoever penalty hath been formerly ordained for treason) he may lawfully be made to suffer whatsoever the representative will. For in denying subjection he denies such punishment as by the law hath been ordained, and therefore suffers as an enemy of the commonwealth, that is, according to the will of the representative. For the punishments set down in the law are to subjects, not to enemies; such as are they, that having been by their own acts subjects, deliberately revolting, deny the sovereign power.[109]

Here we have a strong quid-pro-quo notion of membership: The law is fundamentally protective, includes limits on punishment, and applies only to those who have submitted to the authority of the lawmaker.

As we have seen, both the natural law and *raison d'etat* theorists of the early seventeenth century disqualified those guilty of rebellion or sedition from the category of just enemies. Such exclusion was overdetermined: Rebels both lacked the jurisdictional standing or necessary to constitute a public enemy and had, by that very sedition, committed a crime worthy of punishment in accordance with the *ius gentium* or *ius naturale*. In contrast, those who did not

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[106] *See, e.g.* Anonymous. *Touching the Fundamental Laws*. London, Printed for Thomas Underhill, 1643 (Thomason Tracts), at 3-4: "Fundamental laws are not things of capitulation between King and people, as if they were forainers and strangers one to another, (nor ought they or any other laws so to be, for then the king should govern for himself, not for his people) but they are things of constitution, treating such a relation, and giving such an existence and being by an external polity to King and subjects, as head and members, which constitution in the very being of it is a Law held forth with more evidence, and written in the very heart of the Republic…"

[107] As Gough describes republican Sir Henry Vane doing during the Interregnum. (Gough, *Fundamental Law*, 133.)

[108] Anonymous. *Touching the Fundamental Laws*. Elsewhere the anonymous author describes "[t]he Fundamental Laws of England" as "nothing but the Common laws of Equity and Nature reduced into a particular way of policy…"

[109] Hobbes, *Leviathan*, II.xxviii.13.

owe any allegiance before taking up arms might be judged "*just enemies.*"[110] Because men are enemies by absence of a common power,[111] one need not violate another's right to become an enemy; it is the default status. One can be made an enemy of the commonwealth merely by one's refusal to join the commonwealth in the first place, according to *De Cive*.[112] If being an enemy is an ethical stance, it is unavoidable, at least in some cases. Moreover, a corollary to this position is that Hobbes did not distinguish between just and unjust enemies; rather *everyone* was an enemy in the state of nature and thus have the same absolute right of self-defense as the sovereign. As we have seen, the distinction between criminals and unjust enemies (who were violators of an international order) was a complex one. But in Vitoria's, Grotius's, or even Gentili's conceptual vocabulary, one could speak of an unjust enemy—an outsider without status. Hobbes's account of international law, stripped to a universal right of all against all, admits no such category.

Equating the traitor with the enemy was a loaded, and dangerous, philosophical move during the English Civil War. Hobbes would have been acutely aware that this position invited abuse by Roundheads. Parliamentary supporters alleged that they stood as co-equal sovereigns with the King and therefore could claim to be "just enemies" of the sort identified by Gentili or Grotius. Parliament argued had the right (as does everyone in the state of war) to raise and use a militia of their own. For those who endorsed Charle Stuart's rule, this analysis was impermissible. Thus Digges would insist: "For except they can prove themselves not be His Subjects, I am forced to tell them, if they fight against him, they are by the law of Nations of this land worthily reputed Rebels, and by divine law they are assured of damnation."[113] A Parliament that could gain a right of self-defense against Charles simply by denouncing his authority was a dangerous entity indeed, but given the moral neutrality of hostility, Hobbes's equation of the traitor with the enemy threatens to put Parliament back into the state of nature.

Hobbes is not entirely consistent in his claim that rebellion can *only* be logically forbidden by natural (and not civil) law. Elsewhere in *Leviathan* he suggests that the sovereign may still exercise civil jurisdiction over the rebel. Because the natural and civil laws contain each other, the commonwealth may legitimately punish any subject whose actions threaten the commonwealth (even if they only do so by their example[114]), even if those actions were not specifically proscribed by law. Hobbes specifically permits *punishment* (in the context of describing the limitations discussed *supra*) in cases where no prior law existed, but where the wrongdoer should have known—by his own reason—the act in question tended to undermine the commonwealth. Not only this, but the traitor is "author of his own punishment."[115] He is not merely guilty of an injustice—violating the contract in which he agreed to obey the sovereign—but fails to escape the obligation of that contract by means of his breach. Even though he implicitly denounces the sovereign authority with his act, the traitor still owns the violence he suffers as a result. As the Philosopher argues emphatically in *A Dialogue*, a traitor is both an enemy and a felon (that is, criminal), and it is the prerogative of the King on the basis of his natural law right of self-defense to enforce his civil jurisdiction as he sees fit.[116] In *De Cive*

[110] Digges *Unlawfulness of* subjects, 59, 66.
[111] Hobbes, *Leviathan*, I.xv.5.
[112] Hobbes, *On the Citizen*, VI.2.
[113] Digges, *The Unlawfulness of Subjects*, 139.
[114] Hobbes, *Leviathan*, II.xviii.14.
[115] Hobbes, *Leviathan*, II.xviii.3.
[116] Hobbes, *Dialogue*, 102-3.

Hobbes suggests that once there *are* laws (and common power), to be an enemy is to be worse even than those who do not abide by the laws: "But since I have not found such a law [by which I could condemn atheists as transgressors of the civil law], I have gone on to ask what name God would give to men who are so exceedingly hostile to him...And thus I have placed their sin in the same class as it was placed by God himself. And then I show that atheists are enemies of God; and the name, enemy, I think, is sometimes stronger than 'unjust man'."[117] God ought to be the sovereign of all; to renounce his rule, therefore, is to deny a properly constituted authority.

This is a surprisingly Scholastic position for Hobbes to take. Faced with the problem of explaining why one cannot exit the moral obligations of the commonwealth voluntarily, Hobbes takes refuge in the natural law. Not the prudential natural law of self-preservation that directs individuals to *join* the commonwealth, but of an obligation to obey a specific sovereign, whether it be King Charles or God, without regard to whether one has voluntarily entered into such an obligation via contract. Recall that Vitoria, Suarez, and Grotius all insisted princes could exercise punitive jurisdiction over those that violated the *ius gentium* or natural law, but in reaching this conclusion each relied on a more-or-less Aristotelian understanding of human nature or the existence of an international community. Both of which, of course, Hobbes flatly rejects in favor of a voluntarist account of the state. On the Hobbesian account the rebel renounces the social contract, but Hobbes is reluctant to let the rebel thereby free himself of any future obligation to obey the sovereign. Hobbes thus maintains an uneasy duality: The rebel's breach of the social contract an injustice because one once *did* agree to obey the sovereign, and so, unlike a foreign enemy, a traitor may endure punishment (and thus does not have an absolute right of self-defense) *and* hostility (not limited by the legal requirements set forth in Chapter 28).

This observation—that treason constitutes *both* a crime and hostility against the commonwealth—brings me to the crux of my interpretive claim about Hobbes's theory of the state: What is meant to distinguish treason or rebellion from crime is that the traitor, unlike the criminal, rejects the authority of the sovereign altogether, and thus may be pursued with unlimited violence. But, as we have seen, criminal punishment under Hobbes's justificatory account is indistinguishable from violence. On the one hand, Hobbes offers a definition of punishment whereby any violence that does not respect certain limits becomes hostility; on the other, Hobbes equates the *ius gladii* with the right of all against all by the sovereign that persists from the state of nature.

Crime, the reader will recall, may entail harm to anyone or anything, but constitutes an injury to the commonwealth. For crime to be a category of action distinct from rebellion or hostility, however, this injury must be less than existential. The criminal must somehow accept the sovereign's authority but fail to respect what he in another time or mindset has consented to. In *De Cive* Hobbes explains *all* injuries (which, the reader will recall, he defines violating the terms of an agreement) as the product of a such divided will:

> There is a great similitude between that we call injury, or injustice in the actions and conversations of men in the world, and that which is called *absurd* in the arguments and disputations of the Schools. For as he, that is driven to contradict an assertion by him before maintained, is said to be reduced to an absurdity; so he that through passion doth, or omitteth that which before by covenant he promised not to do, or not to omit, is said to commit injustice.[118]

[117] Hobbes, *On the Citizen*, footnote to XIV.19.
[118] Hobbes, *On the Citizen*, III.3.

A crime, which is an injury to the commonwealth as represented by the sovereign, is one such absurdity. The criminal, at the time of his crime (injustice), acts contrary to what he before, rationally, agreed to. Crucially, however, it is a *contradiction*, not renunciation or termination of the agreement; the criminal's will is still somehow bound up in the contract. The criminal, in violating but one of the civil laws, presumably still respects the sovereign's authority and—following Hobbes's analogy of punishment to the nervous system—has determined that (the risk of) punishment is worth the gain to be achieved through the criminal act. But the criminal's unwillingness to submit to his own punishment is not an injury to the sovereign; the criminal retains the right of resisting the gallows, if not the sovereign himself. A right or liberty, on Hobbes's account, is precisely the ability to commit an act without moral blame. The contradiction, therefore, is not limited to the criminal's will but embedded in the structure of Hobbes's state.

Even if we admit such a divided will, it does not solve the problem of the *sovereign's* justifications. The sovereign's right to punish is not a political power transferred to him by his subjects, but the original right of self-defense *left* to him after all subjects have given up their individual right of resistance. The sovereign's deployment of punitive violence always invokes the safety of the commonwealth as justification. Thus, the response of the sovereign is to treat the criminal *as if* the criminal were no longer a citizen of the commonwealth. Punishment is a return to war, but limited, by the social contract, to a lopsided battle between criminal and sovereign representative. (Lopsided because the sovereign has all the help he can get from the criminal's—former—fellow citizens.) Moreover, the distinction between rebellion and criminality, usually evident from the nature of the act committed, ultimately rests on a subjective determination of the effects of a given act. For Hobbes, which acts undermine the rule of the present sovereign representative is a matter of natural law, known by universal reason and not positive law or the sovereign's will. Recourse to natural law to define such offenses is necessary because such disobedience denies the subjective basis of citizenship, namely consent to sovereign authority. But it also invites exactly the problem the *Leviathan* was designed to solve, namely: Convincing the reader that uniformity of definitions, and moreover the *sovereign's* definitions, is necessary to avoid brutal chaos. We should therefore not be surprised by dual status of the traitor, who lingers under the jurisdiction of the sovereign even as he may be destroyed as an enemy to that same jurisdiction. The contrast between criminal and enemy, in Hobbes's state, seems to be a distinction without a difference.

As I have argued in the first part of this chapter, Hobbes is clearly interested in distinguishing the "normal" political function of criminal punishment – the relationship between the sovereign and her wayward subjects—from the existential crisis brought on by rebellion. I hope I have convinced the reader that Hobbes is unsuccessful in this effort, and that a parallel account of crime and punishment runs through *De Cive* and *Leviathan* in which the criminal and sovereign exist in a state of hostility or war. Hobbes, in attempting to justify the *ius gladii* invokes this account, which in turn fails to provide a stable distinction between crime and rebellion. Ultimately, Hobbes offers a theory of punishment as a warlike state embedded within the commonwealth, limited only by the prudential natural laws that govern a sovereign's self-interest in maintaining peace and thus his own safety.

V. Lockean Punishment

So what? Hobbes's account of the state is such that the sovereign is never *not* in a state of war with his subjects; because there is no contract between sovereign and subject,[119] no crime need be committed for the citizen to be vulnerable in this way. This was Locke's critique of *Leviathan*; in order to find Hobbes's case for an absolutist commonwealth convincing, one must think "that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions."[120] As I have argued, however, Hobbes's absolutism did not extend so far. Hobbes contrasts punishment and hostility as two different forms of violence, and described punishment, both in Chapter 28 and in the Introduction, as a limited, normal part of the commonwealth. Not all violence, in other words, was *natural.* My point is not to criticize Hobbes's absolutism, but to show that Hobbes, although ostensibly distinguishing between the civil violence of punishment and the natural violence of war, in fact reproduces this natural state of war within the commonwealth. The transformation described in the previous chapter—the move to distinguish international conflict from the infliction of violence as a response to wrongdoing—is inverted in Hobbes account: No longer is war punitive, but civil punishment is a kind of war. That this is less a function of Hobbes's absolutism than his contractualism is evident by considering how Locke addresses punishment in his own account of the commonwealth, the *Second Treatise of Civil Government*.[121] Locke's account of the state, designed in significant part to create and maintain a limited, bilateral relationship between sovereign and citizen, presents us with the same difficulties when trying to account for limits on the sovereign's punitive power.

Locke's "strange doctrine" famously posits a natural right to punish, possessed by all men: "[I]n the State of Nature, one Man comes by a Power over another…to use a Criminal when he has got him in his hands…to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for Reparation and Restraint."[122] This, the lawful doing of harm to another "is that we call punishment."[123] Because a criminal, by "transgressing the Law of Nature" has "declare[d] himself to live by another Rule," *any* member of Mankind "may bring such evil on any one[] who has transgressed that Law."[124] For Hobbes punishment is equated with a form of *personal* self-defense. For Locke, punishment is still justified as a kind of self-defense, but a collective one. Locke thus distinguishes between the right of individual self-preservation and the right to do violence to those who have broken the natural law. Men must give both rights up to form the commonwealth, but, *contra* Hobbes's account in *Leviathan*, punishment is not a species of the

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[119] As discussed at note 42, *supra*, Hobbes describes what seems like a contract between sovereign and conquered people at places in *Leviathan* and *De Cive*.

[120] Locke, John, *Second Treatise of Government*. 1690. Edited by C.B. Macpherson, Hackett, 1980, § 93.

[121] Richard Tuck notes a similar ambivalence in the work of Samuel Pufendorf: "Pufendorf was very critical of Grotius for arguing that the right to punish was a natural right possessed by all men." Pufendorf "turned to Hobbes for support" for the proposition that punishment must be threatened and known before the offense—the deterrent model—as Hobbes "also had defined punishment as something necessarily administered by a superior. Pufendorf was, however, forced to admit that Hobbes elsewhere asserted that the right of civil punishment came to the sovereign from the citizens' natural rights to defend themselves" and rejected the equation of the right to punish and the right of self-preservation. (Tuck, *Rights of War and Peace*, 159.)

[122] Locke, *Second Treatise*, § 8.

[123] Locke, *Second Treatise*, § 8.

[124] Locke, *Second Treatise*, § 8.

"[p]ower…of doing whatsoever he thought fit for the Preservation of himself" but a power to execute the Law of Nature, that is, to carry out an objectively determined set of principles.[125]

Locke's account of punishment, on initial inspection, resolves some of the difficulties posed by Hobbes's account by incorporating both limitations on punishment and its collective nature into a *natural* right of punishment. Whereas Hobbes emphasized a set of procedural limitations on punitive violence, Locke proffers a theory of natural punishment whereby substantive limitations, and a theory of general deterrence, are baked into the right itself. Individuals in the state of nature may punish "only…so far as calm reason and conscience dictates, what is proportionate to his Transgression."[126] For Hobbes, punishment—violence in response to wrongdoing—is an exercise of the sovereign's right of self-defense. Hobbes's account of punishment in Chapter 28 includes many of these limitations, but they are by way of the sovereign's self-interest.

On Hobbes's account, as we have seen, there is some analytical difficulty in moving from this individual right of self-defense as possessed by the sovereign to a right of collective self-defense on behalf of the commonwealth where individual subjects harm one another. Hobbes must account for how a horizontal injury—that is, a harm inflicted on one subject by another—can be understood as a threat to the sovereign and therefore justify the use of self-defense. For Locke there is no gap to be overcome: the power to punish is *always* an enforcement of objective right on behalf of all persons. It is the criminal's danger to "Mankind," and not the punisher, that justifies the use of force: Violation of the Law of Nature, "being a trespass against the whole Species, and the Peace and Safety of it,…every man upon this sore, by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary, destroy things noxious to them" may punish the criminal as is necessary to deter him.[127] Crime "consists in violating the Law, and varying from the right Rule of Reason, whereby a Man so far becomes degenerate."[128] The interpersonal harm associated with this act is secondary to this loss of status. Any person can punish the criminal on the basis this deviation from right reason, but only the individual harmed may seek reparation.[129] Punishment is always a form of collective self-defense against an individual who has demonstrated himself to be dangerous; the formation of the commonwealth, in Locke's account, serves to coordinate individuals' executive force and unify judgment as to the fact and extent of the transgression, not to create a new power.[130]

Locke avoids a second gap we have seen in Hobbes's account of punishment through his particularly thick definition of natural law: Whereas for Hobbes the limitations on punishment are articulated separately from the right itself, Locke attempts to define the right itself as limited. In both *De Cive* and *Leviathan* Hobbes posits a natural law mandating that those carrying out revenge "consider future good, not past evil" (*De Cive*) or that "in revenges men look not at the

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[125] Locke, *Second Treatise*, §§ 130-31.

[126] Locke, *Second Treatise*, § 8.

[127] Locke, *Second Treatise*, § 8. I discuss this passage and its implications in much greater detail in the next chapter.

[128] Locke, *Second Treatise*, § 10.

[129] Locke, *Second Treatise*, § 10.

[130] Locke, *Second Treatise*, § 89. ("For hereby he authorizes the Society…to make Laws for him as the publick good of the Society shall require; to the Execution whereof, his own assistance…is due. And this puts Men out of a State of Nature into that of a Commonwealth, by setting up a Judge on earth, with Authority to determine all the Controversies, and redress the Injuries, that may happen to any Member of the Commonwealth.")

greatness of the evil past, but the greatness of the good to follow" (*Leviathan*).[131] Public punishment, as described in Chapter 28, must also be inflicted with respect to future good.[132] For Hobbes, the limitations on both individuals' and the sovereign's right to punish are external and pragmatic, but for Locke the right is *only* to punish this extent because the right is defined with respect to the *offender* rather than the agent of punishment.

Indeed, Locke's account of a natural right to punish returns to the concerns and the practical impetus of the Scholastics. As Richard Tuck points out, Locke defends the "very strange Doctrine" of a natural right to punish by invoking the "*Indian*": "Those who have the Supream Power of making Laws in *England*, *France*, or *Holland*, are to an *Indian*, but like the rest of the World, Men without Authority…I see not how the Magistrates of any Community, can *punish an Alien* of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another."[133] Tuck notes the slippage here between the concern with justifying an English king's authority to punish a foreign national within the kingdom's boundaries and the international problem of how European countries may legitimately war against non-Christian states.[134] That Locke, who drafted a constitution for the Carolina colonies, would be concerned with justifying English authorities' ability to enforce law against indigenous peoples, is hardly surprising. But, as we saw with Grotius's own version of the "strange doctrine" in *De Iure Praedae*, Locke makes the Scholastics' problem his solution. Rather than ask how a prince may enforce the natural law outside the bounds of his political community, and posit an international community to justify punitive war, Locke assumes that such violence is necessary, that political leaders must be justified in enforcing not just natural but *civil* law against those who have not consented to it. The concerns are the same, but the relationship between punishment and membership has been inverted. For Locke, natural law is imported whole into the commonwealth: "Every Offence that can be committed in the State of Nature, may in the State of Nature be also punished, equally, and as far forth as it may, in a Common-wealth."[135] Locke's account of punishment, like Hobbes's, views punishment not as a civil power exercised against members, but the exercise of a fully natural power by a political authority against an individual that has somehow put themselves *outside* the commonwealth.

And, like the Hobbesian accounts described *supra*, Lockean punishment admits a tension between its regulatory function and ontological justification. The right to punish is the right to do so much "as may make [the criminal] repent the doing of it, and thereby deter him."[136] As for Hobbes, the purpose of punishment is forward-looking, and the use of violence accordingly limited to what is necessary for general deterrence. Like Hobbes's nervous system in *Leviathan*, punishment in the *Second Treatise* is described as a form of signaling. It is not recourse to force, but a means of communicating the acceptable bounds of behavior to members of the commonwealth. "Each Transgression may be punished to the degree, and with so much Severity as well suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like."[137] In his other (both published and unpublished) writing, Locke also

[131] Hobbes, *On the Citizen*, III.11; Hobbes, *Leviathan*, I.xv.19. The prohibition on revenge is the sixth law of nature in *De Cive* and the seventh in *Leviathan*.

[132] Hobbes, *Leviathan*, II.xxviii.7.

[133] Locke, *Second Treatise*, § 9.

[134] Tuck, *Rights of War and Peace*, 171.

[135] Locke, *Second Treatise*, § 12.

[136] Locke, *Second Treatise*, § 8.

[137] Locke, *Second Treatise*, § 12.

describes punishment as a form of communication, albeit one that operates on unreasonable men. In his sixth *Essay on the Law of Nature*, Locke writes that the bond of law is twofold; if one does not "pay dutiful obedience," one is liable to punishment "so that those who refuse to be led by reason and to own that in the matter of morals and right conduct they are subject to a superior authority may recognize that they are constrained by force and punishment to be submissive to that authority and feel the strength of him whose will they refuse to follow."[138] In a note written between 1686 and 1688 intended for his magnum opus *Essay Concerning Human Understanding*, Locke comments, "rewards and punishments are the good and evil whereby superiors enforce the observance of their laws; it being impossible to set any other motive or restraint to the actions of a free understanding agent but the consideration of good or evil; that is, pleasure or pain that will follow from it."[139]

But Locke, in explaining the natural right to punish, insists that individuals may punish even where the object of that punishment is under no obligation to abide the laws in the first place. "'Tis certain [a Prince or State's] Laws by virtue of any Sanction they receive from the promulgated Will of the Legislative, reach not a Stranger. They speak not to him, nor if they did, is he bound to hearken to them. The Legislative Authority…hath no Power over [the Stranger]."[140] Yet a Prince or State *must* be able to "punish an Alien"; this is the assumption Locke offers to convince his skeptical reader of the "strange doctrine" of a natural right to punish. Punishment, meant to speak to an individual and direct their actions going forward, is justified even where the laws do not otherwise speak to an individual. There remains a gap between a right of punishment that remains pre-political even in the commonwealth and an impulse or desire on the part of Locke as a political theorist to tie punishment to a civil, regulatory function.

For Hobbes, the state of nature and the state of war were equivalent, a condition of mutual limitless right without authority. Locke, unlike Hobbes, believes it possible for men to "liv[e] together according to reason, without a common Superior on Earth."[141] He accordingly distinguishes between the State of Nature (a condition, to be sure, of "Great" "inconveniences," because each man is a judge of his own case[142]) and the State of War. This latter state is not the mere absence of shared authority but of "Enmity and Destruction" in which one man "attempts to get another Man into his Absolute Power" or to kill him.[143] Because freedom is the precondition of all of men's other rights, any attempt by an individual to take away another's freedom—to force another to submit to one's will—is the equivalent of a threat to the victim's life.

As with his "strange doctrine" of a natural right to punish, Locke's account resembles Grotius's, with important variations. Grotius defined war broadly to include any "dispute by force of arms," without regard to the public or private status of those carrying it out.[144] For Grotius, as for Gentili, the key quality of war was the absence of a higher authority and thus the

[138] Locke, John. "Essays on the Law of Nature VI." *Political Essays*. Edited by Mark Goldie, Cambridge University Press, 1997, 117-18.

[139] Locke, "Of Ethick in General." *Political Essays*, 301

[140] Locke, *Second Treatise*, § 9.

[141] Locke, *Second Treatise*, § 19.

[142] Locke, *Second Treatise*, § 13.

[143] Locke, *Second Treatise*, § 16.

[144] Grotius, Hugo. *The Rights of War and Peace*. Translated by John Morrice, edited by Richard Tuck, vol. 1, Liberty Fund, 2005, at 134.

need to rely on force to resolve a dispute. Locke acknowledges this quality as the distinct disadvantage of war, that "there is no appeal but to Heaven" when such conflicts occur.[145] But crucially for Locke, war is not characterized by the dispute or the use of violence, but the subjective intent of the parties with respect to the other. War is a condition in which one party is attempting to put the other in a state of subjection, triggering the other's right to use force to preserve their own life. Should one party succeed in subjecting the other, the war is not ended but continued; slavery is "nothing else, but the State of War continued, between a lawful Conqueror, and a Captive."[146]

In the state of nature, both crime and punishment are states of war. It is crime, specifically the theft of property, that Locke cites as the cause of the state of nature devolving into a state of war. "Thus a *Thief*, whom I cannot harm but by appeal to the Law, for having stolen all that I am worth, I may kill, when he sets on me to rob me, but of my Horse or Coat: because the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force…permits me my own Defence, and the Right of War, a liberty to kill the aggressor."[147] Because the thief, by attempting to steal one's coat, demonstrates a willingness to subject the victim to his power *and* to violate the laws of nature, the victim properly understands this effort as an implied threat to his life and therefore enters into a state of war in which violence up to and including homicide is justified in self-defense. In the absence of authority, the state of war, begun by the transgression of natural law, "continues, with a right to the innocent Party, to destroy the other whenever he can."[148]

In civil society, things are different; or at least, they appear to be. Where judges are available to prevent future injury and offer reparations for past injury, war ceases when the use of force ends.[149] But though war may have ceased between perpetrator and victim, Locke does not say much about how we are to understand the relationship between the judge and perpetrator. Admitting that a state of war persists would undermine Locke's case for the commonwealth, namely, that it avoids the fatal violence that is a persistent risk in the state of nature. Locke does not explain what war becomes when the "sedate settled Design" upon the criminal's life is assumed by the executive power of the commonwealth (which has assumed the individual force of each of the commonwealth's members).

In the state of nature, the power "to use a Criminal" is "no Absolute or Arbitrary Power," but one limited by the laws of nature; it is, nevertheless a power to "destroy" and thus, a form of subjection that qualifies under the above definition as a state of war.[150] And the executive power of judges, within the commonwealth, is simply the collective rights of individuals in the commonwealth to "imploy" their respective forces against offenders.[151] Nor does the fact that the judge or magistrate has right on his side mean the situation is no longer warlike; Locke defines

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[145] Locke, *Second Treatise*, § 21.

[146] Locke, *Second Treatise*, § 24.

[147] Locke, *Second Treatise*, § 19.

[148] Locke, *Second Treatise*, § 20.

[149] Locke, *Second Treatise*, § 20.

[150] Locke, *Second Treatise*, § 8.

[151] Locke, *Second Treatise*, § 88. ("[Y]et with the Judgment of Offences which he has givn up to the Legislative in all Cases, where he can Appeal to the Magistrate, he has given a right to the Commonwealth to imploy his force, for the Execution of the Judgments of the Commonwealth…And herein we have the original of the *Legislative* and *Executive Power* of Civil Society.")

slavery as "the State of War continued, between a lawful Conqueror, and a Captive."[152] Even where one party is both in the right *and* triumphs as a matter of force, the subjection that results is a kind of just state of war, not the resolution of the conflict. In the commonwealth, civil punishment is not an "appeal to heaven" because the judge or magistrate carrying it out acts with civil authority. But it is war*like*, in that it consists of the exercise of a natural right against an individual and is justified by that individual's implied willingness to destroy others, as evidenced by his violation of the laws of nature.

Locke's account of punishment, found primarily in the *Second Treatise*, differs significantly from Hobbes's, but shares the same tension: Civil punishment is not a distinctly political power, but a state of war continued into the commonwealth. Locke, unlike Hobbes, is quite blunt about this: Punishment is a natural power and *must* be natural because membership is not a precondition of its exercise. Yet Locke, like Hobbes, is simultaneously invested in defining punishment as a regulatory function, something designed to speak *to* members rather than put them *outside* the community by way of force. Like Hobbes, Locke's regulatory account treats punishment as primarily concerned with deterrence. Yet even as both social contract theorists describe punishment as a form of communication, they can justify it only by reducing the punishee and punisher to a condition of existential struggle. Punishment always recalls something of the fight unto the death, whether in the form of the criminal resisting being dragged to the scaffold (Hobbes) or the traveler killing the thief (Locke).

VI. Conclusion

I have argued that the limits on criminal punishment in Hobbes's account are premised *not* upon the consensual nature of political authority but rather the dictates of natural law. These limits cannot be premised upon the consent of the governed not because Hobbes's version of the social contract disallows limits upon the sovereign, but because the basis of the subject's membership is his obedience to political authority. Hobbes does not provide a convincing account of the psychology of the member who disobeys a specific law but can be said to maintain the voluntary submission necessary for his continued membership in the commonwealth. As Sreedhar, Norrie, and others have pointed out, we cannot easily reconcile Hobbes's unwavering emphasis on self-preservation with this notion that one is the author of one's own physical suffering or even execution. The Hobbesian criminal falls within a liminal space: he is a subject inasmuch as it was his failure to abide by the terms of the social contract that gave rise to *injury* (and thus the right of punishment against him), but he has simultaneously repudiated that relation of obedience and therefore cannot call upon his membership, or his fellow subjects, to protect him from the sovereign's violence.

In the previous chapter I argued that Hobbes's and Locke's accounts of the commonwealth, following Grotius but in sharp distinction to earlier accounts, closely identified political power with the *ius gladii*, or right over life and death. Political authority is constituted, in significant part, by the power to punish. In this chapter, I argued that paradoxically, Hobbes and Locke both rely heavily on natural law and the reproduction of the state of nature to *justify* punishment. Criminals are punished not as subjects, but as humans. Civil punishment is simultaneously a distinctly political capacity *and* a space of pre-political conflict within the commonwealth. In the next chapter I explore this tension with respect to a legal and rhetorical

[152] Locke, *Second Treatise*, § 24.

figure, the pirate, and argue the criminal (as well as the power to punish), evinces this same internalization of the international terrain of war and peace.

Chapter Three: Pirates and Highwaymen

I. Introduction

In this chapter, I describe a relationship between international law concepts and the figure of the criminal that has been overlooked despite recent interest in the figure at its center: the pirate. Tracing the figure of the brigand or *latro*[1] from international legal texts of the sixteenth century into seventeenth-century English political and literary tracts, I argue that an important strain in how "the criminal" would come to be understood in seventeenth century English common law and political thought incorporated, via the figure of the highwayman, international legal theories of the pirate. Political theorists—including, most significantly, John Locke—whose understanding of the criminal reflected this incorporation, understood punishment in terms of a loss of human, not just legal, status.

This chapter proceeds in three parts. First, I describe "the pirate" as a figure in in the works of Hugo Grotius and Alberico Gentili. Second, I argue that depictions of the criminal in several significant texts of seventeenth-century English political thought drew heavily from the pirates or brigands of early seventeenth-century international legal thought. This transmogrification from the brigand as "enemy of all" on the high seas to the "ordinary" criminal came about by way of the highwayman, the land-thief analog to the sea-thief pirate. Finally, I describe one of the normative implications of this descriptive link. In his two major works on international law, Grotius posits a natural right of punishment. In the absence of legal authority, such as in conflicts between states, anyone may punish transgressions of natural law. This natural right to punish leads to an account of punishment whereby individuals are made deserving through a loss of status. In Grotius's and Gentili's writings, pirates not only have lost status, they represent or symbolize the loss of status itself. Wrongdoers are "like pirates" and therefore deserving of punishment. Pirates, in turn, are defined by their exclusion not just from the political commonwealth, but from human sociability.

Methodologically, there is some variation between these three arguments, made necessary by the nature of my claims in each. When writing about the significance and substance of international legal theory, I rely primarily on close reading of major texts. The next and last sections therefore operate primarily in the register of intellectual history. My claims are limited to the conceptual and normative implications of what these thinkers said, and the connections or disagreements between their writings. In between, I consider how a subset of English popular writers and legal authorities understood pirates and highwaymen. This discussion might be better described as a cultural history that draws connections between literary usages and looks to concrete enforcement practices instead of normative treatises. By showing the connections between these normative, theoretical accounts and common usage, I hope to demonstrate that the notion of "the criminal" in seventeenth-century English political thought was informed by the treatment of pirates in the writings of Gentili and Grotius.

[1] The Latin work *latro* (pl. *latrones*) is generally translated, both contemporarily and contemporaneously, as "pirate" or "brigand," and I use both terms interchangeably in translation. The other primary sources are originally in English and therefore the use of "pirate" or "brigand" in quotations or explications reflects their original usage.

II. The Pirate in Early Modern International Law

Pirates played an important role in the writings of both Alberico Gentili and Hugo Grotius. Pirates had been called "the enemies of all" at least since 44 BC, when Cicero used the phrase.[2] Gentili built his entire theory of international law on the distinction between pirates and legitimate enemies. The pirate or brigand was, for these two theorists, a conceptual foil to the notion of the just or public enemy, rather than a historical phenomenon. By distinguishing between pirates and legitimate opponents, Gentili was able to posit a form of war that was neither punishment nor self-defense, but a conflict of interest between two adversaries of equal legal status. Pirates, on this description, were non-members of the international community; more than mere incidental opponents, they were "enemies of all."

Pirates make the occasional appearance in Vitoria's and Suarez's accounts of international law but are not of special theoretical import. Vitoria in one of his very few references describes pirates as ultimately the responsibility of the commonwealth whose interests they represent or with whose nationality they are associated. Thus, if French pirates steal from the Spanish and the French government fails to pay reparations, the Spanish can plunder French farmers in response.[3] This provided a practical, if occasionally harsh, rule to address the complicated reality of piracy in the sixteenth and seventeenth centuries: The line between pirate—robbing on his own behalf—and privateer—robbing on behalf of the monarch—was a thin one, and frequently crossed.[4] The distinction between illegal pirates and sponsored privateers often turned on the presence, authenticity, and authority of a letter of marque carried by a sea captain who sought riches from other men's ships. It was occasionally in the interest of territorial powers to foster this ambiguity to escape responsibility for untoward acts by their semi-agents. Distinguished from these privateers were pirate bands, who sailed primarily off the coast of North Africa, but also the Mediterranean and Atlantic. During the early sixteenth century these bands operated as semi-organized military forces that occasionally formed treaties with European powers.

Gentili's treatment of pirates presents a stark contrast to both Vitoria's relative neglect and the practical reality. Pirates are the primary and persistent foil of legitimate state actors in Gentili's account of international law. Gentili's use of the category of "pirate" was thus both novel and aspirational. "[T]he enemy [*hostis*] [includes those] who have officially declared war upon us, or upon whom we have officially declared war . . . . [A]ll others are brigands or pirates [*latrones*]."[5] The international legal order is thus divided into two categories: Enemies (*hostes*) and pirates (*latrones*). The former can legitimately fight wars, the latter cannot. What the law of

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[2] Cicero, *On Duties*. 44 B.C.E. Translated and edited by Margaret Atkins and Miriam T. Griffin, Cambridge University Press, 1991, at 108.

[3] Vitoria, Francisco de, "On the Laws of War" in *Political Writings*. 1539. Translated and edited by Anthony Pagden and Jeremy Lawrance, Cambridge University Press, 1991, at 318.

[4] *See, generally*: Thomson, Janice, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*. Princeton University Press, 1994.

[5] Gentili, Alberico, *De Iure Belli Libri Tres*. 1598. Translated by John C. Rolfe, The Clarendon Press, 1933, at 15. Note that the Rolfe edition, which I use throughout, has been translated from the 1612 edition, not the original 1598 edition. Gentili uses the term "*hostis*" (plural: *hostes*) in the original Latin and I use this term rather than its English translation, "enemy," to highlight its usage as a term of art within Gentili's writings.

nations (*ius gentium*) permit, and what may be done in that war depends entirely upon whether one's opponent is a *hostis* or *latro*; it is the relative equivalence of status among enemies, moreover, that justifies the constraints placed on warring parties by the *ius gentium*. Gentili cites Pomponius and Ulpian on the legal implications of declared wars against public entities and those of undeclared wars against brigands; one may claim honor and recover captured individuals from the former but not the latter.[6]

Gentili used the terms "pirates and robbers" or "pirates and brigands" to designate those who were not *hostes*. International actors can fail to meet the standards necessary for recognition as an "enemy" in numerous ways; legitimate states acting illegitimately fall into this category, as do rebels, pirates, robbers, and lesser magistrates acting without authorization from their princes. "Pirates and robbers" may renounce others' jurisdiction in a variety of ways—by rebellion or by sailing into the high seas and regularly violating the laws of one's native country. In any case, to recognize a pirate or robber—or rebel—would be to grant him status for his refusal to abide by the legitimate rule of his original prince. Thus, a pirate lost any possibility of standing in the international order by way of his violation of civil obligations. Since those "who have [not] officially declared war on us" includes persons who are not privateers or seafaring bands sailing under their own flag engaged in the act of piracy, the term "pirate" is a normative description, disqualifying actors thus described from legitimate military action.

Gentili shared his reliance on the works of Cicero and Tacitus with other contemporaneous humanist authors. The term *hostes* itself is derived from Roman legal sources and refers to an expansive and ambiguous category in Roman law and rhetoric. For these classical authors, any people who existed outside of or challenged legally constituted authority could be termed brigands or *latrones*, whether they be in a group dedicated to piracy or robbery as a way of life, traitors, a rebellious population, or overly ambitious statesmen.[7] Some of these writers also adopted this broad Roman conception of the *latro*. Jean Bodin shared a similar view to Gentili of this *hostis*/pirate distinction: "But by the name of enemies we understand them unto whom we, or they unto us, have publicly denounced war . . . . [A]s for the rest they are to be deemed of, as of thieves or pirates, with whom we ought to have no society or community."[8] Like Gentili, Bodin begins his explication of the nature of the commonwealth by making

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[6] Gentili paraphrases the same sources to make a distinction between "the enemy . . . who have officially declared war upon us, or upon whom we have officially declared war" and "all others [who] are brigands or pirates." Gentili, *De Iure Belli Libri Tres,* 15. Grotius also relied on this Roman etymology for his own opposition between just enemy and pirate: "But what manner of War this is, is best understood by the Definition which the Roman Lawyers give of an Enemy, Pomponius says, They are Enemies, who publickly denounce War against us, or we against them; the rest are but Pirates, or Robbers. So says Ulpian, They are Enemies against whom the People of Rome have publickly declared War, or they against the Romans; the rest are called pilfering Thieves, or Robbers." Grotius, Hugo, *The Rights of War and Peace*. 1625. Translated by John Morrice, et al., edited by Richard Tuck, vol. 3, Liberty Fund, 2005, at 1247. Grotius may have known these quotations from Gentili's work (which he had read), the original sources, or both.

[7] Grünewald, Thomas, *Bandits in the Roman Empire: Myth and Reality*. 1999. Translated by John Drinkwater, Routledge, 2004, at 161-62.

[8] Bodin, Jean, *The Six Bookes of a Commonweale.* 1606. Anonymous translation, edited by Kenneth Douglas McRae, Harvard University Press, 1962, at 75. I use an edition taken from an anonymous 1606 English translation; the original *Les Six Livres de la République* was published in 1586.

reference to the distinction between treatment in war of pirates and commonwealths: "[R]obbers and pirates are still excluded from all the benefit of the law of Armes. . . . [T]he laws of nations [has] always divided . . . just and lawful enemies, from the disordered, which seek for nothing but the utter ruin and subversion of commonweales, and all civil society."[9] Other of Gentili's contemporaries adopted the Roman emphasis on the relative honor associated with victories in public wars as opposed to the defeat of pirates; for example, English military theorist Sir William Segar wrote in 1602: "Now are we to speake of meane or halfe triumphs . . . as if the warre was not iustly pronounced, or the enemie of base reputation, as a Pirate, a bondman, or a cower."[10]

Grotius also distinguishes between a "public" enemy, the rough equivalent of Gentili's *hostis*, and other, private antagonists. Like Gentili, Grotius recognizes that opponents in a war between public entities (a "solemn" war), specifically the soldiers of another state, are entitled to certain limitations deriving from this status. "[J]ust enemies" are "those who do what they do at the command of a superior power. . . . [W]ithin a state tyrants and rebels are not classified as just enemies, and outside the bounds of any state brigands and pirates are excluded."[11] Grotius—unlike Gentili—included among brigands those who, despite acting on behalf of public authorities, engaged in thefts or illegitimate violence. This expansion of the category can be attributed, at least in part, to Grotius's goals in writing his first major treatise on international law, *De Iure Praedae.*[12] Although (as we have seen) Grotius is not nearly so explicit about a private right to punishment in *De Iure Belli Ac Pacis*, his position on piracy in the latter text is nevertheless informed by his recognition of a just, private war against a public enemy.

That said, Grotius held that even when public entities act unjustly, they are entitled to certain consideration on the part of their opponents, a point Grotius makes explicit in *De Iure Belli ac Pacis*. Though a state may commit an injustice, its integrity as a political body is still to be respected by its opponents: "A sick Body is yet a Body. And a State, however, distempered, is still a State, as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights."[13] This distinction in public/private status mattered both formally and for the conduct of war; property extracted by pirates through the use of force was not rightfully obtained and could be retaken at will, unlike property taken in similar ways by public powers.[14]

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[9] Bodin, *Six Bookes*, 1.

[10] Segar, Sir William, *Honor Military and Civil Contained in Foure Books*. London, Barker, 1602.

[11] Grotius, Hugo, *Commentary on the Law of Prize and Booty*. 1868. Translated by Gwladys L. Williams and edited by Martine Julia van Ittersum, Liberty Fund, 2006, at 126. Titled *De Iure Praedae* in the original, this treaty was not published until a manuscript copy was found among Grotius's papers in 1864. The manuscript itself was begun in 1604 and finished by 1606. I use *De Iure Praedae* f

[12] *De Iure Praedae*, one of two treatises on international law by Grotius. As I discuss at greater length *infra*, the text was originally commissioned by the directors of the Dutch East India Company (VOC) to justify the attack on and confiscation of goods from a Portuguese vessel, the *Santa Catarina*, in the East Indies.

[13] Grotius, *Rights of War and Peace*, 1250.

[14] Grotius, *Rights of War and Peace*, 893 ("And in this Sense may be admitted the Distinction made by Cicero, between an Enemy in Form, with whom, says he, we have many Rights in common, that is, by the Consent of Nations, and Pirates, and Robbers. For if these extort any Thing from us by Fear we

According to both Grotius and Gentili, public enemies are not to be poisoned, betrayed, refused burial, or denied embassy (to name a few elements of the law of war endorsed by both Gentili and Grotius), but pirates are subject to violence unlimited by law. Gentili is clear on this point in a chapter devoted to whether brigands have the right of embassy (they do not) in *De Legationibus*: "Neither brigands nor pirates are entitled to the privileges of international law, since they themselves have utterly spurned all intercourse with their fellowmen and, so far as in them lies, endeavor to drag back the world to the savagery of primitive times."[15] Grotius as well denies the necessity of adhering to either the substantive or formal laws of war when doing battle against "tyrants, robbers, pirates, and all persons who do not form part of a foreign state." To justify this, Grotius makes use of reciprocal reasoning; since one cannot expect these persons to behave lawfully, no reciprocal obligation is placed upon states that go to war with them.[16] Where one's opponent does not have the form of a state, and thus cannot treaty for lasting peace, there is no expectation of reconciliation, and therefore one need not respect the rules of treatment that presuppose and make such a lasting peace possible.[17]

Pirates were for Gentili the "enemy of all." Pirates could be attacked and destroyed by any nation or even any individual without a declared war. This was because their status threatened not just a given commonwealth's well-being, but the international legal order itself.

> For pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law. They ought to be crushed by us . . . and by you in common, and by all men. This is a warfare shared by all nations.[18]

Pirates, by rejecting the law of nations in its entirety as a governing order, put themselves outside the protection of that law. For Gentili, the *ius gentium* (law of nations, governing interstate relations) and *ius naturale* (natural law, mandated by God) were indistinguishable. Gentili did not recognize an international legal order that was not also the law binding all men as men. Any derogation from the laws of interstate recognition would also place violators, such as pirates, outside the community of humanity as well.[19]

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may re[ac]quire it, unless we bind ourselves by an Oath not to re[ac]quire it; but of an Enemy we cannot.").

[15] Gentili, Alberico, *De Legationibus Libri* Tres. 1594. Translated by Gordon J. Laing, Oxford University Press, 1924, at 79. This opinion was not universally held in Gentili's time; he cites his contemporary and colleague in the trade courts of England, Jean Hotman, as holding the opposite: "Therefore I am surprised at the statement of Hotman that international law holds for fugitive slaves and brigands; that even the right of embassy holds, as indicated by the exclamation of Caesar. Just as if Caesar would have claimed any basis of law for that act, or as if it would have been seemly for him to make such a claim!" *Id.*

[16] Grotius, *Commentary on the Law of Prize and Booty*, 143.

[17] Grotius, *Commentary on the Law of Prize and Booty*, 417.

[18] Gentili, *De Iure Belli Libri Tres*, 423.

[19] *See* Waldron, Jeremy, "Ius gentium: A Defence of Gentili's Equation of the Law of Nations and the Law of Nature," *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Edited by Benedict Kingsbury and Benjamin Straumann, Oxford University Press, 2010, at 283.

III. Pirates and Other Non-*Hostes*: Tyrants, Rebels, Atheists, and Bandits

Who were the non-*hostes*, those that fail to have "some basis for a treaty of peace"? Among the international legal theorists of the sixteenth and seventeenth centuries and the English political and legal theorists of the early- and mid-seventeenth century, any complete list must include the tyrant, the rebel, the atheist, the pirate, and the bandit.

A. Tyrants and Rebels

The seventeenth century "tyrant" was an enormously complex rhetorical figure and the notion of tyranny central to the political battles and writings of the English Civil War. For my purposes, however, certain characteristics of the tyrant as understood by early seventeenth century writers are significant: first, the identification of tyrants with theft or robbery – and thus with the pirate or brigand; and second, the vulnerability of the tyrant to assassination by private figures.

Suarez is most explicit about distinguishing between two basic types of tyrant, though this distinction (and its significance) is occasionally implicit in other authors' works. "Tyrant" could refer either to a ruler who came to the throne or authority unjustly *or* to one who ruled in an unjust manner.[20] A prince or king ruled in an unjust manner if they did so selfishly (rather than the good of the commonwealth), by oppressing subjects, and specifically by failing to respect subjects' private property.[21] Grotius and Vitoria emphasize self-serving rule as the basis for distinguishing a tyrant from a king. A tyrant seeks "personal glory or convenience" in going to war, according to Vitoria, whereas a king pursues just causes.[22] Grotius borrows his definition of tyranny from Aquinas: "According to the Angelic Doctor, the rule of a tyrant is unjust, because it is directed to private advantage instead of to the public good."[23] For Bodin, both self-interest and oppression fall under the general heading of a failure by the king to "conformeth himself unto the laws of nature."[24] In a lengthy passage Bodin explains how the tyrant, as opposed to the king, behaves with respect to his subjects:

> "The one of them respecteth religion, justice, and faith; whereas the other regardeth neither God, faith, nor law: the one of them referreth all his actions to the good of the Commonwealth, and safety of his subjects; whereas the other respecteth nothing more than his own particular profit, revenge, or pleasure: the one doth all his endeavor for the enriching of his subjects; whereas the other seeketh after nothing more than the impoverishment of them, to increase his own wealth: the one of them accounteth his own

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[20] Suarez, Francisco. *Selections from Three Works*. Translated by Gladys L. Williams, Ammi Brown, and John Waldron, vol. 2, William S. Hein & Co., Inc., 1995, at 705.

[21] Suarez also includes among forms of misrule religious corruption, that is, leading subjects astray in terms of religious belief. *Id.*, 705.

[22] Vitoria, "On the Laws of War," 303.

[23] Grotius, *Commentary on the Law of Prize and Booty*, 413.

[24] Bodin, *Six Bookes*, 212.

goods to be the goods of the people; the other reckoneth not only the goods, but even the bodies of his subjects also to be his own…"[25]

Although the list here (which continues beyond the quoted passage) is quite comprehensive, elsewhere Bodin most strongly identifies tyranny with a failure to respect one's subjects' *dominium* in both their goods and persons. The distinction between tyrant and king can seem illusory; Bodin permits "lordlike Monarchy," that is, a form of rule where the prince governs his subjects "as the master of a family does his slaves."[26] A "verie tyrant," on the other hand, "contemn[s] the laws of nature and natures, imperiously abus[ing] the persons of his free born subjects, and [treating] their goods as his own."[27] It seems that this lack of respect for his subject's property is key to what sets the tyrant apart from the lordlike monarch. The tyrant "reckoneth not only the goods, but even the bodies of his subjects also to be his own."[28] Elsewhere in *Six Libres*, Bodin argues against the view that emperors or popes may take property from their subjects without cause. To seize such property lawlessly is the equivalent of "rob[bing] and spoil[ing] their subjects" and the notion that sovereign's ability to use force justifies this taking is the "law of thieves and robbers."[29]

English political writers described the tyrant as a thief in two senses: He had stolen the crown *and* the rule of tyranny consisted in part, at least, of theft from the people. The alleged tyrant Charles I was frequently compared with the common thief to justify his trial and execution; he was both a sort of criminal and much worse than the ordinary criminal, thereby meriting the indignity associated with a trial rather than formal battle and the severity of his punishment. Milton frequently described the tyrant as a criminal: Tyranny "comprehend[s] all sorts of Enormities, such as Robberies…" and submission to such a tyrant is no different from handing over one's goods to "a Multitude of Highway-men."[30] "[A]s [the King] is the public father of his Country, so this [the Tyrant] the common enemy. Against whom what the people lawfully may do, as against a common pest, and destroyer of mankind."[31]

Comparison of the highwayman and the tyrant was not limited to those who opposed Charles Stuart's rule. Among those who opposed the establishment of the Commonwealth, such as Edward Gee, comparisons were made between the Roundhead usurpers and "thieves and robbers."[32] Cimelgus Bonde's "royal apology for King Charles" calls Charles's executioners "tyrants." The tyrant is understood to threaten not just political liberty—though Bonde is speaking here of a usurper rather than one who misrules—but the integrity of citizens' ownership over their life and goods alike.[46] Even those who, like Thomas White, endorsed *de facto* theory of political legitimacy adopted the vocabulary: Thomas White, whose theological texts under the "Blackloe" pseudonym prompted Hobbes's first philosophical text, suggested that not only did a

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[25] Bodin, *Six Bookes*, 212

[26] Bodin, *Six Bookes*, 200.

[27] Bodin, *Six Bookes*, 200.

[28] Bodin, *Six Bookes*, 212.

[29] Bodin, *Six Bookes*, 109.

[30] Milton, John, *A Defence of the People of England; in answer to Salmasius's Defence of the King*. 1651. Translated by Joseph Washington. Amsterdam?: s.n., 1692, 68, 123.

[31] Milton, John, *The Tenure of Kings and Magistrates*. London: Matthew Simmons, 1649, at 19.

[32] Gee, Edward, *A Plea for Non-Scribers*. London, s.n., 1650, at 19. (Part of the Thomason Tracts.)

tyrannical magistrate become a *latro*, but also lost his status as a magistrate: "in truth, the Magistrate … by his miscarriages, abdicateth himself from being a Magistrate, and proveth a Brigand and robber instead of a Defender."[33] James II[34] and Louis XIV[35] were both compared unfavorably to pickpockets and pirates during the Glorious Revolution. Tyranny was thus associated with property theft throughout the period under consideration, in both international and domestic contexts, and by writers of all political affiliations – from the French absolutist Bodin to the Protestant republicans of the 1680s.

The consistent association between thievery and tyranny should not, however, obscure a significant shift between the sixteenth and early seventeenth century theorists I have highlighted (Bodin, Vitoria, and Suarez) and the English republicans of the 1640s and 1650s, both with respect to the nature of the legal order the tyrant threatened and the community to which the tyrant was perceived as criminal. Vitoria lists tyrants along with thieves and robbers as the proper objects of a just war: "Surely it would be impossible for the world to be happy...if tyrants and thieves and robbers were able to injure and oppress the good and the innocent without punishment, whereas the innocent were not allowed to teach the guilty a lesson in return."[36] The threat these figures pose is not to the commonwealth, but "the world" as a whole. Tyrants thus can be attacked by any other legitimate prince to secure the wellbeing of that community.

For Vitoria, as for Suarez, the authority to target such an individual lay with those who properly possessed jurisdiction in this world community. Private individuals cannot kill tyrants unless they are delegated public power, at least according to Suarez. The power to punish is necessarily for the sake of the common good and "the act of a superior and one possessing jurisdiction." Thus, an individual, acting in a purely private capacity, does not have the authority to kill even "a homicide, a robber, or an assassin," let alone a tyrant. The tyrant is implicitly compared to these criminal figures, but only to emphasize his invulnerability to private

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[33] White, Thomas, *The Grounds of Obedience and Government*. 1655. Gregg International Publishers, Ltd., 1968, at 123.

[34] James II, too, was compared unfavorably with the petty thief to claim that he deserved at least as much of a penalty as the relatively minor crook: "For shall a poor Pickpocket or a Highway-man be hanged for taking away a little loose Money, and these wholesale Thieves, who strip a Nation of their Lives, Liberties and Estates, and all they have, not be look'd after?" Johnson, Samuel, *An argument proving, that the abrogation of King James by the people of England from the regal throne, and the promotion of the Prince of Orange, one of the royal family, to throne of the kingdom in his stead, was according to the constitution of the English government, and prescribed by it in opposition to all the false and treacherous hypotheses, of usurpation, conquest, desertion, and of taking the powers that are upon content*. London, Richard Baldwin, 1692. For another example of a comparison between James II with petty criminals, with an explicit mention of "highwaymen," *see,* Georgeson, Sir P., *The defence of the Parliament of England in the case of James the II*. London, Timothy Goodwin, 1692, at 20.

[35] One English pamphleteer compared the actions of the French king in seizing territories to "a Banditto, a Pyrate, or a Pick-pocket would be asham'd of such Actions; and an ordinary Man would be hang'd for a Crime a Million times less." Burnet, Gilbert, "Popish Treaties not to be rely'd on: In a Letter from a Gentleman at York, to his Friend in the Prince of Orange's Camp. Addressed to all Members of the next Parliament," *A collection of papers relating to the present juncture of affairs in England*, London, Richard Faneway, 1689.

[36] Vitoria, "On the Laws of War," 298.

punishment. This argument against private punishment is further buttressed by a concern with the consequences of unleashing such a right; "infinite confusion and disorder would result" if any person were permitted to carry out such punitive measures absent a coordinating force and decision-making entity.[37] However, Suarez does permit the assassination of a prince who came to power illegitimately – as opposed to a prince who is rightfully on the throne and whose tyranny lies in his violation of the laws of nature. Such an illegitimate tyrant has threatened the public body by seizing its intrinsic *potestas*, and so the assassin acts not as a private individual but rather on behalf of the public authority and the commonwealth as a whole.[38] In his disputation *On War*, Suarez reiterates and clarifies this position: either the commonwealth as a whole or a portion thereof may wage a war of self-defense against a tyrant who has unjustly attempted or succeeded in seizing that commonwealth.

Bodin takes much the same position as Suarez for similar reasons, with two important differences. In determining whether a subject may slay a tyrant, one must first ask "whether the prince that beareth rule be an absolute sovereign; or not"; if sovereignty rests in the people or the nobility, the tyrant may be proceeded against "by way of justice" or by "open force," depending on whether reason exists to subject the tyrant to a trial.[39] While on its face remarkably permissive—subjects may proceed against a tyrant even absent a legal transgression—Bodin's rule is in fact just a consequence of the tyrant's absence of absolute sovereignty. In Suarez's account, a commonwealth may act against a usurper (or delegate their authority to an assassin to do so) out of collective self-defense; for Bodin, it is the power of sovereignty, located in the whole or part of the commonwealth, that authorizes them to act against a tyrant who rules illegitimately. For Bodin as for Suarez, however, a subject acting individually may never proceed against his king by law because said subject does not have jurisdiction over this sovereign power; if he were to proceed by force, he would be guilty of treason.[40] Unlike Suarez, Bodin inserts an additional permissive case for the destruction of tyrants: it "is lawful for any stranger to kill a Tyrant; that is to say a man of all men infamed, and notorious for the oppression, murder, and slaughter of his subjects and people."[41] Bodin cites Hercules an example of one such stranger, who liberated various persons from tyrants. Bodin here establishes that the *absence* of jurisdiction is sufficient to justify the execution of tyrants, whom he compares to "monsters."[42] Thus, according to Bodin, tyranny was a threat to the internal community of the commonwealth, but one that could only be eliminated by the heroism of outside actors.

In Gentili's writings, the tyrant is a criminal with respect to the domestic community. He remains an analog of the pirate, but the content of this analogy had shifted. While compared to the pirate as a sort of unjust enemy, the tyrant is no longer such with respect to his opponents in the international field. In *De Jure Belli Libri Tres* Gentili describes Mezentius, a tyrant who

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[37] Suarez, *Selections from Three Works*, 721. Suarez reiterates this prohibition as the position of the Council of Constance in his disputation "On War." *Selections from Three Works*, 855.

[38] Suarez, *Selections from Three Works*, 721.

[39] Bodin, *Six Bookes*, 221.

[40] Bodin, *Six Bookes,* 222.

[41] Bodin, *Six Bookes*, 221.

[42] Bodin, *Six Bookes*, 221.

feared improper burial[43] by the subjects who hated him. Gentili classifies this "case of a tyrant" as a "question of civil law, not of this law of war."[44] He again takes this position, albeit by implication, in *De Legitionibus*: addressing the question as to whether tyrants have the right of embassy – a right associated with one's status as a *hostes* as described in *De Jure Belli Libri Tres* – Gentili says the following:

> In this connection I should find difficulty in distinguishing between tyrant and king, because in the field of our inquiry the rights of both may be regarded as equal. Each of them is master, and law perhaps is the basis of each one's sovereignty. A king rules over his subjects because they want him to do so, a tyrant in spite of them. Yet a tyrant is none the less a prince, for we know of princes who have acquired their power by arms and warfare, and who for the most part rule over their subjects in spite of them. [45]

While the passage can be read as merely reaffirming Suarez's distinction between lawfully enthroned but cruel tyrants (who must be respected as legitimate rulers), and tyrants who assumed rule illegitimately, the last sentence suggests that in the field of international relations, this distinction is of little importance: *All* princes have acquired power through force. Whether this force was just or unjust, it is not the place of other sovereigns to question the basis of opponents' authority.[46] Sovereignty has, in a sense, provided a "black box" for the internal workings of the state, and sovereigns, once they have gained such status or recognition, now participate as coequals with respect to certain practices and norms.

Within the commonwealth, in contrast, citizens may treat the tyrant as "an unjust enemy" and are permitted forms of violence against a tyrant that enemies within the international legal regime may not commit against one another. In this respect Gentili's thinking differs radically from both Bodin and Suarez. Such "unjust enemies" or, "strictly speaking…one who cannot be an enemy…may be punished by a shameful death, crucified, and left unburied."[47] In other words, citizens may do to a tyrant what princes may do to a pirate: refuse them burial. This is the source of Mezentius's concern, which Gentili does not assuage. A tyrant is a non-*hostes*, but only with respect to his own subjects. In Vitoria's writings, a tyrant's criminality was founded in his violation of international legal norms; for Gentili, it resulted in an exclusion from the community that the tyrant purported to rule.

Among political writers of seventeenth century England, as for Gentili, the tyrant was conceived as an internal problem, subject to punishment *within* the commonwealth rather than outside of it. At least was the position of the more radical republicans during the Civil War: "*To bring* [the tyrant] *to punishment is Gods will, and mans work…*[B]ecause his power is great, his will boundless, and exorbitant, committing wrongs, oppressions, murther, massacres, rapes,

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[43] The threat of improper burial is quite profound within Gentili's worldview, and its import derives in part from Gentili's use of Roman sources. Not to be buried is to be treated as non- or sub-human.

[44] Gentili, *De Iure Belli Libri Tres,* 283.

[45] Gentili *De Legationibus*, 76.

[46] There are echoes, in this assertion, of the story of the pirate and Alexander, discussed *supra*.

[47] Gentili, *De Iure Belli Libri Tres,* 283.

adulteries, desolation and subversion of his good people, [a tyrant] is to be seized upon, secured, and executed, as a common Enimy of his Countrey or People."[48]

The author of the text on tyrants from which the above is quoted, John Price, also introduced another basis of comparison between pirates and tyrants: both represent deviations from what are considered legitimate or lawful forms of rule: "[F]or when the peoples Pilot proves a Pirate, not ruling, but ruining them, the hands and hearts of God and men will be swift Avengers of such perfidiousness."[49] Pirates often began their careers as legitimate sailors who "turned pirate," and sought greater economic gains by operating outside the law. A tyrant, similarly, takes a legitimate institution into the realm of lawlessness, metaphorically crossing the boundary between commonwealths and bands of brigands. The danger of such tyrants lies with their capacity to take the entirety of the state, like a captain's ship, with them. Thus, while one must sometimes obey a thief or tyrant out of self-preservation or respect his lawful orders, one should not swear allegiance to a tyrant. This prohibition was of significant practical relevance in both the 1650s and 1690s, as both Charles I's and James II's alleged usurpers demanded oaths of allegiance. To quote Theophilus Downes, comparing the problem of allegiance in 1689 to that of 1649: "I may lawfully obey a Highway-man, and I may lawfully swear it; but I suppose it will not follow thence, that I may lawfully swear to be faithful, and bear true Allegiance to him. It was lawful to swear Obedience to *Cromwel* in all lawful things; but I think there were few, even in that Age of Usurpations, that were so hardy, as to assert the lawfulness of swearing Allegiance to that Unnatural Usurper."[50]

Other writers of the period are explicit that not only may the tyrant be collectively punished but that he is subject to execution at the hands of any individual citizen who takes it upon himself to exercise the collective will. Bonde cites the laws and writings of "ancient Fathers," the Bible, and civil (Roman) lawyers in support of the proposition that any person may destroy a tyrant and that one who does so deserves praise and reward as well. In this passage the tyrant is compared to a "wild boar" and a "viper," and "wolf amongst men"; the law of nature is invoked to support the proposition that one may destroy such a dangerous creature out of self defense: "every man is obliged to preserve himself."[51] Moreover, this right of self-defense and defense of one's property is explicitly analogized to the sort of confrontation between traveler and robber we will later find in Locke, and the principle that one is licensed to kill one's attacker: "…and by the same reason and law…I may destroy a Tyrant; for the onely difference betwixt a common highway man, or Burglar, and he is their strength and might, the one is a little thief, the other a great one."[52] This language of bestiality closely resembles that used by both

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[48] Price, John, *Tyrants and protectors set forth in their colours. Or, The difference between good and bad magistrates; in several characters, instances and examples of both*. London, H. Cripps and L. Lloyd, 1654, at 21.

[49] Price, *Tyrants and protectors*, 29.

[50] Downes, Theophilus, *A discourse concerning the signification of allegiance, as it is to be understood in the new oath of allegiance*, London, s.n., 1689, at 20.

[51] Bonde, Cimelgus, *Salmasius his Buckler: or, A royal apology for Charles the martyr*, London, H.B., 1662, at 195.

[52] Bonde then quotes the story of Alexander's encounter with the pirate to illustrate this moral equality of the tyrant and robber, and relative greatness of the former's crimes. Bonde, *Salmasius his Buckler*, at 196.

Grotius and Locke—discussed at length below, as is the conclusion that the destruction of such a figure is necessitated by self-defense.

Comparing the treatment of the pirate by sixteenth century international legal theorists to that of the political writers of the two English revolutions, two changes are apparent. Once a transgressive figure in the context of international law and threat to human community, the tyrant came to be understood primarily a violator of civil law and threat to the commonwealth. Where collective action on the part of the community as a whole—an exercise of its *potestas*—was once required to rid itself of such a tyrant (even if such power could be implicitly invested in an individual), the tyrant of the late 1680s is a beast against which anyone may exercise self-defense. As we shall see, there was a similar evolution in how the same thinkers approached the problem of the pirate.

Only Gentili of the authors under consideration here discusses rebels at any length in the context of international law and he does so only to establish that rebellions are a matter for civil law, and not the *ius gentium.* Like tyrants, the determination of who is a rebel is a matter of the civil law, to be resolved internally by a state.[53] However, within the international field rebels, unlike tyrants, are not to be admitted to the community of *hostes* who are entitled to embassies, as Gentili makes clear in a chapter devoted entirely to the question of whether rebels have the right of embassy.[68] While other states are not to examine too closely *how* a particular ruler came to the throne the decision by a subgroup of a particular commonwealth to challenge precisely this principle of sovereignty disqualifies them from recognition. The refusal to respect rightful authority cannot be the basis of a right to an embassy among third-party states.[54]

This reasoning raises, however, tension between Gentili's insistence, in *De Jure Belli Libri Tres*, that rebels are "defined by an Imperial constitution and by the interpreters of the law" and the suggestion that the violation committed by such rebels is of the same sort as one "who has shown contempt for the rights of embassy."[55] In *De Legitionibus* the rebels are treated as the analog of another state that has failed to respect the sovereignty of their neighbor by denying them the rights of embassy; in *De Jure Belli Libri Tres* they are internal criminals (defined so by civil or imperial law) whose loss of citizenship for this offense cannot form the basis of recognition or status as a *hostes.*[56] In short, Gentili provides us with two ways of reading the crime against sovereignty committed by rebels: as a violation of civil law *or* of the *ius gentium*. This ambiguity is in keeping with the transition we have seen in Gentili's writing around the nature of the tyrant, since the tyrant and the rebel are inverses of one another: Those who fight a tyrant illegitimately (or unsuccessfully) are termed rebels; the target of a legitimate (or successful) rebellion is a tyrant.

B. Atheists

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[53] Gentili, *De Iure Belli Libri Tres*, 321.

[54] Gentili, *De Legationibus*, 76.

[55] Gentili, *De Legationibus*, 76.

[56] "Hotman is wrong too in asserting that the law of nations is extended to those who have revolted. For as to what Paulus seems to assert, that those who have revolted are enemies to the extent of losing their citizenship, he surely was not consulting for their interests or giving them the benefit of a new law, to wit, the law of nations, since neither the charge nor the penalty has this effect." (Gentili, *De Iure Belli Libri Tres*, 23-24.)

Although I have used "atheist" as shorthand for the next category, this is a something of a misnomer – and not just because the concept of "atheist," in its modern meaning, was unavailable to thinkers of the early seventeenth century. By "atheist" I include both those peoples without religion and those whose social norms or practices are in violation of natural law—two types of people that were discussed together by Vitoria and Grotius (following Vitoria). "Godless" is probably the best contemporary synonym—used both to describe people lacking deistic beliefs understood as necessary for true moral conduct and for those who—presumably due to this lack of belief—engage in morally outrageous conduct. (I primarily use "atheist," following the translations on which I rely.) For Gentili, the absence of religion is a violation of natural law. While Vitoria, Suarez, Grotius, and Gentili addressed the question of whether and how the right of war against such non-believers differed from that against Christian princes and peoples, there is a striking difference between the former two and the latter two in how membership in a global community was understood vis-à-vis the interstate right of punishment.

Gentili and Grotius follow Vitoria and Suarez to an extent in disqualifying religion *per se* as a just cause of war. Grotius agrees with Vitoria that you cannot make war on non-believers for the purposes of *conversion*. This prohibition stems from the requirement that Christianity be accepted voluntarily and not, as in Vitoria's writings, from an absence of jurisdiction on the part of the Christian evangelist.[57] Gentili's reasoning is different; since "religion is a relationship with God…man cannot complain of being wronged because others differ from him in religion."[58] Because war is just only when in response to a wrong or anticipated wrong, evangelical wars are unlawful. However, such reasoning applies only among those peoples with *some* religion. While mistaken belief is a violation of Christian law, the absence of belief altogether is a violation of natural law. Those "who, living rather like beasts than like men, are wholly without religious belief [are] the common foes of all mankind, as pirates are, ought to be assailed in war and forced to adopt the usages of humanity."[59] Later in *De Jure Belli* Gentili reiterates this point: "Some kind of religion is natural, and therefore if there should be any who are atheists, destitute of any religious belief, either good or bad, it would seem just to war upon them as we would upon brutes."[60]

For Gentili, the godless are the equivalent of pirates in threatening all of humanity and can be subject to indiscriminate violence as such. Less clear is the aim of such violence. Whereas in the first instance Gentili suggests that the purpose of this war is the reintegration of atheists into the human community by "forc[ing them] to adopt the usages of humanity," in the second such atheists are treated as the equivalent of brutes, sub-human and morally excluded from such membership. These two competing desiderata—to physically exclude and to restore to membership (or at least usefulness) those who are deemed to be morally outside the bounds of a community—apply not just to the atheist but, as we shall see, are characteristic of the "criminal" as such.

Deferring discussion of this ambivalence for the time being, the contrast between Gentili and Vitoria on the question of non-believers is nevertheless instructive. Gentili states one may wage war against atheists as one would against brutes—that is, *because* such atheists are excluded from the community of humans they are therefore subject to violence. Vitoria's

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[57] Grotius, *The Rights of War and Peace*, 1044-1045.

[58] Gentili, *De Iure Belli Libri Tres,* 41.

[59] Gentili, *De Iure Belli Libri Tres,* 41.

[60] Gentili, *De Iure Belli Libri Tres,* 125.

reasoning is the exact inverse of this. A Christian king may not wage war against a non-Christian people because the latter is not subject to the former; "a Christian prince has no more power over an infidel prince than over another Christian."[61] Any additional power a Christian prince might have would derive from the Pope's authority, but the Pope lacks such authority over non-believers precisely because they are not members of the Christian community: "unbelievers are not subjects of the pope; the pope therefore can confer no authority over them upon a prince."[62] Even when a Christian prince *does* have cause to go to war against unbelievers—and this reason may include their abuse of their own people through, e.g. anthropophagy—the limits on that military violence are the same as apply to wars between Christians.[63] Where for Vitoria and Suarez the ability to punish was the function of a relationship of authority that is founded in the common membership of punisher and punishee, for Gentili this authority to carry out violence is a right of expelling from the physical world community those who have already been morally excluded.

Grotius, in contrast, is explicit in rejecting "the opinion of *Victoria, Vasquez, Azorius, Molina*" that requires direct injury for a party to begin a war. These authors "assert, that the Power of Punishing is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature." Thus, individual princes may take it upon themselves to punish those who violate the laws of nature, not only in those cases where such violations hurt other humans—as in Vitoria's case of anthropophagy—but where the harm is "indirect and consequential, as Self-Murder; for instance, Bestiality and some others."[64] In Gentili's explication of the laws of war the exclusion from the community of *hostes* is a matter of status – non-believers are the equivalent of brutes, and thus ineligible. In Grotius's account (as I will argue below) the policing of this boundary is active and ongoing; otherwise legitimate powers may act like brutes and being treated accordingly.

Whereas Gentili viewed tyrants and rebels (other kinds of non-*hostes*) as internal problems, whose legitimacy or lack thereof was a matter for their own political community to solve, atheists were outside any political community altogether, and thus a problem for *all* of humanity. The godless may be punished because they are outsiders not just of a political community but *all* human community; they are beasts and therefore may be exterminated as such, without the usual constraints that apply to even the illegitimate rulers of other political communities. Paradoxically, the *purpose* of this violence—which is justified by the atheists' outsider status—is to reincorporate them into the human community by "forc[ing them] to adopt the usages of humanity."

IV. The ambiguous figure of the pirate in seventeenth-century England: Deceiver, traitor, thief, leader, and privateer

Gentili, writing in England about international law in the late sixteenth century, viewed the distinction between enemies and pirates as fundamental to the laws of war. Writers of seventeenth-century England had a more complex understanding of the pirate as both politically

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[61] Vitoria, "On Dietary Laws," *Political Writings*, 218-219.

[62] Vitoria, "On Dietary Laws," 223.

[63] Vitoria, "On Dietary Laws," 226 ("By whatever title war is begun on the barbarians, it is not lawful to take it further against them than we should take a war against Christians. This is clear, because the justice of the war has nothing to do with their being unbelievers.").

[64] Grotius, *The Rights of War and Peace,* 1028.

and economically troublesome. The clear distinction Gentili drew between pirate and prince bore little resemblance to conditions on the seas during much of the seventeenth century. Princes readily made use of mercenaries and other irregular (that is, not carrying a flag identifying one as part of a national navy) ship-captains to carry out raids in the national interest. As both Lauren Benton and Janice Thomson (and others) have described, what distinguished "pirate" from "privateer" was often little more than a letter from a political authority on land authorizing the captain to attack and take the goods of one or more other nations' ships.[65] The legitimacy of these letters of marque could themselves turn on domestic political battles of which sailors had delayed or imperfect knowledge. A pirate could be praised as a war hero one year and hung as a criminal the next, depending on the financial and political interests of the monarch and the willingness of the pirate to abide by his current wishes.[66]

For example, a pamphlet published in 1694 by Matthew Tindal addresses at length whether commissions issued by James II prior to his abdication during the Glorious Revolution were still valid, or whether those captains attempting to sail under such *marques* were liable to prosecution as pirates was a matter of extensive public debate in the 1690s.[67] Tindal's arguments for why these such captains ought to be prosecuted pirates generally follows Gentili's arguments for the (lack of) status of pirates generally. (He also cites Grotius extensively.) Because everyone believes himself to be in the right, only by distinguishing between "publick cause[s]" and private actors are a set of limitations on seafaring violence possible.[68] Like Locke, Tindal argues that a man who disobeys *a* government, "destroyeth, as far as in him lieth, all Government and all Order, by breaking all those Ties and Bonds that unite People in a Civil Society."[69] Thus, Tindal argues, it is not necessary to prove a pirate is *literally* an enemy to all mankind to prosecute him as a *hostis humani generis*. As for the captains carrying James's commissions, Tindal argues that if English authorities fail to prosecute men who sail under the "protection" of illegitimate rulers, then ships may operate lawlessly because there is *no* legitimate king who can call them to

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[65] Benton, Lauren, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, Cambridge University Press, 2009, at 113-114. Thomson, *Mercenaries, Pirates, and Sovereigns*, 21-23.

[66] Not only a pirate's skills, but his dual status as a useful soldier and wanted criminal are highlighted by the following "satyricall epigram": "A Pirat is an excellent Bow-man. Who from his childe-hood being much bent to rouing, is in time become a cunning Shooter, and thereby hath wonne many a Prize. If you purpose to outgoe him, you must betake you to your flight: but if once he Boord you, your game is lost. Adam Bell and his Archers gaue him first example to bee an Outlaw; And because in times past he hath beene a beneficiall Souldier to the English, hee is sent vnto the Marshalsey; for whose sake, there is a Stake or two set vp at Wapping, for him, or any of his Companions to make vse of." Gent, I.H., *The House of Correction: Or, Certayne Satyricall Epigrams*, London, Richard Redmer, 1619.

[67] *See* Tindal, Matthew, *An Essay Concerning the Laws of Nations*, London, Richard Baldwin, 1694.

[68] Tindal, *An Essay Concerning the Laws of Nations*, 18. Tindal cites Grotius for the proposition that just as pirates, if they form themselves into a civil society, may become "just Enemies," so may a "King that loseth his Empire, and can no longer protect People," lose his status and thus ability to grant commissions.

[69] Tindal 25-26.

account.[70] In Tindal's work we see the contemporaneous concern with the dynamic Thomson describes, namely: Where there is no single sovereign state to be held accountable for a captain's actions, deterrence of bad behavior on the high seas is practically impossible.

A parallel ambiguity characterizes the distinction between pirates and merchants. Texts from the period frequently include references to merchants "turning pirate" once lawful tradesmen deciding they could make a better profit by pillaging or stealing from fellow sailors. This kind of theft-based piracy was obviously illegal, but—like the distinction between piracy and privateering—had a clear legal analog. The renegade lifestyle associated with merchants who "turned pirate" must have held some interest for the average seventeenth-century reader, as histories or biographies of famous pirates, both ancient (Roman or Greek) and modern (primarily English) was a genre during the period.[71] In defining piracy, many seventeenth-century English writers made no reference to their status within international law. Instead, they would refer only to the threat pirates posed to private interests, that is, property and trade.[72]

Whether literary or real, pirates operated on two sides of the law with respect to both their economic and military roles. This double ambiguity (military/economic and lawful/unlawful) with respect to historical piracy no doubt informed the occasional metaphorical usage of "pirate" as a kind of deceiver, a usage that persisted through the seventeenth century. Pirates were a common figure in moral aphorisms. For example, hypocrites were like pirates and rovers in that they used false banners to lull other sea voyagers into complacency before attacking them, according to an Italian moral treatise translated and published in 1605.[73] Pirates also served as a foil or comparative figure for political betrayal, specifically false leadership. For example, the possible "popish successor" (*i.e.* James II) was described as a pirate in 1681 as follows: "Nay, he shall vary his Disguises as often as an Algerine his Colours, and change his Flag to conceal the Pyrate."[74] Unlike the clarity of opposition between enemies and brigands, the

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[70] Tindal 13.

[71] *See, e.g.* Anonymous, *Ward And Danseker Tvvo Notorious Pyrates, Ward An Englishman, And Danseker A Dutchman.* London, E. Allde for N. Butter, 1609; Impartial Hand [Anonymous], *A True Relation Of The Life And Death Of Sir Andrew Barton, A Pyrate And Rover On The Seas*. London, Alex Milbourn, W. Onley & T. Thackeray, 1695; Anonymous, *The Grand Pyrate, Or, The Life And Death Of Capt. George Cusack, The Great Sea-Robber With An Accompt Of All His Notorious Robberies Both At Sea And Land: Together With His Tryal, Condemnation, And Execution*. 1676.

[72] *See, e.g.* Philipot, Thomas, *An Historical Discourse Of The First Invention Of Navigation And The Additional Improvements Of It With The Probable Causes Of The Variation Of The Compasse, And The Variation Of The Variation*. London, W. Godbid, 1661, at 19 (". . . [T]hat although in these Moderne Ages, the Name of Pirate is still applied to one who supports himself by Pillage and Depredation at Sea, yet in Times of an elder inscription, the word Pirata or Pirate, was sometimes attributed to those persons to whose care the Mole or Peer of any Haven (call'd in Latine Pyra) was entrusted, and by whose Inspection it was provided, that those places should receive no prejudice, which were the occasion of so much advantage to the publique interest.").

[73] Romano, Fra. Giacomo Affinati D'Acuto Romano, *The Dumbe Divine Speaker*. Trans. By A.M., London, William Leake, 1605.

[74] Settle, Elkanah, *The Character Of A Popish Successour, And What England May Expect From Such A One*. London, T. Davies, 1681. Settle continues: "As for instance; Another fit, for whole Years together, he shall come neither to one Church nor th'other, and participate of neither Communion, till

rhetorical and moral significance of pirates in seventeenth-century English writing lay in their ability to switch between roles—or at least to be perceived as doing so. James II's deception in the above quote is not limited to the change of banner, that is, his willingness to hide his true religion. He is not just like a pirate, he is revealed to be a pirate.

Especially during the Civil War period, piracy was used as a metaphor for political leadership itself, frequently by way of an anecdote from texts by Cicero and Augustine about Alexander and an unnamed pirate. Having been captured by Alexander the Great, a pirate informs the emperor that what distinguishes them is only the magnitude of their respective thefts; had the pirate a fleet instead of a single ship, he too would be called emperor. This remark, in the apocryphal tale, earns the pirate his freedom.[75] Among English political pamphleteers, this story could be used to undermine the authority of leaders or to challenge monarchical rule altogether. An illegitimate king was, like Alexander, nothing more than a particularly successful pirate and thus subject to violent overthrow. The last colloquy at Charles's trial was a retelling of this tale by the Lord President of the Court; the deposed king, now sentenced to death, responded by saying it was his prosecutors who were engaged in a robbery.[76]

The story could also be used to acknowledge the difficulty associated in distinguishing just from unjust wars, and the sometimes impossibility of punishing the latter when they are successful and carried out by kings.[77] Locke extends the comparison from political leaders to "whole nations [who] have professedly been pirates and robbers," citing Cato for an aphorism closely resembling Augustine's pirate's shot at Alexander: "'Thieves committing private theft,' says Cato, 'spend their lives in prison and in chains; public thieves, in gold and in purple.'"[78] A tyrant, like a pirate or robber, enforced his will through fear; a subject had no moral obligation to obey such a ruler, even though he might do so out of expedience.[79]

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ignobly he plays the unprincely, nay the unmanly Hypocrite, so long, that he shelters himself under the Face of an Atheist, to shrowd a Papist."

[75] Augustine, *The City of God Against The Pagans*. c. 413-426. Translated and edited by R.W. Dyson, Cambridge University Press, 1998, at 147-48.; Cicero, "On the Commonwealth," *On the Commonwealth and On the Laws*. 54-51 B.C.E. Translated and edited by James E.G. Zetzel, Cambridge University Press, 1999, at 67.

[76] Iagomarsino, David, and Wood, Charles T., *The Trial of Charles I: A Documentary History*. Dartmouth University Press, 1989, at 10.

[77] *See* Freke, William, *Select Essays Tending To The Universal Reformation Of Learning Concluded With The Art Of War*. London, Thomas Minors, 1693, at 243-44 ("So surely, one might as justly be guilty of a Robbery as a Conquest, unless one had the justest cause of War to move one to it. . . . Robbers and Murderers of thousands in Corruption and Flattery, we admire without regret, while the more innocent Rogues from necessity we destroy in this World, and damn in the next; but surely, God will be more just to them.").

[78] Locke, John, "Essay on the Law of Nature V," *Political Essays*. Edited by Mark Goldie, Cambridge University Press, 1997, at 110-11.

[79] "Anyone would easily discern in himself that this is so and perceive that there was one ground of his obedience when as a captive he was constrained to the service of a pirate, and that there was another ground when as a subject he was giving obedience to a ruler; he would judge in one way about disregarding allegiance to a king, in another about wittingly transgressing the orders of a pirate or robber. For in the latter case, with the approval of conscience, he rightly had regard only for his own well-being,

Pirates were not just economic troublemakers or robbers in disguise but were construed as a threat to English political rule as well. At least some seventeenth-century English authors also described pirates as "the enemy of all." This statement, "*pirata est hostis humani generis*," was not just rhetorical, but did theoretical work. In his treatise on the criminal common law of England, Brydall notes that before the great statute of 25 Edward III, piracy was considered petit treason: "Before the Statute of 25 E. 3. C. 3 *De proditionibus*, if a Subject had committed Piracy upon another, this was holden to be Petit treason, for which he was to be drawn and hanged: because *Pirata est hostis humani generis*, and it was *contrae Ligeantiae suae de[b]itum*."[80] Brydall cites Cicero as the source of this proposition, but its logic depends on the English legal conception of treason:Treason entails the use of force against one who has authority over you. Hence a wife murdering her husband was petit treason under English law of the time, but a husband murdering his wife was simply homicide.[81] According to Brydall, piracy is a form of treason because it is against the obligation (*contrae Ligeantiae suae debitum*) the pirate has to *any* subject. The pirate's status as "the enemy of all" is construed to put all subjects in a position of relative authority to the pirate and thus to make piracy treason. The pirate, under Brydall's interpretation of English law, closely resembles the criminal in Locke's state of nature, who has, "[i]n transgressing the law of nature," has given every man the right to punish, and thus exercise a kind of authority, over him.[82]

As Brydall observes, the major statute defining treason (25 Edward III, enacted in 1351/2) eliminated piracy from the list of petit treasons.[83] However, even if not technically traitors under the law, pirates were frequently referred to as such. Thomas Overbury—whose political rise, fall, poisoning, and posthumous vindication is well-documented in the state trial records of the 1610s—presents a characterization of pirates as traitors that also captures several contemporaneous piratical associations:

> A Pyrate, truly defined, is a bold Traitour, for he fortifies a castle against the King. Give him Sea-roome in never so small a vessel; and like a witch in a sieve, you would think he were going to make merry with the Divell. Of all callings he is the most desperate, for he

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but in the former, though conscience condemned him, he would violate the right of another." (Locke, Essays on the Law of Nature VI," *Political Essays*, 117-8.)

[80] Brydall, John, *A Compendious Collection of The Laws Of England, Touching Matters Criminal*. London, John Bellinger, 1675, at 70.

[81] Coke, Edward, *The Third Part Of The Institutes Of The Laws Of England Concerning High Treason, And Other Pleas Of The Crown, And Criminal Causes*, London, M. Flesher for W. Lee & D. Pakeman, 1644, at 20.

[82] *See* Locke, John, *Second Treatise of Government*. Edited by C.B. Macpherson, Hackett, 1980, at § 8.

[83] That is not to say the crime of piracy was considered an ordinary felony by Gentili's time; judges conferring around 1603 determined that it was not included under the heading of "felonies" for purposes of a general pardon. "About the end of the Reign of Queen Elizabeth . . . [i]t was resolved by all the Judges of England, upon conference and advisement" that the Queen's attempt to pardon English Pirates who had robbed merchants of Venice "in amity with the Queen" was null, since piracy "was no felony, whereof the Common Law took Conusance, and the Stat. of 28 H. 8 did not alter the offence, but ordained a Tryal, and inflicted punishment; therefore it ought to be pardoned especially, or by words." Brydall, *A Compendious Collection*, 71-72.

> will not leave off his thieving though he be in a narrow prison. . . . He is one plague the Divell hath added, to make the Sea more terrible then a storm. . . . He is very gentle to those under him, yet his rule is the horriblest tyranny in the world: for hee gives licence to all rape, murder, and cruelty in his own example . . . a perpetually plague to noble traffique, the Hurican of the Sea, & the Earth-quake of the Exchange.[84]

In Overbury's telling, a pirate is a threat to the king's rule because the pirate resists punishment ("he fortifies a castle against the king"). His threat to ordinary persons is one of tyranny—again, the contrast with justice among thieves presented as a foil to legitimate rule and following the identification between tyranny and crimes against personal property and integrity (rape). This contrast between the *de minimis* of justice associated with groups of thieves and the failure of the pirate to respect the property or political integrity of others echoes Grotius's criteria for state recognition. The pirate is either directly associated with the devil or is a creation thereof. Finally, the pirate is a "perpetually [sic] plague" to trade and legitimate sea-traffic.[85]

Overbury's description captures something of the complexity and ambiguity of piracy as a historical practice, legal concept, and metaphorical referent in seventeenth-century England. The pirate was, on occasion, the "enemy of all," but this was neither his most salient nor most popular designation. More frequent in the popular or legal literature of the seventeenth century are references to or emphasis upon the pirate as thief and his ability to pass back and forth between thieving and legitimate activity, which in turn gave rise to the pirate's metaphorical significance as a hypocrite or deceiver. As we have seen, the pirate was not described primarily in opposition to a legitimate military actor by seventeenth-century writers, but instead, as dangerous precisely because he could be mistaken for a merchant or soldier.

Thus, one must be careful not to read Gentili's striking assessment of "pirates and brigands" as the foil to legitimate states as characteristic of popular early modern understanding. While the pirate's role as foil to legitimate ruler and as "enemy of all" were both well-established within the conceptual vocabulary of seventeenth-century English writers, the phrase "*hostis humanis generis*" is found in early modern writings almost exclusively by way of a quotation from Cicero. Rather than a claim about the structural role of pirates in an international legal regime, *hostis humanis generis* was often used simply as a rhetorical trope or recitation. The pirate in seventeenth-century English thought certainly carried, among his many possible associations and meanings, the connotations and status in international law that Cicero, by way of Gentili, assigned to him. Considered relative to English subjects and the English state, however, the category of pirate did not just describe an opposition to legitimate actors, but had significant content: Pirates were traitors, privateers, and thieves. This thicker notion of piracy, while still linked to the *moral* standing of pirates in the international legal order, was in turn closely tied to the English highwayman, a connection the next section describes in detail.

V. From Pirate to Highwayman in Seventeenth-Century England

[84] Overbury, Thomas, *Sir Thomas Ouerburie His Wife With New Elegies Vpon His (Now Knowne) Vntimely Death*. London, Edward Griffin, 1616.

[85] Overbury also identifies piracy with natural disasters that affect sea travel; a much more literal concern with piracy as one of many well-established threats to sea trade and with the rules governing risk associated with such threats can be found within several primers for merchants.

In this section, I argue that the figure of the pirate in international law was closely linked, in both political writings and narrative or reference works aimed at a popular audience of seventeenth century England, to the highwayman. Highwaymen, in turn, were a synecdoche for the broader category of criminal in political writings and one prominent object of early centralized state-based efforts at criminal prosecution and enforcement. Others have argued that pirates were the early modern analogs of the contemporary terrorist; for at least one important subset of English political writers they were also the object of theorizing about and implementation of criminal punishment.

Although perceived as exceptional or transgressive, pirates and their treatment cannot be understood solely or even primarily in contrast to an "ordinary" criminal law or punishment. Pirates were, for many English writers of the seventeenth century, primarily a type of thief with a clear domestic analog: the highwayman. Not only were the pirates and highwaymen treated as equivalent by seventeenth-century thinkers and writers both inside and outside of England, but they also shared crucial characteristics: they challenged both *imperium* (political authority) and *dominium* (property rights or ownership), and they did so by blocking passages between nodes of civil communities, disrupting both economic and political movement, and thereby disrupting nascent state spaces. Pirates carried connotations of universal enmity and vulnerability to state violence, but they did so not in opposition to some separate category of everyday criminals; rather, at least one prominent *domestic* criminal in seventeenth century England was identified with the pirate.

A selective survey[86] of English writings from the seventeenth century reveals that pirates and highwaymen were thought of as analogs on land and sea, and that this pairing was both a matter of legal doctrine and rhetorical usage. This identification could be at the level of definition, as evidenced by Elisha Cole's 1677 English dictionary, which defines "land-pirates" as "highwaymen."[87] Alternately, the two could be paired, described as occupying the same or analogous professions,[88] or twinned within a single metaphor that relied on their shared characteristics.[89] Both were frequently termed "rovers," distinguished by their respective field of

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[86] In addition to reviewing a selection of what are generally regarded as the most theoretically significant political and legal texts of the period 1600-1700 (including the major texts of Francis Bacon, John Brydall's *Jus Criminis*, George Lawson's *Political Sacra et Civilis*, James Harrington's *The Commonwealth of Oceana*, and Matthew Tindall's *Laws of Nations*), I performed keyword searches for "pirate," "brigand," and "hostes" appearing in texts dated from 1600 through 1700 in the Early English Books Online database, a collection of more than 125,000 titles which includes the full Thomason Tracts.

[87] Coles, Elisha, *An English Dictionary Explaining The Difficult Terms That Are Used In Divinity, Husbandry, Physick, Phylosophy, Law, Navigation, Mathematicks, And Other Arts And Sciences*. London, Peter Parker, 1677. In the same work, pirates are defined as follows: "Pirate, l. a Sea-Robber, (formerly any Sea-Soldier, or the Overseer of a pira or Haven-peer.").

[88] *See, e.g.,* Hobbes, Thomas, *Leviathan*. 1651. Edited by Edwin Curley, Hackett, 1994, at I.x.49 ("[T]ill there were constituted great Commonwealths, it was thought no dishonor to be a Pyrate, or a High-way Theefe; but rather a lawfull Trade—not onely amongst the Greeks, but also amongst all other Nations [sic].").

[89] *See, e.g.*, Crosse, Henry, *Vertues Common-Wealth: Or the High-Way to Honour*. London, John Newberry, 1603 (No matter how wealthy and sensually satisfying a man's life may be, "yet if he be not noble in Vertues, but ignoble in vices, and have not those good parts that carry a union of good mens praises, he is but pirat & latro, a theefe and a robber.").

operation as “land-rover” or “sea-rover”. Both were considered infamous.[90] Like pirates, famous highwaymen were the subjects of poems and popular biographies, and occupied a similar place in the popular mindset as worthy of fear, moral condemnation, and perverse admiration for their ability to thwart attempts by agents of the Crown to capture them.[91] Pirates and highwaymen were both seen as perversions of respectable professions; just as merchants could “turn pirate,” so could farmers “abdicate their plough” in favor of “robbing on the High-way.”[92]

There is at least one case of an English author substituting “highwayman” for “pirate” in summarizing Cicero’s and Grotius’s position on whether oaths obliged in the case of pirates, discussed above: “For tho’ a Man swear to pay money to an Highwayman, the Highway-man has no Right to this money. Cicero held the Oath absolutely void; but Grotius and Bishop Sanderson, who oppose him in this, are express, that the Highway-man acquires no Right.”[93] An author could make the same theoretical or normative point about the nature of promises by substituting “highwayman” for “pirate.” This example is significant, furthermore, because it suggests that pirates and highwaymen were not only considered analogous vis-à-vis the domestic law of theft or in the social imagination, but with respect to the norms of international law articulated by Gentili and Grotius. Whether by way of translation—Grotius and Gentili, after all, wrote in Latin—or for all the similarities cited above, highwaymen were understood as having similar standing with respect to the natural law by the late 1680s as did pirates in Grotius’s thinking of the 1620s.

Why, then, were pirates and highwaymen so closely identified? These two figures—in both their rhetorical and historical forms—shared two important characteristics: First, they both interrupted or made especially difficult movement through or across space; specifically, they disrupted transportation between nodes of governance in a broader space over which these nodes were attempting to project power. Second, their violations of both economic and political orders were not incidental to one another, but intimately related. These two characteristics were, in turn, interconnected. Trade was a primary mode of governance in the fledgling early states of the seventeenth century. Pirates and highwaymen utilized theft as a means of operating outside the social and economic authorities to which they were supposed to be subject; by stealing, they were able to live outside of political authority.

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[90] See, e.g., Perkins, William, *A Golden Chaine: Or the Description Of Theologie Containing The Order Of The Causes Of Salvation And Damnation, According To Gods Word*. London, Edward Alde, 1600, at 91 (“For robberies, these sorts of men especially are famous: Theeves by the Queenes high waies, Pyrates upon the seas, Souldiers not content with their pay, and whosoever they be, that by maine force take that which is none of their owne.”).

[91] This is not to say these accounts were without differences. Highwaymen (auto)biographies tended to include accounts of sexual misadventures that were likely unavailable—or taboo—to those who spent long stretches at sea. Tales of pirates often ended with the antihero lost at sea, whereas highwaymen were more likely to tell their tale from jail awaiting execution—or to have their execution described by observers.

[92] Foolwood, Francis, *Agreement Betwixt The Present And The Former Government, Or, A Discourse Of This Monarchy, Whether Elective Or Hereditary?* London, Awnsham Churchill, 1689, at 34-35. Foolwood is here comparing a pirate and a highwayman to James II, invoking his abdication of the throne as a reason to support William’s and Mary’s rule.

[93] Atwood, William, *The Antiquity and Justice Of An Oath Of Abjuration In Answer To A Treatise, Entituled, The Case Of An Oath Of Abjuration Considered*. London, Richard Baldwin, 1694.

Both pirates and highwaymen interrupted the travel of and stole from individuals who were attempting to carry goods from one place to another.[94] This was, according to Grotius, the primary reason why pirates were so despised: "For there is no stronger reason underlying our abhorrence even of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse."[95] It is not difficult, moreover, to see why pirates' disruption of trade routes made them the enemy of all, understood both singularly and collectively. Pirates could attack indiscriminately, without regard for the nationality of the traveler—although, as we have seen, the use of letters of marque and commissions often led to politically motivated or otherwise selective attacks. They threatened all sea-going vessels without regard to the nationality or the political affinities of the captains they attacked. By disrupting trade between nations, moreover, pirates made more difficult and dangerous communication and trade within the community of nations. They were therefore the enemy of all, not just because they threatened, at some point, each individual nation, but because their activity undermined human sociability itself as carried out via oversea trade and communications. Moreover (among those who maintained certain Aristotelian tendencies), pirates were beastly because they lived outside of political community: For Grotius, those who are not part of commonwealths "seem hardly worth to be called human beings."[96]

Scholars of piracy and sovereignty in the early modern period generally, and of Grotius and Gentili in particular, have emphasized the significance of the sea as a realm of lawlessness or site "beyond the law". Carl Schmitt has argued that the juxtaposition of this ungoverned and ungovernable realm and license of violence "beyond the line" was constitutive of the Westphalian land-based system of mutually respecting sovereigns.[97] The division of land into clearly defined boundaries made possible both by a conceptual opposition to, and practical military engagement within, "the high seas," where no nexus existed between physical space and political authority and thus imperial contest was possible. Benton argues that the inability of states to exercise dominium on the high seas made necessary the sea's inscription within an international legal regime not tied to a territorial boundary.[98] The sea demands transnational legal rules because no state can carry out the basic ordering (*nomos*) necessary for establishing jurisdiction. Simultaneously, it resists legality altogether, as a constantly changeable space over which it was technologically difficult, if not impossible, to project power with any kind of regularity.[99] Despite their conflicting views on the role of the sea in the development of modern international law, Benton and Schmitt share the assessment that what is distinctive about pirates

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[94] *See* Head, Richard, *The English Rogue Described, In The Life Of Meriton Latroon, A Witty Extravagant Being A Compleat Discovery Of The Most Eminent Cheats Of Both Sexes*. London, Francis Kirkman, 1666. The text is an elaborate autobiographical account of a reformed highwayman, including the former thief's advice to travelers for avoiding others like him on the highways.

[95] Grotius, *Commentary on the Law of Prize and Booty*, 305.

[96] Grotius, *Commentary on the Law of Prize and Booty*, 36.

[97] Schmitt, Carl, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. 1950. Translated by G.L. Ulmen, Telos, 2006, at 95.

[98] *See* Benton, *A Search for Sovereignty*, 121-25.

[99] Benton 105 ("By its very nature, the ocean has seemed to demand the mutual recognition of legal norms derived from natural law or other law standing outside the control of polities. At the same time, the historical weakness of such legal regimes has given the oceans an enduring association with lawlessness—a legal void to accompany its emptiness as a medium of travel and communications.").

is both that they move within these lawless boundaries—that these realms of ambiguous legality are their "home"—and that the threat they pose to travelers is in some sense constitutive of the lawlessness endemic to sea travel.

Much has been made, therefore, of pirates' field of operation on the high seas. As seafarers, they had the ability to operate at a great distance from the centers of legal authority or power projection, and to move in a realm where boundaries were uncertain or non-existent and identities easily obscured. Schmitt's argument in *Nomos of the Earth* that imperial contests on the high seas enabled the development of a kind of mutual territorial respect on land by the eighteenth century rests on the underlying historical claim that no firm territorial legal ordering existed on land at the start of the seventeenth century.[100] While by no means possessing the same symbolic significance as the high seas, much land of the period ostensibly within political boundaries was, to a lesser degree, ungoverned by any centralized power.

These politically ambiguous or border lands were the realm of highwaymen and bandits, whose felonious careers depended upon their ability to escape to and move around relatively inaccessible geographic territory. Highwaymen were understood to both operate beyond the confines of civilized society and along cross-national borders. An act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons"[101] passed by the English Parliament in 1656 describes highway robbery as growing out of the general social condition of border inhabitants. These people "having been long accustomed to Idleness and Theft," during periods of political instability, "by reason of the scituation [sic] of their Habitations and Dwellings near to the great Bogs and Mountains," were able to move stolen goods with ease across national boundaries.[102] Like pirates on the open seas, border inhabitants were able to use a combination of geophysical inaccessibility and the uncertainty or absence of territorial authority to carry out crimes against property with relative impunity. Among the enactments included in this 1656 Act is a provision granting local officials on either side of the border power to extradite felons back to the location of their crimes. Highwaymen were thus understood to find their home in lands beyond political control, and, like pirates, to threaten individuals on both sides of the boundary and to choose national identities selectively.

Highwaymen blurred national boundaries and were perceived to operate "beyond the line"[103] like pirates; pirates, like highwaymen, threatened tenuous links or lines of sovereignty between trading loci of relative safety. Conversely, historians like Lauren Benton have challenged Schmitt's characterization of the high seas in the period as "remain[ing] free of the spatial order of firm land organized by states" and thus enabling "the great equilibrium of land and sea originated [that] was able to last for more than two centuries."[104] According to Benton, by the eighteenth century "interimperial maritime conflicts" represented "contests over the tracks of sea lanes and the nature of legal control within them," and the ocean increasingly envisioned "as an uneven legal space divided into long, thin zones of imperfect control connecting port

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[100] Schmitt, *Nomos of the Earth*, 148.

[101] *An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland, and for Discovery of Highway Men and Other Felons*, 1656, 7 & 8 Car. 2 (Eng.).

[102] *Id*.

[103] Schmitt, *Nomos of the Earth*, 95-97.

[104] Schmitt 181.

towns, garrisons, and islands."[105] Benton further characterizes attempts to rein in piracy during the eighteenth century as "depend[ing] on the shared understanding of ships at sea as law-bearing vessels tied to sovereign sponsors, tracing through their movements corridors of potential jurisdiction."[106] By the end of the seventeenth century, the high sea was less and less "beyond the line" and instead very much subject to attempts to trace lines of jurisdiction across large distances.

On this account, pirates did not operate outside of the realm of sovereign territories so much as disrupt tenuous attempts to extend sovereignty across space, much as highwaymen did. Pirates were threatening not because they operated in a fully lawless territory, but because imperial powers in the seventeenth and eighteenth centuries strove to impose law tied to spatial boundaries on the sea. Pirates disrupted shipping lanes, pathways that were increasingly seen not as extending between, but as falling within, the sovereign territory of nations. I do not mean to suggest that the way in which the burgeoning English empire attempted to project power across oceans or a string of colonial possessions along coasts and rivers was the same as the ways in which the nascent English state sought to incorporate local elites and distant villages into a coherent territorial body. However, the rhetorical pairing of the pirate and the highwayman was grounded in broader geopolitical perceptions and practices. The threat posed by pirates internationally had a clear analog in how highwaymen were understood within England.

Pirates and highwaymen both presented a dual threat to political ordering or jurisdiction, and to *dominium*, or property rights. While it is the perceived inability or unwillingness of pirates to participate in a lasting interstate order that makes war against them so necessarily ruthless in the eyes of the Romans and early moderns alike, pirates were not unique in this respect. As we have seen, similar concerns were expressed about tyrants, rebels, and atheists, whose refusal to adhere to natural law called into question their ability to participate in the rules governing legitimate political bodies. Instead, what is distinctive about pirates among the various misfits of early modern international law is the threat they posed to private property. Most seventeenth-century English texts that mention pirates are more concerned with the threat they pose to material wealth and the physical security of merchants rather than metaphorical opposition between pirates and the human community (*i.e.* pirates as *hostis humanis generis*). Brydall, who was one of a few writers prior to Blackstone to attempt a summation of criminal matters in English common law, identifies pirates precisely in this way: "Theft generally taken doth comprehend Larceny, Robbery, Burglary, and Pyracy."[107] Within this domestic family of thieves, a pirate was "a robber upon the Sea."[108] Others classified pirates as a type of thief or even considered the terms at least partial synonyms. Henri Estienne explains his translation of the story of Alexander and the pirate as follows: "Here note that the word pirate which I have translated theefe, signifieth one that robbeth by sea, whom we call a rover, or searobber: which general word I was the more bold to use, because it suteth better with the other generall, viz.

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[105] Benton, *Search for Sovereignty*, 108.

[106] Benton 159.

[107] Brydall, *A Compendious Collection*, 55. Brydall's text is evidence these two valences—thief and *hostis humanis* generis—were not mutually exclusive; as we have seen Brydall also describes pirates' former status as traitors with reference to Cicero's phrase.

[108] Brydall 55.

robberties."[109] Pirates' use of the high seas did not necessarily make their actions categorically different from other "ordinary" criminals.

Still, there seems to be an important distinction: Pirates threatened not just the specific interests of individual nations, but the international community; highwaymen, on the other hand, did not violate the *ius gentium*, or international law. Whatever the analogies between these two types, one could not characterize a highwayman as "the enemy of all," because his crimes were only against the laws of one legal order.

However, the rights which highwaymen violated were not only or primarily those of the common law, but of the natural law. While both pirates and highwaymen threatened the territoriality of sovereignty or legal ordering, it was not this political threat but rather what we would now identify as their "private" violations that were understood to constitute transgressions of the law of nature. Specifically, theft—the defining crime for both pirates and highwaymen—was a violation of the natural law protecting property. As we have seen, Gentili explicitly analogized the causes of war to individual claims regarding one's *dominium* or *ius*; property is not a civil matter but also protected by the *ius gentium*, and war the analog of a civil suit.[110] For both Grotius and Locke, property precedes the state and is governed by natural law.[111] Theft, while harming a private person, transgresses not just positive legal authority but also a universal mandate.

Thus, highwaymen in seventeenth-century political tracts, like pirates in international legal tracts, threatened both specific political authorities and a broader, more fundamental order. Locke makes this point explicitly; the robber puts himself not just on the wrong side of civil laws, but outside the human community. In the *Second Treatise of Government*, Locke asserts that he may kill the thief who accosts him on the highway as he would a "noxious creature."[112] By threatening Locke's *dominium* in his property, the highwayman also threatens Locke's person and thus puts himself in a state of war with his victim. While in this state of war, the laws of nature permit the victim to kill in self-defense.[113] The highwayman's, like the pirate's, "individual" crimes against property were in fact constitutive of his fundamental opposition to the natural law, and thus the community of mankind. Highwaymen, like pirates, violated both natural and positive law, and threatened property and political rule.

VI. The Highwayman and the Developing English Criminal Law

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[109] Estienne, Henri, *A World Of Wonders: Or An Introduction To A Treatise Touching The Conformitie Of Ancient And Moderne Wonders Or A Preparative Treatise To The Apologie For Herodotus*. Translated by R.C., London, John Norton, 1607, at 97.

[110] *See* Gentili, *De Iure Belli Libri Tres*, 59, 32 (identifying defense of one's property as a just cause for war and comparing war to a civil suit, respectively).

[111] *See* Grotius, *Rights of War and Peace*, 420-21; Locke, *Second Treatise*, § 25.

[112] Locke, *Second Treatise*, §§ 10, 182.

[113] Locke, *Second Treatise*, § 182 ("[F]or though I may kill a thief that sets on me in the highway, yet I may not (which seems less) take his money, and let him go."), § 17 ("This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life."). "Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat."

In the absence of a coherent body of law or uniform procedures governing "criminal" acts and their punishment, highwaymen often stood in as a representative figure for a category of wrongdoers— criminals—that did not (yet) have a clear correlation to any substantive law. The legal category of "criminal" did not exist in the seventeenth century. By this I do not mean the term was not in use; seventeenth-century English authors certainly used the term "criminal" as both adjective and noun, generally in relation to punishment.[114] However, no strictly delimited body of "criminal law" existed in England at the time Gentili, Hobbes, or Locke wrote. Common law in the early sixteenth century lacked a substantive criminal law doctrine. There were certainly acts characterized as "crimes," and treatises that attempted to organize and explicate the nature of these crimes. However, in practice, the vast majority of these "crimes" could be tried by either indictment or appeal—what we would now recognize as a tort case.[115] As David Lieberman puts it, "The terms crime and criminal law, while enjoying wide linguistic currency, were not part of the technical vocabulary of the law."[116] It was not until Blackstone's Commentaries, composed and published in the mid-eighteenth century, that English scholars or lawyers recognized a category of substantive law as "criminal."[117]

Similarly, while individuals certainly underwent criminal punishment, this was largely a matter for local authorities, with prosecutions carried out by the victims themselves. Although felons were convicted under "the King's law," the punishing authority who invoked that law was almost always a local official whose authority was grounded in social standing or land-ownership, and not from the fledgling central government.[118] Petty offenses had just begun to be "the business of the state" rather than the local community, addressed by local justices rather than in manorial courts set up by local landowners.[119] Finally, most prosecutions were private; victims, rather than any state-based prosecutorial apparatus, were primarily responsible for pursuing punishment of wrongdoers through the mid-eighteenth century.[120]

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[114] *See, e.g.*, Locke, *Second Treatise*, § 11.

[115] *See* Seipp, David J., "The Distinction Between Crime and Tort in the Early Common Law," *Boston University Law Review*, Vol. 76, 1996, pp. 59-87, at 59.

[116] Lieberman, David, "Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence," *Law Crime and English Society, 1660-1830*. Edited by Norma Landau, Cambridge University Press, 2002, at 139-40.

[117] The technical vocabulary of the law "instead recognized other general categories of felony and trespass, as well as the intricate procedural routines by which specific injuries were prosecuted at specific courts." Lieberman 139-40.

[118] Sharpe, J.A., *Crime in Early Modern England 1550-1750*. 2d ed. Routledge, 1999. Trials for felonies were primarily conducted at the assizes, while "the absence of trials for felony" in the records of the King's Bench is "striking." (Sharpe 31.)

[119] Sharpe 133.

[120] *See* Langbein, John H., "The Origins of Public Prosecution at Common Law," *American Journal of Legal History*, Vol. 17, No. 4, 1973, pp. 313-335, at 317. Langbein argues that while private prosecution was "dominant" through the eighteenth century, public prosecution had its origins in new roles assigned to the Justices of the Peace by 1555 Marian statutes. *See also* Beattie, John M., *Policing and Punishment In London, 1660- 1750: Urban Crime And The Limits Of Terror*. Oxford University Press, 2001, at 395-96, 422 (describing the evolution of "thief-taking" bounties to the use of organized police and prosecutions in eighteenth-century London); Hay, Douglas, and Snyder, Frances, "Using the

In the absence of either a legal category or public procedure we would now classify as the criminal law, the "highwayman" served as a synecdoche for what we would now call "criminals." Locke uses the highwayman in this way. Other writers of the latter half of the seventeenth century and even the interregnum Parliament used highwaymen, pirates, or one of their cognates in similar fashion. For example, *A Universal Etymological English Dictionary* (1675) defined "*latrociny*" as meaning "larceny, theft, robber," and "the privilege of adjudging and executing thieves."[121] *Latro* is the Latin term used by Grotius and Gentili that is translated as "pirate"; here it is linked to a punishment of theft, a broader class of actions. An act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons" passed by the English Parliament in 1656 uses highwaymen in this way—the stand-in and most prominent type of a general category of felons.[122]

There is, moreover, evidence that the problem of highway robbery played a significant role in early criminal enforcement efforts by representatives of the English state—i.e. King and Parliament. Professional policing and public prosecutions would not become the norm in England until the nineteenth century. Before then, the primary intervention by Parliament in law enforcement outside of London entailed instructions and incentives for local officials and landowners. But highwaymen were a repeated concern for Parliament both during the Interregnum and after. Hence the passage of the above-referenced 1656 Act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons." In June 1677, March 1680, May 1681, and January 1683, Charles II issued and re-issued a proclamation urging officials to make greater efforts to use "their utmost diligence" in apprehending robbers or highwaymen, and provided that anyone who apprehended a highwayman or robber and brought him into custody was to receive a £10 reward from the sheriff of the county where the highwayman was brought.[123] William and Mary issued a

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Criminal Law, 1750-1850: Policing, Prosecution, and the State," *Policing and Prosecution in Britain, 1750-1850*. Edited by Douglas Hay and Frances Snyder, Clarendon Press, 1989, at 3, 25-27 (arguing, *contra* Langbein, that Justices of the Peace were not under any systematic obligation to investigate crimes and only a small percentage of criminal prosecutions saw involvement of government officials through the end of the eighteenth century). Even Bruce Smith, who challenges the "private prosecution" thesis as applied to the eighteenth century acknowledges it as the dominant model during the seventeenth. (Smith, Bruce P., "The Myth of Private Prosecution in England, 1750-1850," *Modern Histories of Crime and Punishment*. Edited by Markus Drubber and Lindsay Farmer, Stanford University Press, 2007, at 151-52.

[121] Bailey, Nathan, *A Universal Etymological English Dictionary*. 21st ed. London, R. Ware et al., 1675.

[122] Additional examples exist of this use of "highwaymen and …" to describe the category of what we would now call criminals in sources of less political or historical significance. *See, e.g.*, Defoe, Daniel, *An Essay Upon Projects*. London, R.R. for Tho. Cockerill, 1697, at 91 (describing work maintaining roads as "[a] proper Work for Highwaymen, and such Malefactors, as might on those Services be exempt'd from the Gallows"); Burton, Richard, *Historical Remarques, And Observations of The Ancient And Present State Of London And Westminister*. London, Nath. Crouch, 1681, at 17 (remarking of Newgate, "[t]his Gate hath for many years been a Prison for Felons, Murderers, Highwaymen and other Trespassers.").

[123] By the King. *A proclamation for the apprehending of robbers or high-way-men, and for a reward to the apprehenders.* May 14, 1681

similar proclamation in September 1692, quadrupling the reward for private persons who either apprehended or caused a highwayman to be apprehended to £40.[124] Such proclamations and public rewards were, for most of the seventeenth and eighteenth century, the primary means by which the central government engaged in the capture and prosecution of lawbreakers.[125] The highwayman, in this manner, served as at least an incidental or partial link between the figure of the pirate and "the enemy of all" in international law of the seventeenth century early forms of state-based criminal prosecution.

VII. Punishing the Pirate and Highwayman

In this section, I argue that punishment of the pirate, and later highwayman, was justified by his inherent dangerousness and the corresponding loss of moral consideration. Gentili, Grotius, and later English writers all compared pirates, tyrants, highwaymen, and atheists to beasts. In the previous two chapters I argued that punishment, according to Grotius and Locke, is a natural right to be deployed against inherently dangerous transgressors. Here I argue that this notion, first elaborated in international legal thought, accompanied pirates and highwaymen into political and legal texts concerned with domestic, criminal punishment.

A. Punishment and Self-Defense

According to Grotius, the right of punishment is not a power inherent in a commonwealth; instead every individual has the right to punish those who violate natural law to protect our "common Humanity."[126] The right to punish is therefore both natural, *i.e.* does not rely on the existence of a political community, and universal. This universalization of the power of punishment shifts the justificatory frame for violence (including war) from one concerned with the authority of the punisher to one concerned with the character or past actions of the punishee. War is now justified against certain actors, rather than for or by certain political authorities.

Grotius's clearest statement that the right to punish wrongdoing is natural, and that all individuals have this right in the absence of political authority, is found in the posthumously published *De Jure Praedae* (*Commentary on the Law of Prize and Booty*): "Accordingly, that precept of law which demands the punishment of evildoers is older than civil society and civil law, since it is derived from the law of nature, or law of nations."[127] As I argued in Chapter 1, this right is stated less clearly, but nevertheless implied in the widely contemporaneously read *De Jure Belli Ac Pacis* (*The Rights of War and Peace*).

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[124] England and Wales, Sovereign. *By the King and Queen, a proclamation for the discovery and apprehending of highway men and robbers, and for a reward to the discoverers.*

[125] *See* Fletcher, Anthony and Stevenson, John, Introduction, *Order and Disorder In Early Modern England*. Edited by Anthony Fletcher and John Stevenson, Cambridge University Press, 1985, at 16-17; Beattie, *Policing and Punishment in London*, 376; Beattie, John M., *Crime and the Courts in England 1660-1800*. Oxford University Press, 1986, at 71. The first professional police force in England was established in London in 1829. (Smith 152).

[126] Grotius, *Rights of War and Peace*, 385.

[127] Grotius, *Commentary on the Law of Prize and Booty*, 133.

This naturalization of the right of punishment shifts the emphasis in what makes punishment just away from the status of the punisher or their relation to the offender toward the status or quality of the wrongdoer. While inside a commonwealth the positive law channels this natural right of punishment and limits its exercise to certain authorities, outside the commonwealth (spatially or temporally) anyone and everyone has an inherent right to punish any wrongdoer. Because any person has the right to punish, what matters for whether punitive violence is permissible is the moral status of the wrongdoer. Thus, the question in deciding the legitimacy of war ceases to be, "Does this person have the right to punish?" but "Does this person deserve to be punished?"

To be sure, there could be a universal right of punishment per se that nevertheless required some relation between wrongdoer and punisher to justify the use of violence. Both Grotius, and later Locke, however, insist that the natural right of punishment may be exercised without reference to the relationship between victim, wrongdoer, or punisher. For example, if Abigail steals Bob's wallet, Bob may have the natural right to punish Abigail, but Cathy, who was not a victim of the crime, might not. Locke, who adopts a position in his *Second Treatise* very close to Grotius's in *De Jure Praedae*, justifies Cathy's right to punish Abigail for her crime against Bob by asserting that any individual crime threatens *all men*.[128] But what enables, within the logical contours of Grotius's or Locke's thought, this move to seeing wrongdoers as subject to universal punishment?

First is a link between punishment and self-defense. For both Grotius, as for Gentili, punishment is a means to self-preservation. The limits of punishment, correspondingly, come to be defined not simply in retributive terms, but also with respect to the safety of the commonwealth waging the just war in question. Vengeance, says Grotius, is a justification for war approved by natural law; it is (quoting Cicero) "'that act by which, defensively or punitively, we repel violence and abuse from ourselves and from those close to us whom we should hold dear,' and also as 'that act whereby we inflict punishment for wrongdoing.'"[129] Gentili similarly acknowledges the distinction between prevention and retribution ("defensively or punitively") even as he includes them under the same heading of just, expedient causes of war: "Now punishment (*ultio*) usually fulfills two ends, solace for injury and security for the future. Therefore it includes revenge (*vindicta*)…. [R]evenge (*vindicta* or *vindicatio*) prevents wrongs in the future."[130]

One effect of the adoption of this Roman conceptual vocabulary was to blur what some contemporaneous theorists saw as a rigorous distinction between self-defense and punishment. For Suarez, self-defense was limited to force deployed against an immediate and ongoing attack. For example, if an army, having successfully engaged in a defensive war, pursues the attacker to

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[128] *See, e.g.*, Locke, *Second Treatise*, § 8 ("In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity . . . and so he becomes dangerous to mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him. Which being a trespass against the whole species . . . every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law. . . .").

[129] Grotius also uses this Roman definition of revenge in *De Iure Belli ac Pacis*: "We repel Force and Injuries either defensively or offensively both from ourselves and those who ought to be dear to us." Grotius, *Rights of War and Peace*, 967.

[130] Gentili, *De Iure Belli Libri Tres*, 353.

regain lost property, the war has become offensive (though it may still be justified). War carried out to redress past injuries, while often justified, is aggressive and requires political authority.[131] Unlike punishment, self-defense is a natural right grounded in the value of one's individual life rather than the existence of a political community and therefore not reserved (as is the right of war) to public authorities.[132] Gentili undermined this distinction by opening up the category of self-defense temporally, to include any forward-looking action deemed necessary to prevent wrongdoing to oneself. As Blane and Kingsbury have remarked with reference to Gentili's theory of just war, "If injury is defined broadly enough, deterrence as a means of forward-looking self-defense can be invoked even before the occurrence of any act that directly affects the state."[133]

Deterrence was recognized as a legitimate cause of war among Grotius's predecessors. Grotius, who made a point of utilizing his Spanish opponents' theorists to make his case for Dutch belligerence, cites Vitoria in particular, and "the theologians" in general, in support of his claim that measures taken without immediate provocation against Spanish ships were necessary to self-defense: "As the Spanish theologian Vitoria has rightly observed…'the enemy would be emboldened to make a second attack…if they were not deterred from injurious acts by the fear of punishment.'"[134] However, while Vitoria's account emphasizes the ongoing conflict with a particular opponent, and the role that punishment plays in specific deterrence (to use contemporary vocabulary), for Grotius the problem is framed in terms of self-protection: "Thus it is impossible to protect oneself from persons of the kind described [in this case, the Portuguese] without resorting to vengeful measures."[135] This shift is subtle but significant: No more is the enemy "emboldened," but rather, self-protection requires vengeance against "persons of the kind described." It is the character of one's opponent, and not ongoing or anticipated actions, that makes further vengeance necessary.

Grotius and Gentili justified punishment by and among commonwealths as a form of self-defense and with reference to the status of its target. The right of self-defense does not depend on whether one's opponent is acting morally or immorally, or even the ethical standing of the person, animal, or thing that threatens one's life. The law of self-defense and defense of one's property "do not take into account the intent of one's adversary"[136] and thus one has the right to harm or even kill individuals who are not morally or causally culpable, or even those who act with good intentions, but who threaten one's life.[137] Grotius compares these innocent threats to "Beasts"; their moral status is irrelevant to one's right of self-preservation. Gentili takes the same

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[131] Suarez, *Selections from Three Works*, 804.

[132] Suarez 802-03. Self-defense may even be an obligation to God. (Suarez 807).

[133] Blane, Alexis and Benedict Kingsbury, "Punishment and the Jus Post Bellum," *The Roman Foundations of the Law of Nations.* Edited by Benedict Kingsbury and Benjamin Straumann, Oxford University Press, 2010, pp. 241-258, at 251.

[134] Grotius, *Commentary on the Law of Prize and Booty*, 469.

[135] Grotius, *Commentary on the Law of Prize and Booty*, 469.

[136] Grotius, *Commentary on the Law of Prize and Booty*, 161.

[137] *See* Grotius, *Rights of War and Peace*, 398 ("[T]his Right of Self-Defence arises directly and immediately from the Care of our own preservation, which Nature recommends to every one, and not from the Injustice or Crime of the Aggressor; for if the Person be no Ways to blame, as for Instance, a Soldier who carries Arms with a good Intention; or a Man that should mistake me for another; or one distracted, or delirious . . . I don't therefore lose that Right that I have of SelfDefense.").

position both on the applicability of the right of self-defense despite the innocence of the threat in question and on the analogy between this individual right and that of nations:

> And yet one may defend oneself against the violence of madmen or somnambulists, even at the cost of the lives of the latter; just as we kill wild animals which rush upon us, following the universally recognized law of self-defence. This holds good, however much you may argue that madmen, somnambulists, and beasts are incapable of acts of injustice.[138]

The right of self-defense is apparently distinguished from punishment precisely with respect to the moral standing of its object.

Grotius himself expresses some doubt about this characterization: Does not Christian morality, a mandate that applies to us not merely as self-preserving beasts but as moral actors subject to divine law, demand that we love our neighbors as ourselves? Though we are required to love our neighbors as ourselves, we need not love them *more* than ourselves. When an us-or-them situation arises, we can defend ourselves at their expense.[139] This objection—with a different rebuttal—comes up again in *De Iure Belli*. There Grotius concedes that "charity" demands that we sacrifice ourselves rather than kill our neighbors in certain circumstances. He would thus seem to allow that natural right (to self-defense) must sometimes take second place Christian obligation (to charity). However, acts of self-preservation are still defensible on Aquinas's principle of double-effect: "we take this Course, as the only Means left to preserve ourselves, and not as the principal End proposed, just as in the Judgment of Criminals condemned to Death."[140]

This last comparison—between the necessity of killing in self-defense and the act of criminal punishment—is revealing. Although Grotius at times speaks in retributive terms regarding the right of punishment, he also suggests here that punishment is a form of collective self-defense. Unlike in the case of immediate threat, where the intentions (or even personhood) of that threat do not matter, what makes an individual a threat and punishment necessary is his moral character. As part of Grotius's argument that "the Right of making War is not absolutely taken away by the Law of the Gospel" in *De Iure Belli Ac Pacis*, he describes the fourth "proof" as follows:

> If it were not permitted to punish certain Criminals with Death, nor to defend the Subject by Arms against Highwaymen and Pyrates, there would of Necessity follow a terrible Inundation of Crimes, and a Deluge of Evils, since even now that Tribunals are erected, it is very difficult to restrain the Boldness of profligate Persons.[141]

Punishment, in other words, is necessitated and therefore justified (as a form of self-defense) by the existence of certain individuals who by their very profession or nature constitute an ongoing threat.

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[138] Gentili, *De Iure Belli Libri Tres*, 260.

[139] Grotius, *Rights of War and Peace*, 244.

[140] Grotius, *Rights of War and Peace*, 398.

[141] Grotius, *Rights of War and Peace*, 201-02.

Who are these individuals for whom punishment is required? None other than pirates and highwaymen, this time paired with "certain Criminals." Whereas we had previously seen pirates in Grotius's texts as transgressors of an international order and threats to states, here it is *subjects* who must be protected from pirates and highwaymen. The right to punish is justified by its effect of general deterrence, but one that is illustrated by these particular "profligate Persons." The tension between the moral neutrality of self-defense and the suggestion that punishment relies upon an objective denigration of the wrongdoer rather than a subjective relationship between punisher and punishee is resolved by way of this essentialization. Self-defense can be justified without reference to the moral quality or intentions of the threat, but the pirate or highwayman is a threat because of his moral quality and intentions. The wrongdoer is not punished for his act, but rather because he has revealed himself to constitute *by his very nature* the sort of threat that a beast or rolling boulder might pose. There is no tension between retributivist and consequentialist justifications of punishment because the same quality that makes an individual *deserving* of punishment also makes him a forward-looking menace.

Commentators on Grotius have not sufficiently emphasized this crucial contrast between post-Kantian theories of punishment and that held by Grotius. One exception to this generalization is Benjamin Straumann, who has identified both retributivist and consequentialist tendencies in Grotius's theory of punishment, but is concerned primarily with how these competing purposes draw from Grotius's account of natural rights.[142] Although the fundamental opposition between consequentialist and retributive accounts of punishment is taken for granted among contemporary theorists of punishment, these two were commensurate and even mutually reinforcing among the early moderns. This convergence is most clear when Grotius uses animal metaphors to describe the appropriate relation of the innocent and the guilty. The following passage from *De Iure Praedae* is worth quoting at length. Beginning by asserting that Genesis 9:6 ("Whoso sheddeth man's blood, by man shall his blood be shed") is subordinate to Genesis 9:2-3, wherein God "delivers the beasts into man's service," Grotius continues:

> For when the theologians inquire into the origin of punishments, they avail themselves of an argument based on comparison, as follows: all less worthy creatures are destined for the use of the more worthy; thus, despite the fact that the beasts were indeed created by God, it is nevertheless right that man should slay them, either in order to convert them to use as his own property, or in order to destroy them as harmful . . . ; similarly, so the theologians contend, men of deplorable wickedness, for the very reason that they are of such a character—stripped, as it were, of all likeness to God or humanity—are thrust down into a lower order and assigned to the service of the virtuous, changing in a sense from persons into things . . . .[143]

Animals are created by God, and therefore have value. However, they have less value than humans. Hence, humans are permitted to use animals for the humans' benefit by, for example, eating them, or destroying those animals (such as wolves) that threaten human safety. Criminals are in this respect like beasts. Their crimes reveal them to be less human—"stripped . . . of all

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[142] Straumann, Benjamin, "The Right to Punish as a Just Cause of War in Hugo Grotius's Natural Law," *Studies in The History of Ethics*, Feb. 2006, at 15, available at: http://www.historyofethics.org/022006/StraumannRightToPunish.pdf.

[143] Grotius, *Commentary on the Law of Prize and Booty*, at 135.

likeness to God or humanity"—and therefore, like animals, they may be used as slaves or things or destroyed to protect others. The permission to punish grows out not just of the loss of moral consideration, but of the teleological, divine mandate to make use of all *things*.

Two premises are necessary to reach this conclusion: First, that wrongdoers present an ongoing threat; and second, a teleological understanding of the relationship between things and persons, an understanding in Grotius's case that derives from Aristotle's theory of natural slavery[144] by way of Vitoria and other theologians. Once wrongdoers have revealed themselves to be in the category of beasts, it becomes permissible to use them for general deterrence purposes as well as slavery. As Annabel Brett has pointed out, Scholastic writers often invoked comparisons between wrongdoers and beasts to justify the former's destruction. However, among Scholastics, the comparison remained metaphorical; sinners kept their essentially human nature despite the loss of juridical status. To quote Brett, quoting Domingo de Soto, a contemporary of Vitoria and a fellow Salamancan:

> [E]ven if human beings who have degenerated from their nature are compared to animals, they differ, however, in that beasts are by their nature such; and therefore any one can kill wild ones without any injustice, and tame ones without injustice to them, although possibly to their owner; but a sinner (*peccator*), since he is not by nature cattle (*pecus*), must not be killed excepted by public judgment.[145]

Grotius, like de Soto, refers to the common good as a necessary precondition for the killing of wrongdoers. However, he is not so careful to repeat the theologians' reassurance of man's essential nature even within the criminal; wrongdoers have lost not just status under the civil law, but status under the natural law as well.

This quality of wrongdoer-ness extends beyond any immediate retributive harm to a general loss of moral consideration. Grotius even goes so far as to state that, "If Regard be here only had to *expletive* Justice, [one] has a Right of revening so small a Crime [as a box on the ear], even by the Death of him that attempts it."[146] Christian charity prohibits carrying out this act, but the intrinsic nature of punishment itself does not. This shocking conclusion—that one may put a man to death for a punch—suggests it is the loss of moral consideration of the wrongdoer rather than a retribution for wrong*doing* that makes punishment permissible. Elsewhere Grotius remarks that the goods of an innocent man are more deserving of protection than the life of the robber who attempts to steal them.[147] It is the relative value of the robber's life that makes homicide in defense of one's property permissible.

Thus, according to Grotius, punishment is a natural, universal right and form of collective self-defense justified by reference to the generalized threat a wrongdoer poses. When we exercise the natural right of punishment, we do so on behalf of the common good. Grotius

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[144] See Aristotle, "The Politics," in *The Politics and The Constitution Of Athens*. c. 350 B.C.E. Edited by Stephen Everson, translated by Benjamin Jowett, Cambridge University Press, 1996, at 70.

[145] Brett, Annabel S., *Changes Of State: Nature And The Limits Of The City In Early Modern Law*. Princeton University Press, 2011, at 35-36.

[146] Grotius, *Rights of War and Peace*, 406.

[147] Grotius, *Rights of War and Peace*, 408 ("For the inequality betwixt the Goods of one Man and the Life of another is made up, by the Difference betwixt the favorable Cause of the innocent Person, and the odious Cause of the Robber.").

analogizes wrongdoers to animals whose nature it is to threaten humans and excuse or justify their elimination as a form of pest control.[148] In the final subsection, I return to pirates and highwaymen, this time armed with a broader understanding of how Grotius understood punishment.

B. "Like a brigand"—wrongdoing and loss of status

Pirates and highwaymen, as we have seen, are appropriate targets of punitive violence. What about *hostes*? The central claim of Gentili's theory of international law is that the world is divided into *hostes* and *latrones*; the former can wage lawful war, the latter never can. However, *hostes* can engage in "brigandage" by violating the rules governing one's conduct in war with a fellow *hostis*. This misbehavior includes carrying out violence without having a legitimate reason to do so: "[I]f it is evident that one party is contending without any adequate reason, that party is surely practicing brigandage and not waging war."[149] Gentili implicitly compares the misbehavior of states and the typical behavior of pirates—a poorly behaved state acts *like* a brigand and may presumably be treated as one. Gentili never suggests, however, that such brigandage may result in a wholesale loss of status.

For Grotius, the category of brigand was far more permeable. Punitive violence is not limited to those who by their profession or nature pose a threat to humankind like pirates. Not only is war "lawful against those who offend against Nature," including states, but because violations of the law of nature threatens all of humankind, anyone may make war against the violator.[150] Even more dramatically, Grotius describes otherwise legitimate states that have violated natural law as pirates or brigands, rather than simply comparing their behavior. Both Grotius's assertion that even a successful belligerent in an unjust war is "a thief, an armed robber, an assassin,"[151] and his gloss on the anecdote about Alexander and the pirate,[152] make a similar point. Carrying out war necessarily entails killing and taking items at gunpoint. These acts may be excused when one carries out a just war with authority, but absent authorization, one simply commits crimes on a larger scale.

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[148] Grotius, *Rights of War and Peace*, 973-74 ("Of this natural Right [of punishment for the sake of the common good] *Democritus* thus speaks; for I will quote his own Words, because they are remarkable. . . . *What we have said of Foxes, and noxious Reptiles, will hold good also of Men, of whom we ought to be no less aware. . . . Every one who kills a Robber, or a Thief, is innocent*. . . . Upon which passages Seneca seems to have had his Eye, when he saith, *When I command a Malefactor to be put to Death, I do it with the same Air and Mind, that I kill a Serpent or venomous Beast*.").

[149] Gentili, *De Iure Belli Libri Tres*, 32.

[150] Blane and Kingsbury, "Punishment and the Jus Post Bellum," 252 (quoting Grotius, *Rights of War and Peace*, 1024).

[151] Grotius, *Commentary on the Law of Prize and Booty*, 76 ("Finally, it is an indisputable fact that he who knowingly resists a just war, commits a grave offence. Even if such a belligerent is to some extent successful, he is a thief, an armed robber, an assassin . . . .").

[152] Grotius, *Commentary on the Law of Prize and Booty*, 76 ("Accordingly, King Alexander was rightly included by the pirate among the latter's partners in crime, if that ruler had no just cause for war against Asia; and in this same sense Lucan called Alexander the 'plunderer' of the world, while Seneca described him as a 'robber.'").

The claim that otherwise legitimate powers may be treated as pirates or brigands is at the core of Grotius's motivation for writing *De Jure Praedae*. *De Jure Praedae* was commissioned by the Directors of the VOC (Dutch East India Company) to justify the 1603 seizure of a Portuguese merchant ship by a Dutch captain. As *De Jure Praedae* makes clear, this seizure of a peaceful ship was motivated by both the metropolitan rebellion of the Dutch against Spanish imperial rule and the ongoing battle for commercial dominance with respect to trade with the peoples of the East Indies. The seizure of another nation's ship without immediate provocation was justified, however, by positing the possibility of a just war of private entities against public ones—which required that the public entities act like pirates and therefore be subject to universal jurisdiction.

In describing the atrocities justifying the seizure of the merchant ship, Grotius maintains a contrast between the standards of behavior owed soldiers and those owed criminals. At the same time, he characterizes the behavior of the Portuguese (who were at the time under the Spanish crown) as that of pirates—and therefore deserving of violence governed by the drastically lower set of standards usually applied to wars against pirates. Grotius describes the massacre of Dutch sailors by Portuguese as follows: "Thus it came to pass that six men of Holland . . . were subjected to the cruelest and most hideous punishment, suited to robbers and pirates."[153] Because of these executions:

> We shall plainly perceive that the Portuguese, though they assume the guise of merchants, are not very different from pirates. For if the name of "pirate" is appropriately bestowed upon men who blockade the seas and impeded the progress of international commerce, shall we not include under the same head those persons who forcibly bar all European nations…from the ocean and from access to India…?[154]

Grotius concludes that anyone may punish the Portuguese, including private Dutch merchants. The Portuguese, although acting on behalf of a legitimate sovereign and presumptive member of the community of *hostes*, had become the enemy of all.

Thus, according to Grotius and to a lesser extent Gentili, while pirates are spoken of as categorically subject to a different sort of violence, legitimate powers can be made subject to this violence via wrongdoing. This does not mean the categories have collapsed. To the contrary, they are reaffirmed each time Grotius or Gentili explains this change in status by saying the wrongdoer is "like a pirate or robber." This broader category of problematic figures encompasses those who violate the rules associated with the international order, either systematically (in the case of the pirate or brigand), or incidentally. This analogy is only possible, however, if status as a pirate, brigand, or *latro* is not the equivalent of being outside all law, but rather, that of a violator of a law which they ought to obey. There is therefore a tension here between the recognition that single acts of wrongdoing may allow one to be treated *like* a figure based on his supposed incapacity to participate in the international community and the fact that this obligation to obey itself derives from the wrongdoers' membership in the international community.

Pirates were not the only *hostis humani generis*, a category that also included tyrants, rebels, and atheists. This tension around membership can be seen more clearly by examining the Vitoria's and Suarez's, on the one hand, and Gentili's and Grotius's, on the other, contrasting

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[153] Grotius, *Commentary on the Law of Prize and Booty*, 281.

[154] Grotius, *Commentary on the Law of Prize and Booty*, 449.

treatment of atheists, and whether war was justified against them. The striking differences in their respective approaches evince a stark contrast in how membership in a global community was understood vis-à-vis the interstate right of punishment

For Vitoria and Suarez, membership within the same legal community was a precondition of punishment. Although liable to punishment for violations of the natural law, "barbarians" such as the Turks or American Indians were not Christian and therefore not subject to Papal jurisdiction. A Christian king may not wage war against a non-Christian people on the basis of the latter's religion because the latter is not subject to the former; "a Christian prince has no more power over an infidel prince than over another Christian."[155] Because the Pope is the head of the Church and thus of supreme jurisdiction in matters of Christianity, Christian kings may only wage war on behalf of the religion on his delegated authority. The godless are not members of the Christian community and therefore not subject to the Pope's jurisdiction: "[U]nbelievers are not subjects of the pope; the pope therefore can confer no authority over them upon a prince."[156] Even when a Christian prince *does* have cause to go to war against unbelievers—and this reason may include an atheist ruler's abuse of his own people through, e.g. anthropophagy—the limits on that military violence are the same as those that apply to wars between Christians.[157] The ability to punish was the function of a relationship of authority that is founded in the common membership of punisher and punishee.

In contrast, for Gentili and Grotius, punishment was justified inasmuch as individuals or states placed themselves *outside* the human community. Gentili and Grotius follow Suarez and Vitoria to an extent by disqualifying conversion or heretical religious beliefs as a just cause of war.[158] Grotius's reasoning with respect to atheists reflects his insistence on a natural right to punish and the fundamental reorientation this entailed. Grotius rejects the views of those who "assert, that the Power of Punishing is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature."[159] Thus, individual princes may take it upon themselves to punish those who violate the laws of nature, through a kind of humanitarian intervention. This punishment is permissible not only in those cases where those violations hurt other humans (as in Vitoria's case of anthropophagy), but where the harm is "indirect and consequential, as Self-Murder; for instance, Bestiality and some others."[160] Violators may be punished by anyone because they have revealed themselves to be sub-human.

For Gentili, the right of war against atheists is the right of expelling from the physical world community those who have already been morally excluded. While mistaken religious belief is a violation of Christian law, the absence of belief altogether is a violation of natural

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[155] Vitoria, Francisco De, "On Dietary Laws," *Political Writings*. 1537. Edited by Anthony Pagden and Jeremy Lawrance, Cambridge University Press, 1991, at 218-19.

[156] Vitoria, "On Dietary Laws," 223.

[157] Vitoria, "On Dietary Laws," 226 ("By whatever title war is begun on the barbarians, it is not lawful to take it further against them than we should take a war against Christians. This is clear, because the justice of the war has nothing to do with their being unbelievers.").

[158] According to Grotius, because Christianity must be accepted voluntarily, evangelical wars are useless. *See* Grotius, *Rights of War and Peace*, 1044-45. According to Gentili, because "religion is a relationship with God…man cannot complain of being wronged because others differ from him in religion." *See* Gentili, *De Jure Belli Libri Tres*, 41.

[159] Grotius, *Rights of War and Peace*, 1024-25.

[160] Grotius, *Rights of War and Peace* 1028.

law.[161] Those "who, living rather like beasts than like men, are wholly without religious belief [are] the common foes of all mankind, as pirates are."[162] Atheists are the equivalent of pirates in threatening the community of humanity in its entirety, and can be subject to violence by any political authority. One may wage war against atheists as one would against brutes—that is, because atheists are excluded from the community of humans they are therefore subject to violence.[163] This moral exclusion is expressed in terms of bestiality. Atheists "liv[e] like beasts, rather than men."[164] Thus, no political authority is required to punish those individuals—even within a political community. Gentili not only endorses Spanish war against the Indians for their bestiality and anthropophagy but announces the general principle that "in a state any one whatever is allowed to accuse an offender against the community, even one who is not a member of the state, when an action is defended which is not peculiar to the state but of interest to all men."[165]

The godless thus evoke two competing desiderata—to physically exclude *and* to restore to membership (or at least usefulness) those who are deemed to be morally outside the bounds of community. Whereas in the first instance Gentili suggests that the purpose of this war is the reintegration of atheists into the human community by "forc[ing them] to adopt the usages of humanity," in the second atheists are treated as the equivalent of brutes, sub-human and morally excluded from membership in that same community. Atheists have placed themselves outside the moral community of mankind and are therefore subject to the kind of violence that might be used against other sub-humans like beasts or pirates—but nevertheless somehow ought to be reincorporated. They retain, in other words, the potential of full status.

Rather than a means of ensuring justice *within* a community, punishment in the interstate sphere was, for these two Protestant writers, a means of enforcing coherence between the moral and physical bounds of community. With the creation of the category of *hostes*, the violation of natural law norms represents a deviation from an implied community of reasonable actors. According to Gentili, deviation from these norms of conduct constitutes a breach of a kind of global social compact: "How can men who have withdrawn from all intercourse with society and who . . . have broken the compact of the human race, retain any privileges of law, which itself is nothing else than a compact of society?"[166] To violate natural law is to place oneself outside the category of the relevantly human, and to be punished was to be treated as if one were a pirate or brigand, that is, one who, by definition, is not a *hostes* or member of the international community.

This notion of criminality, articulated in Grotius's account of the laws of war, is at the heart of Locke's account of punishment and political authority. More than simply rhetorical links between pirates, highwaymen, and felons, Grotius's conceptual account of pirates and punishment grounds Locke's account of the state. Men leave the state of nature and enter political society by relinquishing "every one his Executive Power of the Law of Nature, and . . . resign[ing] it to the publick."[167] Political authority is therefore the collective "Executive Power"

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[161] Gentili, *De Iure Belli Libri Tres*, 125.
[162] Gentili, *De Iure Belli Libri Tres*, 125.
[163] Gentili, *De Iure Belli Libri Tres*, 125.
[164] Gentili, *De Iure Belli Libri Tres*, 125.
[165] Gentili, *De Jure Belli Libri Tres*, 122.
[166] Gentili, *De Iure Belli Libri Tres*, 79.
[167] Locke, *Second Treatise*, § 89.

of a commonwealth's members. This "Executive Power" is the right to punish. Locke, like Grotius, asserts there is a natural right of punishment; an admittedly "strange doctrine."[168] Locke's treatment of criminals with reference to this account of the right to punish closely resembles Grotius's. This natural right of punishment is necessary

> to secure Men from the attempts of a Criminal, who having renounced Reason . . . hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security.[169]

Just like the pirate, the criminal is at war with all mankind and may be killed like a beast. Just like a pirate any specific incident of wrongdoing or theft is extrapolated to imply an inability to socialize.

Locke's language in this crucial passage has attracted considerable scholarly comment. Richard Ashcraft has argued that the purpose of this language is to convey, to fellow radicals who were part of the Shaftesbury conspiracy of the early 1680s, coded reference to the King or the Duke of York and the need for violence to overthrow him.[170] Waldron, along the same lines, argues that it is the tyrant, or king, that serves as the paradigmatic criminal figure for Locke. "Any comments we make about his theory of punishment should be framed with the reminder that, historically, most of what he wrote about criminality was oriented to the specific crimes associated with the establishment of or with attempts to establish an absolute power. To put it another way, the crimes that particularly interested Locke were crimes against equality."[171] Accordingly, Waldron downplays Locke's forfeiture theory of punishment and his comparison of criminals to beasts. He argues, following John Dunn, that Locke's "bestialization of offenders" is not literal. Rather, criminals are liable to be treated as if beasts in the most extreme cases *or* "has to do with the very specific relation between conqueror and aggressor in a just war."[172]

As I argued in the previous chapter, what crime, punishment, and war all share in the *Second Treatise* is an attempt by one or both parties to subject the other to their will. When done wrongly, this is crime; when done rightly, in response to a prior reciprocal attempt, it is punishment; in all cases, the attempt at subjugation constitutes a state of war. I thus agree with Waldron that Locke's understanding of crime is closely linked to his concern with human equality, and that he is concerned with forms of wrongdoing that tend to undermine this

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[168] Locke, *Second Treatise*, § 13.

[169] Locke, *Second Treatise*, § 11.

[170] "The conspirators also invented a more colorful language about killing 'wolves or tigers' which Locke employed. Several times in the Second Treatise, Locke refers to "dangerous" and "noxious" beasts, such as 'wolves,' 'tigers,' or 'lions' and to the fact that individuals who 'degenerate' to the level of these "noxious beasts" may be 'destroyed.' In using this language, it was clear to the participants in the revolutionary movement that they were speaking of the King or the Duke of York." (Ashcraft, Richard, *Revolutionary Politics and Locke's "Two Treatises of Government.*" Princeton University Press, 1986, at 471-72).

[171] Waldron, Jeremy, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*. Cambridge University Press, 2002, at 141.

[172] Waldron, *God, Locke, and Equality*, 147.

equality.[173] Waldron's interpretation, however, does not account for the significance of the thief as well as the tyrant for this account of crime. Although the *Second Treatise*'s primary target may have been James II, the text leans heavily on a broader account of theft as implicitly carrying the threat of subjugation: I do not know what else the highwayman may take. As we have seen, the Civil War debates had already given rise to ample literature equating tyrants with thieves. Locke thus relied upon, even if he did not primarily aim at, an account of "ordinary" criminality in which the protection of property and the protection of one's life were closely linked and where the threat to the former signaled a threat to the latter and, moreover, the onset of a state of war. Whereas pirates lacked the form of a state that would enable lasting peace treaties, criminals lack reason necessary for peaceful relations with others. Punishment is justified by a loss of status associated with the universality of the criminal's threat. What the pirate was to Grotius's account of the laws of war, the criminal is to Locke's account of the commonwealth.

VIII. Conclusion

A heightened interest in pirates among legal scholars over the past decade has been primarily concerned with identifying parallels between pirates and terrorists. These accounts have emphasized the pirate as an "exceptional" figure who conflated two pre-existing legal spheres, the laws of war and the criminal laws. A close and contextualized reading of early modern sources that discuss piracy, however, suggests a very different conclusion: The pirate was linked, by way of the highwayman, to the criminal and thus offers us important insight into the notion of criminality that early modern political English philosophers adopted. The linkage between pirate and criminal was both rhetorical and historical: the pirate and highwaymen were figures of popular mythos and concrete economic concern; highwaymen were particularly prominent objects of early forms of centralized crime control. While the pirate and highwaymen operated in parallel both historically and rhetorically for much of the seventeenth century, the development of a distinctive criminal substantive and modern procedural law in England began well after Gentili and Grotius brought the pirate to prominence in international legal discourse. Thus, rather than, as Daniel Heller-Roazen has argued, "collapsing the distinction between criminal and enemy," the figure of the early modern pirate was—as a matter of intellectual historical development—at least partially constitutive of justifications of state punitive violence and of the concept of the *domestic* criminal who merits that violence.[174]

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[173] *See* Waldron, *God, Locke, and Equality*, 141, 145.

[174] Heller-Roazen, Daniel. *The Enemy of All: Piracy and the Law of Nations.* Zone Books, 2009.

Chapter Four: Treason

I. Introduction

In previous chapters I argued that Hobbes and Locke ostensibly distinguished between international war and civil punishment but ended up reproducing the state of nature through punishment in the commonwealth. I have also argued that the idea of the "criminal" in English political theory of the seventeenth century borrowed much from the "pirate" as a key rhetorical figure in early modern international law. In this chapter I turn to the distinction between military and punitive violence in English domestic law by examining the development of treason law across the seventeenth century. Grotius, Hobbes, and Locke eschewed membership as a precondition to punishment (the position taken by at least some of their predecessors in the natural rights tradition), instead viewing punishment as a means of defining membership. English lawyers and politicians during the same period (roughly 1630-1690) came to see treason less as a violation of one's obligations of membership and instead as a particularly significant threat to the security of the government or laws. This reimagining of treason informed the major reforms in its prosecution at the end of the seventeenth century, reforms which would serve as the model for the prosecution of "ordinary" crimes beginning in the eighteenth century.

Treason defines the levying of war as a crime, circumscribing what might otherwise be extralegal and international violence within the punitive domestic law. Treason thus stood and stands oddly between two apparently opposed ways of classifying illegitimate violence: it is both military *and* criminal, intelligible under the conceptual and legal rubrics of both war and civil punishment. In England from the Middle Ages, treason was recognized as both a common law and statutory crime, subject to prosecution in the assizes or at Old Bailey and included in the list of felonies in legal treatises. Yet the content of the "crime" of treason included participation in international or other military conflict: "levying war against the king," which could mean taking up arms either against the king or without his permission, and adhering to the king's enemies. As I have argued in an earlier chapter, just war theory in the early part of the seventeenth century—most prominently in the work of English jurist Alberico Gentili—came to put increasing emphasis on the distinction between legitimate state-based military conflicts and other forms of non-state violence. Treason law in England, first defined in the fourteenth century, viewed making war, at least in some contexts, as a domestic crime.

The seventeenth century saw a subtle, but decisive shift in how both the object of treason and the traitor were understood. Early in the seventeenth century, the traitor was a deceptive figure, someone with an "English face and a foreign heart." Authors of legal treatises on treason were concerned with properly drawing the line between those who owed allegiance to a sovereign and those who did not, because it was this preexisting obligation that determined whether an act was treasonous. During the Civil War, the legal doctrine of treason was stretched and eventually inverted to justify the execution of Thomas Wentworth, Earl of Strafford and then, eight years later, King Charles I. That the English king could be executed for a crime nominally against himself is a historical paradox that has, unsurprisingly, merited significant study and commentary. While I will provide some overview of the extensive secondary literature debating the validity of the legal theory under which Charles Stuart was tried and executed, my argument looks largely to the consequences of this watershed event. After the treason trials of 1641-49, the politically engaged Englishman possessed a deep uncertainty as to who or what treason could be *against*. Treason had become a weapon by which one political faction could

assert its theory of sovereignty. A loser in the military battles preceding and following Charles I's execution could not be sure whether he would be treated as a vanquished enemy or a traitor, that is, a civilian criminal. Following this period of profound uncertainty as to who was the legitimate ruler of England, treason was increasingly figured—particularly by Matthew Hale, who served as a judge under both Cromwell and Charles II—as a threat to *de facto* leadership. This shift was further entrenched in the century's *second* English civil war. Having survived the use of treason prosecutions as a cudgel against political enemies at the Bloody Assizes and against the Rye House plotters in the 1680s, the triumphant Whigs of the 1690s enacted a reform bill that presupposed the question of whether treason had been committed to be epistemological or a matter of statutory interpretation. The problem with treason prosecutions was not, as it had been in the 1640s, competing conceptions of English sovereignty, rather, it was a problem of factual innocence.

The outline of this argument is as follows: First, I provide a summary overview of substantive developments in statutory treason law from James's ascension to the English throne through 1696. Next, I turn to two major legal treatises of the period, Sir Edward Coke's enormously influential *Institutes* and Sir Matthew Hale's *Historia Placitorum Coronae* (*History of the Pleas of the Crown*). Although written in the 1670s, Hale's work was not published until 1736. The text is nevertheless evidence of what a major legal figure of the period thought, one who served under Cromwell but also was instrumental in the Parliamentary maneuvers that brought about the Restoration. I then (following Orr) recount the theories of treason of which Parliament made use in its executions of Strafford and Charles. A description of the legal reasoning around the distinction between traitors and enemies is followed by evidence to suggest these terms were readily interchanged by political propagandists of the 1640s and 1650s. Having established the significance of the Interregnum period in the history of treason in the seventeenth century, I skip ahead to 1689, when efforts to pass a bill reforming treason trials began and consider how these earlier developments informed the debate and ultimate passage of the 1696 Act. I also rely on transcripts of treason trials of the period, as collected in the *State Trials* volumes published (in second edition) by Sollom Emlyn in 1730, and by Thomas Bayly Howell from 1809 onward.

II. The Treason Statute: 25 Edward III[1]

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[1] This chapter will be concerned only with high, and not petit, treason. Petit treason, by Coke's time, was committed against "subjects and inferior persons" as opposed to the royal majesty (hence its comparative title), and consisted of three types, all homicides: the killing of a master by his servant, of a husband by his wife, or a prelate or religious superior by a secular individual. (Coke, Edward, *The Third Part of the Institutes of the Laws of England*. 1644. London: W. Clarke and Sons, 1817, at 19-20.) Although nominally an analog of high treason and, like the greater crime, concerned with the usurpation or rejection of rightful authority, petit treason was from the passage of 25 Edward III "to be treated in all essentials as a felony." Although a capital crime, petit treason did not merit the ritual desecration of the high traitor's execution; the forfeiture entailed was the same in cases of petit treason and felony (a year and a day to the king, rather than permanent and excluding all heirs and ancestors, as in the case of high treason). Unlike high treason, actual homicide and not mere compassing was required, and while all participants in high treason were principals, one could be convicted as an accessory in a case of petit treason if one, say, was a servant who aided another in killing one's master. (Coke, *Third Institute*, at p. 20). One might argue that by ignoring petit treason I am eliding or silencing the feudal quality of treason as a political offense. However, I could find no evidence to suggest that the relationship between high and

Treason, for most of the seventeenth century, was defined by a single statutory provision. Enacted in 1351 [1352 NS], 25 Edward III (the twenty-fifth statute of Edward III's reign) was, according to Coke, of exceeding importance: "For except it be Magna Charta, no other act of parliament hath had more honor given unto it by the king, lords spiritual and temporal, and the commons of the realme for the time being in full parliament, th[a]n this act concerning treason hath had."[2] Coke lists the acts considered treason under the Edwardian statute as: first, seeking the death of the king, either by imagining his death (and informing others one had done so) or by actually killing one of the king's officers; second, the sexual violation of the king's consort, his eldest unmarried daughter, or the prince's wife; third, levying war against the king within his realm; fourth, adhering to the king's enemies; fifth, counterfeiting the great seal, the privy seal, or the king's coin; and sixth, bringing counterfeit coin into the realm. Hale's classification of the acts compassed by 25 Edward III are identical, save for listing the killing of the Chancellor or other officers as a separate, seventh category, rather than (as did Coke) treating the actual killing of the king's officers as an implicit compassing of the death of the king himself.[3]

One could be convicted of treason by one of several different procedures, and which court had jurisdiction in a specific case was often as much a matter of political strategy by those prosecuting the case as anything else. Like other felonies, treason could be tried in a court of oyer and terminer (a commission from the king granting jurisdiction), which included the common law criminal courts of the assizes (in London, the Old Bailey). Some alleged traitors were also tried at the King's Bench, when it was in operation, and the Court of Common Pleas. Unlike other criminal offenses, an individual who levies war against the king while the king's banner is raised (a chivalric marker of formal battle) might be convicted "on the King's Record"—that is, on the king's testimony alone and without trial—though this practice was seemingly defunct by the seventeenth century. Peers could only be tried for treason in the House of Lords. The great statute of 25 Edward III specified that in cases where treason was doubtful, it was Parliament that should decide the case; in practice, this meant allegedly treasonable acts not clearly proscribed by 25 Edward III would be prosecuted in the House of Commons. Finally, Parliament could "attaint" someone of treason through legislative action.[4] Originally a means of resolving difficulties surrounding the forfeiture of property following a conviction, these "bills of attainder" could and were used to convict individuals of treason when judicial processes looked likely to fail.[5] Even after debates had begun on the reformation of treason trials in 1689,

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petit treason was any more than terminological by the seventeenth century. "Treason," in the remainder of this essay should be understood as "high treason"; in this, I follow my sources.

[2] Coke, *Third Institute*, 2.

[3] Hale, Sir Matthew. *Historia Placitorum Coronae* (*History of the Pleas of the Crown*). 1736. London: T. Payne and others, 1800, p. 91.

[4] Although most of his contemporaries considered such bills of attainder legislative proceedings, it should be noted that Coke insisted that the process was judicial; Parliament was acting in its capacity as high court. Coke was therefore critical of the lack of process associated with such bills on the grounds that "the more high and absolute the jurisdiction of the Court is, the more just and honorable it ought to be in the proceeding, and to give example of justice to inferior courts." (Quoted in Gough, J.W., *Fundamental Law in English Constitutional History*. Oxford: OUP, 1955, at 43).

[5] Parliament used a bill of attainder to convict Thomas, Earl of Strafford of treason in 1641 after his impeachment trial went awry when the prosecutors' accumulative theory of treason (Strafford, by a course of conduct but without a single overt act qualifying as treason, subverted the fundamental laws) proved unconvincing. *See* Timmis, John H. "Evidence and Eliz. I, Cap. 6: The Basis of the Lords'

Members of Parliament did not hesitate to consider the speed and likelihood of a conviction in deciding whether to pursue an indictment or an impeachment.

The statutory offense of treason had an uneasy relationship with the category of "felony." According to Coke, treason *used* to lie inside the category of felonies but has since been excluded: "In ancient time every treason was comprehended under the name of felony, but not *e contra*: and therefore a pardon of all felonies was sometimes allowed in case of high treason. But the law is, and of long time hath otherwise holden."[6] Treason was listed separately from felony in both Hale's *History* and Coke's *Institutes*.[7] Treason, unlike felonies, merited a particularly gruesome execution and total forfeiture of both land and portable property for a traitor's heirs and ancestors as well as himself. There were other differences. A person involved in the commission of a felony could be convicted as an accessory, but all participants in a treasonable offense were considered principals. Hale describes treason as a kind of felony-*plus*: "*Crimen capitale,* or felony, in this acceptation, is of two kinds, namely, that which is complicated, and hath a greater offense joined with it, namely *Treason*, and that which is simple *Felony*. Touching the former of these, namely *Treason*, it is the offense, which is committed against some special obligation, subjection, and faith more than is found in other capital offenses, and therefore it hath the denomination of *proditio*."[8] Consistent with much criminal procedure of the period, invocation of this specific was necessary to prosecute the more serious offense; both Hale and Coke insist that an indictment that does not include the term *prodito* must be mere felony.

Decision in the Trial of Strafford," *The Historical Journal*, Vol. 21, No. 3, Sep. 1978, pp. 677-683, at 678-79.

[6] Coke, *Third Institute*, 14.

[7] The full punishment for high treason was particularly gruesome, though it was often reduced to mere beheading or hanging by a partial pardon. Coke described the formal procedure, as well as its symbolism, while speaking as Attorney General during the trial of several defendants in the Gunpowder Plot:

> For first, after a Traitor hath had his just Trial, and is convicted and attainted, he shall have his Judgment to be drawn to the place of Execution from his Prison, as being not worthy any more to tread upon the face of the Earth whereof he was made; Also for that he hath been retrograde to Nature, therefore is he drawn backward at a Horse-Tail. And whereas God hath made the Head of Man the highest and most Supreme Part, as being his chief Grace and Ornament, *Pronaque cum spectent Animalia caetera terram, os homini sublime dedit*; he must be drawn with his Head declining downward, and lying so near the Ground as may be, being thought unfit to take benefit of the common Air. For which cause also he shall be strangled, being hanged up by the Neck between Heaven and Earth, as deemed unworthy of both, or either; as likewise, that the Eyes of Men may behold, and their Hearts contemn him. Then is he to be cut down alive, and to have his Privy Parts cut off and burnt before his Face, as being unworthily begotten, and unfit to leave any Generation after him. His Bowels and innlay'd Parts taken out and burnt, who inwardly had conceived and harbored in his Heart such horrible Treason. After, to have his Head cut off, which had imagined the Mischief. And lastly, his Body to be quartered, and the Quarters to be set up in some high and eminent Place, to the View and Detestation of Men, and to become a Prey for the Fowls of the Air.

Emlyn, Sollom, et al., eds. *A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanours; from The Reign of King Richard II To The End of The Reign of King George I*. Solom London: Printed for J. Walthoe et. al., 1730, at 235.

[8] Hale, "Proemium, "*History of the Pleas of the Crown*.

This uneasy relationship between treason and ordinary crimes was reflected not just in the distinction between treason and felony, but in legal scholars' theorizing about the different ways of committing treason. Although "levying war against the king" and "adhering to the king's enemies" may appear to be substantially similar acts, the two categories arose from substantially different reasoning. "Adhering to the king's enemies" meant assisting the wrong side in an international conflict; this was an act of betrayal or disobedience, of acting contrary to the king's interests. "Levying war against the king," however, could include raising a flag signifying the onset of feudal conflict or engaging in an anti-enclosure campaign against landowners; in either case, one could be guilty of treason without opposing the king's army or even his interests. The crime here was not betrayal, but usurpation: To claim for oneself the right of making war, a right that is rightfully limited to the sovereign power (in this case the king), usurps a *marque* of sovereignty and thus damages the *majestas* of the king. Coke and Hale both explain this prohibition in similar terms: Coke declares that making war without the king's authorization "was high treason by the common law, for no subject can levie warre within the realme without authority from the king, for to him it only belongeth."[9] Hale identifies this exclusive power with the *ius gladii*: "The *ius gladii*, both military and civil, is one of the *jura majestatis,* and therefore no man can levy war within this kingdom without the king's commission."[10]

The formal raising of arms was a sign of war so unequivocal as to merit summary conviction by the king during the medieval period. But a private individual who raised arms did not necessarily commit treason, according to Coke, if his purpose was equally private: "Whereby it appeareth, bearing of arms in warlike manner, for a private revenge or end, is no levying of war against the king within this statute. So that every gathering of force is not high treason. And so it was resolved in parliament, …the earle of Northumberland's case."[11] Even though raising arms was historically of symbolic or dignitary significance, by the seventeenth century treason was limited to violence that aspired to political status. Both Coke and Hale posited a similar distinction for violence by the poor and working classes. Riots did not constitute treason unless their aims amounted to a public or general end. Even if the object of this violence was private property, according to Hale, riots could constitute a war against the king "interpretatively and constructively." Efforts that qualified as such a war were those "to throw down inclosures

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[9] Coke, *Third Institute*, 9.

[10] Hale, *History of the Pleas of the Crown*, 130. Coke's distinction was invoked in political debates through at least 1689. In a debate as to whether to reverse the attainder of an individual convicted of treason under James for levying war against the king, one Mr. Finch, MP, argues that conspiring to levy war (which Coke says is not in fact treason) merited the conviction, on the grounds that general designs against the king, including the destruction of inclosures, were in fact efforts to put the king in one's power and therefore were treason under the first article of 25 Edward III, namely compassing the king's death. Here we see an interesting flexibility in classifying acts according to the ostensible distinction betwen levying war and compassing death. Mr *Finch*.] "...To throw open all inclosures generally all over the Kingdom, was the case of the Miller of *Oxfordshire*, who was actually executed. Upon this the difference stands in Books. Any general design (though not immediately against the King's person) to keep him in custody, till he had confirmed any thing that the People would have, is Treason; as in the case of *Rea* and *Ramsey*, in *Rushworth*'s Collection—To raise War against the King, all the Judges declared it Treason." (*Grey's Debates of the House of Commons: Volume 9*. Edited by Anchitell Grey, London: T. Becket and P. A. De Hondt, 1769. *British History Online*. Web. 3 July 2018. http://www.british-history.ac.uk/greys-debates/vol1, March 11, 1689.)

[11] Coke, *Third Institute*, 10.

generally, or to inhanse servants wages, or to alter religion established by law; and many instances of like nature might be given; this hath been resolved to be a war against the king, and treason within this clause."[12] Hale expresses some skepticism that large-scale violence against private property necessarily constitutes treason. He cites Coke's examples of wage riots under Henry VIII and enclosure riots under Elizabeth as settling the legal principle, but suggesting "that in new cases the parliament should be first consulted."[13] Brydall draws much the same distinction as Coke between "a great Rout, or the like, and Levying of war," citing the Elizabethan precedence: If "three or four" burn down an enclosure, this is an unlawful assembly, but "if they have risen of purpose to alter Religion established within the Realm, or Laws, or [] go from Town to Town generally" to cast down *all* enclosures, "this is a Levying of War" within 25 Edward III "because the Pretence is publique and general, and not private in particular."[14]

Teasing out such a distinction, however, suggests that it was the intentions of the defendants and not the precise nature of their actions, that qualified violence as treason. "Levying war against the king" was as much a mental crime as was "compassing or imagining" the king's death. Although 25 Edward III required an overt act for conviction of treason, the prosecution of treason was a means of stamping out subversive sentiment. Moreover, what constituted an overt act—in particular, whether words or letters qualified—was a matter of some debate in treatises, trials, and the Commons alike. General purpose may be inferred from the crowd's actions or language, but it is this inference, and not the scale or scope of the actions themselves, that would ultimately matter at trial.

Considered solely as a statutory offense, treason in the seventeenth century was both exceptional and hybrid. It could be both committed and prosecuted in strikingly different ways (levying arms, publishing texts, or sexual intercourse), and those means (of both commission and conviction) reflected different underlying theories of the offense itself, or of the nature of the authority (judicial or political) by which it could be punished. Consistent throughout were the spectacular nature of punishment (not just execution, but a gruesome and ritualized execution) and a concern with the perpetrator's attitude toward the king, of which the overt act was understood as evidence.

III. Traitors and Enemies

Both Coke and Hale, whose compendiums of English law are considered the most comprehensive and theoretically rigorous of the seventeenth century, drew a clear distinction between enemies and traitors, with correspondingly different types of force justified against them: Traitors were subject to criminal punishment, but violence against enemies governed by the *ius gentium*. For Coke, a subject "in open war or rebellion against the king" was nevertheless a traitor, whereas an "enemy coming into open hostility into England" could not be tried for treason but could be "executed by martial-law or ransomed."[15] Hale set forth a similarly bright-line rule: "if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall

[12] Hale, *History of the Pleas of the Crown*, 131.

[13] Hale 132.

[14] Brydall, John. *A Compendious Collection Of The Laws Of England, Touching Matters Criminal*. London, John Bellinger, 1675, at 98-99 (citing the case of Richard Bradshaw Miller, Robert Burton,---- Mason, and others of Oxfordshire, *Pasch. 39. Eliz.*).

[15] Coke, *Third Institute*, 11. Like Gentili, Coke places much emphasis on the legal significance of the term *hostes*.

be dealt with as an enemy, but not as a traitor, because he violates no trust or allegiance."[16] One could only be convicted of treason if one owed allegiance to the king.

Because treason consisted of the breaking of a bond of obligation, traitor and enemy were mutually exclusive categories. An invading French soldier could be tried under martial law, but it would be a miscarriage of justice to convict him of treason. Coke is quite clear on this: "And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust or allegiance; resolved in the lord *Herise*'s case Co. P.C. cap. 1. p .11 7 Co. Rep."[17] Hale draws a similar bright-line rule. Traitors were subjects, individuals who betrayed the government to which they rightfully owed obedience and of which they could be construed as members; foreign enemies owed no such obedience and therefore were not in violation of treason law even when they were openly hostile to the king. If one did owe natural or temporary allegiance to the king, adhering to the king's enemies—within the bounds of his kingdom or outside of it—constituted treason. One could not simply renounce this allegiance. "If a subject join with a foreign enemy, and come into England with him, he shall not be taken prisoner here and ransomed, or proceeded with as an enemy shall, but he shall be taken as a traitor to the king."[18]

Whereas traitors were tried under the common law, enemies were subject only to the law of nations (the *ius gentium*), a set of legal principles that included rules for military engagement defined by practices within and among nations rather than English judges. Hence *if* an ambassadors attacks or attempts to undermine his host government, he is construed as being at war with (and not traitorous to) the king: "If he is proceeded against, it must be as an enemy by the law of war of nations, and not as a traitor."[19] Coke goes into greater detail as to how enemies might be dealt with, though he is equally adamant that such men cannot be tried for treason: "An enemy coming into open hostility into England, and taken shall be either executed by martial-law, or ransomed; for he cannot be indicted of treason, for that he was never within the protection or ligeance of the king, and the indictment of treason saith, *contra ligeantiam suam debitam*."[20] This distinction between traitors and enemies was significant enough as a matter of legal principle that even Englishmen who aided traitors while abroad were not considered traitors under 25 Edward III "because the traitor is no enemy, as hereafter shall be said; and this statute is taken strictly."[21] If the Englishman was not within the geographical bounds of his allegiance to the king, he acted not as a member of the commonwealth attempting to undermine its Crown, but as an outsider seeking to damage it.

Although foreigners, by definition, could not be traitors, to be a traitor was often to act *like* a foreigner in contravention of one's obligations as a domestic subject. As a legal scholar Coke was clear that English subjecthood is a precondition of legal liability for treason. But as a prosecutor he frequently accused traitors of being secretly or truly foreign. For example, at Sir Walter Raleigh's trial, then-Attorney General Coke said to the accused in a moment of high drama "Thou has an English face, but a Spanish heart."[22] Such accusations of foreignness and duplicity were echoed by the key state's witness in the trial, a Mr. Cobham. Coke's speeches at

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[16] Hale, *History of the Common Pleas*, 38.
[17] Hale, *History of the Pleas of the Crown*, 38.
[18] Coke *Third Institute*, 11.
[19] Hale, *History of the Common Law*, 95.
[20] Coke, *Third Institute*, 11.
[21] Coke, *Third Institute,* 10-11.
[22] Emlyn, *State Trials* (1730), 208.

the trial of the Gunpowder plotters (again as Attorney General) not only suggested that they were with "the Spanish Plot"—as Raleigh's supposed conspiracy to replace James with Arabella Stuart was called—but that Jesuits, generally, formed a network of conspirators within England.[23] (To be Jesuit, or Roman Catholic, was to be intrinsically traitorous; since the Henrician Reformation statutes, anyone who accepted the Pope as spiritual leader necessarily rejected the King's religious authority over England.) These accused traitors were not English subjects choosing to align themselves with foreign enemies but really or essentially foreign individuals masquerading as Englishmen. National identity remained at the crux of a treason accusation in the years leading up to the outbreak of the Civil Wars; in impeaching Lord Keeper Finch in 1641, the Commons (making their case to the House of Lords) alleged that Finch, by undermining the fundamental laws, left England vulnerable to attack.[24] That his crimes were "plotted and pursued by an Englishman against England…increaseth the crime in no less degree than parricide is beyond murder."[25]

The core group targeted with accusations of duality were Catholics, or those with perceived Catholic sympathies. Most treason trials throughout the seventeenth century include at least one accusation of popery (or, by the accused or condemned, avowals of Protestantism). To be "Popish" was, by definition, to be traitorous, to accept a *foreign* individual as one's spiritual leader rather than the King of England. Moreover, Catholics in England threatened a fifth column in England's ongoing naval rivalry with Catholic Spain; English Jesuits seeking to openly practice their religion (and to convert others) stood to benefit from Spanish efforts at conquest. A a lively debate (in which Francisco Suarez was a prominent participant) raged in the early seventeenth century as to whether the excommunication of the English king by the Pope meant that pious individuals were authorized to depose James I. Stating support for this position was treason, and the basis for the execution of one John Owen.[26] Catholicism, in other words, was not simply a disfavored religion, not just a religion with an earthly leader whom a previous king had explicitly repudiated, but was implicated in England's most significant military and

[23] Emlyn, *State Trials* (1730), 229.

[24] Thomas, Earl of Strafford, was found guilty of treason by a bill of attainder in spring of 1641; Charles I was forced to sign his death warrant. The crux of the charges against Strafford, who had served as Lord Deputy of Ireland, was that he had advised Charles to take a hard line against Parliament and prepared to raise an Irish army against England.

[25] Proceedings in Parliament against John Lord Finch, Baron of Fordwich, Lord Keeper, for High Treason: 16 Charles I. A.D. 1640 [4 Rushworth, 124. 2 Cobb. Parl. Hist. 685] in Howell, Thomas Bayly, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, vol. 4, London: T.C. Hansard, 1816, at p. 17. Note, *contra* n. 1 *supra*, the relationship drawn here between petit and high treason.

[26] *The Case of John Owen, otherwise Collins, for Treason: B.R. Easter, 13 James I. A.D. 1615* [1 Rolle's Rep. 185.] in Howell, *State Trials Vol. 2*, 879-882.

political rivalry.[27] Coke went so far during the trial of the Guy Fawkes conspirators (in his role as Attorney General) to suggest that *all* treasons somehow involved a Jesuit priest.[28]

Prosecution and conviction of such priests made up a significant portion of the treason trials of the first twenty years of James I's reign. Laws during both Elizabeth' s and James I's reigns made it treason to be a Jesuit priest remaining in England or to enter England as a Jesuit priest. One priest who traveled to Spain and returned "to reconcile, seduce, and withdraw his majesties [sic] subjects from their natural duty, love, and allegiance, to a foreign service and obedience" was executed as a traitor.[29] A second, Robert Lalor, attempted to evade the law by changing his name and moving to Dublin. Upon trial, he confessed that the Pope lacked power to excommunicate the English king and escaped conviction; he promptly informed his friends that he professed only the absence of papal *temporal* jurisdiction and saw himself prosecuted again for *praemunire*.[30] Lalor was prosecuted on the theory both that his ministrations to Catholics, including issuing dispensations for divorcees, was "against our sovereign lord the king and his dignity royal, and in contempt of his majesty, and disherison of his crown." The prosecutor spoke more generally about the "encroachment of the bishop of Rome upon the liberties of the crown of England." John Ogilvie, who was received into an order of Jesuits in Gratz and returned to Scotland, was charged not under 2 Eliz. but the forty-eighth Act of James I, which required the king's lieges, on pain of treason, to be governed solely by the King's laws. By taking orders, and preaching masses, Ogilvie "cast off all reverence, respect, and obedience to his sovereign authority and laws, and dedicated [his] mind and actions to the unlawful obedience of foreign powers, adversaries to his majesty; and resolving, so far as in [him] lieth, to seduce his majesty's subjects from the faith and allegiance due to his majesty."[31] To preach Catholicism,

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[27] Locke, famously, shared this attitude toward Catholics, arguing that they should not be tolerated because their allegiance to a foreign prince (i.e. the Pope) constituted political animus rather than the exercise of private conscience. "But I think it is far otherwise with Catholics, who are less apt to be pitied than others, because they receive no other usage than what the cruelty of their own principles and practices are known to deserve; most men judging those severities they complain of [to be] just punishments due to them as enemies to the state, rather than persecutions of conscientious men for the religion, which indeed it is not; nor can they be thought to be punished merely for their consciences who own themselves at the same time subjects of a foreign enemy prince." (Locke, John, "An Essay on Toleration," in *Political Essays*, ed. Mark Goldie, Cambridge: Cambridge University Press, 1997, at 152).

[28] Emlyn, *State Trials* (1730), 229.

[29] *A true Report of the Arraignment, Tryall, Conviction, and Condemnation, of a Popish Priest, named Robert Drewrie, at the Sessions-house in the Old Baylie, on Friday and Wednesday, the 20th and 24th of February; the extraordinary great Grace and Mercie offered him, and his stubborne, traytorous, and wilfull Refusall. Also the Tryall and Death of Humphrey Lloyd, for maliciouslie Murdering one of the Guard. And lastly, the Execution of the said Robert Drewrie, drawn in his Priesly Habit, and as he was a Benedictine Fryer, on Thursday following to Tiborne, where he was hanged and quartered. London; printed for Iefferie Chorlton, and are to be sold at his Shop adioyning to the great North Door of Paules*, A.D. MDCVII [1607]. 5 Ja. I. 1607, in Howell, *State Trials Vol. 2*, 358-71.

[30] *The Conviction and Attainder of Robert Lalor, Priest, being indicted on the Statute of the 16th Rd. II. cap. 5, commonly called, The Case of Praemunire in Ireland*. Hill. 4 James I. A.D. 1607 in Howell, *State Trials Vol. 2*, 534-577.

[31] *Proceedings against John Ogilvie, for High Treason, on Tuesday the 28th Day of February, at Glasgow, in Scotland: 13 James I. A.D. 1615* in Howell, *State Trials Vol. 2*, 884-99.

and with it, the spiritual authority of the Pope, was by definition to subvert the king's rule by both submitting to another sovereign's authority *and* encouraging others to do the same.[32]

The emphasis on Catholics as the canonical traitors did not disappear after the 1640s—perhaps the most consistent pattern throughout a century of treason trials and executions was the use of "Popish" as an epithet against the accused and the insistence (by those not executed for being Jesuits) of convicted traitors at the gallows that they were true Protestants. And, of course, the leading charge against James II was his Popish sympathies. But the 1640s saw the introduction of a new complication. The trials that persisted through the Civil War and into the 1650s raised the problem of multiple plausible loyalties within the same nation. To be a traitor who "adheres to the King's enemies" or "levies war against the King" was no longer to be an Englishman with foreign loyalties, but to be an Englishman with a different version of *what England was and who should rule it* than one's judges.

Although in legal tracts and trials of the first half of the seventeenth century the distinction between traitor and enemy was largely conceived along lines of national identity, Parliament repurposed the opposition between enemy and traitor to claim legitimacy for their military efforts against Charles I. At issue during the first civil war was whether Parliamentary forces were subjects violating their allegiance to the king (committing treason) or, as members of a co-equal institution within the English government, were acting as just enemies by resorting to force against a usurper of their own political authority. Dudley Digges (a Royalist and acolyte of Hobbes), described the debate as follows: "[E]quals though they have not *imperium*, right to govern, yet if injur'd and they require satisfaction, and upon denial of it, attempt to compass it by force, they are esteemed by the Law of Reason and nations, *just enemies*, whereas Subjects, if they make war upon their Sovereign, though when wronged, are worthily accompted Rebels."[33] Digges explicitly quotes Gentili's definition of war as a "just dispute of difference by public swords," and endorses Gentili's conclusion that "Citizens or Subjects cannot be lawful enemies opposed to their Prince, because they want supreme authority, without which the war is not public, nor can it be justified." War, Digges states, following Gentili, is only justified "when there is no legal way to end controversies."[34] Of course, Digges is begging the question: The Roundheads would simply counter that Parliament's authority is equal to that of the King, and between these two political authorities, there is no legal arbiter.

Nevertheless, Digges's reliance on Gentili is significant. First, it shows that the Civil War debates were informed by the just war theories discussed in the previous chapters, and specifically, that Gentili's major innovation in distinguishing war from punishment influenced the thinking of major writers of the 1640s. Second, it signals a move away from a feudal understanding of obligation to one grounded in the practical authority of the sovereign. Rather than insist his political opponents are betraying an obligation to the King founded in a reciprocal

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[32] During the lead-up to the Civil War Parliament took a harder line than did King Charles I as to the Popish problem. Parliament issued a Remonstrance to the King demanding that John Goodman, who received a reprieve from Charles, be executed as a traitor. Charles eventually conceded, although protesting that the purpose of 3 James was not to criminalize religion per se; he would remit Goodman to Parliament to do what they would with him. Goodman, for his part, wrote a letter at King Charles's behest volunteering to be executed for the greater good. *Proceedings Against John Goodman, a Seminary Priest, condemned for High Treason, A.D. 1641* in Howell, *State Trials Vol. 4*, 60-64.

[33] Digges, Dudley. *The unlawfulnesse of subjects taking up armes against their soveraigne, in what case soever*. London, 1644, at 66.

[34] Digges, *Unlawfulness*, 158.

relationship or intrinsic authority, Digges's argument rests on the *absence* of political authority over Parliament. The key phrase for Coke in distinguishing the enemy from the traitor is "*contra ligeantiam suam debitam*"—against one to whom one owes allegiance. But Digges does not speak in terms of allegiance; he speaks in terms of status and the existence or absence of a shared political authority. Treason is not about severing the ties that bind but engaging in violence against the state without being a state oneself.

The rhetoric surrounding the trial and execution of Charles I reflects both a continuing link between treason-as-foreignness and treason-as-non-*hostes.*[35] Among many of those who wrote in support of the Parliamentary cause, there is a tendency to include parenthetical references to nefarious foreign influences on Charles's supposed betrayal or murder of the English people.[36] Such references are commensurate with the legal approach taken by Parliamentarians in their eventual prosecution and execution of Charles—first alleging that advisors were responsible for misleading the King (as the prosecution had argued in two prior treason trials, those of the Earl of Strafford and Archbishop Laud), then launching a direct assault on Charles's rule. At the same time, John Milton—one of the most vocal defenders of the King's execution—argued emphatically that political membership is not defined by proximity but by allegiance. Thus, the Englishman who offends against life and liberty "is no better than a Turk, a Sarafin, a Heathen."[37] The traitor *acts like* a foreigner (and more specifically, with echoes of Gentili and Grotius, a *godless* foreigner), despite being one of us; he is defined in opposition to foreignness, but still in reference to non-membership not just in the English commonwealth but the Christian world community.

While arguing that betraying the commonwealth makes one an outsider, Milton also argues that it is worse to betray one's own community than to attack it from the outside. For Milton, it is the King himself who poses this threat to the English people.[38] Milton justified the treatment of the King as an enemy by arguing he was something worse—when one threatens one's own community, "[W]hy should they not be dealt with as enemies?" For Milton, classifying the King as an enemy was crucial to justifying violence against him, but the use of the term did not always carry such theoretical weight. For example, the Earl of Bristol described himself as "marked out as an enemy to the Commonwealth" in his (successful) attempt to defend himself against treason charges by way of a published "apologie."[39] There was also a countervailing trend among Civil War partisans to describe what might be considered exceptional or militaristic actions in terms of common law norms and legal reasoning in defending against charges of or accusing others of treason.[40] Whether or not the King should

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[35] I discuss the trial and execution of Charles I—and the theories of treason used to justify both—at greater length *infra*.

[36] E.g. Prynne, William. *A soveraign antidote*. 1642 ("…upon probably grounds and informations and proofs that his Majesty seduced by some pernicious Enemies to the Kingdom's tranquility…").

[37] Milton, John. *The Tenure of Kings and Magistrates.* London, Matthew Simmons, 1649, at 22.

[38] Milton, John. *A Defence of the People of England; in answer to Salmasius's Defence of the king*. 1651. Translated by Joseph Washington, Amsterdam?, s.n., 1692, at 20.

[39] Bristol, George Digby, Earl of. *The Lord George Digbies apologie for himselfe*, *published the fourth of January, Anno Dom. 1642* (Thomason Tracts).

[40] See, for example, William Prynne's close reading of 25 Edward III to argue that Hotham was not guilty of refusing to return Hull to the King. (Prynne, *A sovereign antidote*, 32), and Marchamont Nedham's reliance on the fact that treason admits only principals (and not accomplices) to argue that those who remained loyal to the conquered Royalist side even after the Roundheads' victory might be

stand before the people as a criminal or by way of the "trial of the sword only" remained a contentious debate from Parker's *Observations* in 1642 through at least 1651, when Milton set out to defend the "ordinary" criminal trial of the king two years after his execution in *A Defence of the People of England*.

Milton was not alone in defending the execution of Charles I (and the prosecution of the Civil War more broadly) as an exercise in punitive jurisdiction. While Charles (understandably) dismissed the claim on the part of Parliament that they had the power to raise their own militia, at least one pamphleteer of the period defended this militia on the grounds of Parliament's criminal jurisdiction. William Bridge argued that parliament's use of the militia was merely an exercise of its authority to forcibly bring those accused to stand trial.[41] Herbert Palmer makes a similar claim in passing, stating that the "legal power to punish" of the two Houses is "more than sufficient to prevent and restraine Tyrannie." In this partisan retelling, it is the Cavalier's resistance to Parliament's right to civilly punish that precipitated the slide into military conflict: According to Herbert Palmer, "But when they will resist the *Parliament* by Arms, it hath no way to punish them, or defend the State but by Arms which therefore it may lawfully take up." [42] And Prynne's exhortation to Roundhead soldiers in 1643, *The doome of cowardisze and treachery*, called upon soldiers to bring "Delinquents, Traytors, to their native Country, unto condigne punishments."[43] Of course Royalists disputed this characterization, but also accused Parliament of interfering with the proper course of criminal law enforcement more generally. Charles's response to Parliament's *Remonstrance* charged the Commons with interfering with the normal course of justice in at least one case in Southwark, overruling a decision to investigate a (presumably pro-Parliament) riot there.[44] Digges contended that taken to such a scale Parliament's supposed attempt at enforcing the law amounted to civil war, a result that—even admitting the justice of the initial cause – was "more grievous than they seek to punish."[45]

Whereas legal scholars Coke and Hale carefully distinguished between "enemies" and "traitors," pamphleteers and propagandists used the terms together, accusing opponents of being "enemies" and "traitors" in the same tract or even sentence. The willingness to cross between legal categories can be attributed to political exigencies and to a tendency to use traitor as a pejorative for betrayal separate from its legal meaning. Nevertheless, the very usefulness of this ambivalence—the fact that it was not implausible, on its face, to treat one's opponents as both traitorous criminals and military enemies—suggests that the categories themselves were not completely settled as Coke's legal treatises might suggest. Read alongside the just war theorists of the period one can see the complex understanding of the relationship between war and punishment reflected in, for example, Prynne's call to join arms with the Roundheads: "All men of valour will protest and join forces with me against Cowards; all persons of honor & sincerity,

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justly punished by those conquerors. (Nedham, Marchamont, *The Case of the Commonwealth of England, Stated.* 1650. Edited by Philip A. Knachel, University Press of Virginia, 1969, at 37.)

[41] Bridge, William, *The Wounded Conscience Cured, the Weak One Strengthened, and the Doubting Satisfied by Way of Answer to Doctor Ferne*, London, 1642, 6.

[42] Palmer, Herbert, Sections IV and V, *Scripture and reason pleaded for defensive arms*. John Bellamy and Ralph Smith. 1643 (Thomason Tracts).

[43] Prynne, William, *The doome of cowardisze and treachery*. John White, 1643, at 1.

[44] His Majesty's Answer to a Book, entitled, *The Declaration or Remonstrances of the Lords and Commons of the 19th of May, 1642*. In Rushworth, John, *Historical Collections Vol. 4*, *1640-42*. London, D. Browne, 1721, at 711.

[45] Digges, *Unlawfulness of subjects*, 131.

against Traitors and Deceivers (the only enemies here encountered); especially in a public War, undertaken, managed for no other end, but the defence of Religion, Laws, Liberties, Justice, and bringing Delinquents, Traitors to their native Country, unto condign punishments."[46] Prynne is invoking a potpourri of concepts and justifications, but certain key concepts are apparent: By asserting a *public* war, Prynne is declaring Parliament the legitimate government; by linking "Traitors and Deceivers," Prynne's language recalls the pirate, for whom we have seen, deceit is a core characteristic; the purpose of this public War is punishment, but punishment not of wayward citizens but non-members of the commonwealth.

Milton's writings also reveal how the ambiguities of such comparative definition of traitor as criminal or enemy might be deployed to justify various concrete legal ways of dealing with traitors as political contingency required. Parliamentarians pursued an ostensibly regular military conflict against Charles even as they had prosecuted and executed Charles and his allies under a legal framework that depended upon their status as Englishmen and fellow citizens. Both criminal and military strategies had to be defended as legitimate courses of action. Thus, in the same essay where he trumpets the fidelity to the law and mercy shown by Englishmen in giving Charles the full benefit of a legal trial, Milton defends the inclusion of soldiers on the panel that tried Charles as appropriate to the military trial he deserved.[47] To be a tyrant, as Charles was, is to oppose the interests and well-being of one's country and thus to stand outside it: "[W]ho but Enemies to their Country look upon a Tyrant as a King? So that *Eglon*'s being a Foreigner, and King Charles a Prince of our own, will make no difference in the case; both being Enemies and both Tyrants, they are in the same circumstances."[48] At the outset of the essay Milton had referred to the execution of Charles in 1651 as "Capital Punishment,"[49] and pointed out—against those who would fault the English for degrading the king by treating him as a common criminal—that the relatively ordinary charges for which Charles was tried were both better than he deserved[50] and preferable in the procedural benefits they offered versus a lawless execution.[51] The wronged party nevertheless maintained this right to achieve justice by military rather than civil legal means. Thus, Milton argues in another essay: If a fellow-subject, neighbor, or supposed friend acted as an enemy, "what doth the Law decree less against them, then op'n enemies and invaders?" In such a case where legal prosecution might be unavailable or insufficient, "what doth it warrant us to less than single defence, or civil war? And from that time forward the law of civil defensive war differs nothing from the Law of foreign hostility."[52]

We have seen that international legal theorists (Gentili) and political theorists (Hobbes) of the first half of the seventeenth century had gone to significant lengths to distinguish between

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[46] Prynne, *The doome of cowardisze and treachery*, 1.

[47] "You may remember that we are not now discoursing of a Subject, but of an Enemy; whom if a General of an Army, after he has taken Prisoner resolves to dispatch, would he be thought to proceed otherwise than according to custom and martial Law, if he himself with some of his Officers should sit upon him, and try and condemn him?" (Milton *Defence*, 4).

[48] Milton, *Defence*, 89.

[49] Milton, *Defence*, xi.

[50] Milton, *Defence*, 8.

[51] "Whether it be not more just, more agreeable to the Rules of Humanity, and the Laws of all Humane Societies, to bring a Criminal, be his Offence what it will, before a Court of Justice, to give him leave to speak for himself: and if the Law condemn him, then to put him to death, as he has deserv'd, so as he may have time to repent, or to recollect himself, than presently, as soon as ever he is taken, to butcher him without more ado?" (Milton 4-5).

[52] Milton, John, *The Tenure of Kings and Magistrates*, 22.

war and criminal punishment (with varying degrees of success). In Milton's polemical writings we see how the unstable distinction between these two categories might be deployed to justify different strategies of violence. Milton acknowledges there is a meaningful distinction between criminal prosecution and war against enemies and valorizes the former as affording certain elements of due process that the other does not. But this distinction is invoked to justify Parliament's right to take *either* approach, depending on both the actions of the King and the availability of courts.

According to Barbara Donagan, the flexibility evidenced in the political writing of the period also characterized the legal strategies of Parliamentary and Royalist forces over the course of the Civil War. Donagan argues that soldiers were governed by, and punished according to, a combination of natural law norms, laws of nations, and professional codes considered appropriate to international military conflict in the period during the first war (beginning with the King raising his standard in 1642 and ending with the New Model Army's successes in 1646), but "the victors' justice of the second war [a series of Royalist revolts ending in the execution of Charles I] moved toward reduction of military enemies from professionals to whom the laws of their fellows applied to traitors subject to the penalties of civilian treason law."[53] During the first war, both sides claimed political legitimacy that would justify punishing their opponents as traitors, but a practical inability on both sides to carry out criminal trials, as well as a fear that their opponents might reciprocate, led to a general reliance on norms of war rather than treason. By December 1642 neither side had the political or administrative capacity to rule *as if* they controlled the means of civil punishment. Thus, while "both sides had established a reserve claim to the legal right in regard to the enemy as traitors to a civil state" they adopted a policy of restraint and "refrained from implementing treason's penalties." Lord Strange (who led the attack on Manchester where the first deaths of the conflict occurred), for example, was impeached for treason by the House of Commons, but the proceedings did not culminate in his execution and Lord Strange would fight future battles on behalf of the Stuarts.[54] For Royalists, treating Roundheads as soldiers—that is, maintaining them as prisoners of war or offering exchanges for their own soldiers in accordance with military practice of the period—"tacitly implied the Justice of the War," according to one of the king's secretaries, "thus granting it the status of war rather than rebellion." Nevertheless, the threat of reciprocal executions of captured soldiers was enough to forestall an attempt by Royalists to execute three captured Parliamentarian captains for treason in 1642, including the Leveller John Lilburne.[55]

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[53] Donagan, Barbara, "Atrocity, War Crime, and Treason in the English Civil War," *The American Historical Review*, Vol. 99, No. 4, 1994, pp. 1137-66, at 1164-65. Donagan's analysis is thus evocative of Schmitt's critique of modern international law norms. Rather than respect military conflict as a particular sphere, within which the basic right of both sides to engage in conflict is respected (even if atrocities or acts that cease to respect the basic existential right of the opponent are forbidden or punished), it is the *fact* of the conflict, the very willingness to engage in it at all, that was punished by the triumphant Roundheads. The arguments, of course, differ significantly in scale: For Donagan, it is the specific application of a particular civilian law (that of treason) that gives pause, whereas for Schmitt it is the criminalization of aggressive war that is so dangerous according to an international legal order whose jurisdiction and content is far less certain even now than that of 25 Edward III and Parliament in 1649. Nevertheless, there is a remarkable analogy between the two: aggression, rather than conduct, becomes the crime vis-a-vis a legal order that is itself enacted or buttressed by the fact of the prosecution.

[54] *Impeachment of James Lord Strange, for High Treason*: 18 Charles I. A.D. 1642 [4 Rushworth, 680. 2 Cobb. Parl. Hist. 1466] in Howell, *State Trials Vol. 4*, 174-75.

[55] Donagan 1140.

The second civil war proceeded in an entirely different manner, according to Donagan, who argues that the conflict of 1648 was interpreted by Parliament to be treason against a settled regime.[56] At the conclusion of hostilities, not just Charles but relatively low-level soldiers were prosecuted under civilian law for treason against Parliament. Donagan cites the prosecution of participants in the sieges of Colchester and Pontefract as examples: "The case of Pontefract demonstrated…the dangers for soldiers when civilian law overrode the laws of war, for its 'offenders' joined common criminals at the assizes."[57] The defendants themselves objected to the court's jurisdiction; records report at least one (Morris) as insisting that as "a martial man" he ought to be tried by "a council of war."[58] More secure in their military triumph, the Parliamentarians were willing to hazard reciprocal prosecutions to assert their political authority by way of criminal prosecutions of individuals who believed themselves to be "enemies," that is, fighting on behalf of a legitimate sovereign.

For example, on August 27, 1649, Cavaliers surrendered the town of Colchester to Sir Thomas Lord Fairfax and the Parliamentary forces. The articles of surrender called for private soldiers to be given quarter and lords and captains rendered to mercy—*i.e.* put to the sword if Fairfax so chose, but if not turned over to Parliament. Three thousand sixty-seven soldiers and three hundred and fifty noblemen surrendered.[59] Fairfax summarily shot two leaders in a "military execution," and, the others, according to a letter from Fairfax to the Commons, were "assured of quarter." Two, Lord Goring and Lord Capel, were brought before the House of Commons on a Bill of Attainder for treason a month later. Explaining to Parliament that they were still free to try and execute men who believed they had been promised immunity by their conqueror, Fairfax wrote that the offered quarter "did not extend to any other but the military power, and that they were notwithstanding liable to Trial and Judgment by the Civil power; otherwise any who was treacherous, or had revolted, might get quarter from a private soldier, and so not be further questionable."[60] Fairfax was attempting to explain away his mistake or duplicitousness in offering quarter. "Levying war against the king" *was* treason; it was, by

[56] Donagan 1162.

[57] Donagan 1159.

[58] Donagan 1161. Donagan suggests, moreover, that principles of military discipline within a particular force also characterized the executions of defeated opponents in 1649: "Exemplary justice, long a staple of discipline *in terrorem* within one's own army, was extended to defeated enemies" (Donagan "Atrocity" 1161). Rather than—as Donagan implies—a violation of accepted legal norms for dealing with one's enemies, punishment was generally understood within legal writing of the period (including Coke's *Institutes*) as primarily serving the purpose of general deterrence. All civilian executions were, in some sense, exemplary. In the account of the proceedings in Howell's *State Trials*, Morris's objection to the forum is brief: "[I]f I have done any thing worthy of death, I appeal to a martial Court, to my lord Fairfax, major-general, or a general Council of War: you have not any precedent for it, either for you to try me in this way, or me to suffer by it." Pressed again to plead guilty or not guilty, Morris pleads not guilty, and his defense is largely concerned with showing that as a soldier on behalf of Charles Stuart he could not have committed treason. *The Trial of Colonel John Morris, Governor of Pontefract Castle; at the Assizes at the Castle of York, before Mr. John Puleston, and Mr. Baron Thorpe, Justices of Assize, for High Treason: 1 Charles II. A.D. 1649*, in Howell, *State Trials Vol. 4*, 1252.

[59] *Proceedings in the High Court of Justice, against the Earl of Holland, the Earl of Norwich, Lord Capel, and Sir John Owen, for High Treason*: 1 Charles II. A.D. 1649. [Rushworth's Collection, Whitelock's Memorials, Heath's English Martyrs, Clarendon's History] in Howell, *State Trials Vol. 4*, 1206.

[60] *Id.* 1208.

definition, illegitimate warfare. Fairfax did not have the authority to offer quarter to a warring party that was, according the sovereign Parliament, an illegitimate force. "Military power" and "civil power," though distinguishable, were (as we have seen) different aspects of the same sovereign. Fairfax had changed the rules on the army defeated at Colchester and was hard pressed to explain why his offer of quarter was not just a lie aimed at easing the capture of the city.

Capel, when brought to trial before Parliament, pointed out this inconsistency.[61] He was given quarter for his life by Lord Fairfax; Parliament brought Lord Fairfax before the High Court to explain. Fairfax insisted Capel was only offered mercy "from the promiscuous execution of the sword, but…might be tried by a Council of War."[62] Parliament was convinced: Capel was not given quarter as a *hostes* (my terminology, not theirs) but merely had his execution suspended (like a Lockean slave) so that civil authorities might proceed against him as a wayward citizen of the English commonwealth. Goring, for his part, tried a number of defenses, first arguing that he acted without the intention of treason and acted only on a commission from Charles Stuart (the son of the late king).[63] When that approach proved unsuccessful he, like Capel, argued that he should be tried by martial, not civil law; in effect, contending that his conduct should be evaluated against the norms of interstate violence, rather than asked whether he should have initiated violence at all. Denied this attempt, he argued that if he were to be tried civilly, he should at least have the benefits of civil law, and demanded a jury of his peers.[64] Both Capel and Goring were attainted and condemned, but Goring given a reprieve.[65] At the scaffold, Capel reiterated his defense: Besides claiming the Biblical fifth Commandment demanded his defense of King Charles, Capel bemoaned that he was "condemned to die, truly contrary to the law that governs all the world, that is, the law of the sword; I had the protection of that for my life, and the honour of it."[66] In executing him as an English citizen who had taken up arms against his sovereign, rather than as the leader of an opposing force, Capel argued that Fairfax and Parliament had violated not just English law but the *ius gentium*. The civil execution of a military leader was itself a war crime.

A similar dynamic would play out again, two years later, after Cromwell was victorious at the battle of Worchester. Among those captured was James Stanley, Earl of Derby, the same Lord Strange who had been tried but not executed for treason for his role in the battle of Manchester some nine years earlier. Unlike Capel and Goring, the Earl of Derby was not tried before Parliament acting as a civilian court but before a Court Martial. Derby was not charged with a violation of the laws of war but a civil crime: treason. Derby protested that he had been given quarter by a captain from the Parliament's forces and that he was immune from trial at

[61] The Earl of Cambridge, tried at the same time, attempted another approach, relying on the nationality predicate to treason convictions over which much ink was spilt in the first quarter of the seventeenth century: He argued he was never naturalized as an Englishman and thus could not be convicted of treason. Parliament responded by reading the Act that naturalized his father and, by extension, the Earl. Howell, *State Trials Vol. 4*, 1209.

[62] *Id*. 1210.

[63] *Id*. 1212-13.

[64] *Id*. 1213-14.

[65] *Id*. 1216.

[66] Howell, *State Trials Vol. 4*, 1232.

Court Martial unless he had committed a subsequent offense.[67] He was overruled on this point and, this time, unable to escape execution. The Lord Sommers, from whose tracts Howell reproduces its account of both Derby's trial and execution,[68] concludes that Derby had no grounds to challenge the Commissioners' jurisdiction to try him for treason:

> [B]ecause quarter for life belongs only to such as are *Hostes*, i.e. Enemies, not to such as are *Perduelles*, Traitors to their Country, the earl is a native of England, and therefore being taken fighting against England, cannot be accounted for a competent enemy, nor in reason expect an exemption by quarter, which in this present case is to be esteemed only a mere suspending of a present military execution, that the offender might be brought to punishment by due course of law.[69]

Sommers wrote this account sometime in the half century following these events. For those with a living memory of the Civil War, the conflict could be described in Gentili's conceptual (and literal) vocabulary: The Cavaliers were a faction of a sovereign state to which they owed blood-based loyalty and thus were not entitled to the status of enemies and the protections that might entail. Quarter *could not be given*.

Still, this argument is not entirely convincing: First, in an effort not to make quarter entirely meaningless, Sommers insists that it still means the "suspending of a present military execution." But for this to be legally meaningful (as opposed to just describing the fact Derby was not actually killed then and there), it presupposes Derby had no right to avoid execution on the battlefield. The traitor, it would seem, is justifiably killed both as an enemy as a criminal, and the suspension of one death (as an enemy) does not constrain execution (as a criminal). In other words, we are back to Fairfax's distinction between civil and military powers, with the implication that a traitor engaged in active warfare has *neither* the rights of the citizen (due process) nor that of the soldier (quarter in the case of surrender). Second, Derby was not ultimately tried by a civilian court but by a martial court, although treason was itself a *civil* crime. Treason included participation in illegitimate warfare, but court martials were generally used to prosecute illegal conduct *in war or* the violation of *military* authority. (Cromwell commissioned the court-martial to try Derby for the violation of the new treason law, described *infra*, prohibiting correspondence with Charles Stuart.)

Donagan argues that the prosecution of Cavaliers for treason under civilian law was vindictive, a form of "winner's justice." Criticism of Parliament's treatment of ordinary Cavaliers post-1649 finds significant support in the just war theory previously described. Both Gentili and Grotius distinguished between the moral culpability of the sovereign who pursues an

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[67] *Proceedings Against James Stanley, Earl of Derby, Sir Timothy Fetherstonhaugh, and Captain John Benbow, before a Court Martial, for High Treason*, 3 Charles II. A.D. 1651 in Howell, *State Trials Vol. 5*, 297.

[68] Baron John Somers's (1651-1716) personal papers were published in 1809 by Sir Walter Scott, under the title *A collection of scarce and valuable tracts, on the most interesting and entertaining subjects: but chiefly such as relate to the history and constitution of these kingdoms: selected from an infinite number in print and manuscript, in the Royal, Cotton, Sion, and other public, as well as private, libraries: particularly that of the late Lord Somers*. London, T. Cadell and W. Davies, 1809-15. Howell would incorporate Somers's (sometimes spelled Sommers's) account as part of his later-published *State Trials* collection.

[69] Howell, *State Trials Vol. 5*, 296

unjust war, and the efforts of his subjects who are meant to prioritize their political obligation over any individual assessment of the war's moral quality—except when the latter is egregiously and obviously wrong. Even if not a violation of contemporaneous laws of war, the prosecution and execution of soldiers at Pontefract and Worchester is a reminder that from the perspective of a soldier on the losing side, it was not always preferable to be treated as a citizen rather than an enemy. At times, the Parliamentarians were at pains to justify their actions in accordance with existing laws, at times displaying pedantry in their adherence to 25 Edward III while calling for the death of Charles I as a tyrant.[70] Parliamentarians insisted, from 1642 onward, that they were protecting the constitutional status quo, notwithstanding the apparent absurdity of such a claim by those who sought to execute the King for treason. There was thus an implicit claim of political legitimacy embedded in such prosecutions: By treating as traitors those who fought on behalf of the King, the Parliamentarians assumed, retroactively, the key question over which the war was fought.

Royalists, at the Restoration, took a different approach, implicitly accepting the legitimacy of some aspects of *de facto* rule during the Interregnum and declining to destabilize a broad political consensus in favor of the monarchy by attempting to punish anyone who had supported the Parliamentary cause. Parliamentarians were, in effect, treated as a vanquished enemy in an unjust war—their leaders were subject to spectacular and symbolic violence, but ordinary supporters largely exempt from consequences. Treason, and the longstanding distinction between treason and other felonies—marked by, as we have seen, the use of *proditio* and the execution ritual—was crucial to this balancing act. The Act of Oblivion, passed in 1660, sought to put an end to two decades of discord and violence by wiping the slate clean for all but the leaders of Charles's execution. The Act of Oblivion provided that "all and all manner of Treasons, Misprisions of Treason, Murthers Felonies Offences Crimes Contempts and Misdemeanors Counceled Commanded Acted, or done since the first day of January in the yeare of our Lord One thousand six hundred thirty seaven by any person or persons before the [twenty fourth] day of June in the yeare of our Lord One thousand six hundred and sixty other then the persons hereafter by name excepted…be Pardoned Released Indemnified Discharged and put in utter Oblivion."[71] The act pardoned those convicted—or guilty but not yet convicted—of crimes associated with taking sides during the Civil War. A separate act restored to the heirs of those convicted on both sides property lost to attainder.[72] Exempted from such pardon were "those guilty of bribery, forgery, perjury, and subornation of witnesses ...and Roman Catholic priests and Jesuits" as well as those responsible "for traitorous correspondence with foreign powers over

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[70] Prynne, whose call to arms against the Cavaliers (*The doome of cowardisze*) is cited above, also denied charges of treason against Parliament generally and John Hotham in particular (whose refusal to turn over the magazine Hull began the outright hostilities of the first civil war) with reference to a detailed and literal reading of 25 Edward III. (Prynne calls Charles I a "viper" in the same text.) In *The soveraigne povver of parliaments & kingdomes*, Prynne insists that only private men can be guilty of treason, and that Parliament has "a joint interest with the King in the premises in the Kingdom's right…especially when they both seize and detain it for its own proper use," and that the seizure of the King's castles, ports, ships, and armies does not fall within the scope of behavior prohibited by 25 Edward III.

[71] "Charles II, An Act of Free and Generall Pardon Indempnity and Oblivion" (1660), *Statutes of the Realm: Volume 5, 1628-80*. Edited by John Raithby, s.l., 1819, 226-234. *British History Online* http://www.british-history.ac.uk/statutes-realm/vol5/pp226-234 [accessed 18 December 2017].

[72] 12 Car. II, c. 12: An Act for confirmation of judicial proceedings. Quoted in Kenyon, J.P., *The Stuart Constitution: 1603-1689: Documents and Commentary*. 2nd ed., Cambridge, Cambridge University Press, 1966, at 372-73.

the same period,"[73] *i.e.* communicating with foreign powers under the false pretense of representing the King. Section X of the Act excepted killings not committed under the authority of one of the Civil War parties (which included Cromwell and various groups claiming the mantel of Parliament at different points throughout the war), certain sexual crimes, witchcraft, and piracy. Participants in the Irish Rebels of 1641 and the more than sixty justices who sat on the panel that condemned Charles to execution were also excluded from these pardons. This included leaders who had died a natural death in the intervening eleven years who now stood attainted of treason, and three men (New Model Army generals Ireton and Cromwell, as well as John Bradshaw, who presided at Charles's trial) were exhumed and beheaded.

Exceptions in the Act of Oblivion fell into two categories. First, convictions for certain sufficiently serious non-political crimes were left undisturbed. If someone had killed or engaged in piracy on behalf of the Roundheads or Cavaliers, a pardon was forthcoming. But punishment was left intact for those found guilty of killing their neighbor (or putting a curse on them) over a property dispute. The Act distinguished between "ordinary," or interpersonal, crime, and criminal acts committed on behalf of a party claiming political legitimacy. Second, participants in the Irish Rebellion, named leaders (including both military leaders, such as Cromwell, and those responsible for the death of Charles I), and members of the royal household who falsely acted as representatives of the King vis-à-vis foreign governments were all excepted.[74] Authors of unjust action were punished, while the mass of soldiers, who engaged in the conflict due to political obligation (or coercion) were largely exempted from individual, capital punishment.

Latent in the Act of Oblivion, then, was an account of treason as distinguished from both felony—purely interpersonal crimes—and war. Those guilty of treason were to be punished spectacularly; those guilty of ordinary crimes punished as they would normally be, notwithstanding the illegitimacy of the political authority that sentenced them. Those who followed traitors, however, would be treated like soldiers who possessed "invincible ignorance" (to use Suarez's or Vitoria's terminology) and spared the consequences of their role in intrastate violence. This was consistent with international law of the time: Ordinary soldiers' primary obligation was obedience to their political leadership, and so they were not punished when that leadership led them astray. Even as the newly passed treason laws affirmed the illegitimacy of the Parliamentarian cause, the Act of Oblivion treated the mass of its supporters as vanquished enemies. Consistent with this implicit treatment of Parliamentarians as *hostes*, the conviction and execution of felons at the hands of judges appointed by Cromwell were adopted; at least some of the Protectorate's acts had the force of law, even if Cromwell himself was a usurper. (This choice was not without irony, given that the treason charges against Strafford and, before him, Lord Keeper John Finch, emphasized both men's mismanagement of ordinary criminal prosecutions and abuse of local law enforcement resources.[75])

Strikingly, the career of Matthew Hale (author of the most widely read legal treatise between Coke and Blackstone) itself reflects a practical willingness on the part of English politicians to draw a rough distinction between "ordinary" and "political" crimes and to forgive

[73] Kenyon, *The Stuart Constitution*, 370.

[74] Sections XXV, XXXII, XXXIV, and XXXVI of the Act.

[75] *Proceedings in Parliament against John Lord Finch, Baron of Fordwich, Lord Keeper, for High Treason*: 16 Charles I. A.D. 1640 [4 Rushworth, 124. 2 Cobb. Parl. Hist. 685.] in Howell, *State Trials Vol. 4*, at p. 13-14 (Finch "lay imputations and scandals upon his majesty's government" by sending warrants to release individuals accused of outlawry and falsely imprisoned individuals until they paid ransom).

the latter in the interest of maintaining cohesion after 1660. According to his near-contemporary biographer Gilbert Burnet, Hale would take on "common and ordinary felonies" during his time as judge under the Protectorate but refused to sit on trials of those accused of crimes against the state.[76]

Hale's discussion of ambassadors also reflects this implicit distinction between political and ordinary criminal offenses. Ambassadors enjoyed the king's peace even as they acted in the interests of their natural sovereign. Hale argued that as the representative of a foreign sovereign the rebellious or conspiring ambassador should be treated like an enemy soldier. "But now, altho it should be admitted that a foreign ambassador committing a consummate treason is not to be proceeded against as a traitor, but as an enemy; yet if he or his associates commit any other capital offense, as rape, murder, theft, they may be indicted and proceeded against by indictment in an ordinary course of justice…for tho those indictments run *contra pacem regis*, yet they run not *contra ligeantiae suae debitum*."[77] As someone who had witnessed such trials, as well as the bloodshed of the 1640s and the fall of the Commonwealth, Hale had good reason to be skeptical of treason trials, and a strong self-interest in avoiding committing himself to a particular theory of treason and, by extension, political legitimacy. In contrast, Hale's willingness to serve as a judge under Cromwell, and his ability to continue as a respected jurist after 1660, evince a notion that punishing "ordinary crimes" in the absence of legitimate political authority is consistent with "the rule of law." Indeed—as we shall see in the next section—Hale's theory of treason itself, while largely identical to that of Coke's pre-Civil War writings, reflects in a different way his commitment to a "rule of law" distinguishable from the sovereign himself.

IV. From Crime Against the King to Crime Against Security

In this section, I argue that, notwithstanding the restoration of the statutory basis of treason and the Stuarts in 1660, the meaning of treason had shifted subtly but significantly from one concerned with the person (in either his bodily or corporate capacity) of the king to the security of the body politic. This security could be configured as rule *per se*, fundamental laws, or the physical safety of the people. But treason no longer threatened the ruler, but the ruled. While Strafford, Archbishop Laud, and eventually Charles I were tried and executed for treason, a theory of political obligation whereby protection provided by a *de facto* sovereign is exchanged for obedience to that sovereign gained increasing currency among English political thinkers. Such theories were in wide circulation, on both sides, during the pamphlet wars of the 1640s. In the political writings of mid-century, treason was increasingly understood as a crime against the

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[76] "Yet at first he made a distinction between common and ordinary felonies, and offences against the state; for the last he would never meddle in them; for he thought these might often be legal and warrantable actions, and that the putting to death of men on that account was murder; but for the ordinary felonies, he first was of the opinion, that it was necessary, even in times of usurpation, to execute justice in those cases, as in matters of property…but having considered further of it, he came to think that it was at least better not to do it, so that after the second or third circuit, he refused to sit any more on the crown-side, and told plainly the reason; for in matters of blood, he was always to choose the safer side" (Burnet, Gilbert, *The Life and Death of Sir Matthew Hale*. London, W. Nicholson, 1805, at 30). *See also* Cromartie, Alan, *Sir Matthew Hale, 1609-1676: Law, Religion, and Natural Philosophy*. Cambridge University Press, 1995, at 85 and Tuck, Richard, *Natural Rights Theories: Their Origin and Development*. Cambridge University Press, 1982, at 16-7.

[77] Hale, *History of the Pleas of the Crown*, 99.

legal order (or order more generally); attacks on individual office-holders are dangerous not because of their dignitary or representative capacity, but because those office-holders are perceived as necessary to the maintenance of the *status quo*. By the time of Hale's *History*, an account of treason-as-threat-to-the-general-safety has developed alongside this understanding of treason-as-usurpation.

A. Treason Statutes in the Interregnum

Treason, until 1649, was defined as an attack on the king. In 1649, Charles I, King of England, Scotland, and Ireland, was executed for treason. Even before King Charles I was executed for treason, a militarily victorious Parliament began to adapt 25 Edward III to account for the fact that they had deposed the king. Altogether, the Long Parliament, the Commonwealth, the Council, and Cromwell passed a total of fourteen treason statutes.[78] Revisions were slow to begin with; the Long Parliament passed only one treason statute, a reflexive, ad hoc measure against London mobs that was rescinded two days after its passage in July 1647.[79] But in March 1649, Parliament declared that the "office of King in this Nation, shall not henceforth reside in, or be exercised by any one single person"; anyone attempting to install Charles Stuart (son of the executed Charles) as King would be guilty of treason.[80] In all, six statutes during the years 1649-59 made efforts to restore the Stuarts to the throne treasonous: correspondence with Charles Stuart, his court in exile, or anyone in Scotland was declared treason, as was openly supporting Charles's claim to the throne.

After negating the younger Charles's claim to the throne and making efforts to continue the Civil War on behalf of the Cavaliers traitorous, successive treason statutes became a means by which the current claimant to English sovereignty not only asserted their authority, but criminalized challenges to their legitimacy. On 14 May 1649, more than two months after the House of Commons had declared themselves supreme and set about trying Charles under 25 Edward III, but five days before England was declared a commonwealth, Parliament passed a new comprehensive treason act. Gone were provisions for attacks on the king's person or his family. Assisting foreigners in an invasion of England or Ireland and counterfeiting remained treasonous. Added was incitement to mutiny by non-soldiers; this provision named Thomas Lord Fairfax as the commanding officer and was, according to Hast, aimed primarily at Levellers and their efforts at inspiring an uprising among laboring and peasant soldiers.[81] In place of the king as the object of treason were the Keepers of the Liberty of England or the Counsel of State, representatives of Parliament. Subversion of the new authority was treason and so was speaking openly against it: "[I]f any person shall maliciously or advisedly publish by writing, printing, or openly declaring that the said government is tyrannical, usurped, or unlawful; or that the Commons in Parliament assembled are not the supreme authority of this nation…every such offence shall be taken, deemed, and adjudged, by the authority of this Parliament, to be high

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[78] See, generally, Hast, Adele, "State Treason Trials during the Puritan Revolution, 1640-1660," *The Historical Journal*, Vol. 15, No. 1, 1972, pp. 37-53.

[79] Hast 38-39.

[80] "March 1649: An Act for the abolishing the Kingly Office in England and Ireland, and the Dominions thereunto belonging," *Acts and Ordinances of the Interregnum, 1642-1660*. Edited by C H Firth and R S Rait, London, 1911, 18-20. *British History Online* http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp18-20.

[81] Hast 40.

treason."[82] Sedition—the printing or declaring of words tending to the undermining of the government—had previously been considered a lesser act but was now included as high treason.[83]

In 1654, the slate was wiped clean again with a statute that, like 25 Edward III, declared "no other offense" than those listed to be treason.[84] The Supreme Authority of the Commonwealth was declared to be "the Lord Protector and the people in Parliament assembled," or the Lord Protector assisted with a Council when Parliament was not assembled. Writing, printing, or openly declaring otherwise was treason, as was plotting or endeavoring to subvert "the Protector or the present Government." By 1656, the personal nature of treason as defined in 25 Edward III had been applied almost wholesale to Lord Protector Cromwell. "[I]f any person or persons shall…Attempt, Compass or Imagine the death of the Lord Protector; and such Attempted Compassing, or Imagining shall declare by open deed; Or shall levy War, or Plot, Contrive, or endeavour to stir up, or raise Force against the Lord Protector, or the Government, to subvert or alter the same, and shall by open deed declare such Endeavour, Plotting or Contriving," that person shall be guilty of treason.[85] Counterfeiting the great seal of England remained treasonous and now, so was counterfeiting the Lord Protector's privy seal. Having, five years earlier, declared it treasonous to assert that the office of King resided in a single person, Parliament began to reinstate some of the aspects of kingship vis-à-vis the protection of Cromwell's person.[86]

Notwithstanding these legislative efforts, Alan Cromartie argues that the "great statute of 1352" proved remarkably tenacious through the Interregnum and would be quickly re-asserted in its original formulation after the Restoration. For the four years following the 1649 treason statute, according to Cromartie, treason trials were generally handled within the high Courts of

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[82] "May 1649: An Act Declaring what Offences shall be adjudged Treason.", in *Acts and Ordinances of the Interregnum, 1642-1660*. Edited by C H Firth and R S Rait, London, 1911, at 120-21. *British History Online* http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp120-121. Quoted in Judson, Margaret, *From Tradition to Political Reality: A Study of the Ideas Set Forth in Support of the Commonwealth Government in England, 1649-1653*. Archon Book, 1980, at 6. Sedition would again be declared treason after the Restoration, suggesting a repeated tendency—independent of substantive political ideology—to entrench new leadership by way of criminalizing spoken dissent that could be tolerated in more stable times.

[83] In July, Parliament reaffirmed that mutiny and sedition were now to be considered high treason, and that subversion of the Keepers of the Liberty of England and Council of State was treason. The same Act spelled out the prohibition on counterfeiting in greater detail, clarified that conviction for counterfeiting did not (unlike other forms of treason) extend to the corruption of blood and loss of inheritance, and set a one-year statute of limitations. "July 1649: An Act declaring what Offences shall be adjudged Treason," *Acts and Ordinances of the Interregnum, 1642-1660*, 193-94.

[84] "January 1654: An Ordinance Declaring that the offences herein mentioned, and no other, shall be adjudged High Treason within the Common-wealth of England, Scotland and Ireland, and the Dominions thereunto belonging," *Acts and Ordinances of the Interregnum,* 831-35.

[85] "November 1656: An Act for the Security of His Highness the Lord Protector His Person, And Continuance of the Nation in Peace and Safety," *Acts and Ordinances of the Interregnum,* 1038-42.

[86] Also carried forward from the 1649 statute were the prohibitions on proclaiming Charles Stuart to be king, counterfeiting, adhering to foreign enemies, the lack of corruption of blood for counterfeiting convictions, and the one-year statute of limitations. The anti-Catholic laws of Elizabeth and James I, making it treason to be an ordained priest within England's borders, to "maintain or defend" the Pope's power or authority within England, or to obtain or publish any Papal bulls, were reinstated during this period as well.

Justice, "tribunals that sat without juries, erected by parliament's power," relying on 25 Edward III and the Treason Act of 1649. Whatever statutory changes were made in London, local judges remained attached to the formulations of 25 Edward III, with the term "king" understood to refer to the supreme magistrate. [87] "The rule of a 'single person' had led to repeated abuses, so the people had resolved to do without one. It was nonetheless unnecessary to change the Treason Act. 'The name and word king' applied to 'the supreme authority', whatever the happened to be, because 'it was frequently used to set forth the public interest of the people' as in the phrase, 'the king's peace.'"[88] In the more radical redefinitions of 1649, new prohibitions were couched in the vocabulary of 25 Edward III, construed as forms of "levying war" and "aiding enemies" of the current government.[89]

This continuity was put to the test with the passage of the Treason Ordinance of 1654, which purported to entirely supersede 25 Edward III. The first major application of this Ordinance was a response to Penruddock's rebellion, a planned large-scale uprising by Royalists that was aborted, preempted, and only briefly successful across various sites in 1655.[90] The captured royalist plotters "were tried for committing a common law treason, defined by the great statute of 25 Edward III. This Act referred to treason as a crime against the king, but the word was deemed to cover a Protector."[91] When faced with a choice between Cromwell's Instrument and a return to the medieval statute, judges of the Interregnum preferred the latter. In the end, the dozen state treason trials of the 1650s were of royalists, either Cavalier leaders of failed uprisings against Cromwell's New Model Army, plotters seeking to restore Charles II, or intended assassins of Cromwell.[92] The prosecution of treason was thus, over the course of the Interregnum, either a continuation of the Civil War struggle *or* a conventional means of punishing individuals who sought to kill an individual sovereign. The lack of imagination as to the nature of sovereignty reflected in the Interregnum treason law, according to Cromartie, would prove the undoing of the Revolution of 1649: A legal framework built around the existence of a king could survive only so long without one or a suitable substitute, and Cromwell refused to accept the crown even if he would rewrite the treason law to protect his person.

The Restoration meant a return to 25 Edward III as originally written as the legal standard for treason. Like Parliament in 1649, Charles II sought to shore up his authority by expanding the body of treasonable offenses with a supplementary statute. This 1661 Act made clear the Roundheads (supporters of the Parliamentary cause) were traitors and made the publication of seditious documents treasonable. (Recall that Parliament had also included

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[87] Cromartie, *Sir Matthew Hale*, 76. "[T]hough the balance of short-term advantage was on the protectoral side, the judges had exacted a very significant price. The precedent was followed in a later group of trials, which were based on the Henrician Treason Act. The juries were instructed, in interpreting the charge, to remember that 'Chief Magistrates' (including regnant queens) were described in the enactment by the shorthand term of 'King'. In the north, where a parallel rising had even less success, a different legal tactic was adopted. The judges on assize, Baron Thorpe and Justice Newdigate, were told to use the treason ordinance. On their refusal, they were sacked…The judges' terms were simple, if this was any guide [quotes manuscript report]. They were happy to defend the Lord Protector, so long as he confined himself to acting as a king." (Cromartie, *Sir Matthew Hale*, 81).

[88] Cromartie, *Sir Matthew Hale*, 61.

[89] Hast 39.

[90] "Penruddock's Rising" in *Historical Dictionary of the British and Irish Civil Wars, 1637-1660*. 2nd ed. Edited by Martyn Bennett, Rowman & Littlefield, 2016, 183.

[91] Cromartie, *Sir Matthew Hale*, 80-1.

[92] Hast 50.

sedition as a form of treason in the statute of 1649.) More significantly, the legal definition of treason was supplemented and clarified to foreclose the interpretations that had permitted the Parliament of 1649 to find Charles guilty of treason. Charles II's first Parliament quickly set about establishing legal prohibitions meant to preclude the "late troubles and disorders" of the past twenty years. Rectifying what had been a pernicious ambiguity in the law, the 1661 Act stated unequivocally that to "compass imagine invent devise or intend death or destruct[i]on or any bodily harm tending to death or destruct[i]on maim or wounding imprisonment or restraint of *the Person* of the same our Soveraigne Lord the King" was treason (emphasis added). While it was legal orthodoxy *prior* to the Civil War[93] that the treason statute applied to the king's person and not merely his "crown or dignity," attempts to distinguish the person of the king from his crown dated back to the 15th century. This distinction between person and crown was at the heart of the legal theory by which Charles himself was tried for treason.[94] The 1661 Act also made it treason "to deprive or depose [Charles II] from the Stile Honour or Kingly Name of the Imperiall Crowne of this Realme or of any other," to "move or stirr any Foreiner or Strangers with force to invade this Realme or any other His Majesties Dominions or Countreys" and to "exp[re]ss utter or declare by any Printing Writing Preaching or Malicious and advised speaking" any of these "Compassings Imaginations Inventions Devices or Intentions."[95] The statute made settled law what had been the Royalists' interpretation of 25 Edward III. It revised the law to preclude the more radical arguments of the 1640s. Treason now included efforts or writings that challenged the existence of the office of kingship, not simply the person of the king. The events of the previous decades had taught Royalists that the monarchy was threatened not just by dynastic challenges or assassination, but political revolution.

B. Treason Trials and Political Pamphlets

Although the Civil War and Interregnum saw numerous statutory innovations to the law of treason, the theoretical work on treason was most evident in several blockbuster political trials and the political pamphleteering of Civil War partisans during the period. D. Alan Orr has argued that the debate over treason during the Civil War trials of the 1640s was a contest about *marques*, in the Bodinian sense: Treason was a crime of usurpation (seizing *marques*), and so determining whether treason had been committed depended on one's beliefs about the *marques* held by an office-holder. "By the early seventeenth century English jurists had developed constructions of 25 Edward III that portrayed treason as a crime of usurpation or unlawful

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[93] Bacon, for example, construed the language of 25 Edward III to necessarily apply to the King's *person*: "A Corporation can have no wife; nor a Corporation can have no sonne; how is it then, that it is treason to compasse the death of the Queene, or of the Prince. There is no part of the body politique of the Crovvne in either of them, but it is entirely in the King." Bacon, Francis, *Three speeches of the Right Honorable, Sir Francis Bacon Knight, then his Majesties Sollicitor Generall, after Lord Verulam, Viscount Saint Alban. Concerning the post-nati naturalization of the Scotch in England union of the lawes of the kingdomes of England and Scotland*. 1641. (Thomason Tracts).

[94] Nenner, Howard, "Loyalty and the Law: The Meaning of Trust and the Right of Resistance in Seventeenth-Century England," *The Journal of British Studies*, Vol. 48, No. 4, 2009, pp. 859-870.

[95] "Charles II, 1661: An Act for Safety and Preservation of His Majesties Person and Government against Treasonable and Seditious practices and attempts," *Statutes of the Realm, Vol. 5: 1628-80*. 1819, at 304-06.

appropriation of the monarch's sovereignty tending to the compassing of their death."[96] Supporters of the Parliamentary cause were called upon to produce a theory of treason that could both excuse open war against Charles and, eventually, the execution of the lawful king for treason against his own *majestas*. The theory they developed in the trials of Strafford, William Laud (Archbishop of Canterbury)[97], Connor Maguire (Second Baron of Enniskillen),[98] and Charles himself, according to Orr, was largely available in the mainstream of English legal thought, as represented by Coke, by 1640. This was an account that understood king and people to be bound together as a corporate body; sovereignty adhered in this corporate body, as did the king's *majestas.* "[H]igh treason occur[red] whenever any words, counsels, or actions tend towards depriving the lawful sovereign of his or her sovereignty," including by causing a schism between king and people.[99]

Orr's account helps to link the apparently disparate types of treason were grouped under the same offense: one could attack the king's authority by killing his body, by assuming the *marques* of sovereignty through counterfeit coins or seal, or could, by taking up arms, act *as if* one were king. This theory of treason, moreover, hewed closely to its Roman origins as *crimen laesae majestas,* a crime of usurpation of the majesty of the Roman people in their sovereign capacity, but incorporated, in new ways, pre-existing notions of the state and the king's second body. The previously-described distinction between general violence (which is treason) and private violence (which is not) can also be reconciled with a usurpation account of treason. By pulling down enclosures or attempting to change religious practice through mass uprising, rioters were engaging in a kind of legislation-by-force. Coke[100] explains the treatment of such riots as treasonous in this way, in a passage Hale quotes.[101] It is this general purpose, and neither the chivalric signifiers of military conflict nor the numbers of participants, that constitutes a

[96] Orr, D. Alan, *Treason and the State*. Cambridge University Press, 2007, at 29.

[97] William Laud, Archbishop of Canterbury (the top Anglican religious official other than Charles I himself), was convicted of treason at a trial beginning March 1644 and executed in January 1645. Laud was found guilty of expanding clerical jurisdiction—a usurpation of the jurisdiction of the king's courts. As Orr points out, such ecclesiastical encroachment had constituted the lesser crime of praemunire under the laws of the time. Moreover, because Parliament was actively at war at the time of Laud's trial and prosecution, the object of Laud's traitorous conduct was described as against the king's political body (his crown) rather than his person. *See* Orr, *Treason and the State*, 101-30.

[98] Maguire was an Irish Baron who participated in the Irish Rebellion of 1641, an effort to throw off English rule. He was tried for treason in the English Parliament in 1645; he argued that under Magna Charta he ought to have been tried by his Irish peers. His conviction rested on the legal conclusion that Magna Charta extended to Ireland, but that Irish peers were made triable in England by a Henry VIII statute. The significance of Maguire's prosecution and conviction goes primarily to the imperial relationship between England and Ireland rather than the relationship between King and Parliament. *See* Orr, *Treason and the State*, 168-69.

[99] Orr, *Treason and the State*, 56.

[100] "It was resolved by all the judges of England in the reigne of king H. 8. that an insurrection against the statute of labourers, for the inhansing of salaries and wages, was a levying of war against the king, because it was generally against the kings law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do." (Coke, *Third Institute*, 10).

[101] "[B]ut if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Laborers*, or for inhansing salaries and wages, this is a levying war agains the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do." (Hale, *History of the Pleas of the Crown*, 133).

usurpation of the *ius gladii*. Orr's thesis also finds some support in the treason trials of the first half of the sixteenth century. Not only Jesuits frequently accused of undermining subjects' affection or obedience toward James by preaching mass, but at least one defendant, Richard Chambers, was convicted on the theory that, by complaining about the treatment of merchants in England in a speech before the Privy Council, he did "endeavor to alienate the good affection of his majesty's subjects from his majesty," Charles I.[102]

Until 1641 the king's person and the mystical body politic remained indivisible and prosecutions continued "in the king's name"—albeit also "for the preservation of the kingdom, state, and commonwealth."[103] Orr argues that English treason law required the identification of *majestas* with the person of the king to make sense of the specific tenets of 25 Edward III concerning the person of the king and his family as forms of usurpation of this sovereignty.[104] This was true according to Parliamentarians even as late as 1642, when their official response to the King's Remonstrance acknowledged the personal nature of treason, even as it moved the location of this obligation within the king's person from his body to the royal trust within.[105] The "body politic" was not the general public or its institutions, but a "corporate juristic person" that could act throughout the realm, and was tied to the physical person of the King. However, whereas Strafford's trial in 1641 was conducted in Charles's name, by Charles's own trial eight years later the marks of sovereignty were to be found in a body politic to which Parliament, even more so than the king, had claim to represent. As Kantorowicz puts it, the corporate body politic was not executed in 1649. Instead, a medieval account of the state was used to execute the king's natural body as that of a wayward magistrate.[106] Orr argues this "shift from a mixed corporate and personal conception of public authority or the 'state' to an impersonal or 'abstract' conception of the state" as the object of treason is observable in four treason trials (Strafford, Laud, Maguire, and Charles).[107] This latter conception was not novel in 1642, according to Orr, but it was wielded in a novel way. The "state" or body politic that treason threatened was a "single, abstract, juristic person" whose immortality "lent continuity to the constitutional order."[108]

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[102] *Proceedings against Mr. Richard Chambers, in the Star-Chamber, for seditious speeches before the Privy-Council*: 5 Charles I. 1629. [1 Rushw. Collections, 670.] in Howell, *State Trials Vol. 3*, 373.

[103] Orr, *Treason and the State*, 55.

[104] Although drawing from Kantorowicz's account of medieval kingship, Orr does not say much on how the concept of "the crown"—distinguished but not separable from the king, but nevertheless capable of encompassing the body politic in the terminology of Tudor lawyers—might have mediated the developments he describe. *Cf.* Kantorowicz, Ernest H., *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton University Pres 1957, 382. The silence is perhaps even more notable for the close relationship between the king's "crown" and his "dignity," the latter of which is oft described as insulted by treasonous activity pre-Civil War seventeenth-century treason trials.

[105] "[W]e acknowledge that [the king] is the only person against whom [treason] can be commited, that is, as he is king; and the treason which is against the kingdom is more against the King than that which is against his person because he is King; for that very treason is not treason as it is against him as a man, but as a man that is a king, and as he hath relation to the kingdom, and stands as a person entrusted with the kingdom, and discharging that trust…" *Remonstrance of both Houses, in answer to the King's declaration concerning Hull, 26 May 1642*, reprinted in Kenyon, *The Stuart Constitution*, 243.

[106] Kantorowicz, *The King's Two Bodies,* 23.

[107] Orr, *Treason and the State*, 208.

[108] Orr 172.

Beyond these four trials, however, discussion of treason in the1640s and 1650s saw *security* gain increasing significance. A theory of political obligation grounded in an exchange of security-for-obedience, played an important role in how treason was understood. This shift toward security persisted past the restoration of the monarchy with Charles II and the reunification of the body politic and the king's physical body. Despite the restoration of a Royalist interpretation of treason law along with the Stuart monarchy in 1660, by 1696 there had been a subtle but decided move within English treason law toward viewing the crime as a threat to a political order and community that is conceptually separable from king and crown, rather than the person of the king. This transition, as Skinner has argued by tracing the usage of the term "state,"[109] hinges around a notion of status or condition of security.

This concern with security is evident in Parliamentary writings of the period. For example, in defending Parliament's levying of war against the king—an act that was, on its face, treasonous—prominent Parliamentary supporter William Prynne advocated an understanding of treason where the danger of a personal threat to the king is entirely derivative upon the consequential harm to the kingdom as a whole: Is not war against the king treason "*because, and as he is, the head and chief member of the Kingdom, which hath a Common interest in him*; and because the *Kingdom itself sustains a public prejudice and loss by this War against, and violence to his Person*?" Prynne asks, and the answer is obvious: "Doubtless every man must acknowledge this, to be the only reason; for if he were not such a public person, the levying war against, or murdering of him, could be no High Treason at all."[110] If concern for the king's person is only a distant second for that of the kingdom as a whole, surely in the case where the kingdom's security is threatened by the king (as, the Parliamentary consensus would have it, was the case in 1642), it was not treason to make war against the king's mere person.[111]

Treason threatened the people's security; it did so by attacking "the state" or body politic directly, or the person of the king who was tasked with guaranteeing the well-being of that body politic (but was no longer identified with it). One could also commit treason, and threaten the *salus populi*, by undermining the historically grounded, specific constitutional norms of the English people that had long ensured the appropriate balance of power between king, Parliament, and people: The "fundamental laws" or "ancient constitution." Orr mentions this association between treason and the "fundamental law(s)" only incidentally, and in only one aspect: fundamental laws "constituted the sinews of the body politic," binding the kingdom to the king.[112] Concern with treason as a tearing of these sinews was particularly prominent in the trial

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[109] Skinner, Quentin, "The State," *Political Innovation and Conceptual Change.* Edited by Ball, Farr, and Hanson, Cambridge University Press, 1989.

[110] Prynne, William, *The soveraigne povver of parliaments & kingdomes. Or Second part of the Treachery and disloialty of papists to their soveraignes*. London, J. D. Sparke, Senior, 1643, at 7.

[111] Another Parliamentarian, Henry Parker, also made similar argument about defending kingdom from king in response to Charles's own response to Remonstrance of 1642: "I come now to those seven doctrines, and positions, which the King by way of recapitulation lays open as so offensive – And they run thus…. *That no Member of Parliament ought to be troubled for treason &c. without leave.* This is intended of suspicions only, And when leave may be seasonably had, and when competent accusers appear not in the impeachment…6. That levying forces against the personal commands of the King (though accompanied with his presence) is not levying war against the King: But war against his authority, though not person, is war against the King? If this were not so, the Parliament seeing a seduced King, ruining Himself, and Kingdom could not save both, but must stand and look on." (Parker, Henry, *Observations upon some of His Majesties late answers and expresses*. 1642, at 45.)

[112] Orr, *Treason and the State*, 100.

of Strafford. Even within the category of treason, lead prosecutor John Pym suggested, Strafford's crimes were particularly heinous: "Other treasons are against the rule of law; this is against the being of the law. It is the law that unites the King and his people, and the author of this treason hath endeavored to dissolve that union…"[113]

"Fundamental laws" were not just the sinews connecting the king to the persons who made up the body politic, but the framework that protected those subjects from the arbitrary exercise of power. This understanding of fundamental laws was part of the basic political vocabulary of the 1640s. Charles, in response to the Strafford trial, attempted to try the lead prosecutor, John Pym, and others for treason. The resulting Impeachment of the Five Members (dated January 3, 1642) echoes, in part, the accusations against Stafford himself: "That they [the five MPs] have traitorously endeavored to subvert the fundamental laws and government of the kingdom of England, to deprive the King of his regal power, and to place in subjects an arbitrary and tyrannical power over the lives, liberties, and estates of his Majesty's liege people."[114] Usurpation ("deprive the King") is but one of the three ways of framing Pym's crimes. Even the King himself invoked the security of subjects as one of the core aspects of the Five Members' treason.

This way of understanding treason as a threat to the rule of law or fundamental security of the kingdom—*not* explicitly present in Coke and earlier legal writings—could be characterized sometimes as treason-*plus*. In Strafford's indictment, quoted above, Pym goes on to draw the following distinction between treasons generally and Strafford's specific form treason: While "other treasons are particular: if a fort be betrayed, or an army, or any other treasonable fact committed, the kingdom may outlive any of these. This treason would have dissolved the frame and being of the Commonwealth."[115] The king (and his advisor's) guilt lay in the destruction of both the legal framework for the kingdom, and consequent to this, its physical security. If treason was both crime and worse-than-crime, Charles's and his advisers' treasons were also worse-than-treasons, existential threats to the commonwealth.

The novelty of this conception of treason as a threat to the fundamental laws of the state and the security they guaranteed is evident in descriptions of treason not just as a particularly bad sort of crime, but one that by threatening the existence of the state (and the king) *per se* entails *all* crimes. Along with the suggestion that the particular offenses of Strafford and Charles were worse, somehow more fundamental than ordinary treasons, was the claim that—by leading the country to war—"all other offences" were entailed: "[This] is an offence comprehending all other offences; here you will find several treasons, murders, rapines, oppressions, perjuries…. There is in this crime a seminary of all evils hurtful to a State; and if you consider the reason if it must needs be saw."[116] Such language had particular power in that it reflected contemporary notions of tyranny, an association Milton—defending the execution of Charles after the fact—

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[113] Pym's speech to the preliminary charges at Strafford's impeachment, 25 November 1640, reprinted in Kenyon, *The Stuart Constitution*, at 206.

[114] *Proceedings, by the King's command, upon Charges of High Treason, and other high Misdemeanors, against Lord Kimbolton and Five Members of the House of Commons; namely, Mr. Denzil Hollis, Sir Arthur Haslerig, bart. Mr. John Pym, Mr. John Hampden, and Mr. William Strode: 17 Charles I A.D. 1641*, Howell, *State Trials Vol.* 4, 83. Reprinted in Kenyon, *The Stuart Constitution*, at 241.

[115] Reproduced in Kenyon, *The Stuart Constitution*, at 206.

[116] *Pym's reply to Strafford's last speech in his own defense*, 13 April 1641. Reproduced in Kenyon, *The Stuart Constitution,* at 214.

did not hesitate to make use of: being a tyrant, as Charles was, "is a Crime that comprehends all sorts of Enormities, such as Robberies, Treasons, and Rebellions against the whole nation."[117] Milton was writing at a time where "crime" had no general usage; what we now might call crime was instead classified by the procedural mechanisms of prosecution (hence, "pleas of the crown"). Yet Milton's use of the term gestures at recognition of this category not in procedural terms, but in substantive ones. The crime of tyranny—a political offense—was construed, by nature of its lawlessness, to entail all legal transgressions. One can read in this type of accusation the beginning of a move toward understanding *crime* as a category of actions, and one that is linked to a conception of treason as threatening the "fundamental laws." At the same time, Milton's language is suffused, consciously or not, with the moral categories of international law. The tyrant is a robber of nations, a *hostis humanis generis*; Milton's use of a litany of criminal acts sounds less in an existing legal category familiar to Englishmen and instead draws together the same brigands we have confronted elsewhere: the tyrant, the rebel, and the robber.

By 1643, an anonymous pamphleteer would go so far as to suggest that even ostensibly legal attempts to alter these laws constituted treason: "…nor can or ought any statute or written law whatever, which is of later and inferior Condition, being but an offspring of this root, be interpreted or brought in Plea, against this primary and radical constitution, without guilt of the highest Treason and betray [sic] enmity to the Publique weale and polity because by the very constitution of the kingdom, all laws or interpretation of the laws tending to confusion or dissolution, are *ipso facto* both."[118] Like other pamphleteers of this period, the anonymous author identifies treason with enmity (to which, as we have seen, in legal doctrine treason is nominally opposed). But this pamphleteer goes further, suggesting even nominally legal means of political change may be treasonous because those changes presents an existential threat to the kingdom by way of altering its fundamental laws.

Roundheads, for the most part, attempted to cast these novel theories of treason in existing terminology or logics. For more radical writers of the 1640s and 1650s (some of whom supported the Parliamentary cause), this notion of treason as a threat to the "fundamental laws" was entirely divorced from the kingship or *majestas*. Treason, which since 25 Edward III was defined as a crime against the person or dignity of the king, was refigured in these texts as an attack on the core political or legal values of a non-hierarchical commonwealth. Gerrard Winstanley, a "True Leveller" or Digger who advocated for the abolition of private property, articulated a vision for a communist utopia. The fundamental law of this utopia was the right to common land ownership.[119] The criminal code of this hypothetical communist society listed several forms of treason, for which the penalty was death.[120] "Traitors"—at least, metaphorical ones—included those who offered legal services for fee, as well as those who "tried to buy or sell land or its fruits," who should be "put to death as 'traytors to the peace of the Common-wealth because it brings in Kingly bondage again and is the occasion of all quarrels and

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[117] Milton, *A Defence of the People of England,* 146.

[118] Anonymous, *Touching the fundamentall lawes, or politique constitution of this kingdome, the Kings negative voice, and the power of Parliaments. To which is annexed the priviledge and power of the Parliament touching the militia.* London, Thomas Underhill, 1643, at 4-5.

[119] Winstanley, Gerrard, *The Law of Freedom in a Platform*. 1652. Reprinted in *The Works of Gerrard Winstanley*. 1941. Edited by George H. Sabine. Russell & Russell, 1965, at 534, 561.

[120] Rogers, Michael, "Gerrard Winstanley on Crime and Punishment," *The Sixteenth Century Journal*, Vol. 27, No. 3, Autumn 1996, pp. 735-747, at 746.

oppressions.'" [121] Armed insurrection was also defined to be treason and, like efforts to reinstate private property, was punishable by death.[122] Treason for these writers was necessarily construed as a threat to the commonwealth as a whole and not the Crown; significantly, however, treason remained a cognizable crime, something that could be committed even in the absence of a king.

This substitution of "the Commonwealth," the fundamental laws, or "the peace" for the king as the object of treason is evident in political writings after Charles's execution; if it was a theory that served immediate political ends in 1649, it did not end with the Interregnum. Indeed, it would appear in George Lawson's *Politica Sacra et Civilis*, a text published in 1660 and again in 1689 and often read as laying the groundwork of both the return of Charles II and the overthrow of James II.[123] Lawson asserts that "the greatest treason and rebellion and infidelity is against *the state itself and real majesty*; the next is that against personal majesty in the general representative of the whole community; the next to that, is that against the person or persons, upon whose safety the peace and happiness of the people much depends."[124] Even though Charles II has been restored as the personal representative of the people, and bearer of the English Crown, it is the *state* that is the first object of treason and the *person* of the king is only protected inasmuch as he is the guarantor of this state. Lawson goes on to declare, "[t]reason against laws is more heinous than treason against persons."[125] This is, in a mainstream political text relied upon by Royalist and Parliamentarian alike, a striking assertion; where the revolutionaries of 1642 had to strain to produce a narrative whereby Archbishop Laud misled the King into alienating the people's affections (and thereby committing treason against him), Lawson outright states that one may betray not the people and their representatives, or the Crown, but the laws themselves. That treason was against the security of the British state was an uncontroversial assertion among MPs by the Glorious Revolution; Sir Hampden would say, without objection, in Parliamentary debates in April 1689: "[T]here is a Treason against the Realm, which the King cannot pardon."

I do not wish to suggest that this notion of treason as a threat to the general security entirely supplanted the usurpation account that Orr has identified. For example, John Brydall, in a compendium on the English criminal law published in 1676, still explained that levying war against the King as treasonous not because it attacked the king directly, but because levying war at all was a usurpation of the King's exclusive authority. "To levy War against our Lord the King is High treason: This was so by the Common Law, for no Subject can levy War within the Realm without Authority from the King; for to him it only belongeth."[126] Brydall used *crimen laesae majestatis* and high treason as synonyms as well.[127] The significance of this new understanding of treason was also downplayed by the seventeenth century English tendency to seek legal justification in "time immemorial." Sir Richard Temple, speaking against the suspension of habeas corpus in Parliament in 1689, would assert it was 25 Edward III that changed treason from a crime against the laws to a crime against the king. "Before the Statute 25 Edward III, the greatest Treason was subverting the Law, and even a Judge to break his Oath, was judged

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[121] Rogers 746.
[122] Rogers 746.
[123] Condren, Conal. "Introduction." *Politica Sacra et Civilis*, by George Lawson, Cambridge University Press, 1992.
[124] Lawson, *Politica Sacra et Civilis*, 223-24.
[125] Lawson 223-24.
[126] Brydall, *A Compendious Collection,* 82.
[127] Brydall 155.

Treason at the Common Law."[128] Those who supported the Parliamentary cause in both 1642 and 1689 were "revolutionaries" in the sense that they believed themselves to be—or told others they were—returning to a pre-corrupt condition. They were not altering the ancient constitution by making the national object of fealty order itself rather than the king but restoring it.

To be clear, this new notion of treason as acts tending to threaten the present order is not the same as the subversion account identified by Margaret Judson and heavily relied upon at the trial of Charles I. Judson, following Conrad Russell, argues that prior to the 1640s, "in addition to treason against the king, there had existed a parallel theory of 'treason against the state, or against the stability of the kingdom,' and that 'the essence of this doctrine of treason is the idea of making a division between the king and the people" that could trace its roots all the way to the original 25 Edward III.[129] Pym and St. John, Strafford's prosecutors, needed a theory of treason cognizable under the ancient statute whereby the King himself could be the bad actor—to do this they argued that the King's advisors had undermined him by turning the people against him (through usurping the people's rights). Strafford and Laud were convicted on the theory that, by advising Charles I badly, they undermined his relationship with the people—and thus threatened the *king's majestas*, or ability to maintain control of the government. This is not the security of the government, its laws, or "the people" as such. The threat to the *salus populi* (or rather, the relationship between the king and the people) was treason because it tended to undermine the King. But in Hale's account of treason, as in Digges's and Lawson's, treason's special dangerousness is explained by the threat that harming the King poses to the common safety, rather than vice-versa.

C. Coke, Hale, and Treason Against the State

This theory of treason-against-the-common-safety, invoked in Charles's trial and adopted by the most radical political writers of the 1640s, has roots in Coke's discussion of foreigners' local obligations and was permanently, if incompletely, entrenched in Hale's post-Restoration, later-canonical account of treason. Hale begins his first chapter on the crime of treason in *Historia* with a general account of allegiance, "since the specification of this offense consists principally in this aggravation, that it is *contra ligeantiae sua debitum*."[130] Treason is not just *contra pacem regis* (the king's peace) but *contra ligeantiae suae debitum*, against the debt of allegiance owed to the king. Indeed, those without such obligations cannot commit treason; while a foreign ambassador may be guilty of theft or murder, he *cannot*, by definition, commit treason.[131] This reflects a feudal understanding of the political order that privileges the relationship between individual and king as a distinct and *worse* violation of the social order than simply disrupting the general social well-being (i.e. the king's peace). Treason causes a harm that is cognizable apart from the material consequences (injury or lost property) of one's behavior.

The significance of betrayal for Coke's understanding of treason is linked both to the practical dangers that treason posed and its metaphorical link to poison or other forms of

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[128] *Grey's Debates of the House of Commons: Volume 9*. Edited by Anchitell Grey, London: T. Becket and P. A. De Hondt, 1769. *British History Online*. Web. 3 July 2018. http://www.british-history.ac.uk/greys-debates/vol1, March 5, 1689.

[129] Judson, *From Tradition to Political Reality*, 40.

[130] Hale, *History of the Pleas of the Crown*, 37-8.

[131] Hale, *History of the Pleas of the Crown*, 99.

corruption from within. Part of what made treason so pernicious to sixteenth century governments was the difficulty of its detection. Coke compared treason as something hidden that gives bloom to traitorous acts in his prosecution of both Sir Walter Raleigh and the Guy Fawkes conspirators:

> For Treason is like a Tree whose Root is full of Poison, who lieth secret and hid within the Earth, resembling the Imagination of the Heart of Man, which is so secret only God knoweth it. Now the Wisdom of the Law provideth for the blasting and nipping, both of the Leaves, Blossoms, and Buds which proceed from this root of Treason; either by Words, which are like to Leaves, or by some overt Act, which may be resembled to buds or blossoms, before it cometh to such Fruit and ripens, as would bring utter Destruction and Desolation upon the whole State.[132]

Later prosecutors would also compare treason to poison. In the impeachment of Strafford's allies (an impeachment later dropped), Audley Mervin, speaking on behalf of the Commons, described the accused treason as follows: "The quick-spreading venom of an infectious pestilence may be prevented by antidotes, and qualified by physical remedies: but this Catholic grievance, like a snake in the most verdant walks, (for such are the unblemished laws truly practised) stings us to death when we are most secure, and, like the king's-evil, can only be cured, by his majesty's free and gracious permission, of our modest and gentle proceedings for his vindication."[133]

This understanding of treason as a crime of betrayal and deception was so important that in at least one instance documented by Coke, sufficiently treacherous *homicides* that did not otherwise implicate the king's person were made high treason. If treason was metaphorical poison, literal poisoning could also be treason. "Poyson, is, as hath been said, the most detestable of all, because it is most horrible, and fearfull to the nature of man, and of all others can be least prevented, either by manhood, or providence…This offense was so odious, that by act of parliament [22 H. 8.] it was made high treason…But this act was too severe to live long, and therefore was repealed by 1 E. 6 cap 12 and 1 Mar. cap. 1."[134] Sufficiently horrific deaths, carried out by methods that were inherently dishonest (and therefore difficult to avoid), could merit the designation of high treason even if they did not threaten the king personally. At the same time, those convicted of poisoning would contrast their own crime to treason in a (successful) bid for a royal pardon. Robert Carr, convicted for the poisoning of Sir Thomas Overbury, begged for a reprieve from James I: "...It is true, I am forfeited *to* your Majesty, but not *against* you by any treasonable or unfaithful Act; besides, there is to be yielded a distinction of *Men*, as in *Faults*; in which I am of both under the nearest degrees of Exception. Yet your

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[132] Emlyn, *State Trials* (1730), 228. Coke had made a similar, if somewhat less flowery statement in the trial of Raleigh: ""There is Treason in the Heart, in the Hand, in the Mouth, in Consummation: comparing that *in corde* to the root of a tree; *in Ore*, to the bud; *in Manu* to the Blossom; and that which is in *Consummation*, to the fruit." (Emlyn 207).

[133] *Impeachment of Sir Richard Bolton, knt. Lord Chancellor of Ireland, Dr. John Bramhall, Lord Bishop of Derry; Sir Gerard Lowther, knt. Lord Chief Justice of the Common Pleas; and Sir George Ratcliff, knt.; before the House of Lords in Ireland: 16 Charles I A.D. 1641* in Howell, *State Trials Vol.4*, 54-55.

[134] Coke, *Third Institute*, 48.

Majesty hath pardoned Life and Estate to Traitors and Strangers…"[135] Poisoner though he was, Carr argued, his crime was not against the king and therefore merited at least as much consideration as those whose crimes of having been unfaithful to their king were much worse.

But who owed this allegiance? For the first part of the seventeenth century the canonical answer to this question was the decision in *Calvin's Case* (1607), which resolved the question of land rights for the "*post-nati*"—those born after the unification of the crowns of Scotland and England with James VI/I's ascension to the English throne in 1603. For Bacon (who argued one side of the case), the King's power to dictate who among foreign commonwealths was a friend or enemy was evidence that political allegiance in England was owed to the king's person, rather than the "body politic" or the laws themselves. In a strikingly Schmittian argument occasioned by the *post-nati* case, Bacon reasons that because allegiance to the kingdom precedes the laws and persists in the absence of law, as in the case of suspension or war, it must adhere in the king rather than the law:

> The first is, that allegeance cannot be applyed to the Law or Kingdome, but to the person of the King, because the Allegeance of the Subject is more large and spatious, and hath a greater latitude, and comprehension, then the Law or the Kingdome...That Allegeance is in vigour and force, where the power of Law hath a cessation appeareth notably in time of Warres, for *silent leges inter arma.* And yet the Soveraignty, and Imperiall power of the King, is so farre, from being then extinguished, or suspended; as contrariwsse it is raised, and made more absolute, for then he may proceed by his supreame authority, and Martiall Law without observing formalities of the Lawes of his Kingdome.[136]

The determination of who qualifies as an alien enemy, alien friend, or denizen (the three categories besides natural citizen recognized by Coke in his decision in *Calvin's Case*) lies within the king's prerogative.[137] Even natural allegiance was at the king's discretion if an individual sought to leave the commonwealth, in which case he would need the king's consent.

For Coke, as for Bacon, one's obligations toward the English king (and liability for treason) as a temporary resident of England depends on whether one's own sovereign is recognized as an ally or enemy by the said king.[138] However, and unlike Bacon, Coke emphasizes not merely the will of the king, but the economic and social conditions under which such a temporary resident lives within England as having moral purchase in the determination of political obligation. Both Coke and Hale make a more general distinction between a "local," or temporary and contingent allegiance and a "natural" allegiance that individuals (including Calvin) have by birth.[139] In exchange for protection and the associated benefits of civil society,

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[135] *The Trial of Robert Carr, Earl of Somerset, for the Murder of Sir Thomas Overbury. May 25, 1616. 14 Jac. I.*, in Emlyn, *State Trials* (1730), 349.

[136] Bacon, *Three speeches*, 39-40.

[137] Bacon, *Three speeches*, 14-15.

[138] "And all aliens that are within the realme of England, and whose soveraignes are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience of the king, (are *homes* within this act) and if they commit high treason against the king, they shall be punished as traytors, but otherwise it is of an enemy, whereof you may reade at large, lib. 7. Calvin's case." (Coke, *Third Institute*, 4).

[139] "The basis of [Coke's] theory, that 'protectio trahit subjectionem, et subjection protectionem', generated a 'local allegiance', which was owed to whoever kept order in a given place and time, and also

the peaceful visitor owed obedience to the sovereign – and failure to provide this obedience constituted treason, as it would for the natural citizen.

Hale followed Coke in distinguishing between what he called "original, virtual, and implied" allegiance and voluntary allegiance, expressed through an oath or promise, but went further in spelling out the implications of Coke's account of local allegiance.[140] Hale analogizes the obligations of a subject under a temporary usurper to that of a visitor; though neither has a natural or absolute obligation, inasmuch as both benefit from the political stability created by the host or illegitimate, temporary ruler, they are bound to obey him. "And upon the same account it is, that tho there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practice treason against this person…because of the breach of ligeance, that was temporarily due to him, that was the king *de facto*."[141] (Attempts to restore the *de jure* sovereign are exempted.) An account of political obligation developed used by Coke to account for temporary visitors had come in Hale's writings to describe all Englishmen under the succession of governments of the Interregnum and Restoration.[142]

Hale, unlike Coke, grounded the "*ligeantiae sua debitum*" not just in one's subjecthood-by-birth or a vicarious obligation to one's own ruler's allies, but the physical guarantees of protection offered by a *de facto* ruler. This subtle, but significant shift in how treason was understood between Coke and Hale is also evident in their respective discussions of treason's severity. Treason was the worst crime a seventeenth-century Englishman could commit. Coke calls it "…the highest, and most hainous crime of high treason, *Crimen laesae majestatis*…"[143] Treason's superlative quality would seem to derive from the fact it threatens the king directly. "Nothing can concerne the king, his crowne, and dignity, more than *crimen laesae majestatis*, high treason."[144] In Hale's *History of the Pleas of the Crown*, we are introduced to an additional explanation of treason's especial severity. "[T]he safety, peace, and tranquility of the kingdom is highly concerned in the safety and preservation of the person, dignity, and government of the king; and therefore the laws of the kingdom have given all possible security to the king's person and government under the severest penalties."[145] The threat to the king is not the ultimate reason for treason's danger, but rather, an attack on the king or his majesty is particularly dangerous because it *threatens* the general welfare. The importance of *ligeantiae suae debitum*, it is implied, derives from the necessity of such allegiance to maintaining the *pacem regis.*

Hale did not conceive of these two explanations as incommensurate. One can read them as answering different normative questions about why and to what degree to punish treason as a crime. Betrayal of trust is an aggravation, an explanation for the *moral* quality of treason. The importance of the king and his physical safety for the well-being of the commonwealth, on the other hand, provides a political and consequentialist reason for treating treason especially

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a 'natural allegiance,' which was local allegiance at birth. A local allegiance was binding for the purposes of normal social life." (Cromartie, *Sir Matthew Hale*, 76, citing Hale, *History of the Pleas of the Crown*, 103.)

[140] Hale, *History of the Pleas of the Crown*, 61, 68.

[141] Hale 60.

[142] This was not a hypothetical argument for Hale: Having served as a judge under Cromwell as well as the Stuart kings, Hale was vulnerable to a charge of treason after the Restoration for his obedience to such a usurper.

[143] Coke, "Proeme," *Third Institute*.

[144] Coke, *Third Institute*, 2.

[145] Hale, *History of the Pleas of the Crown*, 38.

harshly. The addition of this new reason is nevertheless significant, because it effects a subtle inversion of the feudal logic: one's relational obligation to the king gains normative force from its necessity to the *public* peace. Although the 25 Edward III had ostensibly been reinstated as the law of treason, and the king as its object, the seismic upheavals of the 1640s and 1650s had subtly but decidedly shifted the meaning of treason.

Coke's *Institutes* gestured at a theory of political obligation that arose in primary relation to the civil condition, established through the fundamental laws and guaranteed by the sovereign, rather than with the person of the sovereign himself.[146] By Hale's *History* England's most prominent legal theorist was willing to apply this theory not just to visitors to *create* obligations to the king, but to posit an obligation to obey a usurper who was sufficiently successful in establishing a *de facto* civil order. Hale, like Coke and Bacon, continued to insist upon the personal nature of treason; it was undoubedly a crime against the (biological) person of the king, as evidenced by the law's reference to his wife and children. Nevertheless, despite a legal as well as political restoration of the person of the king as sovereign, dominant legal notions of membership within the English commonwealth had moved permanently toward an identification of the crown with security and the political body as a kind of condition, one toward which any individual king stood as guarantor.

V. Reforming Treason

Two political revolutions punctuated the seventeenth century in England. The Civil War of the 1640s culminated in the treason trial of Charles (to which Strafford's trial was an important practical and theoretical precursor); the Glorious Revolution of 1688-89 precipitated, among other Parliamentary innovations, the most significant changes to statutory English treason law since 25 Edward III. The Treason Act of 1696 introduced important procedural protections for defendants accused of treason which would, over the course of the next century, eventually come to apply to all individuals charged with a felony by the crown.

In this section I argue that the choice of reforms by Parliament reflect the longer-term changes in how treason was understood by legal scholars and lawyers in the seventeenth century—that there is continuity between the apparent ruptures of the 1640s, which were nominally reversed in 1660, and the reforms of the 1690s which would persist into the eighteenth century and beyond. Although treason had been used as a *political* means of legitimizing the execution of opponents in a contest for authority in the 1680s as well as the 1640s, the understanding of a treason trial implicit in the 1690s reform was one in which the key question was not *who* treason could be committed against but *whether* an individual had committed an act

[146] Coke, hardly a revolutionary figure in his time, might therefore find it somewhat ironic that similar reasoning would be used by the *de facto* theorists who supported the Engagement Oath to the Commonwealth of England. To quote Marchamont Nedham: "[A]llegiance is but a political tie for politic ends, grounded upon political considerations; and therefore, being politically determined, when those considerations are altered by new circumstances (be it in relation to Caesar or the Senate) the old allegiance is extinct and must give place to a new." (Nedham, *The Case of the Commonwealth*, 41.) Unlike Coke, however Nedham excluded allegiance to the former king as a basis for action against the current government; the old oath of allegiance to Charles (and by extension, Charles II) was not sufficient basis for making war against commonwealth. (Incidentally, Nedham had written a defense of Charles before the latter's defeat; one might give him the benefit of the doubt by saying that he lived his theoretical commitment to a *de facto* theory of government.)

within a legally delineated set of wrongs. That MPs were, in the 1690s, able to frame their anxieties around treason as a problem of the wrongly accused, is due in part to the shift I have described toward a theory of treason as threatening *security* and founded in the violation of an exchange of protection for obedience to a *de facto* political authority.

Some efforts were made to reform treason trials between the Restoration and the Glorious Revolution. Throughout the 1670s the Lords had repeatedly attempted to protect themselves from execution at the hands of a rump Parliament. "In 1667-1668 a bill passed the House of Lords providing that, whenever a peer was accused of treason or felony, the Lord High Steward should summon all peers who had attained their majority; and a similar bill was passed by them in 1673-1674."[147] The same bill was reintroduced the following year (1675), this time requiring only forty members of the court of the Lord High Steward (rather than summoning all peers), of which thirty must attend trial and twelve vote to convict. This failed to pass the House of Commons, as did another version introduced four years later.[148]

In March 1689, shortly after the formal declaration of William and Mary as King and Queen and the passage of a Bill of Rights meant to guarantee individual liberties against them, the Lords introduced a bill to reform trial procedure in cases of capital punishment. So began a series of dueling proposals, with the Lords attempting to institute procedural protections for themselves and the Commons rejecting these measures out of institutional jealousy. During the 1688-1689 Parliamentary term one of the Lords (Levinz) tried again, this time including provisions designed to provide protection for all persons accused of high treason: property qualifications for the jurors; permission of the prisoner to have a copy of the indictment before trial; the right to be defended by counsel; and an oath requirement for witnesses. The House of Commons again rejected the bill, and this time, so did the Lords.[149] That same term, the Commons passed a similar bill—but excluded the protections for the Lords that were part of Levinz's bill. "A conference was held; and the Commons were induced to consent that there should be a jury of thirty-six in trials for treason in the court of the Lord High Steward; but they absolutely refused to give way to the Lords' proposal that all the peers should be summoned. The result was that the bill was lost," as was another bill in 1694 for much the same reason.[150] Finally, in 1696, the Commons acceded to the Lords' demands for special protection and a bill was passed in both houses.

The final bill provided:

> That all Persons indicted for High-Treason, or Misprision of it, shall have a Copy of the Indictment five Days before their Trial, and shall be admitted to make their Defence by Councils learned in the Law, not exceeding two. That no Person shall be indicted or attainted, but by the Oaths of two lawful Witnesses. That no Person shall be prosecuted, unless the Indictment be found within three Years after the Offence committed. That all Persons indicted shall have Copies of the Jury two days before their Trial; and shall have

[147] Holdsworth, Sir William. *A History of English Law*, vol. vi, Methuen & Co. Ltd., 232.
[148] Holdsworth 232.
[149] Holdsworth 233.
[150] Holdsworth 233.

> like Process to compel their Witnesses to appear before them, as is usually granted to Witnesses against them.[151]

The Act did not alter the substantive law of treason, but instead provided those charged with treason access to information about the charges against them, clarified the two-witness rule that had been in place since at least 25 Edward III, ensured defendants would have the power to produce evidence in their own defense by compelling witnesses, and granted the accused right to counsel to both prepare and present their case.[152] A statute of limitations of three years was placed on treason prosecutions. Also new in the Act was a right of cross-examining witnesses and of producing one's own defense witnesses.

At least some of the statutory guarantees introduced by the Act were already regularly permitted at trial and expected by defendants, if ultimately subject to the judge's discretion, including access to the indictment and to the jury panel, as well as to a solicitor before the trial and notary (if not a trained lawyer) for assistance during the hearings themselves.[153] Defense witnesses had been allowed in principle in earlier trials, but judges could and regularly did deny postponements to facilitate the appearance of defense witnesses.

The most significant change instituted by the Act was the allowance of defense counsel for the accused. Prior to the Act's passage, defendants were barred the use of counsel to argue facts at trial, though they could request "learned counsel" "for every matter of law rising upon the fact" under a certain, limited set of circumstances. According to Coke, such cause for the appearance of counsel arose if there was an issue as to whether the indictment listed an overt act, if the defendant claimed the indictment was not grounded by a statute, if the defendant claimed there were not two lawful accusers, to claim deficiencies in the form of the indictment or trial.[154] These exceptions applied to both treason and felony trials. It was a matter for the judge whether an issue in the case warranted such legal debate; Coke himself was not particularly quick to allow counsel when serving as Chief Justice. As he explained in the *Third Institute*, counsel is unnecessary in capital trials because, first, "the evidence to convince [the jury] should be so manifest, as it could not be contradicted"—if defense counsel *could* make a difference, then the defendant should be acquitted anyhow—and second, "the court ought to see, that the indictment, trial, and other proceedings be good and sufficient in law"—the court had responsibility for ensuring fairness to the defendant.[155]

John Langbein attributes both the passage of the Act and the choice of reforms therein to the Whigs' desire to avoid repetition of the "misbehavior of the judiciary in the late Stuart treason trials"—those following the Popish Plot (1678), the Rye House Plot (1683), and Monmouth's Rebellion (1685).[156] In each case, prosecutions believed or later revealed to be

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[151] The third parliament of King William: First session, begun 22-11-1695. *The History and Proceedings of the House of Commons, Volume 3:* 1695-1702 (1742), pp. 1-25. *http://www.british-history.ac.uk/report.aspx?compid=37654*.

[152] As John Langbein explains, because defendants were still not given access to a witness list (out of fear of witness intimidation), advance notice of the indictment was primarily useful to the newly available attorneys in preparing the defense case.

[153] Rezneck, Samuel. "The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England." *The Journal of Modern History*, Vol. 2, No. 1, 1930, pp. 5-26.

[154] Coke, *Third Institute*, 137.

[155] Coke, *Third Institute*, 137.

[156] Langbein, John H. *The Origins of Adversary Criminal Trial*. Oxford University Press, 2005.

baseless culminated in the execution of Whig leaders and sympathizers. Having gained control of the English government after the ouster of James II, according to Langbein, Whig MPs were willing to engage in major criminal procedural reforms to prevent future bloodshed.

Langbein views the introduction of defense counsel as the most significant innovation, to which the availability of the indictment and compulsion of witnesses were secondary: For the first time in England, facts would be contested at trial. The need for defense counsel arose not just from the Crown-selected judges' bias against defendants, but from the Crown's own use of trained counsel and the use of constructive treason (exemplified by prominent Whigs Russell's and Sydney's trials for the Rye House Plot), which involved intricate legal interpretation. The performance of Judge Jeffreys at the Bloody Assizes following Monmouth's failed rebellion had disabused Whigs of the notion, previously commonplace, that the judge would serve as counsel for the accused.[157] Early on in the debates, one of the reform's supporters made this point explicit: "Colonel Sidney had not lost his life, if he had had counsel allowed him."[158]

Langbein describes the purpose of the Act as "meant to vindicate [a] changed conception of the accused as a potential victim rather than as the foregone villain." In this, he agrees with Alexander Shapiro, who argues that treason reform should be understood as an ideologically-driven effort to instantiate in legal procedure the recognition of the defendant's right to a presumption of innocence and equal standing with the state to prove that innocence. According to Alexander Shapiro: "The act...emerged out of the victory not only of political moderation, but of a political world view…[:] the recognition and acceptance of an intellectual framework that at least theoretically recast the priorities of civil government in terms of the individual citizen."[159] Against those who suggest that the presumption of innocence the Act was designed to protect was a matter of generosity by a relatively secure government, Shapiro argues that the act "arose less from the government's sense of security than from an appreciation of the political identity of the individual defendant."[160] Records of Parliamentary debate support Shapiro's suggestion that the act was not a vote born of confidence; debates on reform bills took place nearly

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[157] Langbein, *The Origins of the Adversary Criminal Trial*.

[158] Pulteney, Sir William. "House of Commons Journal Volume 10: 20 March 1689." . 53-56. *British History Online*. http://www.british-history.ac.uk/commons-jrnl/vol10/pp53-56.

[159] Shapiro, Alexander H. "Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696." *Law and History Review,* Vol. 11, No. 2, Autumn 1993, pp. 215-255, at 219. Shapiro's account of the ideological justification of the bill provides an interesting comparison to James I's own notes about the treason trial of one Edmund Peacham, who was accused of authoring, but not giving, a sermon that subverted the King's authority. James I attempted to influence the outcome of the trial by instructing Francis Bacon to badger Edward Coke to provide the King with an advance copy of his opinion. Coke initially resists, but eventually capitulates. Writing on the case privately, James expressed frustration that Coke was so reluctant to infer intent from the unpublished sermon, opinion that "if judges will needs trust better the bare negative of an infamous delinquent, without expressing what other end he could probably have, than all the probabilities, or rather infallible consequences upon the other part, caring more for the safety of such a monster, than the preservation of a crown, in all ages following, whereupon depend the lives of many millions; happy then are all desperate and seditious knaves, but the fortune of this crown is more than miserable." *The Case of Edmund Peacham, for Treason: 12 James I. A.D. 1615* [Croke Car. 125. Bacon's Works] in Howell, *State Trials vol. 2*, 879. Note too, that James construes his own significance and the threat posed by treason in terms of the effects of the execution of the king on the general public.

[160] Shapiro, "Political Theory," 244.

simultaneously with debates on bills meant to impeach lingering supporters of James II or to require an oath as a means of winnowing out those supporters yet unknown.

James Phifer argues that the Act was not only meant to remake the criminal trial, but to tame the use of treason trials as a political tool. According to Phifer, the Act's immediate effect was to make treason trials into actual trials of fact rather than ritualized modes of condemnation and conviction.[161] The Act's changes "helped to bring to a close an age in which politicians frequently attacked their opponents with charges of treason, and it thus played a part in opening a new age, one where less violent practices were employed in the political struggle."[162] This, Phifer argues, was the assessment and purpose of the bill's proponents as well. It had become clear to politicians of the 1680s that treason could be used by both sides in any dispute; a treason charge was a weapon and a "truly vicious" one.[163]

The contrast between the attitudes toward treason of the successful Parliamentarians, on the one hand, and successful Whigs, on the other, is indeed striking. Whereas in 1649 the Commons and later Cromwell passed treason statutes criminalizing correspondence with the Stuart court in exile or the Scottish and making mutiny treason to tamp down on the restive Leveller forces, the House of Commons rejected a similar bill in 1689. One MP, speaking against the 1689 bill, observed, "When you pass a Bill like this, to make it Treason to aid and assist those that consult against the Government, I may be censurable for other mens [sic] Treasons, which, from my heart, I utterly abhor." Sure, the treason statute required that the Crown prove the act was committed "knowingly and maliciously," Sir Joseph Tredenham acknowledges, but we all know that provision is generally ignored. Moreover, mutinies (included in the bill) "have often risen from innocent occasions"—mutinies are of course not "innocent," but they may be, like the tearing down of enclosures, a form of protest against local conditions rather than a challenge to the King's authority. Tredenham would had "adhering," of 25 Edward III, better defined.[164] Sir Hampden reminded his fellow MPs of the danger of such expansions: Constructive treason was introduced by Charles II, "but some of you have been restored in Blood this Parliament, who lost their lives for it, by words of one witness, and a pretended writing found in Mr. Sidney's closet."[165] Making speech treason, Sir William Williams adds, is dangerous: "Carry but two witnesses from *Berwick* to *Dover*, and you may destroy the Nation."[166] The bill was rejected.

Langbein, Phifer, and Shapiro all agree that the Act placed "the accused on roughly the same level as the prosecution when the two stood before the court,"[167] and thus reflected and codified "an intellectual framework that at least theoretically recast the priorities of civil government in terms of the individual citizen."[168] But the notion that the king and defendant

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[161] According to Roger B. Manning, "A person indicted for treason in sixteenth-century England had only one chance in twenty-five of being acquitted." (Manning, Roger B. "The Origins of the Doctrine of Sedition" *Albion*, Vol. 12, No. 2, 1980, pp. 99-121, at 109.)

[162] Phifer, James R. "Law, Politics, and Violence: The Treason Trials Act of 1696," *Albion*, Vol. 12, No. 3, 1980, pp. 235-56, at 235.

[163] Phifer 240.

[164] "Debates in 1689: April 6th-22nd." *Grey's Debates of the House of Commons: Volume 9*. Edited by Anchitell Grey, London, T. Becket and P. A. De Hondt, 1769, at 205-226. *British History Online*. http://www.british-history.ac.uk/greys-debates/vol9/pp205-226.

[165] *Grey's Debates*, April 1689.

[166] *Grey's Debates*, April 1689.

[167] Phifer 255.

[168] Shapiro, "Political Theory," 219.

stood on equal footing was not novel; Coke asserts such equality was part of England's "Ancient Constitution": "[W]e have made it apparent from the lively voice of the laws themselves, that no country in the Christian world have in criminal cases, or highest nature, laws of such express and defined certainty, and so equal between the king and all his subjects, as this famous kingdom of England hath, being rightly understood, and duly executed..."[169] Even accepting each of these historians' account of both the ideological content of the act and the motivation of its authors, we are left with the question: Why *these* reforms? What assumptions about the nature of treason and the purpose of its prosecution are embedded in the choice of defense counsel as the means of addressing abuses?

The Act's limitations provide some hints. The Act's procedural reforms also did not apply to indictments for treason for counterfeiting the king's seals or coin.[170] Although counterfeiting *could* be a manifestation of a usurper's claim of political legitimacy, unlike levying war against the king—which had been attempted, several times, in recent memory—it had relatively little contemporaneous salience. According to Holdsworth, the bill only applied to indictments for treason, not impeachments. The Act thus did little to stop Parliament's ability to use the latter as a means of attacking its political enemies. Trials, which were conducted by judges appointed by the king, posed a threat to Parliamentary sympathizers that impeachment proceedings did not. Parliament was clearly institutionally self-interested in protecting defendants from royal persecution but not Parliamentary ones. The legislative history of the Act, too, supports the conclusion that the Act was perceived as a means of self-protection for certain institutional actors. Much of the controversy and the bill's initial series of defeats concerned the relative stature of Lords and Commons, the applicability of protections afforded commoners to trials of the Lords among their peers, and anxiety among the Commons that they would lose their right of impeachment.

Most strikingly, Parliament made no effort to reform the *substantive* law of treason. For Coke, as for Hale, the threat to the security of individual liberties in treason cases was not procedural but substantive—the introduction of constructive treasons beyond what was specified by 25 Edward III. The Commons considered bills to expand the definition of treason to include correspondence with James II and passed a bill of impeachment against those who dispersed a declaration by the ex-King around the time early versions of the Act was introduced. In each of these debates however, 25 Edward III was taken for granted—or, as in the case of the impeachment, seen as a limit to be worked around.[171] In debates about the Reform Act, concerns about the content of treason law were overshadowed by attention to the procedures of treason prosecution. One might have protected against politically motivated prosecutions in any number of ways: by changing or limiting the acts included as treasonable offenses or contracting or even specifying what constituted "overt acts." The execution of numerous individuals at the Bloody Assizes who were, at most, accessories to treason, suggests another obvious reform: Adding "accessory to treason" as a separate offense, with a separate punishment. Whigs' anxiety about constructive treason (the charge against the Rye House plotters Sydney and Russell) could also have been addressed through a substantive change to the treason law.[172]

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[169] Coke, *Third Institute*, 243.

[170] Holdsworth 234.

[171] *Grey's Debates*, March-June 1689.

[172] Commons had already reversed the attainder against Russell seven years before the passage of the Treason Reform Act, in March of 1689. When one of the MPs involved in Russell's execution stood up to "vindicate" himself by explaining why Russell had committed treason under the operative law at the

Indeed, even as Parliament struggled with reforming treason prosecutions, it continued to bypass existing procedural protections to convict its political enemies of conduct that was only arguably treasonous. During the seven years spent debating treason reform, the House of Commons repeatedly chose to proceed by impeachment rather than indictment to prosecute individuals adhering to James II after his abdication, but whose actions (generally consisting of speaking or refusing an oath) were at the very outer bounds if not beyond the reach of 25 Edward III altogether. For example, in 1689, although expressing some anxiety that, in impeaching the individuals for treason who promulgated a declaration from James II after his exile they were prosecuting men for speaking their mind, the Commons nevertheless passed the bill up to the Lords.

Before doing so, however, a Sir Thomas Lee remarked that they should only pass the bill if they were certain of the facts.[173] The remark is telling. Advocates for and against the 1696 Reform Act were largely concerned with whether it protected "innocent" defendants. Speaking in favor of an earlier version of the Bill, a Mr. Finch insists that the procedural reforms will not "make it easier to commit treason" but only to give the defendant "an easier way of Defence." All the bill does is give the defendant more information to contest the facts introduced at trial; "[s]hall it be said, that a Man may commit Treason safely, with a Copy of his Indictment, and Witnesses sworn to tell Truth?"[174] Reporting on the Commons' reasons for disagreeing with a proposed amendment by the Lords in December 1691, MP Montague described the scope of the Act as "the protection of all innocent men."[175] Other MPs described the bill not in terms of altering the meaning or scope of treason, but of preventing false convictions: "There is nothing in it, but to render an innocent man safe, and it does not weaken the Government. It makes it more hard to condemn an innocent man, and acquit a guilty."[176]

This concern was not limited to the Reform Act itself, but extended to other Parliamentary debates on treason of the years 1689-1696. For example, the expansion of treason to include words spoken against the king is construed as a problem not because men are entitled to speak against political leaders, or because Whigs have been executed for speaking the truth about King and Parliament a few years prior, but because evidence against individuals for allegedly *saying* something impermissible is so easy to fake. Hence Sir Williams does not defend the substance of Lord Sidney's criticism of the since-abdicated James II but bemoans the ease with which the case against him was *forged*, with false papers and a very few witnesses.

Alexander Shapiro's study of the Act emphasizes the increasing political significance of innocence, drawing from Robert Ferguson's *No Protestant Plot* as representative of Whig thought at the height of their (perceived) persecution in the 1680s. Not only is the presumption of innocence part of the protection subjects exchange for political obedience, the persecution of innocent citizens threatens the stability of government. To "exclude a company of Innocent

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time, he was shouted down. One of the bill's supporters responded that he thought "the Bill is carefully penned, and I think the most that *Lord Russel* could be guilty of, was but Misprision of Treason, War not actually levied." ("House of Commons Journal Volume 10: 5 March 1689." *Journal of the House of Commons: Volume 10, 1688-1693*. London: His Majesty's Stationery Office, 1802.)

[173] *Grey's Debates*, June 24, 1689.

[174] *Grey's Debates*, November 18, 1691.

[175] *Grey's Debates*, December 17, 1691.

[176] Speech of Mr. Finch, House of Commons debates, Thursday, December 31, 1691. Mr. Finch made a similar remark a year later with regard to a different version of the Bill: "The matter of this Bill provides no more, than that an innocent man may have opportunity to make his innocence appear."

persons, from the benefit and protection of the Law" is to, "in effect, to cancel all bonds, by which Subjects are tyed to the Prince; & destroy all Pleas & Arguments, which may influence their Consciences to obedience and subjection."[177] When, Ferguson suggests, "laws cease to be a security unto men," such men "will be sorely tempted to apprehend themselves cast into a state of War, and justified in having recourse to the best means they can for their shelter and defense."[178] The threat is clear, and one that bears remarkable similarity to Locke's *Second Treatise* (which at that time had been written but not yet published): Security from unwarranted prosecutions was a necessary condition of political order; in the absence of such protection sovereignty could be rightfully contested and political violence becomes a form of self-defense.

If Parliamentarians in the 1640s argued that Parliament acted in self-defense against Charles because the latter had overstepped his institutional role as King, Whigs in the 1680s defended their own against accusations of treason not by attacking Charles II's or James II's legitimacy but urging the innocence of the accused. Ferguson defends Shaftesbury (recently convicted of treason at Oxford) not on political grounds, but by suggesting that without resources, Shaftesbury was unable to properly defend himself before the jury and that thus, the verdict—meant to be a revelation of truth—was itself suspect.[179] Unlike in the debates of the 1640s which questioned the nature and location of the *majestas* treason laws were meant to protect, here the problem was getting at the truth amidst the deception of Papists and vindictiveness of judges. The solution to the bloody, unfair treason trials of the 1680s was to make the facts known via adversarial procedures.

Barbara Shapiro has also noted the Act's orientation toward the empirical problem of determining guilt and innocence. She attributes this concern to a century-long trend within numerous fields to develop and articulate "rules of probability." Knowledge was increasingly a matter of degree, and guidelines were necessary to evaluate the value of different kinds of evidence, including that arising from personal observation or experience in the laboratory or the courtroom. The 1696 Reform Act, according to Barbara Shapiro, is the culmination of a trend that was manifest in earlier revisions to the treason law. "Statutes, particularly those concerned with treason, also indicated the growing concern with problems of credibility and standards of proof. While the 16th-century statutes confined themselves to demanding the testimony of 'lawful witnesses,' the revised treason statute of 1661 required 'two lawful and credible witnesses.'"[180] The choice of reforms that would aid in the development of a factual record equally favorable to the defense and Crown, on this account, is not a function of treason's role in the previous century of political upheaval, but represents a broader shift in how certainty was understood by seventeenth-century lawyers.

Changing notions of certainty played a role in the formulation of the 1696 Act but so, I argue, did the new understanding of treason as a threat to security. At issue in the treason trials of

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[177] Ferguson, Robert. *No Protestant Plot*; *or The present pretended Conspiracy of Protestants against King and Government, Discovered to be a Conspiracy of the Papists against the King and his Protestant-Subjects*. London, R. Lett, 1681, Second Part, at 1.

[178] Ferguson, *No Protestant Plot*, 1-2.

[179] "For, considering upon what disadvantages the man pleaded, being deprived of his Papers, a Pannel of the Jury, and refused the assistance of any Friend to stand by him, and much more of a Solicitor to assist him; I do not see what cause there is to boast of any Reputation acquired by the Verdict brought in upon the Evidence." (Ferguson, *No Protestant Plot*, 28-9.)

[180] Shapiro, Barbara J. "Law and Science in Seventeenth-Century England," *Stanford Law Review*, Vol. 21, No. 4, 1969, pp. 727-766, at 760.

the 1640s was the relationship between the king's *majestas* and his physical person: Did the King or Parliament subvert the unitary sovereign authority in claiming superior power over the other? Was a King's *majestas* severable from his physical person such that he could betray an obligation to a sovereign outside of himself? These were not questions which could be answered by additional or more even-handed presentation of facts. And, notwithstanding the efforts of lawyers on both sides to argue 25 Edward III could support conflicting accounts of the King's two bodies, these are not questions of legal interpretation for which training as a solicitor or barrister provides much help. The 1696 reforms, focused on ensuring the accused had the means to produce facts in the courtroom and the resources to raise arguments of legal interpretation, are entirely useless for challenging the identify of the sovereign you are accused of having committed treason against. Debate on the 1696 Reform Act often took place mere days or weeks after debate about the impeachment, for treason, of individuals who proclaimed James II was still King. Given that two major conflicts over the site of English sovereignty were in the living memory of many of those that enacted the reforms, the broader cultural shift identified by Barbara Shapiro does not fully explain this choice of reforms.

Rather, part of the explanation of the Act lies with the shift I have identified in the meaning of treason. By 1696 treason was defined less as a betrayal of the sovereign, to whom one owes a personal obligation grounded in one's nationality by birth, and more by the threat it poses to the *de facto* legal or political order, to which one owes obedience in exchange for the very security treason undermined. But the nature and magnitude of a threat is susceptible both to legal interpretation as to the boundaries of what's *bad enough* and to factual contestation. Ensuring against wrongful convictions is a solution to the problem of overreach in treason prosecutions if the fear is of a sovereign that conflates his personal interest in maintaining power with the public safety. But this would mean treason is a crime against the public, not the sovereign.

Both the prosecution of treason, and its limitation, were now understood in the vocabulary of "security" rather than "loyalty" or "sovereignty." The final recorded exchange before the final Bill was committed to a Grand Committee by a narrow vote included the following:

> Lord *Coningsby*.] I always thought the impunity of the Government would hazard the security of it. If the Plotters succeed, there is no security to you; and if this Bill helps to restore those who violated formerly, you are still worse. One particular you allow; public Enemies are those who own not the Government. Are they to have the advantage of this Bill, and the Papists, that will bring Popish Evidence against us?

Treason prosecutions protect those who are in charge. But the security of the ordinary citizen (and, more to the point, the average MP), also depends upon the protection of the status quo and the current government. As Williams put it in rejecting a proposed expansion of the meaning of treason: "This is a Bill, from the Crown, to enlarge Treason. We are here for the security of the Subject; and this is no security for neither Crown nor Subject; and I would reject it."[181] Conversely, in arguing that the Commons should *not* be limited to 25 Edward III in taking up the cases of individual adherents to King James II, Hampden cites security as a reason for not limiting the power of Commons *too* much: "I would not have it pass for doctrine, that there is no Treason but what is declared by 25 *Edw*. III. If you take not that for granted, we shall never be

[181] "Debates in 1689: April 6th-22nd." *Grey's Debates of the House of Commons, Vol. 9.*

safe, nor any Government, if you cannot declare Treason."[182] Against the suggestion that a statute of limitations would "enervate" the Government, MP Finch asks how "the Safety of the Government [could be] concerned" where a supposed treason has gone undetected for three years.[183] Arguments both for and against reform sounded in political security, not just of the accused but of the commonwealth.

After their military triumph in the 1640s, supporters of the Parliamentary cause stretched the law of treason. The most obvious example, of course, is King Charles I's execution as a traitor to the crown, but the execution of the surrendering forces of Pontefract and Worchester as criminals against the Parliamentary government involved similar contortions of existing doctrine. Treason was, for Parliament and later Cromwell, a tool to assert their own legitimacy through the criminalization of political opposition. The Whigs who successfully unseated James II in favor of William and Mary of Orange had installed a new king rather than overthrow kingship. But even as the Whigs impeached as traitors their political opponents—those who (like the soldiers at Pontefract and Worchester) still clung to the old king's legitimacy—they asserted a wholly different political significance to the crime of treason. No longer was it a means of enforcing the winner's justice but was assumed to be just the opposite: A means of securing the status quo, whatever that might be, against those who were an empirically provable threat. Parliament, by maintaining the ability to *impeach* individuals for treason, did not divest itself of the legal authority to make this determination or to use treason trials as a means of suppressing political opponents. But now, when Parliament impeached an Englishman for treason, it did so in the name of the security of the laws and the public—not the King.

VI. Conclusion

Treason sat uneasily between war and felony, criminalizing illegitimate efforts at the former without quite subsuming those actions into the latter. This slipperiness proved useful to insecure rulers (James II, overseeing the Bloody Assizes) and victorious rebels (the Roundheads in 1649) in justifying the use of the *ius gladii* against their opponents. The understanding of treason as a political crime, ironically, helped Charles II to negotiate the Act of Oblivion, putting old rivalries to rest without undermining the day-to-day rule of law as it had been enforced during the Interregnum (including by such great legal minds as Sir Matthew Hale). If we take the long view of the century rather than focusing on the paroxysm of the 1640s and the trial of King Charles I, more pronounced trends emerge notwithstanding the doctrine's flexibility and ambiguity: Treason was less and less a crime of deception, betrayal, and foreign loyalties, and increasingly a threat to the general order—the fundamental laws, the *salus populi*, or the "safety" of the Government.

Given this shift, it should not surprise us to learn that the innovations of 1696, which treated treason trials as truth-seeking endeavors, became the model for felony trials writ large. Although the 1696 Act itself was limited to treason trials, it was the culmination of a legislative process that began with a broader commitment to criminal trial reform and would serve as a model for later changes to felony trials more generally. The Act's original incarnation was not limited to treason but was rather a "Bill for the regulation of Tryals [sic]" passed by the Lords and rejected by the Commons in March 1689. This broader bill was ostensibly rejected because the procedural modifications specific to the Peers would have made it too easy for an accused

[182] *Grey's Debates*, June 13, 1689.
[183] *Grey's Debates*, November 18, 1691.

Lord to ensure a mistrial.[184] Langbein, however, attributes the Act's limitation to treason to both self-interest and principle on the part of MPs: MPs were far less likely to be accused of other felonies than of treason. Moreover, the introduction of defense counsel to treason trials was particularly meaningful for three reasons: "Ordinary" trials were generally prosecuted by private citizens, who also lacked the benefit of trained lawyers, whereas the Crown prosecuted treason; the king hand-selected judges likely to hear treason trials; and the reliance of many treason prosecutions on things *said* by the defendant raised particularly thorny evidentiary issues not apparent where, e.g. the *actus reus* was theft or battery.[185] Finally, limiting these reforms to treason trials was fairly easy, as treason trials were both relatively infrequent and located in London rather than conducted at Assizes throughout the country.

Eventually, however, Langbein argues, the adversarial trial introduced in the 1696 Act came to apply to *all* felony trials. Judges began allowing limited access to defense counsel more generally in the 1730s; as the Crown increasingly relied upon public prosecutors to effectuate the "ordinary" criminal law, the arguments for allowing defense counsel in the special case of treason trials came to apply to trials generally. Treason—the worse-than-felony, extraordinary crime—came to serve as the model for ordinary criminal prosecutions. In the last chapter we saw how seventeenth century political theoretical accounts of crime drew from international legal accounts of piracy; both the justification of capital punishment of criminals *simpliciter* in Locke and early forms of state prosecution took the *hostis humanis generis* as one model. But the form of these prosecutions—and, ironically, the protections for the defendant—borrowed from another exceptional figure: the traitor. Captain James Hind, a highwayman called "'the great robber of England,' whose 'merry life and mad exploits' were commemorated in a number of ballads and chapbooks" was precisely the boundary-crossing outsider who captured both the legal and popular imagination. Hind, "[t]radition tells us," also preferred to rob Roundheads, including Cromwell.[186] When he was put to death in 1652, it was not for his many successful robberies, but for treason.[187]

[184] Peers were to be allowed peremptory challenges to peers who might sit on the panel that judged them, just as commoners were allowed to challenge potential jurors. Given the limited number of peers available, and the degree to which peers were social and political associates, MPs Thomas Lee and William Pulteney argued, such exclusions might allow for jury-stacking that would make it impossible to try a peer at all, let alone obtain a conviction. (*Grey's Debates*, March 20, 1689.)

[185] Langbein is critical of this development, arguing that two assumptions underlying the reform of *treason* trials were ill-suited to criminal trials generally. First, treason defendants were generally relatively wealthy and thus could fund their own defense; but the decision to privatize defense would systematically disadvantage poorer citizens in the future. Second, MPs in 1696 assumed that treason trials would be partisan and so the Crown could not be relied upon to fairly introduce evidence; but the solution—a reliance on adversarial truth-production—undermined the reliability of evidence in the less politically charged trials.

[186] Sharpe, J.A., *Crime in Early Modern England 1550-1750*. 2d ed. Routledge, 1999, at 229.

[187] Sharpe 229.

Conclusion

How, if at all, did seventeenth-century English thinkers understand the distinction between the criminal and the enemy? The foregoing four chapters, drawing only selectively on writings that address this question, do not provide a comprehensive answer, but they do reveal certain important strands. By way of conclusion I describe four themes linking the preceding chapters before turning to a brief discussion of what insights we might take from these seventeenth-century texts for the historiography of the criminal and contemporary Anglo-American punitive practices.

First, the relationship between "the enemy" and "the criminal" was a complicated, unstable one. The Protestant political philosophers whose works are at the center of this project—Gentili, Grotius, Hobbes, and Locke—rejected a view of criminal punishment and war as isomorphic, divine exercises of the *ius gladii*, emergent functions of the naturally necessary civil and global commonwealths, respectively. These four thinkers' writing gestured at a distinction between war as an exercise of subjective right in the absence of jurisdiction, and punishment as legally circumscribed violence. But this distinction was neither fixed nor complete. As I argued in Chapter 2, Hobbes's *Leviathan* admits two very different accounts of punishment, one defined in opposition to "hostility," or war, and the other an exercise of the pre-political right of all against all. Hobbes and Locke thought of war and punishment as different, in a way Vitoria and Suarez did not. They also articulated accounts of civil punishment that, grounded in natural right rather than an Aristotelian view of the commonwealth, reproduced the logic of pre-political war of all against all. Even Gentili, whose account of international war had at its center the idea of the *hostis*, the opponent of equal moral and political stature, saw punishment as a valid reason for carrying out war and used "war" to describe the legitimate acts of force by one public power against a group or individuals who are acting unjustly or without authority.[1]

The distinction was also unstable in legal doctrine or practice. The English treason law in effect during Gentili's, Hobbes's, and Locke's lifetimes included as a *criminal* offense both the making of war without authorization of the King *and* assisting in international conflict on the side of the King's enemies. Moreover, whether an act was "levying war against the king" (and therefore treason) or a simple felony turned on the intentions of the person committing the act. And having those intentions—"compassing the death of the king"—was treasonous in and of itself.[2] As Barbara Donagan has argued, and a close reading of the Act of Oblivion evidences, parties to the English Civil War were not constrained by any contemporaneous legal theory of the laws of war or of treason but strategically invoked military or civil justice and wrote into a civil act forgiving treason international legal ideas of invincible ignorance as they felt was necessary to maintain political power. Grotius built this uncertainty into his theory of just war: A legitimate power could, by acting unlawfully, become like a brigand and, so disqualified from political status, be attacked blamelessly by even private individuals. It was this flexibility in his understanding of who was a brigand that justified the Dutch attack on the Santa Catarina.

[1] Gentili, Alberico. *De Iure Belli Libri Tres*. 1598. Translated by John C. Rolfe, The Clarendon Press, 1933, at 33, 298.

[2] Coke, Edward. *The Third Part of the Institutes of the Laws of England*. 1644. London: W. Clarke and Sons, 1817, at 10; Hale, Sir Matthew. *Historia Placitorum Coronae* (*History of the Pleas of the Crown*). 1736. London, T. Payne and others, 1800, at 131; Brydall, John. *A Compendious Collection Of The Laws Of England, Touching Matters Criminal*. London, John Bellinger, 1675, at 98-99.

In short, the distinction between punishing others for wrongdoing and waging war against an enemy was neither rigorously nor consistently maintained in seventeenth-century England. Whether an act was a civil crime, to be punished after trial, or an act of hostility, meriting execution on the battlefield or the mercies of conquest, depended on the political exigencies and chosen strategy of the person holding the sword and contested claims of political legitimacy by both the punisher and punishee. Princes (and even non-public officials) carried out punishment outside their borders; participating in military conflict could be prosecuted as a crime.

Second, private property, and the natural right *to* property, was important to both punishment and war. *Imperium* and *dominium* did not correspond to different types of justified violence or categories of wrongdoing, rather, the natural right to property was at the core of both punishment and war. This conclusion, moreover, undermines recent historiographical efforts to treat piracy as exceptional, rather than a model for criminal conduct more broadly. Daniel Heller-Roazen has argued that piracy's distinctive character was its dual quality as both an action of individuals against other individuals—or more precisely, their seaborn property—and as the "act of one political association with respect to another."[3] Heller-Roazen argues this duality is what made piracy distinctive and justified extreme violence against it. Although pirates did threaten both property and political authority, I have argued that this quality was not unique to pirates and that seventeenth-century English writings do not recognize the stark opposition Heller-Roazen asserts between acts against political authority and acts against private property.

That threats to *both* private property and political authority were characteristic of the highwayman, and that these dual threats were accordingly not exceptional but baked into popular literature and "ordinary" criminal enforcement is among the central arguments of Chapter 3. The English King and Parliament were engaged in a project of projecting political authority through building trade routes on both land and sea; commerce carried the King's authority both to the edges of empire and to towns within England. To threaten trade *was* to threaten political authority and, moreover, to threaten human sociability and thus *humanis generis*.[4] The ability of individuals within the borderlands to "turn pirate" (or highwayman), become economically self-sufficient through theft and thereby reject local or metropolitan political authority was a matter of concern on the English-Scottish border as much as the high seas.[5] Under the law of treason, too, threats to private property writ large were understood as threats to the King's power to make law. Coke and Hale, as we have seen, are very much concerned with when the tearing down of enclosures becomes levying war against the king. [6]

[3] Heller-Rozen, Daniel. *The Enemy of All: Piracy and the Law of Nations.* Zone Books, 2009, at 11.

[4] *See, e.g.* Grotius, Hugo. *Commentary on the Law of Prize and Booty*. 1864. Translated by Gwladys L. Williams and edited by Martine Julia van Ittersum, Liberty Fund, 2006, at 305 ("For there is no stronger reason underlying our abhorrence even of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse.").

[5] *An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland, and for Discovery of Highway Men and Other Felons*, 1656, 7 & 8 Car. 2 (Eng.).

[6] Coke, *Third Institute*, 10 ("It was resolved by all the judges of England in the reigne of king H. 8. that an insurrection against the statute of labourers, for the inhansing of salaries and wages, was a levying of war against the king, because it was generally against the kings law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do."); Hale, *History of the Pleas of the Crown*, 133 ("[B]ut if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Laborers*, or for

For Grotius, Hobbes, and Locke, *dominium* or property was natural and pre-political; it was, accordingly, the subject of extra-political violence (whether the war between nations or the natural condition of mankind). According to Grotius, defense of one's property and recovery of the same was one of the four (in *De Jure Praedae*) or three (in *De Jure Belli ac Pacis*) just causes for war.[7] Both Gentili and Grotius insisted the recovery of property was a proper basis for war and analogized civil suits for recovery to inter-state commonwealth between militaries. Conversely, Locke invoked the right of war as the justification for killing an ordinary thief, who threatens the *private* man's cloak on a domestic highway: "Thus a *Thief*, whom I cannot harm but by appeal to the Law, for having stolen all that I am worth, I may kill, when he sets on me to rob me, but of my Horse or Coat: because the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force…permits me my own Defence, and the Right of War, a liberty to kill the aggressor."[8] War was, both inside and outside the state, a means of protecting and obtaining property.

Third, theoretical and rhetorical discussion of civil crime and punishment in circulation in seventeenth-century England reflected, to a significant degree, an internalization of international law. By this I mean both that concepts originating in international legal texts informed how English writers thought about crime and criminals *and* that theories of civil punishment viewed punitive violence as a kind of internal war. As I argued in Chapter 2, both Hobbes's and Locke's social contract theories—which were written to two very different effects in how one ought to understand the relative power of individuals and their rulers—justify punishment as an exercise of a natural right to violence. According to Hobbes, the "right to everything, and to do whatsoever he thought necessary to his own preservation, subduing, hurting, or killing any man in order thereunto…is the foundation of that right of punishing which is exercised in every commonwealth."[9] Punishment reproduces, in the body politic, the pre-political violence the Leviathan is constructed to allow individuals to escape. For Locke, crime (the thief setting upon the traveler to rob him), triggers the Right of War.[10] Locke, unlike Hobbes, is not so explicit that the magistrate in punishing the captured thief exercises the same right. But wrongdoing reintroduces into the commonwealth the existential morality of the state of nature.

In Chapter 3, I argued that this analytical move in Hobbes's *Leviathan* and Locke's *Second Treatise* was not limited to high theory. Rather, there was a parallel tendency among popular writers of the period to equate highwaymen—a particularly prominent and troublesome type of criminal—with pirates. For Locke the highwayman is a central figure, used as both an exemplar for how to think about punishment in general and (as others have argued[11]) a stand-in or metaphor for James II. Gentili and Grotius, borrowing from Cicero, described pirates as

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inhansing salaries and wages, this is a levying war agains the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do.").

[7] Grotius, Hugo. *The Rights of War and Peace*. Translated by John Morrice, edited by Richard Tuck, vol. 2, Liberty Fund, 2005, at 394-5; Grotius, Hugo. *Commentary on the Law of Prize and Booty*. Translated by Gwladys L. Williams, edited by Martine Julia van Ittersum, Liberty Fund, 2006, 103.

[8] Locke, John. *Second Treatise of Government*. 1690. Edited by C.B. Macpherson, Hackett, 1980, § 19.

[9] Hobbes, Thomas. *Leviathan*. 1651. Edited by Edwin Curley, Hackett, 1994, II.xxviii.2.

[10] Locke, *Second Treatise*, § 19.

[11] Waldron, Jeremy, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*. Cambridge University Press, 2002, at 141.

hostis humanis generis; the enemy of all, pirates were excluded from the international community and subject to violence without the normal limits that applied to war, such as the prohibition on poisoning or the requirement of burial.[12] Rather than existing outside civil communities, on a lawless sea, pirates (the practical reality of which, as Janice Thomson has argued, was both complex and commonplace) were equated with highwaymen. In thinking about criminal figures and lawbreaking, seventeenth-century writers, both popular and philosophical, looked to a prominent figure in international law to describe and understand the moral, legal, and social status of decidedly domestic lawbreakers.

A different kind of "internalization" can be seen in the changes to treason law in England between 1603 and 1696. Traitors were figured as "foreign" in the early part of the seventeenth century; they professed, exhibited, or (most dangerously) secretly harbored allegiances to sovereigns other than the King of England. A traitor was someone with an English face, but a Spanish heart.[13] When, in the 1640s, the King was betrayed by others who unquestionably shared the same nationality, this association shifted. But the problem of treason remained the same: The crime presupposed loyalty, and thus membership, in the commonwealth but also rejection of the same. Hence, when the commonwealth seemingly broke into two—as it did during the Civil War—the choice of whether to prosecute someone as a traitor or execute him as an enemy depended on how one viewed the conflict. The treason law that emerged from two periods of violent conflict as to the site of sovereignty in the 1640s and 1680s had shifted subtly but significantly away from an understanding of treason-as-betrayal and toward treason-as-threat. The traitor's equivocal membership was no longer bound up in his or her relationship to the personification of the sovereign (whether the King, Parliament, or Cromwell), but the stability of rule *per se*.

The traitor, however, remained a liminal member of the commonwealth he threatened: At trial, unlike accused felons (who faced their victims), the traitor stood accused by the King himself. The 1696 Treason Act's reforms to treason trial procedure were designed to grapple with this aspect of the treason trial: The accused traitor must be provided with some of the guarantors of citizenship (which, at least for some defenders of the Ancient Constitution, meant some degree of formal equality between subject and King) even as the very prosecution against him impliedly excluded him from the symbolic unity of the Crown and body politic. Once treason was refigured as a threat to security, rather than sovereign, however, the distinction between treason and other crimes began to erode.

Finally, and perhaps most significantly for contemporary, normative discussions about *how* and *why* we punish civil wrongdoers, I have argued that seventeenth-century criminals share with their transnational relatives the pirate, atheist, and traitor, an ambivalent membership status, and this ambivalence drives the frequently existential violence directed at such figures. Membership was a meaningful precondition for punishment for both Vitoria and Suarez. Those who are not Christian "cannot be punished because they do not accept the judgment of the pope; the latter presupposes the former."[14] As I argued in Chapter One, among the most dramatic

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[12] Gentili, Alberico, *De Legationibus Libri* Tres. 1594. Translated by Gordon J. Laing, Oxford University Press, 1924, at 79.

[13] Emlyn, Sollom, et al., eds. *A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanours; from The Reign of King Richard II To The End of The Reign of King George I*. Solom London: Printed for J. Walthoe et. al., 1730, at 208.

[14] Vitoria, Francisco de. "On the American Indians." 1537-38. *Political Writings*. Translated and edited by Anthony Pagden and Jeremy Lawrance, Cambridge University Press, 1991, at 275; Suarez,

differences between the theory of just war and of the commonwealth posited by Grotius and that posited by Vitoria and Suarez is Grotius's insistence the right to punish is *not* so limited to those in authority over an existing political community, but is a natural and universal right. It is only *after* the formation of political community that this right is limited to sovereigns.

But rejecting membership as a precondition of punishment did not mean the objects of punishment were necessarily excluded—rather, punishment could be a means of asserting exclusion *or* inclusion, as analytical or practical necessity warranted. Hobbes and Locke, who adopted versions of Grotius's natural right to punishment, viewed punishment as a form of exclusion, and punitive violence as war taking place outside the *moral* boundaries of the commonwealth (if not the physical ones). For Gentili, Grotius, and Locke (and their contemporaries who described the highwayman or pirate as *hostis human generis*), this exclusion was not simply from the political community but humankind altogether. The criminal, according to Locke, has "declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security."[15] Gentili asks, with respect to pirates (who, unlike *hostes*, are not the object of war but extermination): "How can men who have withdrawn from all intercourse with society and who…have broken the compact of the human race, retain any privileges of law, which itself is nothing else than a compact of society?"[16] And Grotius quotes Seneca favorably to suggest that in killing a "Malefactor," he does so "with the same Air and Mind, that I kill a Serpent or venomous Beast."[17] Rather than view punishment as justified by the wrongdoer's and punisher's shared participation in a community, seventeenth-century Protestant thinkers suggested that violators of the natural law were morally outside of *all* community, and could be destroyed by anyone.

This exclusionary impulse, however, admits a double movement, perhaps most clearly seen in the figure of the atheist. Those "who, living rather like beasts than like men, are wholly without religious belief [are] the common foes of all mankind, as pirates are, ought to be assailed in war and *forced to adopt the usages of humanity*."[18] The godless put themselves outside of humanity through their conduct and their rejection of the ultimate sovereign (God), but they are also human, and must be forced *back into* human sociability. The appropriate action toward such individuals is simultaneously predicated on their non-membership and aimed at (and accepting the possibility of) their *inclusion*. A foreigner cannot be a traitor, and so even if the traitor possesses a "Spanish heart" he must still be, somehow, *English* to merit the particularly gruesome punishment befitting a member who denies his own membership. Even pirates can turn back, raise the King's flag, and steal for the sake of the commonwealth's ends, rather than their own.

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If, as I have argued, the pirate and the *hostis humanis generis* were models for how important early modern theorists of the commonwealth, English legal writers, and even Parliament or the King (through the passage of anti-highwayman laws) thought about public prosecution and punishment of wrongdoers, this line of influence has important normative

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Francisco de. *De Legibus*. *Selections from Three Works*. Translated by Gladys L. Williams, Ammi Brown, and John Waldron, William S. Hein & Co., Inc., 1995, at 407.

[15] Locke, *Second Treatise*, § 11.

[16] Gentili, *De Iure Belli Libri Tres*, 79.

[17] Grotius, *Rights of War and Peace*, vol. 2, 973-74.

[18] Gentili, *De Iure Belli Libri Tres,* 41 (emphasis added).

implications for our contemporary punitive practices. To the extent our contemporary understanding of, and justification for, the use of violence by the state against individuals for the transgression of laws reflects the philosophical accounts I have described, those contemporary norms also reflect an understanding of criminal punishment that is dehumanizing and exclusionary.

Many of these English thinkers' predecessors (I have emphasized Vitoria and Suarez) saw membership as a requirement for punishment; only Christians could be excommunicated. Military violence, however brutal, was theoretically predicated on the fact that both sides were members of an international community, governed by laws, which one side took it upon themselves to enforce. As described in Chapter 1, Carl Schmitt has critiqued some of the normative implications of an international order, such as that described by these predecessors, that did not distinguish between war and punishment. For Schmitt, the move (begun by Gentili) away from the Scholastics, toward an understanding of war as a morally neutral terrain, was a major advance in Western thought, a means by which warfare could be limited; the reintroduction of war-as-punishment in a human rights idiom post-World War II allowed for, once more, the possibility of war-as-annihilation.

Schmitt's account is significantly undermined by the fact he was, quite literally, a Nazi. His complaint in *Nomos of the Earth* was the punitive attitude toward his own nation. He also ignored (or treated as the "open seas") the genocidal violence of European colonial warfare and the role of racism in defining the sphere of humanity and, thus, the limitations on military violence. Nevertheless, Schmitt's basic insight into the relationship between war and punishment in international legal theory of the seventeenth century has some merit. In the preceding four chapters, I have interrogated what happened to this distinction between war and punishment domestically, rather than internationally, and argued the converse: that punishment became a kind of war.

Twentieth and twenty-first century historians have pointed to ways in which the liberal ideological conception of punishment contrasts with social or legal discourse and practice. Nicola Lacey, for example, has argued that as British criminal procedure moved away from the self-informing jury, criminal responsibility was understood in the framework of "character"; "criminal behavior was seen as proceeding from uncivilized, savage human nature" intrinsic to the wrongdoer.[19] Punishment, specifically in the form of the modern prison, was viewed as a means of instilling "the proper habits of self-governance" by treating them "as if they were fully responsible."[20] Foucauldian historians have pointed to the ways in which the practices of the modern welfare state and modern social theories have produced a conception of the criminal that is both quasi-biological and grounded in the criminal's nature rather than his or her actions.[21] Rather than being punished, these historians argue, the criminal has been—at least since the nineteenth century—disciplined.[22] Although primarily descriptive, these accounts gain normative or critical force from the contradiction between liberal, process-oriented ideology, and the reality of social practices built around a quasi-biological understanding of a criminal "type."

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[19] Lacey, Nicola. "In Search of the Responsible Subject: History, Philosophy, and Social Sciences in Criminal Law Theory." *Modern Law Review*, Vol. 64, 2001, at 364.

[20] Lacey 364.

[21] *See, e.g.,* Leps, Marie-Christine. *Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourse*. Duke University Press, 1992.

[22] Foucault, Michel. *Discipline and Punish.* Translated by Alan Sheridan, Vintage Books 2d ed., 1995.

I hope the preceding has suggested to the reader that the figure of "the criminal" is both older and more important to the development of liberal legal and political thought than a Foucauldian account would suggest. Rather than a nineteenth century innovation, or a concept derivative of the notion of criminal law, the idea of a wrongdoer who merited state violence was an important element of the development of English political thought. Moreover, the concept and many of the legal norms concerning "the criminal" in Anglo-American legal history have some of their origins and philosophical analogs not only in the day-to-day practice of punishing petty thieves or assaults, but in international natural law of the late sixteenth and early seventeenth centuries by way of the pirate and highwayman. The notion of the criminal as a *threat*, not just to an individual victim but to the political order in its entirety, also finds its way into the development of English criminal procedure by way of treason and the traitor. As I argued in Chapter 4, it is the transformation of treason into a crime against the status quo (rather than a betrayal of a feudal obligation) that underlay the late seventeenth century reforms that would come to define the Anglo-American adversarial trial. Liberal guarantees were tied to the shift from criminal prosecution as a primarily community-based endeavor to one in which the Crown stood symbolically and materially opposed to the wrongdoer. It was only when ordinary trials became *like* treason trials—and the ordinary criminal the enemy of the state—that these procedural protections were understood as useful. Cynthia Herrup has argued that the invention of the prison was not a reform meant to temper the brutality of capital punishment but reflected a loss of faith in-community rehabilitation and a shift away from a religious view of the world as a test for offenders' souls toward a more cynical willingness to warehouse those who threatened others or their property.[23] Like Herrup, I argue that modern criminal punishment has roots in a view of the wrongdoer as an existential threat, a view drawn from international law and theories of war.

Legal theorists in the first decade of the twenty-first century wrote a great deal about the ways in which a conceptual vocabulary tied to piracy drove conversations and legal norms (or the lack thereof) around terrorism in the United States and Britain after the attacks of September 11, 2001. These writings—prominent among them Daniel Heller-Roazen's *The Enemy of All*—describe a terrifying response to "terrorism" that, by bringing about an "indistinction" between war and crime, adheres to the laws and norms of neither. Implicit or explicit in these accounts is a juxtaposition or contrast with "ordinary" criminal prosecutions, which are understood to proceed lawfully, with due process, and under a presumption of regularity—something like the nervous system Hobbes describes.

Without ignoring or erasing the exceptional quality of the violence brought to bear on contemporary *hostis humanis generis* or the erosion of existing norms or legal constraints evident in, e.g. the ongoing use of the prison at Guantánamo Bay to hold men for more than a decade and a half without legal recourse, I wish to suggest that this opposition between the

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[23] Herrup, Cynthia. *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England*. Cambridge University Press, 1989, at 122. Herrup, bases this conclusion on her examination of assize records from East Sussex for the years 1592 to 1640. She concludes that English criminal justice of the period was deeply informed by the religious belief that everyone is a sinner and thus it was only those criminals perceived as "hardened"—a relatively small percentage of those convicted of capital felonies—who were actually executed. Lack of remorse, outsider status, or a crime that evinced greed (or economic ambition beyond survival) all tended to make a criminal "hardened." But the remaining offenders were perceived as deserving of opportunities for rehabilitation.

ordinary criminal and the pirate, between lawful prosecution and destruction of the enemy of all humanity, is not as historically or theoretically well-grounded as Heller-Roazen and others suggest. *All* civil punishment in Hobbesian or Lockean thought is justified as a reversion to a state of war and struggle for one's own survival. Pirates do not just sail a lawless ocean, but (in the form of the highwayman) rob people on the road to London. The procedural guarantees denied to the men at Guantánamo originated in treason prosecutions and expanded to ordinary felony prosecutions *precisely because* English kings took it upon themselves to prosecute all felons directly, to bring the strength and resources of the Crown to bear on robbers and burglars. Close reading of the seventeenth-century texts I have examined do not reveal a clean split between war and punishment (notwithstanding Gentili's emphasis) or ordinary and political crime (as Kirchheimer suggests) which is muddied by exceptional figures such as the pirate or traitor. Rather, I have argued, there was a persistent tendency to look to such "exceptional" figures outside the commonwealth as the model for how the nascent English state justified its use of violence against its members.

Of course, as I have argued, much of the work of justification turned on denying that membership. I began this project with a discussion of Suarez's and Vitoria's writings because they offer very different accounts not just of the relationship between punishment and war, but of punishment and membership. In punishing, the sovereign implicitly reaffirmed the shared community between himself and his military opponent. Grotius, despite not being English, occupies such a central role in this project because he—and through him, Hobbes and Locke—posited the opposite: Punishment is a natural right that operates in the absence of political community altogether, and punishing is justified by an imputed refusal of the wrongdoer to comply with the norms of *humanity*, not just a civil (or religious) community.

If the intellectual history presented here has merit, it has important implications for how current subjects (and practitioners) of Anglo-American criminal law understand the relationship between wrongdoing, punishment, and membership. If the early theorists of the liberal state justified punishment as a reinscription of a natural state of war within the commonwealth, and if this theoretical account had a parallel in the rhetorical incorporation of the pirate-as-highwayman-as-criminal, then we have reason to question whether the extremes of contemporary punishment are not a derogation from, but instead a culmination of, supposedly foundational political principles. Considered not only as a technological development of the nineteenth century, but as a material instantiation of the attitudes toward punishment embedded deep within formative accounts of political community in general, the prison appears as a tool for forcibly asserting the highwayman's membership in the commonwealth through bodily restraint, while physically and morally excluding him from participation in that same commonwealth. Police shootings in United States cities bear more than a passing resemblance to the Lockean confrontation between property owner and highwayman. In each case, those seeking to justify the killing share the assumption that a threat to property or law is also a threat to life (because this threat reveals the highwayman to be beastly) and that the property-owner's or policeman's fear for his own safety and the loss of moral status of the person who threatens him justify the use of fatal force well before the "victim" finds himself in imminent danger. Of course, in the contemporary United States or Britain, these fears and assumptions are driven primarily by race and its history. However, it may also be true that the moral logic which culminates in the brutality of contemporary prisons, or the willingness to kill perceived criminals without much regard to their humanity, is not a failure or a bug of the modern Anglo-American legal or political tradition, but a feature dating back to its origins.

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