

**The nerves of the Leviathan:
On metaphor and Hobbes' theory of punishment**

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Abstract:

Thomas Hobbes' theory of punishment plays a constitutive role in the *Leviathan's* theory of state sovereignty. Despite this, Hobbes' justification for punishment is widely found to be discrepant, weak, inconsistent, and contradictory. Two dominant tendencies in the scholarship attempt to stabilize the *Leviathan's* justification for the state's right to punish by either identifying it with the sovereign's right to war or by elaborating a theory of authorization within the state. In contrast, by tracing the deployments of the metaphor that Hobbes utilizes to evoke the state's right to punish in the *Leviathan* (i.e. that of the *nerves* of the Leviathan) this paper finds that these two accounts can be made to be consistent with each other — thereby destabilizing the grounds upon which the theory of punishment can be founded.

Key Words: Hobbes - Theory of Punishment – Sovereignty - Artificial Rights - Right of War

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I. Punishment and metaphor in *Leviathan*

Punishment plays a constitutive role in the *Leviathan*'s theory of the state. In particular, Hobbes argues in *Leviathan* that the state's right to punish is one of those rights which "make the essence of sovereignty."² Despite that, Hobbes' justification for punishment has been widely found to be discrepant³, weak,⁴ inconsistent,⁵ and even contradictory⁶. However, neither of these investigations have thoroughly grappled with Hobbes' metaphor for punishment—that is, of punishment as the *nerves* of the *Leviathan*.⁷ In the opening paragraph to the *Leviathan*, quoted above, Hobbes relegates "reward and punishment" to fulfill the same function in the body politic as the "nerves" do in the body natural. It is through rewards and punishment, he writes, which is "fastened to the seat of the sovereignty," that "every joint and member is moved to perform his duty."⁸ What might a dedicated reading of Hobbes' use of this metaphor reveal about his seemingly enigmatic theory of punishment?

The relation between Hobbes' materialism and his use of metaphors in the *Leviathan* is a knotty problem in itself. After all, how is one to take seriously the use of metaphors by a thinker who explicitly disparages their use? Early on in the *Leviathan*, Hobbes writes that "metaphors, and senseless and ambiguous words, are like *ignes fatui* [a fools fire], and reasoning upon them is wandering amongst innumerable absurdities; and their end, contention, and sedition, or contempt."⁹ And yet, despite his belittling of the use of metaphors, Hobbes opens *Leviathan* with a brief introduction that deploys the now

² Hobbes, Thomas. *Leviathan* with selected variants from the Latin edition of 1668. edited by Edwin Curley. Indianapolis: Hackett, 1994. p. 115.

³ Cattaneo, p. 293.

⁴ Hüning, p. 232.

⁵ Heyd, p. 120.

⁶ Norrie, p. 304.

⁷ "For what is the *heart*, but a *spring*; and the *nerves*, but so many *strings*; and the *joints*, but so many *wheels*, giving motion to the whole body, such as was intended by the artificer? *Art* goes yet further, imitating that rational and most excellent work of nature, *man*. For by art is created that great *Leviathan* called a Commonwealth, or State (in Latin *Civitas*), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the *sovereignty* is an artificial soul, as giving life and motion to the whole body; the *magistrates* and other *officers* of judicature and execution, artificial *joints*; *reward* and *punishment* (by which fastened to the seat of the sovereignty every joint and member is moved to perform his duty) are the *nerves*, that do the same in the body natural; the *wealth* and *riches* of all the particular members are the *strength*; *salus populi* (the people's safety) it's *business*; *counsellors*, by whome all things needful for it to know are suggested unto it are the *memory*; *equity* and *laws*, an artificial *reason* and *will*; *concord*, *health*; *sedition*, *sickness*; and *civil war*, *death*." (*Leviathan* p. 3).

⁸ *Leviathan.*, p. 3.

⁹ *Ibid.*, p. 26.

famous metaphor of the Leviathan (i.e. the Commonwealth or State) as that great “artificial man” which is but an “artistic” attempt to imitate the “most excellent work of nature, *man*.”¹⁰ This great *artifice*—intended for the “protection and defense” of man—imitates the various organs and elements of the body natural. Writing about the *Leviathan’s* frontispiece, Johan Tralau argues that this is precisely why readers should pay close attention to the instances in which Hobbes mobilizes metaphors to make his argument.¹¹ For instance, against Schmitt’s interpretation of Hobbes’s deployment of metaphors, Tralau argues that the monstrous image of the Leviathan in the famous frontispiece — which expresses in its indeterminacy a certain incommensurability and a sense of “radical difference” — inspires both awe and fear in its readers. In *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, Schmitt famously displaces the figure of the Leviathan as a fearful image (i.e. as an indeterminate metaphor with multiple forms: mortal god, machine, giant man, and sea monster).¹² Schmitt argues that in the historical conjuncture in which Hobbes publishes the *Leviathan*, this indeterminate metaphor of the state inspires neither fear nor awe — it is rather laughable. In contrast, Tralau argues that even if Schmitt’s characterization was adequate, one should still consider that Hobbes’ theory of laughter entails that the metaphor is entwined with power. As such, for Tralau, Hobbes both produces a “intriguing and terrifying image of radical difference” while “at the same time maintaining the persuasive and impressive claim to be operating with pure logic.”¹³ Therefore, rather than displacing Hobbes’ metaphors, this paper takes Tralau’s characterization seriously to then to read the ways in which the *Leviathan’s* metaphors might provide an opening, a crack, through which we might undermine sovereignty’s groundlessness. More specifically, the promise of what follows is that by inquiring into the specificities of the metaphor-image of the Leviathan — in particular, of the nerves as a metaphor for punishment — we might disentangle Hobbes’ enigmatic justification for punishment and thereby also question the groundless ground of the sovereign’s right to punish.

¹⁰ *Ibid.*, p. 3.

¹¹ Tralau argues that “when Hobbes does indeed use a ‘metaphor’ or image, we should look closely for something interesting in it.” (*The Cambridge Companion to Hobbes’ Leviathan*, p. 62). On the relation between materialism and metaphor in Hobbes see Psychaux (2018).

¹² Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, ch.

¹³ Tralau, p. 77.

Before we begin, let me trace a line of demarcation between two tendencies, or characterizations, of Hobbes' theory of punishment. The constitutive disagreement between these two tendencies hinges on whether or not Hobbes relegates the sovereign's right to punish to a natural right (i.e. as *external* to the state) or whether he provides a consistent theory of authorization *within* the state. More specifically, these two accounts (which will be called "traditional" and "revisionist") either seek to, respectively, (1) find a "solution" to the apparent antinomy in Hobbes' theory of punishment by relating the sovereign's right to punish to the right to war or (2) find an "artificial" foundation to punishment by demonstrating that a consistent theory of authorization was already worked out by Hobbes. Put differently, these two accounts seem to be split on whether, for Hobbes, the sovereign has, (1) the right to punish through *natural law* (i.e. a right to defend itself, as with any other body, through war), or (2) the right to punish is attained through *authorization* (i.e. again, this power is *artificial*). Recast in spatial terms, it could be argued that the first account, the traditional account, relegates punishment to a relation between the Leviathan and an element *external* to it, and the revisionist account relegates punishment to a relation between elements *internal* to the Leviathan (i.e. between a sovereign and its proper subjects). The former seems to imply a view of punishment that relegates it *beyond* the artificiality of the Leviathan — beyond the state— and into the domain of natural right. In other words, punishment is a kind of a relation established between two bodies in the state of nature. The latter, in contrast, finds punishment to be within the state, and therefore, within the social contract.¹⁴

This paper argues that both of these accounts can be found to be consistent with each other. This relation is made explicit when we account for Hobbes' "nerve" metaphor for punishment. More specifically, tracing the circulation of this metaphor throughout the pages of the *Leviathan* allows us to make explicit a *relation* which first appears as an *antinomy*.¹⁵ Recall that for Hobbes, the nerves of the body natural act both as a *mediating* relation between elements *internal* to the body as well as with elements

¹⁴ The "traditional" view is held from early commentators such as Pufendorf, and is reconstructed partly by Cattaneo (1956) in a debate between Norberto Bobbio and Leo Strauss on Hobbes' relation to the liberal tradition. See section IV below. More recently, it can be traced to reconstructions of Hobbes' theory of punishment in Norrie (1984), Heyd (1991), and Hüning (2007). The "revisionist" account can be read in Yates (2014) and Green (2016). Also see references therein.

¹⁵ The problem of metaphor in the philosophical text is famously taken up by Friedrich Nietzsche in the essay "On Truth and Lies in a Nonmoral Sense" and by Jacques Derrida in "White Mythology: Metaphor in the Text of Philosophy" published in *Margins of Philosophy*.

external to it. As such, in a similar fashion to the rhetorical strategies pointed out by Tralau, Hobbes can *both* attempt to provide a theory of punishment that is authorized by the social contract (i.e. as relation between *internal* elements to the body politic) while also relegate this justification to the domain of natural law (i.e. as relation between the Leviathan and an external element in a state of nature). The polysemy of the metaphorical language Hobbes deploys allows him to express the dual character of sovereignty: as artifice and as natural person. In this respect, the two accounts of Hobbes' theory of punishment sketched above are one-sided, that is, they tend to emphasize one of these two sides rather than think their relation. Focusing in on Hobbes' metaphors allows for this duality to surface and to give us a more adequate characterization of Hobbes' justification of the sovereign's elusive right to punish and thereby destabilize the state's ground for punishment.

II. The nerves of the body natural and the nerves of the body politic

As has been noted, the *nerves* play a key function in Hobbes' theory of sense perception.¹⁶ This section briefly reconstructs Hobbes' mechanical theory of sense perception to demonstrate how the nerves function as a mediating a relation between elements internal to the body as well as mediating a relation between internal and external elements to the body.

In the two first chapters of the *Leviathan*, respectively titled "Of sense" and "Of imagination," Hobbes provides a brief sketch of his mechanical theory of sense perception.¹⁷ For Hobbes, every perception of an external body is originally what he calls a *sense*. He writes,

"The cause of sense is the external body, or object, which presseth the organ proper to each sense, either immediately, as in the taste and touch, or mediately, as in seeing, hearing and smelling; which pressure, by *the*

¹⁶ This is Hobbes' polemic with the Aristotelian theory of sense perception in the so called "schools" of philosophy. See Leijenhorst (2007).

¹⁷ Hobbes argues that he is only providing a brief sketch of his theory of sense given that he has "elsewhere written of the same at large" (*Leviathan*, p. 6). Leijenhorst (2007) argues that this "elsewhere" must be Hobbes' *De Corpore*. In particular, "[b]y 1651 Hobbes probably still hoped to publish this work in the same year, and the extensive account of sense perception in chapter xxv, belonging to the oldest parts of the work, would certainly have been ready by 1651." Hobbes' more extensive conception of the function of nerves in *De Corpore* is consistent with our argument in this section.

mediation of the nerves and other strings and membranes of the body, continued inwards to the brain and heart, causeth there a resistance, or counter-pressure, or endeavor of the heart to deliver itself...[a]nd this *seeming, or fancy*, is that which men call *sense*¹⁸

In these opening pages Hobbes makes explicit the “cause of sense” and argues that its cause is always that of some pressure exerted by an “external body.” Immediately after this he goes on to say that this pressure of the external object on the appropriate organ of each sense can either be “immediate” (e.g. taste and touch) or “mediate” (seeing, hearing, and smelling). In both of these cases, Hobbes argues that “the mediation of the nerves” are what relay the pressure of this external object “inwards to the brain and heart.”¹⁹ The nerves therefore play a key mediating function in Hobbes’ mechanical account of sense perception given that they connect the pressure of an *external body* to the respective sense organ with the “brain and heart.”

Hobbes argues that this originary impression, or *sense*, is what constitutes both imagination and memory. The imagination (or memory) for Hobbes is akin to the *fading away* of the originary sense of the external object which is mediated by the nerves — that is, what he calls the *decaying sense* of such “register” or “imprint.” As such, “the longer time is after the sight or sense of any object, the weaker is the imagination.”²⁰ Moreover, Hobbes argues, the “*memory* of many things, is called *experience*.”²¹ So, experience is acquired through a kind of accumulation of many decaying sense impressions. It is from these impressions that everything —including knowledge—is derived. What is important to note here is the crucial mediating role that the nerves play in the body natural.

Other mentions of the “nerves” in the *Leviathan* seem to confirm this reading of the *mediating* role of the nerves. For instance, in the chapter “On imagination,” Hobbes discusses the function of nerves in the body natural as it pertains to *dreams*. More specifically, he defines dreams thus: “[t]he *imaginations* of them that sleep are those we call *dreams*.”²² Given that all imagination originates in sense impression, and “because the

¹⁸ *Ibid.*, p. 6. My emphasis. It is important to note that the original Latin of “endeavour” is *conatus*. This is key to understanding Hobbes’ natural right and the incapacity to alienate a body’s right to self-preservation.

¹⁹ *Id.*

²⁰ *Ibid.*, p. 8.

²¹ *Ibid.*, p. 9.

²² *Id.*

brain and *nerves*, which are the necessary organs of sense, are so benumbed in sleep as not easily to be moved by the action of external objects”, it must necessarily follow that “there can happen in sleep no imagination, and therefore no dream, but what proceeds from the agitation of the *inward* parts of man’s body.”²³ The consequences that Hobbes derives here for the nature of dreams is as follows: because the “brain and nerves” are so “benumbed in sleep” dreams must be generated by the “inward parts” of the body, “for the connexion they have with the brain and other organs, when they be distempered, do keep the same in motion.”²⁴ As such, once again, the nerves act as a mediating relation between the “inward parts of man’s body” and “external objects.” Beyond these two examples, we can find two other instances in the *Leviathan* in which Hobbes now evokes the “nerves” as a metaphor.²⁵

The first of these instances is in chapter *xxiii* of the second part of *Leviathan* titled “Of the public ministers of sovereign power.” In this short chapter, Hobbes sketches out the function of those public ministers who seem to have the authority to execute the sovereign’s will. He writes that the public ministers are “all those that have authority to procure the execution of judgments given”, such as to, “publish the sovereign’s commands, to suppress tumults, to apprehend and imprison malefactors, and other acts tending to the conservation of the peace.”²⁶ As such, he writes a few paragraphs before, “this kind of public ministers resembleth the *nerves* and *tendons* that move the limbs of a body natural.”²⁷ Interestingly, Hobbes now adds another metaphor — “tendons” — which seems to complement the metaphor of “nerves.” The emphasis now seems to be that these two elements “move the limbs” of the body politic. As such, “nerves” no longer seems to evoke the perception of an *external* body. However, the emphasis on mediation still holds, but the *mediation* is now between elements solely *internal* to the body politic.

²³ *Id.* Emphasis mine.

²⁴ *Id.*

²⁵ There is actually a third instance, found in the very end of the chapter on “Of Punishment and Rewards”, in which Hobbes repeats more or less what he states in the opening paragraph of the *Leviathan*. He writes. “[a]nd thus much shall suffice for the nature of punishment and reward, which are, as it were, the nerves and tendons that move the limbs and joints of a commonwealth” (*Leviathan*, p. 209). However, in contrast to the mention in the introduction, here Hobbes adds “tendons” to the metaphor of the “nerves.” As mentioned above related to the example of “nerves and tendons” as a metaphor for the function of public ministers the emphasis now seems to be on the *mediating* function between elements *internal* to the body politic. Comparing to the introduction, in which Hobbes writes that “the *magistrates* and other *officers* of judicature and execution, artificial *joints*,” it seems that he’s now using the metaphor of “tendons” to express the function of the magistrate.

²⁶ *Ibid.*, p. 159.

²⁷ *Ibid.*, p. 156.

The other instance in which the metaphors of “nerves” is evoked can be found also in the second part of *Leviathan* — in chapter xxix: “Of those things that weaken a commonwealth.” Here Hobbes seems to be arguing for the banning of certain books written by the “Greeks” and “Romans” which “make it lawful and laudable” for “any man” to kill their king.²⁸ He goes on to argue that “this is a disease which not unfitly may be compared to the epilepsy.” Hobbes’ description of “the epilepsy” or “falling sickness” is related to a nervous problem. In particular, he notes that in this disease there is an “unnatural spirit” that *obstructs* the nerves. It is through this obstruction of the body natural to “external objects” — which allow for the “natural” kind of “power of the soul in the brain”— that causes the otherwise “violent and irregular motions” of epileptic seizures. Moreover, and most importantly, Hobbes argues that this obstruction of the nerves deprives man of his senses, and so he is no longer moved by the power that moves the subjects in a commonwealth, namely, “by the terror of *punishments and hope of rewards*, which are the *nerves* of it”, but rather, by some “unnatural spirit.”²⁹ As such, here we seem to recover the first usage of *nerves* as a mediating element between the inward parts of the body politic and its external elements.³⁰

Hobbes seems to be consistent in his use of the metaphor of the “nerves” in the *Leviathan*. Throughout, he uses it to express the relation established in the introduction of the *Leviathan* between nerves of the body natural and the rewards and punishment of the body politic. However, the polysemy of the metaphor also opens itself to express other relations. In particular, note the instance in which Hobbes couples the “nerves” with the additional metaphor of the “tendons.” In this case, the relation of mediation is no longer one between elements internal to the body and external elements, but rather, it is now solely between internal elements.

²⁸ *Ibid.*, p. 215.

²⁹ “[I]n this disease there is an unnatural spirit (or 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 (which men call convulsions) in the parts, insomuch as he that is seized therewith falleth down sometimes into the water, and sometimes into the fire, as a man deprived of his senses, so also in the body politic, when the spiritual power moveth the members of a commonwealth (by the terror of *punishments and hope of rewards*, which are the *nerves* of it) otherwise than by the civil power (which is the soul of the commonwealth) they ought to be moved, and by strange and hard words suffocates their understanding, it must needs thereby distract the people, and either overwhelm the commonwealth with oppression, or cast into the fire of a civil war” (*Leviathan*, p. 216).

³⁰ Hobbes will then go on to argue that there is a causal relation between Greek and Latin philosophy and civil war (*Leviathan* p. 476). Hobbes’ main target in his elaboration of his theory of sense perception is Aristotle.

To summarize, it seems that Hobbes emphasizes the function of the nerves in the body natural as *both*: (1) being a mediating element between *inward* elements of the body and (2) being a mediating element between *inward* elements of the body and *external objects*. As we will see, this dual character of the nerves can also be traced in the body politic as well, especially as it pertains to the difference between *punishment* and an *act of hostility* in chapter xxviii of the second part of the *Leviathan*, to which we now turn.

III. The sovereign's right to punish

Hobbes begins chapter xxviii of *Leviathan* — titled “Of punishments and rewards”— with a definition of punishment. Embedded within the definition is also a crucial question. He writes,

“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. Before I infer anything 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 commonwealth, every man giveth away the right of defending another, but not of defending himself.”³¹

Given this definition, there are three main points to emphasize here as it pertains to Hobbes' definition of punishment and the crucial question he asks. They are as follows.

First, Hobbes considers punishment to be exclusively an “evil” that is “inflicted by public authority.” Any kind of violence in the state of nature, for instance, can be considered a “private revenge.”³² For there to be punishment a (civil) law had to be transgressed. Recall that for Hobbes, there is no such thing as morality (i.e. there is no objective sense of “just” or “unjust” — these exist only in relation to civil law). That

³¹ *Ibid.*, pp. 203-4.

³² *Leviathan*, p. 204.

person which follows a law is deemed just, the one who does not, is deemed unjust. This distinction, however, cannot be made in the state of nature.³³ Therefore: no public authority, no punishment.³⁴

Secondly, but following from the first point, in contrast to *revenge*, punishment seeks to make the subject of punishment be “better disposed to obedience.” Again, for there to be punishment, a law had to be transgressed. The function of the public authority is to make the punished subject to be better disposed to obeying the law. As such, it might be said that Hobbes’ theory of punishment is “future-oriented.” Meaning that rather than justifying a so-called “backward-focused” retributive practice of punishment — Hobbes’ definition is “forward-looking.”³⁵ Hobbes derives this part of his definition of punishment from his sixth and seventh laws of nature. The former states: “that upon caution of the future time, a man ought to pardon the offences past of them that, repenting, desire it.”³⁶ The seventh law states, “in revenges (that is, retribution of evil for evil) men look not at the greatness of the evil past, but the greatness of the good to follow.”³⁷ In that section on the laws of nature, he continues by stating that “we are forbidden to inflict punishment with any other design than for the correction of the offender, or direction of others.”³⁸ It is the passion of *fear* of that makes this future predisposition to the law possible. Any other evil that does not take on this function is not considered “punishment.”³⁹

³³ *Ibid.*, p. 100.

³⁴ Contrast this to Locke’s otherwise exceptional (i.e. in the social contract tradition) definition of punishment. In the second *Treatise of Government* — which also argues for a rather different conception of the state of nature than Hobbes’ conception— Locke writes, “[a]nd thus in the State of Nature, *one Man comes by a Power over another*; but yet no Absolute or Arbitrary Power, to use a Criminal when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own Will, but only 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. For these two are the only reasons, why one Man may lawfully do harm to another, which is that [which] we call punishment” (*Two Treatises of Government*, p. 278).

³⁵ The classical justification for punishment is often posed in terms of this dichotomy between backward (i.e. retribution) and forward looking (correction and prevention) theories of punishment. For example, see Signy Thora Gutnick All “Thomas Hobbes’s Theory of Punishment,” p. 156.

³⁶ *Leviathan*, p. 96.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Recall that for Hobbes a *promise* is different from a *covenant*. When a *covenant* (or contract) is made, each party must be *guaranteed* that the other will actually carry out their promise. As such, there is no covenant if it is not simultaneously backed up by the “sword.” Hobbes wants to ensure that the parties are certain that their covenant will be enforced. Similarly, there can be no justice or injustice without public authority (*Leviathan*, p. 89).

Lastly, Hobbes' clearly states that the sovereign's "authority of punishing" does not mean that subjects have given up their *natural right* to their self-defense or self-preservation. In other words, Hobbes writes that "no man is supposed by covenant" to *not* "resist violence." Hobbes elaborates this point in chapter xiv, "Of the first and second natural laws and of contracts." He argues that if a covenant is made in which either of the parties agrees "not to defend myself from force by force" the covenant "is always void."⁴⁰ Hobbes argues that this covenant would go against the law of nature, "by which a man is forbidden to do that which is destructive of his life."⁴¹ It is here — through this invocation of the first two laws of nature — that he concludes that "though a man may covenant thus *unless I do so, or so, kill me*, he cannot covenant thus *unless I do so, or so, I will not resist you, when you come to kill me*."⁴² Hobbes thereby argues that the maximum punishment (i.e. the death penalty) imposed on a subject by a state can be justly resisted. Hobbes also extends this conclusion to *all* forms punishment — including imprisonment.⁴³ The punished man is *not* obliged to *not* resist. As such, he states that "the right which the commonwealth [...] hath to punish is not grounded on any concession or gift of the subjects."⁴⁴ If the sovereign cannot be authorized to punish then on what grounds might punishment be authorized? Hobbes seems to answer his question (i.e. "by what door the right or authority of punishing in any case came in?") by invoking the sovereign's natural right to self-defense. As mentioned previously in the introduction, this has been a source of much debate. Therefore, in Hobbes' account of punishment, there seems to be a tension between his theory of sovereignty and his conception of the natural right to self-preservation. Before we turn to the debate on this point, let me briefly reconstruct part of what Hobbes' infers from his definition of punishment.⁴⁵ In particular, I will focus on the difference he makes between *punishment* and an *act of hostility*.

⁴⁰ *Ibid.*, p. 87.

⁴¹ *Ibid.*, p. 79.

⁴² *Ibid.*, p. 87.

⁴³ It is important here to note the difference that Hobbes makes, in this chapter, between Right and Law. He writes, "A Law of Nature (*lex naturalis*) is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved. For though they that speak of this subject use to confound *jus* and *lex* (*right* and *law*), yet they ought to be distinguished, because Right consisteth in liberty to do or to forbear, whereas Law determineth and bindeth to one of them; so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent" (*Ibid.*, p. 80).

⁴⁴ *Leviathan*, p. 204.

⁴⁵ It should be mentioned that Hobbes considers two different kinds of punishment: divine and human. As it pertains to the latter, Hobbes argues that these might be "either *corporal*, or *pecuniary*, or *ignominy*, or *imprisonment*, or *exile*, or mixed of these" (*Leviathan*, pp. 206-210).

As just mentioned, any activity undertaken by public authority which does not aim at making the subject who has “transgressed the law” better “disposed to obedience” is not punishment. More specifically, Hobbes writes that “all evil which is inflicted without intention or possibility of disposing the delinquent (or, by his example other men) to obey the laws is not punishment, but an *act of hostility*.”⁴⁶ Hobbes provides another example in which he clearly distinguishes between *punishment* and war (as an *act of hostility*). He writes that “harm inflicted upon one that is a declared enemy falls not under the name of punishment” precisely “because they were never subject to the law, and therefore cannot transgress it.” However, it is also possible that this applies to those who “having been subject to it [i.e the law] and professing to be no longer so, by consequence deny they can transgress it.” In this case, Hobbes argues, “all the harms that can be done to them must be taken as *acts of hostility*.”⁴⁷ It seems that in the case of punishment, the subject is still a proper subject — that is, punishment entails a relation of *elements* that are *internal* to the body politic.

Hobbes distinguishes these intra-state evils (i.e. punishment) from evils inflicted in the case of war — that is, in the case of enemies of the state which either never were, or *are no longer*, subjects of the state. In the latter situation, war ensues, and the state is in a relation of a kind of state of nature with the warring “subject.” This implies a relation between body politic and an *external* element. But is it not the case that the “subject” of punishment still maintains its natural right to self-defense? Would this not entail that the two (i.e. the state and this “subject”) find each other in a state of nature? That is, in a situation in which force meets force and no higher sovereign can decide to settle the issue? How are we to understand the difference between *punishment* and the *act of hostility*? This is the tension that constitutes the supposed antinomy of Hobbes’ conception of punishment. Yates states it thus:

“(…) the purported identification of the right to punish with the natural right to perpetrate violence exposes the failure of establishing punishment as a juridical institution. The institution of punishment, which is supposed to be an integral institution of the commonwealth, is an institution of war—it is an institution whose *modus operandi* exists external to the commonwealth.”⁴⁸

⁴⁶ *Ibid.*, p. 204.

⁴⁷ *Ibid.*, p. 205. My emphasis.

⁴⁸ Yates, p. 26.

IV. Punishment: within and outside the state

One of the earlier reconstructions of Hobbes' theory of punishment can be found in Mario A. Cattaneo's 1965 essay "Hobbes theory of punishment."⁴⁹ In general, Cattaneo is interested in characterizing Hobbes' view of punishment as proto-utilitarian. More specifically, he argues that Hobbes's account is a liberal account of punishment, as he seeks to wrestle Hobbes away from claims of Absolutism — precisely by bringing him closer to the positions of Beccaria, Montesquieu and Bentham.⁵⁰ For Cattaneo, the aforementioned tension in Hobbes' corpus is made explicit in the theory of punishment recorded in the *Leviathan*. More specifically, while staging the diverging characterizations of Hobbes' corpus by Norberto Bobbio and Leo Strauss, Cattaneo finds in Hobbes "a discrepancy between his theory of sovereignty and his conception of the basic and primary character of the natural right to self-preservation."⁵¹ This discrepancy is traced, as mentioned above, in Hobbes' account of the death penalty. Cattaneo stages Norberto Bobbio's argument in *Legge Naturale* in the following manner,

"Bobbio's view is that in this case two equal and opposite rights have clashed, this being explained by the fact that the covenant has been broken, so that the subject and the sovereign have reverted to the state of nature, in which the stronger will win."⁵²

Bobbio therefore defends the "traditional" account of Hobbes' theory of punishment. That is, he defends the view that in the case of the death penalty the sovereign and the "subject" have "reverted to the state of nature." The right to punish is thereby both external and internal to the social contract. This can be evidenced in Hobbes' argument that the subject cannot "give up" its natural right to self-preservation. That is, it still maintains a right to resist the sovereign's punishment. As such, the right to punish is no mere "gift" of subjects. Where, then, does this right come from? This is, once again, Hobbes' question (i.e. from "what door" does it enter?).

⁴⁹ Cattaneo, Mario A. "Hobbes's Theory of Punishment." *Hobbes Studies*, by Keith M. Brown, Blackwell, 1965, pp. 275–297.

⁵⁰ Cattaneo writes, " I am persuaded that his attachment to the principle of certitude of the law, his conception of the purpose and function of punishment and his attitude to the death penalty and torture do in fact constitute the basic premises for a liberal theory of criminal law" (*Ibid.*, p. 297).

⁵¹ *Ibid.*, p. 293.

⁵² *Ibid.*, p. 292.

Some commentators have argued that the right to punish comes from the state's (as a *person*) own *natural right to self-preservation*. This would seemingly relegate the relation between the subject of punishment and the sovereign to be akin to that of the state of nature: two bodies in a state of war. This would imply that the right of punishment is undertaken *beyond* the contract (ie in a state of war). In this sense, punishment entails a relation between the sovereign and an *external* body. In some sense, this is consistent with Hobbes' statement that punishment should serve as a "future-good"—which can be read as a *reincorporation* into the state that entity who has transgressed the law and now finds himself to be in a war with the state.⁵³

Interestingly, this apparent antinomy—where Hobbes' theory of punishment seems to be entail a relation that is *both* within and outside the body of the Commonwealth—parallels our reading of Hobbes' "nerves" in the body natural as a metaphor for punishment in the body politic. In particular, if we follow the use of the metaphor in which the nerves act as a *mediating* element between the body politic and an *external* object (perhaps no longer a "subject" proper), it seems that the subject of punishment is now *beyond* or *outside* the body politic — that is, it is in a relation of war with the state.

At first sight, this reading seems inconsistent with both: (1) the impossibility of punishment in the state of nature and (2) the explicit distinction Hobbes makes between *punishment* and the *act of hostility*. However, while Hobbes affirms that either a law must have been transgressed, or the subject was never subject to the law to begin with, this relation of punishment is still between a "public authority" and a "subject." What seems to matter for Hobbes is the possibility that the subject must be incorporated back *into* the body of the Commonwealth. That is, in his future-oriented account of punishment, Hobbes is concerned that the subject — even if temporarily in a "state of war" with the state — may be "better disposed to obedience" in some *future*. This emphasis on the future is not only a demarcation from retributive punishment. It may also be read as a temporal account of what might be the *mediating* function of

⁵³ Yates summarizes the antinomy of the traditional view in the following manner: "According to the tradition, the grant of the right to punish is vitiated by the retention of the right to resist violence. It is in response to an antinomy—an incompatibility between two equally plausible claims—within the social contract between subjects granting the sovereign the right to punish and subjects retaining the right to resist violence that the tradition understands Hobbes to reject the former" (p. 233).

punishment — to bring “back” the subject of punishment as a subject of the state. As such, it seems consistent to hold the view that, even if temporarily, the subject of punishment is no longer a subject proper, and must be punished to become, once again, a proper subject. In this instance, the account of punishment that Hobbes gives us can be understood as being a *mediation* between the *internal* elements of the body politic and an *external* body. This is the first use of the metaphor of the nerves. The second use that Hobbes gives the nerve metaphor -which also emphasizes the *mediating* function of the nerves but now between *inward* elements of the body politic- seems more consistent with the view that the subject of punishment is never actually expunged from the body of the state as such. However, as Cattaneo points out, and as Bobbio also seems to agree with, it would be difficult to make this consistent with the subject’s inalienable right to self-preservation. Now, while not “resolving” the tension, Hobbes’ metaphor for punishment seems to surface the relations of Hobbes’s sovereign justification for punishment. Punishment -and therefore sovereignty itself- is both *external* and *internal* to the state. It is both a natural and an “artificial” right. The polysemy of the metaphor allows Hobbes to dissolve the supposed antinomy made explicit by the “traditional” account of his theory of punishment without relegating punishment to being solely within the state (as the “revisionist” account tends to do by elaborating Hobbes’ theory of authorization).

Before I conclude, let me trace a line of demarcation with Cattaneo’s attempt to read Hobbes as a precursor to liberal utilitarian theories of punishment. Cattaneo argues that Hobbes’ question in his definition of punishment -the certain hesitation that gives him pause- is an attempt to set a certain limit to the sovereign, a certain “limit to its absoluteness.” For Cattaneo, this thereby paves “the way for Beccaria” and for liberal criminal law.⁵⁴ Cattaneo’s reading opens the way for the kind of progressive liberal penal reform in which the sovereign “right” to the death penalty is dialectically overcome by Bentham’s panopticon. That is, Cattaneo’s emphasis on Beccaria’s definition of the death penalty as “the war of a whole nation against one citizen” seems to displace the death penalty for the prison without questioning the ground of sovereignty itself. Therefore, the tension in Hobbes’ theory of punishment demonstrates a tension in sovereignty itself—given that punishment is one of the sovereign’s

⁵⁴ Cattaneo, “Hobbes’s Theory of Punishment”, pg. 293

“essential” rights.⁵⁵ The vacillation in the justification of punishment is therefore a vacillation in the foundation of sovereignty. As the metaphors of Hobbes’ justification punishment shows, beyond the supposed antinomy of the two aforementioned tendencies, the sovereign must found its right to punish beyond the social contract while at the same time also be bound by such a contract. Reason, perhaps Hobbes himself, will have us forget such metaphors which unveil the certain groundlessness of sovereignty itself. Punishment is nothing more, and nothing less, but the very practice of sovereign power. Beyond “mere words,” Hobbes reminds us, lies “the sword.” As such, far from attempting yet another twist of the screw that fastens the machinery of sovereignty, we have attempted to inhabit sovereignty’s cracks, and tracked the circulation of its forgotten metaphors, which being metaphors, are as groundless as the state’s sovereign reason.

⁵⁵ *Leviathan*, p. 115.

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