Short Symposium on the Punishment

Punishment Not War: Limits of a Paradigm

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Abstract

The distinction between punishments and acts of hostility is central to Hobbes's theory of punishment in his three political treatises, but also in the 'Dialogue of the Common-Laws' and 'The Questions concerning Liberty, Necessity and Chance'. Such a distinction is not, as Agamben would have it, the expression of the equivalence between sovereignty and exception, but one dimension of a politics of sovereignty in its international context. The example of the statutes of Provisors as interpreted by Hobbes shows that the cruel punishment inflicted on those coming to England to receive ecclesiastical benefits given to them by the pope, the so-called 'Provisors', testifies mainly to the fierce struggles between the kingdom of England and the papacy. Hobbes invents a new theory of punishment no longer based, as in Suarez, on a metaphysics of free will but on the political consequences of punishing.

I. Introduction

The right to punish in Hobbes is known to be a contested matter: whereas *Leviathan* introduces a justification of the rights of public authority on the basis of a covenant of authorization by subjects, Hobbes says that the right to punish cannot be justified on such a basis. The reason given is that the authorization granted to a sovereign by a subject is so given to him in view of an individual good, which can never be found in a punishment, even though the latter be in conformity with penal laws known in advance. A citizen may authorize his sovereign to punish others – preferably not members of his close family and friends' circle – but not to punish himself. Therefore, the obligation to 'assist him that hath the Soveraignty, in the Punishing of another',[1] is not a sufficient justification of a right to punish, if such a right implies an obligation to be punished. No subject ever conceded to his sovereign such a liberty when that punishment constitutes a direct or indirect threat to his own life. Hobbes's stance did not vary on that point, which is already made, prior to *Leviathan*, in

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[1] Th. Hobbes, *Leviathan*, *2. The English and Latin Texts (i)*, edited by N. Malcolm (Oxford: Oxford University Press, 2012), XXVIII, 482 (hereafter: *Leviathan*, chapter in Roman capitals, and page).

De Cive.[2] He has it that the right to punish that sovereigns have 'is not grounded on any concession, or gift of the Subjects', but comes from a right that

> before the Institution of the Common-wealth, every man had (…) to everything, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto.[3]

The difficulties of such a thesis are: firstly, how can the right to punish be attributed to the public authority at all, if indeed it goes back to a situation previous to the foundation of that authority?; secondly, if there is no right to punish in the state of nature, how can it be said that such a state is the 'door' by which 'the Right, or Authority of Punishing in any case, came in'?[4]

What we would like to do in this paper is to show, first, how Hobbes tries to substitute for a justification of the right to punish by the social contract – since there can be no such justification – a justification by the utility of punishment for the maintenance of a legal state, secondly, that, if Hobbes stresses the distinction between acts of punishment and acts of hostility, it is because the justification of the right to punish by its consequences becomes hard to maintain when a sovereign must defend himself against enemies at home, thirdly, that, for that very reason, there is no need to dive deep into Roman penal law, as Giorgio Agamben had done in *Homo Sacer I*,[5] to understand the reason why the British state had instituted exceptional forms of punishment in the late Middle Ages, and, finally, that what is at stake, philosophically speaking, in this new consequentialist justification of punishment is not so much Roman law as a refutation of the justification of retributivism that was given by Francisco Suarez.

II. A Consequentialist Justification of Punishment

We will start, as Hobbes does in *Leviathan*, with the definition of punishment:

> A punishment, is an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the

[2] Th. Hobbes, *On the Citizen*, translated by R. Tuck and M. Silverthorne (Cambridge: Cambridge University Press, 1998), VI, para 5, 78 (hereafter: *On the Citizen*, chapter in Roman capitals, paragraph and page): 'The right of punishment is recognized to have been given to someone, when each one agrees that he will not go to the help of anyone, when each one agrees that he will not go to the help of anyone who is to be punished. (…). Men generally keep this kind of agreement well enough, except when they or those close to them are to be punished'.

[3] Th. Hobbes, *Leviathan* n 1 above, XXVIII, 482.

[4] ibid.

[5] G. Agamben, *Homo Sacer. Il potere sovrano e la nuda vita* (Torino: Einaudi, 1995); Id, 'Homo Sacer Sovereign Power and Bare Life', translated by D. Heller-Roazen, in Id ed, *The Omnibus Homo Sacer* (Stanford: Stanford University Press, 2017) (Hereafter, *Homo Sacer I*).

better be disposed to obedience.[6]

The meaning of this definition is commented upon by Hobbes in eleven 'inferences', that will help us better understand what theoretical difficulties punishment raises in *Leviathan*.

The definition rests on one central thesis: there is no punishment without a public authority, that is, without an authority capable of establishing laws, and judging what is in conformity with them, or contrary to them. Whatever the form of sovereignty, a sovereign acts as a public authority if his authority can be traced back to the terms of a covenant. The function of the covenant is thus to provide reasons to the citizens to let them know who the sovereign is and for what reasons the laws are to be obeyed. Whenever those conditions are met, citizens know that authorized judges are to be obeyed when they ask that someone be punished for trespassing the law. Those conditions – knowing who the sovereign is, that the laws have his approval, and that the judges judge according to the sovereign's authority – are sufficient for a legal system to function but not sufficient to justify punishment:

> Before I inferred any thing from this definition, there is a question to be answered, of much importance; which is, by what door the Right, or Authority of Punishing in any case, came in. For by that which has been said before, no man is supposed bound by Covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person. In the making of a Common-wealth, every man giveth away the right of defending another; but not of defending himselfe. Also he obligeth himself, to assist him that hath the Soveraignty, in the Punishing of another; but of himself not. But to covenant to assist the Soveraign, in doing hurt to another, unlesse he that so covenanteth have a right to doe it himself, is not to give him a Right to Punish. It is manifest therefore that the Right which the Common-wealth (that is, he, or they that represent it) hath to Punish, is not grounded on any concession, or gift of the subjects.[7]

What are we bound to do then when we have accepted the terms of the social covenant? We are bound to assist the sovereign in punishing others but not to assist him in punishing ourselves. The limits of the sovereign's right is the subject's right to resist violence done to him, since 'no man is supposed bound by Covenant, not to resist violence'.[8] This affirmation raises a major difficulty since the sovereign is said to have received from the covenant, first, the power of 'Punishing with corporal, or pecuniary punishment, or with ignominy every

[6] ibid.
[7] ibid.
[8] ibid.

Subject according to the Law he hath formerly made', and, second, 'if there be no Law made', he is allowed to do

> according as he shall judge most to conduce to the encouraging of men to serve the Common-wealth, or deterring of them from doing dis-service to the same.[9]

The sovereign is thus endowed with a right to punish by covenant, which the subjects have an obligation not to resist, 'except when they or those close to them are to be punished'.[10] The latter remark, made in *De Cive* and repeated in *Leviathan*, shows the limits of the sovereign's right to punish. This limit is also expressed by the justification of the right to punish in relation with the state of nature:

> But I have shewed formerly, that before the Institution of Common-wealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of Punishing, which is exercised in every Common-wealth. For the Subjects did not give the Soveraign that right; but onely 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 onely; and (excepting the limits set him by naturall law) as entire, as in the condition of meer Nature, and of warre of every one against his neighbour.[11]

Since the covenant does not authorize the sovereign to punish the subject who authorized him, the justification of a right to punish based on covenant appears very thin. That is the reason why Hobbes looks for a new way of justifying the right to punish now based on the political consequences of punishing.

In the inferences from the definition of punishment he insists, indeed, on a different strategy for justifying the sovereign's right to punish: that justification has to be looked for in the utility of punishment for a commonwealth. The idea is that there is a common utility to others being punished, even though being punished oneself is always a bad thing for the criminal. From the general definition it can be inferred, first, that punishment is not revenge, that is, that it is not an evil done by a private person to compensate an evil previously done by another private person (Inference 1) – we'll come back to that point in Section 4. My first remark is that the definition also implies that punishment presupposes the existence of law, that is, a rule made by public authority. That characteristic of punishment is essential: it means that a punishment must be inflicted according

[9] Th. Hobbes, *Leviathan* n 1 above, XVIII, 276.
[10] Th. Hobbes, *On the Citizen* n 2 above, VI, 5, 78.
[11] Th. Hobbes, *Leviathan* n 1 above, XXVIII, 482.

to a public rule. To put it another way, when punished, I must be given the reasons why I am to be punished. This element of public justification constitutes a guarantee for the person who is punished, since one cannot be punished by a private authority (Inference 1) nor by a judge not appointed by the public authority (Inference 4), one must know the legal reasons stated by a judge for which she is being punished (Inference 3), the punishment cannot be greater than the one prescribed by the law (Inference 8), and one cannot be punished for an act performed before the law was passed (Inference 9). All those characteristic are part of the rule of law. But the truth is there are other characteristics in Hobbes's inferences from the definition of punishment that go in another direction.

My second remark is that the law, the judgement on the transgression of the law, and the punishment that is prescribed by the law for that particular transgression are not enough, according to Hobbes, to make a penal system work. Something else is required, that he calls the 'finality' of the penal system, which means that a legal system must be assessed according to its output. But what is this output? 'That the will of men may thereby (ie the punishment) the better be disposed to obedience'.[12] The will in question can either be the will of the punished or the will of other men who are aware of the punishment. It follows that a punishment that could not produce a disposition to obedience to the state would not be in conformity with the aim of the penal institution. Hobbes stresses the fact that penal law goes with a particular 'intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes'.[13] Punishment, therefore, is not only justified by its conformity to a pre-existing penal law, but also by the way the penal system to which a particular punishment belongs is capable of transforming a political system. Hobbes's main idea is that a penal system aims at producing obedience among citizens, so that contracts, laws, and promises can better be respected. John Rawls takes this Hobbesian idea very seriously, and associates it, in Section 38 of 'A Theory of Justice', with the name of Hobbes:

> By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men's security to one another. This proposition and the reasoning behind it we may think of as Hobbes's thesis.[14]

[12] ibid.

[13] ibid 484. We'll come back to that remark in the third section of the paper.

[14] J. Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), Section 38 'The rule of law', 240.

This homage to Hobbes is sufficiently rare in Rawls that we should underline it.[15] But we must also be aware that there is a huge difference between the interpretation of the right to punish based on the consequences and the Rawlsian interpretation based on reciprocity. In a Rawlsian perspective, if I do not abide by a law I should consider it legitimate to be punished. Why is it so? Because of the reciprocity that prevails in the exercise of rights and liberties I can only accept to see others punished by the sovereign if I accept to be punished myself for similar reasons. But in Hobbes there is no reciprocity as to punishment. I may accept that others be punished and even assist the sovereign in exercising punishment of others but won't ever be persuaded to accept being punished myself. Indeed, such a violence against myself is in contradiction with the very reason why I have covenanted with others, that is, to be protected from all violence done to me. That is why, whereas Rawls can easily distinguish the rule of law from the state of war, Hobbes is sometimes at pains to distinguish between a punishment and an act of war.

III. Can an Act of Punishment Be Distinguished from an Act of Hostility?

There is an element in Hobbes's theory that does not find its place in Rawls's reading of Hobbes's theory of punishment, that is, Hobbes's insistence on distinguishing a punishment from what he calls an 'act of hostility', or 'hostile act'. Hobbes repeats the distinction in almost all of the inferences proceeding from his definition of punishment. Inference 4:

> (T)he evill inflicted by usurped power, and Judges without Authority from the Sovereign, is not Punishment; but an act of hostility; because the acts of power usurped, have not for Author, the person condemned; and therefore are not acts of publique Authority.[16]

The situation is the following: if the judges are not real judges, if the power enacting the punishment is a private power in disguise, there is not punishment but an act of war.

Why, however, does Inference 4 have it that the person condemned can be the author of the acts by which he is condemned, when it is said above that no punishment can ever be authorized by the very person condemned? That seeming contradiction may be resolved if we keep in mind that the person condemned has recognized a public authority as the source of punishment but never accepted to

[15] Another homage to Hobbes is to be found in J. Rawls, *Lectures on the History of Political Philosophy* (Cambridge, Mass: Harvard University Press, 2007), 23: 'Why do I begin a course in political philosophy with Hobbes? (…) My reason is that in my own view and that of many others, Hobbes's *Leviathan* is the greatest single work of political thought in the English language'.

[16] Th. Hobbes, *Leviathan* n 1 above, XXVIII, 484.

be punished by that authority.

The question remains: Why is the distinction between a punishment and an act of war so important for Hobbes? Because without it there would be no difference between a sovereign and a powerful enemy that would have taken power over a citizenry. Although not recognized as a legitimate source of punishment, a sovereign must be seen as a public authority, that is, as in charge of implementing penal law in the service of legal order, not as using it as a weapon against his subjects. That a sovereign cannot be subjected to penal law must be interpreted as a characteristic of it being a public authority:

> Hurt inflicted on the Representative of the Common-wealth, is not Punishment, but an act of Hostility; Because it is of the nature of Punishment, to be inflicted by publique Authority, which is the Authority only of the Representative it self.[17]

Another consequence of the distinction is that a subject who would no longer recognize the authority of his sovereign should be considered by him as an enemy, not as a subject to be punished according to penal law, but as a hidden enemy, 'who may lawfully be made to suffer whatsoever the Representative will'.[18] What changes is the perspective of the public agencies in inflicting the punishment – in the case of a normal punishment, the state considers the punished as a subject, in the case of a crime of *Lèse majesté* as an enemy:

> For in denying subjection, he denyes such Punishment as by the Law hath been ordained; and therefore suffers as an enemy of the Common-wealth.[19]

I may not recognize the authority of the sovereign to punish me, but I do recognize the sovereign as a public authority, and that is enough to allow me to be treated as a citizen, and not as an enemy if I do not abide by the law. Before seeing in the next section what a punishment must be like, it was important to understand that the public authority can decide by itself without further justification whether the transgressor must receive a regular punishment or be treated as an enemy.

IV. The 'Manner of Punishment' and the Implementation of the Law

A 'Dialogue Between a Philosopher and a Student of the Common Laws of England', which contains a careful examination of English penal law, is a good place to study the spirit of Hobbes's penal philosophy. The question is no longer to define in general what a punishment is but 'to define and appoint the special

[17] ibid 486.
[18] ibid.
[19] ibid.

manner of punishment'.[20] The philosopher encourages the student of the laws of England to expose the reasons for the variety of punishments – in contrast with the 'Stoics in old time' who thought 'that all faults are equal, and that there ought to be the same punishment for killing a man, and for killing a hen'.[21] The method of the *Dialogue* is different from the method used in *Leviathan* but the result of the enquiry as concerning the function of penal law is quite similar. Indeed, the philosopher of the *Dialogue* wants to persuade the student of the Common Law that the decision concerning the nature of punishments can be found in the reason of the sovereign. The student of the Common Law has a different idea: 'The manner of punishment in all crimes whatsoever, is to be determined by the common-law'.[22] But what does it mean to be determined by the Common Law? As the law of England knows two main sources, the statute, which is an act of Parliament, and the custom, those will also be, according to the student, the two possible sources for determining the nature of a punishment. But when the case is new, the student can see no reason why the judge could not determine the nature of the punishment by his own reason. The answer of the philosopher clarifies the point in question: if reason could settle the matter, there would be everywhere in the world the same penalties for the same offences, which is obviously not the case, therefore, natural reason by itself is not the solution. The absence of a universal legal system is sufficient proof that there is no rational determination of what a punishment should be for a given crime. The destruction of what may be called the natural law thesis in matters of punishment opens up the way for the positive law thesis. The scepticism of the student, who thinks that if no natural reason can determine the order of penalties there will no longer be any valid penal system, is countered by the philosopher who can see no reason for such scepticism. Taking for granted the impossibility to determine a punishment on a rational basis, the philosopher proves that the choice of penalties depends upon the decision of a particular man.

What comes foremost is not the justification of a particular punishment but the fact that the punishment be known in advance by all citizens, and that those citizens know that all punishments shall be implemented. Otherwise, the question is not of the rationality of a given penalty, since there can be many different rationales for the same penalty, but of the efficiency of the penal system as a whole. In order to be efficient, a penal system must be based on the knowledge of what actions are against the law, and of the punishments ordained for a given evil action. The source of rationality is in the law established by a person who

[20] Th. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, edited by W. Molesworth, VI (London: John Bohn, 1840; reprint, Aalen: Scientia Verlag, 1962), 121. Hereafter: *Dialogue*.

[21] ibid. Cf N. Machiavelli, *The Discourses*, translated by W.A. Oldfather (Cambridge, Mass: Harvard University Press, 1925), Book 1, 7, 30-33.

[22] Th. Hobbes, *A Dialogue* n 20 above, 121.

has the power to implement the law. Therefore, the question is not: how has a given punishment been established, but by whom was it established, and was that person in charge of public authority when she did so?

Hobbes provides an indication of what such an authority must be:

> Now the person to whom this authority of defining punishments is given, can be no other, in any place of the world, but the same person that hath the sovereign power, be it one man or one assembly of men.[23]

It is crucial that public authority be clearly recognizable by citizens, and that the link between an evil action and its punishment be without ambiguity. But why, it may be asked, should the public authority be the sovereign power? It could be envisaged, after all, that a public authority be the authority defining a range of penalties and making those penalties known to all citizens without any other prerogative. In such a case, there would be an autonomy of the penal system, since no one could be submitted to a penalty without a proper legal justification. That solution is not deemed sufficient by Hobbes who has it that the public authority which defines laws and punishment must be the authority that has the power to apply punishments. The difficulty, indeed, is not so much to define penalties for evil actions, nor to have those penalties known, but to have them applied when need be. What Hobbes has in mind is a situation in which several evil doers would unite to oppose public authority:

> For it were in vain to give it (that is, public authority) to any person that had not the power of the militia to cause it to be executed; for no less power can do it, when many offenders be united and combined to defend one another.[24]

Otherwise, the authority to establish punishments would be in vain, had it not conjoined to it the power to have the punishments executed, in particular, in circumstances when wrongdoers get politically organized.

There is no scepticism therefore in Hobbes's theory of punishment, but two very strong arguments: (1) What matters is not so much the *nature* of the punishments themselves, but the fact that they can be established by the authority capable of having them executed; and (2) The only power capable of having punishments executed is the sovereign power. Of course, that power must be recognized as a public authority, and the recognition comes with the process of authorization but, then, what matters is that the citizens abide by the power that has defined penalties, what matters, as said in the definition of punishment in *Leviathan*, is the obedience of the subjects. Although Hobbes does not remind us in the *Dialogue* of the finality of punishment, it is clear that

[23] ibid 122.
[24] ibid 122-123.

the aim of the various punishments discussed by the philosopher and the student of the Common Law of England is to frame the will of the citizenry and to make them abide by the laws of the sovereign.

V. The Statutes of the Provisors

When distinguishing between an act of punishment and an act of hostility Hobbes's real concern is to know what to do in cases of conflict between sovereignties. That aspect of his approach has not always been well seen, notably by Giorgio Agamben who stresses in *Homo Sacer I* the importance of Roman penal law for Hobbes's theory of punishment, whereas what matters is English Statute law. Let's consider for a moment the case of the Statutes of the Provisors, in Latin *de Praemunire* statutes, as understood by Hobbes.

An overly rapid examination of those statutes may conduce us to draw the wrong conclusions, for example, that sovereignty could be defined by its capacity to reduce men to their bare life, or to the fragility of their body when exposed to the violence of others. Agamben's thesis in *Homo Sacer I* is very much concerned by what he sees as a deep link between sovereignty and the 'bare life'. Instead of referring to Roman law he could have drawn on the Statute of Provisors as an even more acute example of a penal law exposing men to the violence of others with the permission of sovereign power. But, first, who are those Provisors? They are the persons who 'provide themselves with benefices', such as bishoprics and abbeys,

> founded and endowed by the Kings and nobility of England (but) bestowed by the Pope upon strangers, or such as with money in their purses could travel to Rome to provide themselves of such benefices.[25]

In section VI of the *Dialogue*, devoted to the punishments established by the Statutes of Provisors, the law student is specific on the content of the punishment for provisors:

> This crime is not unlike to that for which a man is outlawed, when he will not come in and submit himself to the law; saving that in outlawries there is a long process to precede it, and he that is outlawed is put out of the protection of the law. But for the offence against the statute of provisors (…) if the offender submit not himself to the law within the space of two months after notice, he is presently an outlaw. And this punishment (if not capital) is equivalent to capital. For he lives secretly at the mercy of those that know where he is, and cannot, without the like peril to themselves, but discover him. And it has been much disputed before the time of Queen Elizabeth, whether he might not be lawfully killed by any man that would,

[25] Th. Hobbes, *A Dialogue* n 20 above, 111.

> as one might kill a wolf: It is like the punishment amongst the old Romans of being barred the use of fire and water (*Interdictio de aqua et igni*), and like the great excommunication in the papacy, when a man might not eat, and drink with the offender without incurring the like penalty.[26]

This text clearly shows that Hobbes had a good knowledge of the different Statutes of Provisors, and particularly those of Edward III (25 Edward III, st. 1, c. 1, 1351; 27 Edward III), and of Richard II, and of their relation with Roman laws. He was familiar with a type of punishment that was equivalent to treating the guilty man like a wolf. Without doubt, an element of this relates to the mythologeme of the *homo homini lupus*, adding meaning to the connection Agamben makes between the idea of the man who is a wolf to other men, in the state of nature, and the punishment reserved by Provisors in English law.[27] Is it, however, a legal reference that validates Agamben's overall interpretation? Nothing could be less certain.

Before making any further analyses, it is imperative to put those royal writs into their context, which is that of a theory of international relations based on sovereignty. The Statutes of Provisors were adopted over the course of the 14th century in order to prevent the papacy from trespassing on the territory of the English sovereign through ecclesiastical nominations. Thus, the statute II Richard, c. 5, promulgated in 1392, was designed to prevent subjects of the King of England, or foreigners, from obtaining from the Pope the right to enjoy ecclesiastical benefices on English soil. Therefore, the punishment incurred by anyone who violated that law, wishing to assert in England a right that had been granted by Rome, served to sanction a conflict of sovereignty between a spiritual power and a temporal power, and not to reveal the hidden structure of sovereignty, based according to Agamben on the sovereign's capacity to expose men as such to its violence. The statutes of Provisors, already considerably relaxed during Hobbes's time,[28] were a means for the English sovereigns – well before the Anglican split – to establish strict limitations on the ecclesiastical courts' claims to judge *in ordine ad spiritualia*. Certainly, the fact that, on account of this conflict, some men found themselves exposed to prosecution and conviction over the method of legal killing of outlaws constitutes a particularity that should

[26] ibid 110; own italics.

[27] G. Agamben, *Homo Sacer I* n 5 above, 10: 'The protagonist of this book is bare life, that is, the life of *homo sacer* (sacred man), who may be killed and yet not sacrificed, and whose essential function in modern politics we intend to assert.' The relevant pages for the comparison we suggest between the archaic figure of *homo sacer* and the statutes of provisors are to be found in the section 'The ban and the wolf' (ibid 88-92).

[28] The situation described by Hobbes only partly corresponds to the law of his era, which only provided for immediate execution with no other trial in cases of felony, but not in a case involving civil action. Lucien Carrive notes that, in the latter case, 'the outlaw only lost his personal belongings, and even then he was often able to put them in a safe place' (Th. Hobbes, *Dialogue des Common-Laws d'Angleterre*, French translation by L. Carrive (Paris: Vrin, 1990), 139, n 3).

be questioned by anthropologists of punishment, but it is doubtful that it can be made the very paradigm of sovereign power.

Since the return to legally programmed bare life – a life deprived of all legal guarantee – is caused by the coexistence of sovereign States, it is essential to carefully analyse the effects of conflicts of sovereignty on subjects exposed to them. Indeed, contemporary mass slaughters or genocides often testify to the horrid consequences of conflicts of sovereignty. In the *Dialogue*, the extreme violence of the long-lasting conflict between England and the papacy is indeed striking. But the exposure of men to the violence of other men as permitted by the Statutes of Provisors has not much to do with the bare life, although men could be treated in such cases as wolves; it has to do with what a sovereign can do to maintain his sovereignty when threatened by a 'spiritual' power. In matters of sovereignty, Hobbes's logic can be said to be straightforward, as is shown by a critique he addresses to Edward Coke regarding punishment for treason. To the great lawyer who says that a traitor cannot be punished by the king of England without an indictment, a procedure proper to English Common Law, Hobbes answers the following:

> This is not an argument worthy of the meanest lawyer. Did Sir Edward Coke think it impossible for a King lawfully to kill a man, by what death soever, without an indictment, when it is manifestly proved he was his open enemy? Indictment is a form of accusation peculiar to England by the command of some King of England, and retained still, and therefore a law to this country of England. But if it were not lawful to put a man to death otherwise than by an indictment, no enemy could be put to death at all in other nations, because they proceed not, as we do, by indictment.[29]

In order to have an enemy killed, even though the enemy be a former citizen, a sovereign does not need to abide by the laws of his own country: to make this idea still clearer Hobbes goes back to the time of the Conquest, a paradigmatic historical case for considering what a sovereign does when a kingdom is subdued:

> William the Conqueror subdued this kingdom; some he killed; some upon promise of future obedience he took to mercy, and they became his subjects, and swore allegiance to him. If therefore they renew the war against him, are they not again open enemies? Or if any of them lurking under his laws, seek occasion thereby to kill him secretly, and come to be known, may he not be proceeded against as an enemy, who, though he had not committed what he designed, yet had certainly a hostile design?[30]

It is not necessary to press that point any further: Hobbes makes the

[29] Th. Hobbes, *A Dialogue* n 20 above, 74.
[30] ibid.

distinction between punishment and hostility in order to show that punishment is relevant when the sovereign is recognized as the public authority, and that punishment becomes an act of war when the sovereign is no longer acting as the public authority. These are questions that are still relevant to our present situation when it comes to discussing legal cases about terrorists returning to their home country. How should they be treated? As citizens to whom the protection of law is due, or as enemies to the commonwealth?

Establishing the right kind of punishment in those particular cases is part of what may be called a politics of sovereignty. The *Dialogue* shows that Hobbes was very much concerned, for the sake of sovereignty, with the actual forms that the right to punish can take in a commonwealth. To be sure, Hobbes's concern is more for having a multitude obey the law than for the State to respect the principle of liberty:[31] he does not follow here a Rawlsian path by anticipation. But it would be a greater mistake to follow Agamben's suggestions, since Hobbes is willing to preserve the guarantees of a legal system. The fear that goes with the state of nature accompanies, certainly, his political ideas on punishment, but the aim of this fear is not to make the state of nature rule in civil society, or to reduce human life to the bare life. Why so? Because (1) a Hobbesian politics of punishment goes with a strict respect for the forms of the law – no punishment without a prior law establishing the judicial reasons of the punishment; and because (2) such a politics does not aim at developing among the citizenry the terror that goes with a politics of exception but to give us supplementary reasons to abide by the law.

VI. Examining Punishment in the *Questions*: What is Punishment Good for?

Asking who can be punished obliges one to reflect, as we have done in the previous section, on the fact that punishing is not equivalent to waging war. However, such a distinction does not tell us what punishment can be good for in a society. Why is it that the public authority wants to punish its citizens who have trespassed the limits determined by law? Hobbes's answer in *Leviathan* is: 'to the end that the will of men may thereby the better be disposed to obedience'.[32] That is also the answer that he gives in the *Questions*:

> The intention of the law is not to grieve the delinquent for that which is passed and not to be undone; but to make him and others just, that else would not be so: and respecteth not the evil act past, but the good to come. Insomuch as without this good intention of future, no past act of a

[31] On Rawls and Hobbes on the state of nature, cf L. Foisneau, 'Sortir de l'état de nature (Rawls)', in Id ed, *Hobbes. La vie inquiète* (Paris, Gallimard, series: folio/essais, 2016), 464-503.

[32] Th. Hobbes, *Leviathan* n 1 above, XXVIII, 482.

delinquent could justify *his* killing in the sight of God.[33]

What is new in the *Questions* is the setting of this particular part of the definition of punishment within the context of a larger discussion, no longer on the common law, but on our relations to the law of nature, and the right of nature. We'll try and show how the latter debate can help us better understand the intellectual context of Hobbes's discussion of punishment. The truth is that the debate with Bramhall is a source of fruitful objections – Bramhall might be the anonymous source of other famous objections, those that led Hobbes to write extremely helpful remarks in the second edition of *De Cive*.

A first objection conduces Hobbes to justify the end he attributes to punishment: 'But you will say, how is it just to kill one man to amend another, if what was done were necessary'?[34] Hobbes gives here, in a nutshell, what he considers to be the spirit of Bramhall's objections: without free will, and the concomitant capacity to choose between good and evil, rewards and punishments are undeserved, and, therefore, perfectly unjust. That objection corresponds to a theory of natural law that can be found in Suarez, to which Hobbes's natural law theory offers, obviously, a sharp contrast. In Bramhall's Suarezian theory, what matters is that the agent be capable of choice: the punishment will be justified by the fact that the agent did not make an appropriate use of his liberty, using it instead to perpetrate an evil act. The punishment inflicted can be therefore understood as a response to the evil use of liberty: it is a way to make the culprit pay for what evil he has done. The problem to be solved is to find the appropriate equivalent between the evil acted and the punishment inflicted. That kind of theory belongs to retributivism. In contrast, Hobbes's response to Bramhall's objection shows how his theory is distinct:

> To this I answer, that men are justly killed, not for that their actions are not necessitated, but that they are spared and preserved, because they are not noxious; for where there is no law, there no killing, nor any thing else can be unjust. And by the right of nature we destroy, without being unjust, all that is noxious, both beasts and men.[35]

In a somewhat surprising manner, Hobbes discards the criterion of free will to replace it by the criterion of noxiousness: to establish the reason of a punishment there is no need to prove the liberty of the agent before the action was done, since there is no such liberty, but one must know if there were a law, or no law, established by the state, and judge the action accordingly. When there is no law, that is, in the state of nature, one cannot say that a killing or any

[33] Th. Hobbes, *The Questions Concerning Liberty, Necessity and Chance*, edited by W.Molesworth (London: John Bohn, 1841), V, 152.

[34] ibid.

[35] ibid.

act is unjust. Hobbes rejects the idea, present in Suarez, that the problem is to establish the freedom of the agent; the question is, according to him, to determine whether there is, or not, a law. In the absence of a law, there is no reason to say that an act was unjust, even though that act was 'necessitated'. It is not the liberty of the agent that matters, understood as a liberty to act according to the injunction of natural law but the consequences of his actions in his relationship to others. If there is no public authority, there is no limit to what can be done in order to achieve self-preservation among other animals but also among other human beings. One characteristic feature of the arguments advanced in the controversy with Bramhall is the fact that Hobbes takes animals into consideration, and opens up the limits of the state of nature, making it somewhat like a Darwinian state of nature *avant la lettre*: 'And for beasts, we kill them justly, when we do it in order to our own preservation'.[36] The truth is that 'justly' has no place in the state of nature, since justice appears only within the limits of a civil state. What Hobbes means is that animals can be killed by men without men having to feel guilty about the killing in the absence of a law of nature. The change introduced by him in natural law theory has consequences in various fields: in our relations with other men in the state of nature, but also in our relations with other species. But why is it that men can't be punished for their way of treating other animals? The reason is that there can only be punishment when there is a civil law forbidding or commanding a given behaviour. It is therefore public authority that gives meaning to the act of punishment: contrary to what Locke says, Hobbes considers it absurd to speak of punishment in the state of nature since the laws of nature have no application there.

But what makes it so important for a public authority to be able to implement punishments?

> For men, when we make societies or commonwealths, we lay down our right to kill, excepting in certain cases, as murder, theft, or other offensive actions. So that the right which the commonwealth hath, to put a man to death for crimes, is not created by the law, but remains from the first right of nature, which every man hath to preserve himself; for the law doth not take that right away, in case of criminals, who were by law excepted.[37]

Despite its new theory of authorization, *Leviathan* had kept elements of the theory that was already there in the *Elements of Law*, and the *Questions*, just quoted, are still keeping the same line of argument. Punishing a criminal relies on the fact that the public authority has not been given a new right when it was established by the covenant, but has maintained the right the natural person of

[36] ibid.
[37] ibid 153.

the sovereign had in the state of nature. Answering Bramhall's Suarezian objection – that 'Men are (…) put to death or punished, for that their theft proceedeth from election'[38] – conduces Hobbes to be more specific in establishing the scope of punishment. His thesis can be called therefore exemplarism, and as such opposed to Bramhall's retributivist theory. Why so? Because in retributivism, punishment endeavours to repair the evil done by a free person, whereas in exemplarism, punishment aims to create an example that will reinforce the motivation of citizens to abide by the law. Not considering so much the nature of the will, Hobbes proposes a social theory of punishment in which the example of the criminal being punished is supposed to deter others from imitating him:

> Men are not therefore put to death or punished, for that their theft proceedeth from election; but because it was noxious and contrary to men's preservation, and the punishment conducing to the preservation of the rest: inasmuch as to punish those that do voluntary hurt, and none else, frameth and maketh men's wills, such as men would have them.[39]

The debate with Bramhall makes it clear that a theory of punishment is central to a politics of sovereignty aiming at the preservation of its citizens. If establishing the right kind of punishment is an essential part of such a politics, it is because it contributes to motivating citizens to abide by the law. The *Dialogue of the Common Laws* shows, as we have seen in the previous section, that Hobbes was very much concerned with the actual forms that the right to punish can take in a commonwealth; the *Questions* show that the politics of punishment in Hobbes accompanies the refutation of a natural law theory based on a metaphysical theory of free will, since what is central to the whole question is not so much the liberty of subjects when they commit mischiefs as the political consequences of punishment.

To be sure, Hobbes does not follow a Rawlsian path by anticipation: his concern is more for having a multitude follow the law than for the State to respect the rule of law. But it would be a mistake to follow Agamben's suggestions in our reading, since Hobbes is willing to preserve the guarantees of a legal system, and does not want to have the state of nature reappear in the civil state. The fear that goes with the state of nature accompanies, surely, the politics of punishment, but the aim of this fear is not to make the exception become the rule, or to reduce human life to the bare life, because (1) a Hobbesian politics of punishment goes with a strict respect for the forms of the law (no punishment without a prior law establishing the reasons of the punishment); and because (2) such a politics does not aim at developing among

[38] ibid.
[39] ibid.

the citizenry the panic that goes with a politics of exception but to give citizens additional reasons to abide by the law.

A last remark in guise of conclusion: the form taken by Hobbes's theory of the finalities of punishment can also be explained by the fact that he knew from direct experience of a civil war that it is sometimes very difficult for a public authority to maintain a clear cut distinction between punishments and acts of hostility. Indeed, punishments can sometimes be seen, and rightly so, as acts of hostility, that is, as attempts to separate enemies from the rest of the citizenry. Hobbes could have been more explicit on the reasons that prevent us from thinking that all punishments are expressions of the hostility of the state. Going back to the 'right to everything' (*jus in omnia*) as a foundation for a right to punish is probably not the best way to obtain such a clarification. Some cases analysed in the *Dialogue,* the Statutes of Provisors in particular, are good examples of a penal law in which a war-like politics can be read, a politics in which the distinction between punishment and acts of war is hard to maintain. These statutes are, indeed, the translation in the realm of legality of a long-standing struggle between the kings of England and the Papacy. That bellicose dimension can explain the cruelty of the penalty, and the fact that persons so condemned could be killed by whomever found them on English land, without further legal proceedings.[40] But the situation is still very different from the situation described by the ancient Roman texts concerning *homo sacer*: the ambiguities or frailties of Hobbes's theory are also the expression of the frailty of the British state of his time, confronted by civil war.

[40] There is no apology for political violence in Hobbes, as his awareness of men's cruelty shows sufficiently: 'Thomas Hobbes said that if it were not for the gallowes, some men are so cruell a nature as to take a delight in killing men more than I should to kill a bird. I have heard him inveigh much against the Crueltie of Moyses for putting so many thousands to the Sword for Bowing to the Golden Calf' (J. Aubrey, *Aubrey's Brief Lives*, edited by O. Lawson-Dick (London: Mandarin paperback, 1992), 157).