

Liberty and Insecurity in the Criminal Law: Lessons from Thomas Hobbes

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Abstract In this paper, I provide an extensive examination of the political theory of Thomas Hobbes in order to discuss its relevance to an understanding of contemporary issues and challenges faced by criminal law and criminal justice theory. I start by proposing that a critical analysis of Hobbes's account of punishment reveals a paradox that not only is fundamental to understanding his model of political society, but also can offer important insights into the preventive turn experienced by advanced liberal legal systems. I then suggest that the main importance of an analysis of Hobbes's theoretical framework lies in how it reveals an inextricable and problematic link between individual autonomy and political authority in the normative conception of the modern liberal state, grounded on the notion of insecurity. By exploring how legal scholars have recently engaged with aspects of this problematic in criminal law and punishment posed by Hobbes's work, I argue that the paradox found in punishment is such that it both legitimates the criminal law and undermines its normative aspirations, particularly the possibility of securing individual liberty against the power of the liberal state.

Keywords Punishment · Hobbes · Liberty · Insecurity · Criminal law · Political theory

1 Introduction

To speak impartially, both sayings are very true:
that *man to man is a kind of God*;
and that *man to man is an arrant wolf*.¹

¹ T. Hobbes, *Man and Citizen* (Indianapolis: Hackett Publishing, 1991), 89.

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There is something about the way in which we think about law that is inextricably related to conceptions of individual autonomy and liberty. The idea of the free individual stands at the core of the liberal normative framework and arguably represents the starting point of its modern history, theorised in legal and political thought out of the need to re-imagine political society and authority in a way that could break with the old traditions and hierarchies, and provide the necessary basis for the establishment of a new social and moral order.² Moreover, the primacy of individual justice is largely seen as the main feature of a modern and fair system of criminal law and punishment. This centrality is not only a fundamental feature of the normative framework of criminal law, but also one of the main conceptual foundations for an understanding of the current preventive turn³ in Anglo-American law, where developments in criminal law and justice have been interpreted as posing a substantial challenge to this framework, which by its turn has led many criminal law scholars to argue that the criminal law is undergoing a crisis of legitimacy.⁴

The political theory of Thomas Hobbes is an important starting point from which to examine the normative importance of individual liberty to modern political societies, as well as its relation to liberal legal systems.⁵ As the first modern political theorist to advance a model of society based on the liberty and equality of individuals and on the importance of a formal system of civil laws enacted and enforced by political authority for the security of socio-political relations, Hobbes's work arguably laid down foundations that deeply influenced the long tradition of political theory that followed it, including liberal political theory. However, assessing the precise nature and value of such contribution has proven to be no easy task. The diversity of interpretations given to Hobbes's work is notably remarkable; Hobbes has been considered anything from one of the founders of the liberal tradition to one of its greatest enemies, a staunch defender of absolutism and arbitrary rule. Hobbes's relation to the liberal tradition, together with the range of interpretations regarding the precise value which its theory has with regards to it, suggests to me that his theory is particularly useful to examine the extent to and the manner in which both individual freedom and authoritarian government are connected to the conceptualisation of the modern state, and the contemporary challenges underpinning its penal system.

My main argument in this paper is that the current state of insecurity predicated by the preventive turn follows a Hobbesian logic, but that this logic does not necessarily break away from or even compromise the liberal framework of individual

² Cf. C. Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

³ By 'preventive turn,' I mean the shift largely identified in criminal justice towards crime prevention, resulting in an increasing concern towards security and an expansion of the capacity of the state to interfere with individual liberty in the name of its protection. Cf. G. Hughes, *Understanding Crime Prevention: social control, risk and late modernity* (2000); P. Ramsay, *The Insecurity State* (Oxford: Oxford University Press, 2012), ch. 1; and more generally the essays in A. Ashworth, L. Zedner, P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).

⁴ Cf. A. Ashworth, L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy*, 21–51; A. Ashworth, L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014); R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds.), *The Boundaries of the Criminal Law* (New York: Oxford University Press, 2010); R. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007).

⁵ Cf. the references discussed throughout this paper, and more generally D. Dyzenhaus, T. Poole (eds.), *Hobbes and the Law* (Oxford: Oxford University Press, 2012).

responsibility and justice—at least not in the way that is commonly proposed in recent scholarship. Instead, I suggest that an analysis of Hobbes’s work indicates that the liberal promotion of individual justice and the neoliberal need for preventive and authoritarian measures both potentially stem from the same conception of individual liberty and autonomy. This problematic ambivalence in the individualism which lies at the core of liberal law is evident in Hobbes’s work, so that, as Alice Ristroph indicated, ‘Hobbes’s account of criminal law and punishment offers broader lessons about the promise, and limits, of liberalism.’⁶ In this article, I present an investigation of these lessons.

Hobbes’s theoretical model reveals and magnifies the basic assumptions behind the criminal law’s role as an instrument of social order, as well as the influence that this role exerts over the need in liberal society to preserve and justify punishment. His conceptualisation of human nature as intrinsically insecure and in perennial need of reassurance; of political society as the only solution to this insecurity; and of political power as an indispensable condition for the establishment and preservation of society is deeply embedded within the role played by criminal law in the liberal social order. This identification, in turn, sheds some light upon the model of society which lies at the core of contemporary criminal law’s normative justification. The way in which Hobbes connects all these elements with and through his account of punishment, highlighting its central place within political society, provides a unique theoretical model through which to examine the challenges posed by the preventive turn.

In the first part of this paper, I address the issue of insecurity in legal subjectivity, delineating and discussing the implications of the paradox contained in Hobbes’s account of punishment. I look at how this paradox is a reflection of an intrinsic logic within Hobbes’s political theory, which engenders a conceptual separation between the subjectivity of those who follow and respect the law, and that of those whose agency reaches beyond its boundaries. This fissure in the law’s relation with its subjects compromises the justification of punishment, but it paradoxically also constitutes the very reason punishment is seen as necessary in the first place, representing the main motivation behind the authority of the state in Hobbes’s model of society.

In the second part, I explore this model, which involves the main elements in Hobbes’s political theory. I examine Hobbes’s conception of human nature and the way in which it grounds the passage from the state of nature to political society, in order to argue that the endemic insecurity found in the natural condition of mankind implies that the state of nature is never fully transcended, instead remaining at the core of Hobbes’s political society and constituting the main basis for crime and the need for punishment, as well as the primacy of political authority over individual autonomy and liberty. In the third and final part, I discuss the influence that Hobbes’s logic carries in contemporary criminal law, and how the paradox found in punishment is reflected in the contemporary ambivalence towards individual liberty displayed by the preventive turn. I conclude by stating that a critical examination of Hobbes’s influence in modern and contemporary legal thought is an indispensable step towards an understanding of the current crisis of legitimacy in the law, as well as the possibility of moving beyond it.

⁶ A. Ristroph, ‘Criminal Law for Humans’ in D. Dyzenhaus, T. Poole (eds.), *Hobbes and the Law* (Oxford: Oxford University Press, 2012), 97–117, 98.

2 The Paradox of Punishment

If Hobbes's political conclusions are taken as a starting point, it is difficult to think of him as anything other than a defender of absolutism, let alone as one of the founders of liberalism⁷ and 'originator of modernity.'⁸ But Hobbes was more nuanced a theorist, and his postulates more thoughtful and influential, than his staunch defence of absolute authority would suggest. Indeed, Hobbes 'is often credited as inventing the very idea of the modern state,'⁹ understood as a political community concerned with upholding peace and security through law and grounded on the consent of its citizens. Furthermore, the notion that political authority is necessary for the maintenance of the principles and liberties of civil society is a corollary not only of modern societies in general, but also of liberal societies in particular.¹⁰ The relation between Hobbes's political theory and the premises and institutions of the modern state is nowhere clearer than in his account of punishment and criminal law, an aspect of his work that has received surprisingly little attention over the years, in spite of its centrality to his political paradigm as a whole.

Hobbes thought very carefully about punishment and wrote extensively about the substantive content of the criminal law, even criticising jurists of his time such as Edward Coke in his *Dialogue on the Common Laws of England*.¹¹ His account of the form and content of the criminal law advanced many principles and rules that remain at the core of criminal legal theory and doctrine to this day, from a prohibition on ex post facto laws and the need for proportionality between the seriousness of crime and the degree of punishment, to the need to uphold the principle of legality and for trial and conviction to precede punishment.¹² The modern quality of these aspects of Hobbes's conception of the role of punishment in society highlights the importance of examining the nuances in his thinking and their implications to the general outlook of his political theory. In light of this, 'the inattention to Hobbes's account of punishment is regrettable.'¹³

It is particularly regrettable that so little attention is given to the fact that Hobbes's framework, 'both familiar and strange'¹⁴ to modern criminal law theory, displays an unsettling ambivalence with regards to the justification for punishment. For Hobbes, punishment seems to be both necessary and problematic. The necessity of punishment is clear from the very purpose of the state, as individuals only agree to forgo their natural liberty and subject themselves to the commonwealth and its law with 'the foresight ... of getting themselves out from that miserable condition of war, which is necessarily consequent ... to the natural passions of men, when there is no visible power to keep them in

⁷ Cf. J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986); C. B. McPherson, *The Political Theory of Possessive Individualism* (Ontario: Oxford University Press, 2011).

⁸ L. Strauss, *What is Political Philosophy?* (Chicago: University of Chicago Press, 1959), 172.

⁹ I. Loader, N. Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007), 42.

¹⁰ Ibid. Cf. also M. Oakeshott, 'Introduction to Leviathan' in M. Oakeshott, *Hobbes on Civil Association* (Indianapolis: Liberty Fund, 1975), 1–79, 67: 'Indeed, Hobbes, without being himself a liberal, had in him more of the philosophy of liberalism than most of its professed defenders.'

¹¹ T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Chicago: University of Chicago Press, 1972).

¹² Cf. Ristroph, 'Criminal Law for Humans,' 97–100; cf. also Hobbes, *Leviathan*, 193–194.

¹³ A. Ristroph, 'Respect and Resistance in Punishment Theory' (2009) 97 *California Law Review*, 601–632, 606.

¹⁴ Ristroph, 'Criminal Law for Humans,' 97.

awe, and tie them by fear of punishment to the performance of their covenants, and observation of [the] laws of nature.’¹⁵ Punishment is therefore essential to reassure the members of the community that everyone will either respect the boundaries set by the law or be punished for breaching them, and this reassurance is a fundamental condition of the commonwealth.

But, while it appears that the state depends on the proper enforcement of the law for its preservation, it is also clear that, for Hobbes, individuals must subject themselves to it voluntarily. Like most liberal theorists, Hobbes grounded the legitimacy of political authority on the consent of its subjects: individuals establish the commonwealth through a covenant in which they consent to lay down their right to self-government, effectively transferring it to the sovereign. However, the voluntary nature of this exchange generates a problem for punishment, as Hobbes postulates that an individual only consents to such transference of right

in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man [*sic*], the object is some good to himself. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force *The same may be said of wounds, and chains, and imprisonment* And lastly the motive, and end for which this renouncing, and transferring of right is introduced, is *nothing else but the security of a man’s person*, in his life, and in the means of so preserving life, as not to be weary of it.¹⁶

Since security is the main reason individuals establish the state in the first place, they cannot possibly be expected to allow anyone, much less the sovereign, to do anything that could put their own lives and security at risk. For Hobbes, ‘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.’¹⁷ But, if the right to punish inevitably involves the sovereign’s right to ‘lay violent hands’ upon anyone who breaks the law, how could any of the subjects of the commonwealth possibly authorise it? There is an obvious tension between these two aspects of Hobbes’s theory; remarkably, this is a tension of which Hobbes himself was keenly aware. He highlights its existence right after the definition of punishment in *Leviathan*, when he states that ‘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.’¹⁸ His answer is as perplexing as it is illuminating:

It is manifest therefore that the right which the commonwealth ... hath to punish, is *not grounded on any concession, or gift of the subjects*. But I have also showed formerly, that before the institution of commonwealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was

¹⁵ Hobbes, *Leviathan*, 111 (emphasis added).

¹⁶ *Ibid.*, 88–89 (emphasis added).

¹⁷ *Ibid.*, 205.

¹⁸ *Ibid.*

not given, but left to him, and to him only; and (excepting the limits set him by natural law) as entire, as in the condition of mere nature, and of war of every one against his neighbour.¹⁹

What is most perplexing about Hobbes's solution to the problem of punishment is his admission that the right to punish is not directly authorised by the members of the commonwealth. Indeed, such is the apparent incompatibility between punishment and individual self-interest for Hobbes that in his model individuals always retain the right to resist punishment. So although the sovereign's power to punish is indirectly grounded on the consent of the citizens, this power in itself is not an ordinary part of the social contract—even though it is one of the necessary conditions for its possibility. Punishment is both indispensable for the integrity of political society and an act of violence upon the individual who is punished, 'an evil inflicted by public authority' in response to 'a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience.'²⁰

Thus there appears to be an intrinsic self-contradiction in Hobbes's account of punishment, a paradox that threatens to undermine the legitimacy of the institution and even the very reason the commonwealth is established, for 'while the Sovereign is supposed to protect men from the state of nature, the Sovereign's primary tool for achieving this is itself a weapon of war and a logical conduit back into the natural state.'²¹ Hobbes's perplexing honesty about the place of punishment in his theory reveals that the power to punish is not entirely in harmony with the principles of political society, being rather reminiscent of the violence of the state of nature, from which individuals sought to escape in the first place. This is rather 'surprising in its implication that punishment, while necessary, is at best imperfectly legitimate,'²² and raises the possibility that, ultimately, 'the institution of the Commonwealth is a self-defeating proposition.'²³

Both Alan Norrie and Ristroph have deployed this internal tension in Hobbes's account of punishment as a potential challenge to the role of criminal law in contemporary society, seeing it as a manifestation of a conflict between the respect for individual autonomy and the need for political authority which lies at the heart of the socio-political landscape of modernity, and that threatens to compromise the legitimacy of the criminal law. But, if this paradox only hinders the effectiveness of punishment, it would be difficult to explain why Hobbes identified a gap in his theory and still decided not only to preserve it, but also to emphasise it. There must be something more to Hobbes's normative framework that can clarify how punishment can remain so important in spite of being so problematic. A possible answer can be found in an analysis of the specific dynamics operating within the relationship between the state and its subjects—especially those subjects who disobey the law.

2.1 The Nature of the Criminal

The treatment of the criminal in Hobbes's theoretical framework raises interesting reflections for contemporary studies on punishment. For Ristroph, the main critical potential within Hobbes's account of punishment lies in the notion that individuals not only

¹⁹ *Ibid.*, 205–206 (emphasis added).

²⁰ *Ibid.*, 205.

²¹ A. Norrie, 'Thomas Hobbes and the Philosophy of Punishment' (1984) 3 *Law and Philosophy*, 299–320, 308.

²² Ristroph, 'Criminal Law for Humans,' 98.

²³ Norrie, 'Thomas Hobbes and the Philosophy of Punishment,' 307.

do not authorise the sovereign's power to punish, but are also entitled to actively resist it. 'If the state has legitimate authority to punish, how can the subject have a right to resist?'²⁴ For, although it is little more than a 'blameless liberty' which does not incur any obligation on the state to respect it, 'even if unenforceable, the right to resist punishment seems to undermine any account of the justification for punishment.'²⁵ Ristroph uses the disruptive potential within the right of resistance in Hobbes's theory to suggest that, if taken seriously, it may indicate 'that punishment cannot be fully reconciled with the criteria for political legitimacy set forth in modern liberal theory. Instead, punishment creates a dilemma for liberals: physically coercive punishments may be socially necessary, but they are also acts of violence, persistent traces of the rule of the stronger in a system otherwise committed to rule by consent.'²⁶ Awareness of this problem, by its turn, should encourage us to be more cautious with regards to punishment, and to strive to treat criminals with more respect.

Ristroph's account of the right to resist punishment and its implications for the legitimacy of the criminal law is compelling. However, although this aspect of Hobbes's theory does suggest that the justification for punishment in liberal society might be problematic, it did not pose a problem for punishment being one of the most important elements of Hobbes's model of political society, in spite of its liberal aspects.²⁷ The reason for this is arguably that this conflict between the right to punish and the right to resist, at the same time as it creates difficulties for a normative justification for punishment, engenders a strong *motivation* for the state to punish. Ristroph's work is very helpful in examining how this other dimension of the paradox of punishment operates.

According to Hobbes's solution to the question of punishment, the sovereign's right to punish is akin to the right of nature, the right to self-government that every individual possesses before the establishment of the commonwealth, based on the essential right to self-preservation. As discussed below, the main reason the state of nature is rife with insecurity is that the self-interests of individuals are constantly clashing, and the absence of common judgment entitles individuals to pursue their own self-interest to the ultimate consequences, generating endemic potential conflict. In order to stop this cycle of violence, individuals relinquish their right to self-government for the state to exercise in the name of all: 'an individual's right to do violence as he judges necessary for his own security becomes, in political society, the sovereign's right to punish.'²⁸ Punishment is thus analogous to the natural liberty an individual possesses to use one's judgment according to the requirements of one's preservation, which necessarily includes 'the natural right to use violence pre-emptively, even against someone who does not pose an imminent threat.'²⁹

The need to care for one's own security therefore implies the right to use violence for purposes other than direct self-defence, and the criminal law can be seen as an exercise of this right in the name of the commonwealth. From this perspective, the right to punish is not something reciprocal, given to the sovereign by individuals' subjection to its authority, but a consequence of the need to protect the commonwealth and its members against crime.

²⁴ Ristroph, 'Respect and Resistance,' 603.

²⁵ Ibid.

²⁶ Ibid., 604.

²⁷ These aspects of Hobbes's theory are discussed below.

²⁸ Ristroph, 'Criminal Law for Humans,' 110.

²⁹ Ibid.

It is the potential *dangerousness* of crime,³⁰ not the exchange of rights and duties in the social contract, which grounds the right to punish. Punishment is thus not within the political covenant, but rather a condition for its establishment and maintenance, and ‘a manifestation of the *sovereign’s* [as representative of the commonwealth] right to self-preservation.’³¹

This analogy between the sovereign’s right to punish and an individual’s natural right to self-preservation may seem controversial, particularly since the sovereign as an entity only exists after the establishment of the commonwealth, so that the sovereign would not possess any right of nature to begin with. Ristroph tries to ‘alleviate this tension’ by proposing that the state of nature should not be understood as a reference to some pre-political historical moment, but rather as a ‘term of art’ referring to ‘the always-possible situation in which political authority is absent.’³² In these terms, the condition of the state of nature can always be recreated under particular circumstances, so that punishment would occur in what she calls ‘a recurrent, specific state of nature, not an original or universal one.’³³ In this specific state of nature, the unity of political society is absent, and sovereign and criminal face each other as two natural subjects, both aiming towards their own self-preservation. Ristroph highlights that, from this perspective, it becomes clear that punishment does not appear to the criminal as the expression of an authorised, legitimate political authority, but rather as ‘a violent threat to safety and freedom,’³⁴ itself not very different from the crime against which it reacts. It would then be possible to conclude that ‘the criminal has as much right to resist punishment as the sovereign has to impose it,’³⁵ and thus make it harder for us to ‘pretend that we punish prisoners for *their* benefit rather than our own.’³⁶

But the violent character of punishment is not the only thing that Ristroph’s interpretation elucidates. For, within this framework, although punishment operates in a specific state of nature where everyone involved has an equal claim to self-preservation, it is also evident that it was the crime, not the punishment, which led to this state. Punishment is thus presented as a *reaction* to a specific state of nature—a rupture in the peace and security of political society—generated by crime. Hobbes’s peculiar characterisation of the right to punish as a manifestation of the state’s right to self-preservation invests punishment with a normative dimension which appears to legitimate it, even if imperfectly. The fact that individuals do not authorise the sovereign to punish them does not eliminate or weaken the notion that those who commit crimes are breaching the terms of the social contract and may thus be endangering the community tied to it. The idea that crime occurs in political society, and that it potentially threatens this society’s existence, seems to provide punishment with all the legitimisation it needs.

Hobbes’s acknowledgment of the right of resistance does not appear to diminish the motivation to punish either for, when compared to the importance he attributes to

³⁰ By linking crime and dangerousness here, I am not implying that all crime is always dangerous to political society; indeed, the actual dangerousness of crime depends on a number of factors, including the particular socio-political circumstances in which it occurs. What I highlight is that the image of crime is inherently linked to a notion of dangerousness, on which the legitimacy of punishment relies.

³¹ Ristroph, ‘Respect and Resistance,’ 613.

³² Ristroph, ‘Criminal Law for Humans,’ 112.

³³ *Ibid.*

³⁴ Ristroph, ‘Respect and Resistance,’ 619.

³⁵ Ristroph, ‘Criminal Law for Humans,’ 112–113.

³⁶ Ristroph, ‘Respect and Resistance,’ 621.

punishment, without which ‘there can be no security,’³⁷ a blameless liberty to resist gives individuals little cause for consolation. This is because the notion that punishment occurs in a specific state of nature emphasises that a crime can set the criminal apart from the political community of the state, and effectively against it. Hobbes’s logic appears to indicate that crimes, up to the extent of their wrongfulness and harmfulness, have the capacity to distance individuals from society and present them as *dangerous others*. In this sense, at the same time as the right to resist reveals the violent nature of punishment, it also emphasises how the criminal’s liberty and self-preservation, in the moment of punishment, finds itself at odds with that of the state, in conflict with it. Most importantly, by portraying the right to punish as analogous to the right of liberty, which it itself based on the right to self-preservation, Hobbes invests punishment with the same aura of blamelessness ascribed to natural liberty, justifying punishment on the basis of the self-preservation of the commonwealth.

There are two important implications that this analysis of the right to punish as something akin to the right of nature brings to the role of punishment in society. The first is that the possibility that crime can give rise to a specific state of nature suggests that the reassurance provided by the state and its sovereign against the insecurity of human nature in Hobbes’s work is neither permanent nor inviolable. Instead, crime represents for Hobbes the always-present possibility that the state of nature may creep back into the midst of political society. The second is that, as a result of the vulnerability of the security engendered by the social contract, there appear to be two qualitatively different forms of interaction between individuals and the political authority in his society: one comprising the peaceful relation between citizens and the laws of the community, and another representing the violent conflict enacted through crime and punishment.

Hobbes’s account of punishment thereby exposes ‘a fissure between the law itself and the remedies for its violation.’³⁸ What this rupture does with regards to the role of punishment in society, however, is not to compromise its legitimacy by raising questions as to its justification, but rather to reinforce the socio-political motivation for punishment in lieu of the difficulties in normatively justifying it. The real dilemma that Hobbes’s political theory presents for liberals is therefore not that ‘physically coercive punishments may be socially necessary, but they are also acts of violence;’³⁹ instead, it is that even though punishment is rife with violence and clearly at odds with the aspirations of liberal society, it is still posed and maintained to be socially necessary. Likewise, the main problematic arising from the paradox of punishment is not that it constitutes a challenge for the prominence of punishment in contemporary liberal societies, but rather that it constitutes one of its roots.

2.2 Liberties in Tension

At the core of Hobbes’s political theory, there is the idea that human relations are naturally fraught with insecurity. Without a common authority to maintain the law and punish transgressions, it seems virtually impossible for individuals to trust each other.⁴⁰ Individual

³⁷ Hobbes, *Leviathan*, 87.

³⁸ Ristroph, ‘Criminal Law for Humans,’ 115.

³⁹ *Ibid.*, 604.

⁴⁰ For a comprehensive discussion of the role of diffidence, or distrust, in Hobbes’s theory, cf. A. Ristroph, ‘Hobbes on “Diffidence” and the Criminal Law’ in M. D. Dubber (ed.), *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014), 23–38.

liberty is only appropriately secured with the establishment of a commonwealth, as the social contract unites the will of its participants around a common interest, which is then preserved by the sovereign. Within this framework, relations between human beings are fundamentally different in these two moments: individuals in the state of nature pose a continuous threat to each other, while those in political society—since they partake in a common, public interest—display a peaceful and trustworthy exercise of liberty which is therefore protected and promoted by the state.

While this contrast is presented by Hobbes and commonly understood to reflect a rather persistent shift in socio-political conditions, the passage from the state of nature to political society, the paradox of punishment indicates that political relations in society are not nearly as stable as it might have appeared at first sight. This is mainly because these relations depend on certain normative expectations held with regards to the attitudes that individuals have towards each other. In the state of nature, individuals are expected to fully exercise their right to self-preservation regardless of the danger such exercise might pose to the liberty of others, while in political society, citizens are expected to accommodate their liberty to the limits established by the law, so that their autonomy poses no threat to others. Since it is precisely the juridical boundaries of liberty that are forsaken by the criminal's actions, under this logic, criminals effectively behave not as legal subjects who belong to the political community, but as dangerous subjects who put themselves in a state of nature with (or rather against) the state—a threat that must be regulated by the criminal law and minimised by punishment.

The aforementioned fissure between the law and the remedies for its violation is therefore a reflection of a fissure in the law's representation of its subject, caused by a radical normative conceptualisation of individuals' attitudes towards the law. It is this conceptual distinction between those who obey the law and those who break it, more than anything else, which allows Hobbes to explicitly preserve the apparent paradox in his theory of punishment. While Hobbes does not expect individuals to authorise the sovereign to punish them and even concedes that they have a right to resist punishment, he expects that those who will actually be punished are those who have placed themselves, through their crimes, outside of the social compact. Meanwhile, most members of the commonwealth are expected to see their liberty in harmony with the public interest, so that Hobbes's citizen, although not actually *giving* the sovereign the right to punish, acknowledges the necessity and legitimacy of punishment to the point that the citizen 'obligeth himself [*sic*], to assist him that hath the sovereignty, in the punishing of another.'⁴¹

The tension present in punishment's logic therefore possesses a dialectic aspect, engendered by two distinct and contradictory models of subjectivity, whose political nature conditions the relations between the individual, the community and its law. It is this dialectic, first explored in modern thought by Hobbes's theory, that causes the 'impasse'⁴² found in the justification for punishment, which is reflected in contemporary models of criminal law. The ideal of individual justice maintained by most accounts of criminal responsibility legitimates punishment on the grounds that it treats individuals as rational and autonomous beings who can recognise the normative character of the law and act accordingly.⁴³ This cognitive connection between acceptance of the norm and breaking of the norm is deemed essential in order to hold the individual responsible before the law. But the capacity to obey the law—which appears inherent to an individual in political society—

⁴¹ Hobbes, *Leviathan*, 205.

⁴² Norrie, 'Thomas Hobbes and the Philosophy of Punishment,' 318.

⁴³ Cf. A. Ashworth, J. Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 23–26.

is in stark contrast with the propensity for crime commonly associated with the image of the criminal—which is much closer to the image of an individual in the state of nature, Hobbes’s natural subject. The fact that both kinds of subjectivity are inherent to the framework of criminal law, as criminal law only exists within political society but criminals behave as if in the state of nature, compromises the very conceptual distinction that erects and justifies the power of the sovereign—including its power to punish. In this sense, Norrie is right to infer that the normative validity of ‘the conception of man as a free moral agent is only tenable so long as the naturalistic conception is ‘forgotten’’⁴⁴—that is, so long as we accept that punishment can fulfil its purpose of tying individuals to the performance of their covenants.

However, as the paradox of punishment elucidates, at the same time as the natural subject is ‘forgotten’ when it comes to asserting the legitimacy of the criminal law, it remains an essential element of the logic of punishment, resurfacing whenever the state responds to crime. Hobbes thus ‘cannot resolve the contradiction that exists between his juridical conception of man, which makes the contract a possibility and gives it its moral force, and his naturalistic conception of man which threatens to undermine the essential component of Sovereign power and right, punishment.’⁴⁵ By the same token, we cannot expect his right of resistance to rescue or protect the criminal from the necessity and importance that his logic concedes to punishment. But ‘while Hobbes cannot solve this problem ..., he can at least help us understand why the problem exists.’⁴⁶ Most importantly, Hobbes’s theoretical framework can help us examine why the paradox of punishment persists, in a more repressed and pervasive way, in contemporary criminal law. For, while ‘[t]he juridical element at the heart of the Hobbesian theory of punishment is at war with what he understood to be the natural springs of human behaviour,’⁴⁷ this war is not a mere reflection of a philosophical paradox, but a necessary implication of the model of society in which this paradox is generated. What first appears as a logical problem is actually an enduring aspect of a moral order used to engender a socio-political condition in which individual autonomy needs to be permanently managed and disciplined by the state’s authority.

3 The Natural Condition of Insecurity

Before it is possible to examine to what extent Hobbes’s account of punishment reflects a persistent problem in contemporary criminal law, it is necessary to analyse it within the context of his broader political theory, and particularly in relation to his theory’s most essential feature: its individualistic conception of human nature and society. Hobbes’s theory is particularly relevant to an examination of contemporary criminal law because the way in which he conceptualises political society, both as a *reflection* of human nature and as a *reaction* against it, is the key to understanding how insecurity is intrinsic to law’s conceptualisation of its subject, and is the main motivation behind the authority of the state and the force of law. In this section, I explore how, at the heart of Hobbes’s political theory, there lays an individual who is quite autonomous when it comes to the

⁴⁴ Norrie, ‘Thomas Hobbes and the Philosophy of Punishment,’ 319.

⁴⁵ *Ibid.*, 308.

⁴⁶ *Ibid.*, 318.

⁴⁷ A. Norrie, *Law, Ideology and Punishment* (Dordrecht: Kluwer Academic Publishers, 1990), 37.

determination of personal goals, but in dire need of reassurance when it comes to social relations. Individual liberty, at the same time as it is the motor of society, is also rife with insecurity.

Hobbes's radical individualism is evident throughout his work—and nowhere clearer than in *Leviathan*, where the whole of political society is conceptualised in function of the individual, and described in individualistic terms: the commonwealth is an 'artificial man; though of greater stature and strength than the natural, for whose protection and defence it was intended.'⁴⁸ The state is for Hobbes an artificial construct, made with the specific purpose of protecting and securing its subjects, and created in their own image. Furthermore, Hobbes's 'resolutive-compositive'⁴⁹ method understands individuals as isolated entities with their own nature and purpose, and society as the direct result of their interaction. Individuals are the 'constitutive causes'⁵⁰ of society, in function of which it operates.

Aimed at understanding individuals as ends in themselves, this method 'regards individual human beings as conceptually prior not only to political society but also to *all* social interactions.'⁵¹ Individuals are thus taken to autonomously generate their desires and interests, independently of social or historical causality. In Hobbes's framework, '[t]he fundamental characteristics of men are not products of their social existence. ... Thus man is social because he is human, not human because he is social.'⁵² These human beings are predominantly guided by self-interest, acting according to their own 'exclusively self-interested'⁵³ sense of pleasure or displeasure. They are also endowed with reason. However, reason for Hobbes does not act as a hindrance to desire; instead, rationality serves self-interest by allowing individuals to deliberate on the consequences of actions and circumstances and choose the best path to satisfy their desires. 'Rationality would therefore be regarded by [Hobbes] as having instrumental value.'⁵⁴ There is a certain aspect of 'inertness'⁵⁵ in reason, in that it steers action but is not in itself the source of action.

Hobbes's individuals are therefore complex, embodied⁵⁶ beings guided both by reason and by passions, with self-interest as their driving force. Paramount to every individual's self-interest is the desire for self-preservation, and it is this desire, along with the rationality steering its pursuit, that grounds the Hobbesian conception of individual autonomy. Individuals have the liberty to govern their own lives, and for Hobbes this liberty constitutes both a fact and a norm: human beings are naturally free, and their natural freedom entitles them to pursue their own interests in any way they deem best. The highest expression of this autonomy is the right of nature, 'the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he

⁴⁸ Hobbes, *Leviathan*, 7.

⁴⁹ Hampton, op. cit., 7–8.

⁵⁰ *Ibid.*, 6.

⁵¹ *Ibid.*

⁵² D. Gauthier, 'The Social Contract as Ideology' (1977), 6 *Philosophy and Public Affairs*, 130–164, 138.

⁵³ Hampton, op. cit., 24. Cf. also D. Gauthier, 'Taming Leviathan' (1987) 16 (3) *Philosophy & Public Affairs*, 280–298, 285.

⁵⁴ Hampton, *ibid.*, 35.

⁵⁵ *Ibid.*, 16.

⁵⁶ Ristroph, 'Hobbes on "Diffidence" and the Criminal Law,' 27. For a comprehensive discussion of the importance of embodiment for an understanding of punishment, cf. A. Chamberlen, *Embodying Punishment: Emotions, Identities, and Lived Experiences in Women's Prisons* (Oxford: Oxford University Press, forthcoming).

shall conceive to be the aptest means thereunto.⁵⁷ In a philosophically controversial move,⁵⁸ Hobbes derives from a naturalistic conception of individual freedom the normative right of human beings to exercise their autonomy guided only by their own judgment. For the first time in modern history, individual autonomy and liberty acquire an important socio-political dimension.

Furthermore, human beings are not only inherently free, but also inherently equal. This equality is first displayed as one of ability,⁵⁹ from which Hobbes infers also an ‘equality of hope in the attaining of our ends.’⁶⁰ There undoubtedly is a strong emancipatory aspect in Hobbes’s postulate of natural equality, in that whatever differences there might be between individuals, for him, they possess ‘no *political* significance.’⁶¹ The conjunction of natural liberty and equality constitutes the essence of Hobbes’s state of nature, a state where all individuals have the right and the capacity to determine their own fate.

It is in the ‘natural condition of mankind’⁶² where individual autonomy is most expressive; it is also, however, where it is most insecure. Human nature is the source of both liberty and insecurity, and the right of nature is the greatest expression of one as well as the other. Since individuals have the right to do anything they deem necessary in order to guarantee their self-preservation and to pursue their self-interest, any disagreement or conflict of interests proves problematic, as all of those involved have an equal right to whatever claim they advance. As a result, ‘if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end ... endeavour to destroy, or subdue one another.’⁶³ Unhindered self-interest inevitably generates competition, and the awareness of this condition fosters diffidence, or distrust. Since individuals are naturally distrustful,⁶⁴ in the state of nature ‘there is no way for any man to secure himself, so reasonable, as anticipation; that is, by force, of wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him.’⁶⁵ Under these circumstances, the state of nature inevitably leads to violence and war.

‘Conflict is endemic in Hobbes’s world,’⁶⁶ and thus so is insecurity. This is a consequence of the ‘self-destructive character of judgment’⁶⁷—namely, as a result of Hobbes’s radical individualism, the freedom possessed by individuals leads to an incapacity for them to trust each other’s judgment, or to respect each other’s liberty. Consequently, human beings ‘have no pleasure, (but on the contrary a great deal of grief) in keeping company,

⁵⁷ Hobbes, *Leviathan*, 86. It should be stressed that the right of nature is not a right in the sense that it entails a corresponding duty on the part of others, but more in the sense of a ‘blameless liberty,’ which cannot be removed or sanctioned by others. Cf. Ristroph, ‘Respect and Resistance,’ 602–603.

⁵⁸ McPherson, op. cit., 13.

⁵⁹ ‘[T]he difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he’ (Hobbes, *Leviathan*, 82).

⁶⁰ *Ibid.*, 83.

⁶¹ Hampton, op. cit., 25.

⁶² Hobbes, *Leviathan*, 82.

⁶³ *Ibid.*, 83.

⁶⁴ Cf. Ristroph, ‘Hobbes on “Diffidence” and the Criminal Law,’ 30.

⁶⁵ Hobbes, *Leviathan*, 83.

⁶⁶ T. Poole, ‘Hobbes on Law and Prerogative’ in D. Dyzenhaus, T. Poole (eds.), *Hobbes and the Law* (Oxford: Oxford University Press, 2012), 68–96, 69.

⁶⁷ R. Tuck, quoted in Poole, *ibid.*, 69–70.

where there is no power able to over-awe them all'⁶⁸—that is, where there is no authority to reassure them.

The natural liberty and equality of individuals imbue them with the right to govern their own lives, according to their own judgment; but 'where every man is his own judge, there properly is no judge at all.'⁶⁹ This trap contained in individual liberty is, ironically, a reflection of Hobbes's emancipatory project. His 'refusal to impose moral differences on men's wants' is the main reason behind the influence exerted by his work, the essence of 'his revolution in moral and political theory.'⁷⁰ The irony is that the same liberty that frees individuals from the constraints of tradition eventually shackles them to the power of the sovereign. While the state of nature may give human beings the freedom to make their own judgements, it affords them no reassurance that their choices will be respected by others. Since every individual is free to individually make judgments and decisions, no one can accuse another of doing wrong. And, even if someone desires something that belongs to or interferes with someone else's liberty, these urges 'are in themselves no sin. No more are the actions, that proceed from those passions, till they know a law that forbids them.'⁷¹ Political authority is necessary in order to establish a standard of common judgment, to which all individuals must adhere. 'Where there is no common power, there is no law: where no law, no injustice.'⁷²

Hobbes's account of the state of nature establishes a dialectical move where absolute liberty results in a complete lack of security, which by its turn compromises the very liberty that originates it. By the same token, the conceptual independence of human beings from socio-political constraints results in an absolute dependence from the state and its sovereign authority. This dependence is unavoidable, for 'during the time men live without a common power to keep them all in awe, they are in a condition which is called war; and such a war, as is of every man, against every man.'⁷³ The lack of trust intrinsic to Hobbes's conception of liberty turns the state of nature into a state of insecurity. As a consequence, individual autonomy—when unprotected by political authority—gives individuals no reassurance, only anxiety. 'In such condition,' all there can be is 'continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.'⁷⁴

3.1 The Artificial Quality of Security

The solution to the adversities of the state of nature is to find some way to establish a standard of judgment, and a means to uphold it. As Hobbes suggests over and over throughout his work, the institution of a common authority is the way out of the insecurity of the natural condition of mankind. As it became clear, however, cooperation does not come naturally to individuals, and thus the establishment of political society must be a conscious effort, an artificial construct. The crafting of a commonwealth requires for

⁶⁸ Hobbes, *Leviathan*, 83. For a detailed and fascinating discussion of the cause of conflict in Hobbes's state of nature, see Hampton, op. cit., 58–96.

⁶⁹ T. Hobbes, *Human Nature and De Corpore Politico* (Oxford: Oxford University Press, 1994), 95.

⁷⁰ McPherson, op. cit., 78.

⁷¹ Hobbes, *Leviathan*, 85.

⁷² Ibid.

⁷³ Ibid., 84. It should be noted that for Hobbes this does not imply that individuals would always be fighting with each other: 'the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary' (ibid.).

⁷⁴ Ibid.

Hobbes two conditions, one internal and one external to its prospective members. The internal condition is for individuals to restrain their own liberty so that they refrain from invading the liberty of others; the external condition is for this restraint to be kept in check by the threat of punishment. Both conditions are necessary for, at the same time as autonomy must be respected, it must also be restricted. So while individuals themselves must voluntarily lay down their natural right through the social contract, since the insecurity of liberty arises precisely from the lack of boundaries in human nature, these boundaries must be artificially crafted.

It should be highlighted that, for Hobbes, human beings have a natural disposition to try to avoid conflict. It originates in the laws of nature, ‘qualities that dispose men to peace, and obedience’⁷⁵ endowed by reason. The problem of the state of nature is not that individuals do not seek peace; human beings are not necessarily brutes in the absence of authority. But without the reassurance of a standard of judgment that sets limits to natural liberty, peace becomes very difficult to achieve, as ‘individuals seeking self-preservation will pose threats to one another.’⁷⁶ In the state of nature, insecurity tends to escalate, giving individuals increasingly greater reasons to use their right of nature pre-emptively and violently against each other.⁷⁷ Thus while the fundamental law of nature is ‘to seek peace, and follow it,’⁷⁸ this law is qualified by the lack of trust in natural liberty, so that Hobbes’s general rule of reason is ‘that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.’⁷⁹

This rule is a true separator of waters, not only distinguishing two radically opposite forms of social behaviour—the safe pursuit of peace and the blameless pursuit of war—but also determining the ultimate frontier that divides nature from political society, brutishness from civilisation: the hope for peace, which can only be obtained through security. Since natural autonomy is the source of insecurity, security necessitates the curbing of this blameless liberty. This is the second law of nature, which rules ‘that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.’⁸⁰ Liberty must be restrained.

As human beings only transfer or renounce rights with the expectation of getting something in return, the curbing of liberty must be collective and reciprocal, and go as far as peace requires, in order to keep it ‘within the limits of peaceful competition.’⁸¹ However, ‘the laws of nature ... of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like.’⁸² These laws, ‘in the condition of mere nature ... are not properly laws,’⁸³ ‘for they are but conclusions, or theorems concerning what conduceth to the conservation and defence of themselves; whereas law, properly is the word of him, that by

⁷⁵ Ibid., 177.

⁷⁶ Ristroph, ‘Respect and Resistance,’ 608.

⁷⁷ Hobbes, *Leviathan*, 87.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ McPherson, op. cit., 95.

⁸² Hobbes, *Leviathan*, 111.

⁸³ Ibid., 177.

right hath command over others.’⁸⁴ It is the civil law that must determine the boundaries of individual liberty, for they must represent a common standard of judgment. And, in order to overcome the partiality of natural liberty, law necessitates a quality that is absent in the state of nature: authority.

The establishment of a commonwealth requires the institution of a power that is able to uphold common judgment, and reassure individuals of their security against each other’s autonomy. Without such reassurance, ‘every man will, and may lawfully rely on his own strength and art, for caution against all other men.’⁸⁵ Since in the state of nature it is the multitude and equal worth of desires that leads to insecurity, the aim of the commonwealth is to establish a political authority ‘that may reduce all their wills, by plurality of voices, unto one will: which is as much to say ... *to bear their person*.’⁸⁶ The sovereign *personifies* the members of the community, exercising the right of nature in the name and for the protection of all citizens, and thus unifying their self-interest into a single will—a *public interest*. Therefore, intrinsic to the social contract is the establishment not only of political society, but also of a standard of justice. After the restraining of individual liberty and the unification of every individual will into a common will, the social contract effectively *is* justice, and so ‘to break it is *unjust*,’⁸⁷ and thus blameworthy and deserving of punishment.

Once the commonwealth is established, there appears to be an effective transformation in the way individuals exercise their autonomy, in that it ceases to be unfettered and becomes conditioned by the public interest expressed through the sovereign’s law.⁸⁸ Autonomy is *juridified* by the social contract, being both limited and protected by the law. Furthermore, this incorporation of autonomy into legal subjectivity is deeper than a mere convenience, as it includes the assimilation of a politico-juridical form of morality, the public interest manifested in the civil law. This is arguably a reflection of Hobbes’s embodied conception of human nature: as self-interest is informed by reason and conditioned by passions, from the moment individuals feel secure under the sovereign’s aegis and subject their wills to the will of the commonwealth, their autonomy is not merely restricted, but is effectively transformed.

As discussed above, however, the juridification of autonomy is more unstable than Hobbes’s theory would superficially indicate. Even after the establishment of the normative framework of political society, individuals still are in many ways unable to fully overcome the insecurity of the state of nature. The most obvious indication of this issue is that punishment in the commonwealth is not simply an abstract threat, but a fully functional and rather pervasive aspect of the social order. The same can be said of crime, and the existence of crime poses an interesting problem for the normative justification of political society. Why is it that, even though all the conditions for individuals to behave as legal subjects are present, they keep invading each other’s liberty?

A possible answer to this question can be suggested by revisiting the natural condition of mankind. The alignment between individual autonomy and political society is mainly

⁸⁴ *Ibid.*, 106.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 114 (emphasis added).

⁸⁷ *Ibid.*, 95. Cf. Poole, ‘Hobbes on Law and Prerogative,’ 75: ‘Law gives the commonwealth its standard of right and measure of justice.’

⁸⁸ Cf. D. Dyzenhaus, ‘How Hobbes met the ‘Hobbes Challenge’’ (2009) 72(3) *Modern Law Review*, 488–506.

established through the laws of nature, but their prudential quality means that they are but ‘convenient articles of reason, upon which men [*sic*] may be drawn to agreement.’⁸⁹ Reason conditions human behaviour, but primarily as a tool to assist individuals in their pursuit of self-interest, itself guided by passions. Beyond reason, therefore, political society also relies on ‘passions that incline men to peace.’⁹⁰ These, according to Hobbes, are ‘fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them.’⁹¹ It slowly becomes evident that there is more to the social contract than pure rationality and the repudiation of the insecurity of the state of nature. Political society also involves a particular exchange, which privileges some interests over others.

Although the security provided by the state clearly has some common appeal to all individuals (as they all fear death), it is especially desirable to those who, beyond self-preservation, also pursue a commodious living—and even more appealing to those who have actual hopes of obtaining it. Thus while the juridical boundaries of autonomy may be deemed necessary for peace and somewhat beneficial to all individuals, it can only fully *satisfy* some of them. There will likely be many for whom the sovereign’s law may appear excessively restraining, hindering their desires, and for whom the protection they receive in exchange may feel like a poor bargain. And, as Hobbes anticipated, human beings only pursue peace as far as they have hopes of obtaining it. If the juridification of autonomy depends on embodied satisfaction as well as on rational deliberation, it is nowhere nearly as permanent or uniform as the shift from state of nature to political society implies. Moreover, the notion that the self-interest of some individuals is not fully satisfied by the social contract has consequences not only to the liberty of these individuals, but also to those citizens whose self-interest can be fully satisfied by the commonwealth but only insofar as the commonwealth can provide the peace and security it promised, and whose will is personified by the sovereign. Therefore, if necessity, self-interest or the working of some passion leads someone beyond the sovereign’s law and outside the boundaries of society, reason predicts that both individual and state may ‘seek, and use, all helps, and advantages of war.’⁹²

Thus Hobbes himself implicitly indicated that the conflict and insecurity of the natural condition of mankind could not be completely dispelled, but instead merely managed, by the state. This is why the criminal law is not just a guarantee for the security of juridical autonomy, but an instrument of social order, permanently required in order to keep the insecurity of natural liberty at bay. This is not to say that there is no difference between political society and the state of nature; on the contrary, the social order of the commonwealth can be quite effective and pervasive. However, this social order does not entirely overcome the natural condition of mankind; instead, it conditions, regulates and relies on aspects of the state of nature for its continued legitimation.

The establishment of political society in Hobbes’s work initiates a dynamic and complex relationship between individual autonomy and state authority. Individuals remain, at heart, natural individuals; the tendency to disagreement and conflict is always underlying security, capable of manifesting itself. ‘Civil life is fragile and only law conjoined with power can hold it together.’⁹³ Furthermore, the endemic insecurity of human nature means that crime is not only possible, but expected, so that punishment is posited as necessary

⁸⁹ Hobbes, *Leviathan*, 86 (emphasis added).

⁹⁰ *Ibid.*, 109.

⁹¹ *Ibid.*

⁹² *Ibid.*, 87.

⁹³ Poole, ‘Hobbes on Law and Prerogative,’ 94.

even if its justification is problematic. The juridical moment of consent is only formally required, for although individuals don't actually give the sovereign the right to punish them and would undoubtedly individually resist its exercise, juridical autonomy (legal subjectivity) cannot exist without the threat (and security) of punishment.

This perspective on human nature has seemed far-fetched to many, an opinion which Hobbes himself anticipated.⁹⁴ Hobbes's materialism, along with the lack of trust that accompanies it, is rigorous and unavoidable, so that insecurity is always present beneath the surface of autonomy, both within and outside of political society. But, though the philosophical consistency of Hobbes's work can be (and has been) criticised, it is quite possible to accept such criticism and still maintain that his postulates on individual autonomy and liberty enjoyed a significant and long-lasting influence⁹⁵ over the liberal tradition of legal and political thought. This is because such influence did not arise from the impeccability of his logic, but from the ideological thrust of his individualistic conceptions.

4 The Vulnerability of Liberty

The paradox of punishment is inextricably linked to an individualistic perspective of the human condition. It is this conception of human beings as atomised and self-interested individuals that *naturalises* distrust and grounds the insecurity behind the motivation for punishment, and this is nowhere clearer than in the theoretical framework set out by Hobbes, 'the theorist par excellence of human vulnerability.'⁹⁶ This vulnerability is at the core of Hobbes's political theory, justifying both the liberty of the individual and the authority of the state. 'Without the performance of covenant, we would be back in the state of nature.'⁹⁷ This same logic legitimates the state's right to punish, as punishment reinforces the integrity of the community by reassuring citizens of the security of their liberty.

The 'reassurance function'⁹⁸ of state authority, however, cannot completely overcome the natural condition of insecurity, so that the vulnerability that Hobbes finds in human nature is also an aspect of the political community. Because dangerous criminal behaviour is always a possibility, and since it threatens the integrity of the common judgment sustained by the state, it follows that punishment is indispensable for the preservation of juridical autonomy: 'covenants, without the sword, are but words, and of no strength to secure a man at all.'⁹⁹ Therefore, not only individuals themselves, but also the very notion of legal subjectivity that lies at the core of political society, and even political society itself, are vulnerable to natural liberty and its primary social expression, crime. The lack of trust

⁹⁴ In response to such possible claims, he argued that even 'civilised' social mores suggested a common distrust among individuals: 'when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws, and public officers, armed, to revenge all injuries shall be done him ... Does he not there as much accuse mankind by his actions, as I do by my words?' (Hobbes, *Leviathan*, 84–85).

⁹⁵ C. Gearty, 'Escaping Hobbes: Liberty and Security for our Democratic (Not Anti-Terrorist) Age' in E. D. Reed, M. Dumper (eds.), *Civil Liberties, National Security and Prospects for Consensus* (Cambridge: Cambridge University Press, 2012), 35–61, 43.

⁹⁶ Ristroph, 'Respect and Resistance,' 607.

⁹⁷ R. Shiner, 'Hart and Hobbes' (1980) 22(2) *William and Mary Law Review*, 201–225, 208.

⁹⁸ B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal*, 1029–1091, 1037.

⁹⁹ Hobbes, *Leviathan*, 111.

engendered by Hobbes's individualistic conception of autonomy and liberty infiltrates (and motivates) the whole of his political theory.

In political society, therefore, individuals are always dependent on the authority of the state, as it alone can guarantee that conduct is being regulated, crime is being prevented, and the conditions for responsible legal agency are being protected. Hobbes's theory displays a privileged concern towards security, on which his very conception of political and juridical liberty relies. This logical connection between individual liberty, political authority and security, manifested within the paradox of punishment, which I analysed at the beginning of this paper, is an intrinsic conceptual and normative element of the modern state. It is this link that conveys the importance of understanding Hobbes's work to a study of contemporary issues concerning law and society, as his theoretical model exposes a specific logic that is embedded within 'our very 'social imaginary,'"¹⁰⁰ and that significantly influences changes and transformations in the contemporary socio-political framework, reflected by the preventive turn.

In this sense, there are two main lessons that can be taken from Hobbes's account of punishment and political society, in relation to the contemporary dynamics of criminal law. The first relates to the artificial nature of juridical liberty and public interest in Hobbes's theoretical framework. The conceptual distinction drawn by Hobbes between the exercise of individual liberty in the state of nature and in political society, together with the link between natural liberty and crime, suggests not only that these two expressions of subjectivity are in conflict with each other, but also that natural subjectivity is the presumptive position, while legal subjectivity is the normative position with regards to individual autonomy. In other words, while individuals in political society are supposed to behave as legal subjects, restraining their liberty to the limits of the law, they are all in fact, or at least potentially, natural subjects who may, out of self-interest, become dangerous to the project of political society.

Under this perspective, if an individual is accused or suspected of committing a serious crime, the state is more likely to expect this person to be dangerous than to be a trustworthy, law-abiding citizen who would otherwise not have committed this offence against the community, or who was falsely accused. The artificial quality of juridical liberty both necessitates and undermines the peace and security promised by the state authority, preserving a latent threat that maintains a fragile 'balance between freedom and insecurity.'¹⁰¹ This balance sustains both the normative primacy of juridical liberty and the need for punishment through an uneven distribution of insecurity in society, which is mainly subjectively felt by those identified as responsible legal subjects, and objectively experienced by those who behave in a way considered deviant or dangerous, or whose social position associates them with one of the many 'suspect communities.'¹⁰² When structural socio-political conditions for trust and solidarity are lacking in a particular moment, within this framework political authority appears as the only thing that can preserve social cohesion, and thus any suspicion of disharmony between an individual's autonomy and the public

¹⁰⁰ Loader, Walker, *Civilizing Security*, 44. Cf. also Taylor, op. cit.

¹⁰¹ Gearty, *Liberty & Security*, 20.

¹⁰² Cf. C. Pantazis, S. Pemberton, 'From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-Terrorism Legislation' (2009), 49 *British Journal of Criminology*, 646–666. For more general comments on the social distribution of insecurity in contemporary liberal societies, cf. L. Wacquant, 'Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity' (2010), 25(2) *Sociological Forum*, 197–220, 208; see also L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (London: Duke University Press, 2008).

interest is enough to undermine the expectation that such individual can be expected to behave within juridical boundaries.

The second lesson, however, is that the vulnerability of the state with regards to the insecurity generated by human relations does not necessarily compromise the state's authority, but on the contrary can also ground and reinforce it. In Hobbes's theory, political society is not presented as a failed project; instead, an absolute state is postulated as the only hope of managing the endemic insecurity of human nature, a formidable power aimed at containing a formidable threat. Within Hobbes's logic, the state may have to be authoritarian at times, and the liberty of many individuals is bound to suffer from this, but this unfortunate situation is not created by the state—it is the consequence of the fickleness of human nature, which the state is precisely trying to contain however it can. The fissure created by the paradox of punishment is 'mended' by the socio-political distribution of its conflicting conceptions of subjectivity: the state's primary function is to promote and preserve juridical liberty, something which can only be achieved through the repression and coercion of natural liberty. As seen above, the trap contained in Hobbes's theory lies in the fact that the authoritarian vein of his model of political society stems precisely from his emancipatory postulates. Since respect for individual liberty is conceptualised as connected with and dependent upon the need to protect liberty from its own vulnerabilities, the primacy of individual autonomy inevitably leads to its subjection to political authority.

4.1 Hobbes, Insecurity, and Criminal Law

In making these claims, I am in a sense both supporting and disagreeing with the view of recent theorists, such as Richard Ericson¹⁰³ and Peter Ramsay,¹⁰⁴ who have critically analysed the current preventive turn in the law. While, like them, I see that the substantive changes occurring to the criminal law in the past few decades are deeply problematic, and intimately connected to the liberal state's efforts to produce and maintain authority, my approach to the relationship between the current framework of preventive and regulatory laws and the normative premises of the liberal legal and political tradition is slightly different. For both Ericson and Ramsay, it seems that the growing preventive apparatus of the criminal law gives form to a waning of political authority experienced by the preventive state as it, in employing this apparatus, is openly and fundamentally questioning the force and the validity of its own authority. Both authors, furthermore, use Hobbes's theory to substantiate their claim that a preventive state acts as a state that does not recognise its own authority, drifting apart from Hobbes's ideal of the state as the ultimate reassurer of socio-political order.

Ramsay's perspective on the preventive turn is grounded on the acute perception that the legitimacy of contemporary preventive measures relies on the assumption that citizens have a right to security which must be actively guaranteed in virtue of the vulnerable character of their autonomy, 'an assumption ... that is radically at odds with Hobbes's account of Leviathan's sovereignty.'¹⁰⁵ Although Hobbes conceptualises individuals as intrinsically vulnerable, it is precisely this vulnerability which the state, through its authority, is supposed to eliminate. Sovereignty seems to be justified in Hobbes's theory as the power necessary to remove individuals from the insecurity and vulnerability of the state of nature, 'to keep them in awe, and tie them by fear of punishment to the performance of

¹⁰³ R. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007).

¹⁰⁴ P. Ramsay, *The Insecurity State* (Oxford: Oxford University Press, 2012).

¹⁰⁵ *Ibid.*, 215.

their covenants.’¹⁰⁶ Preventive measures, by their turn, strongly imply that the state is ‘declaring the normal vulnerability of its subjects,’ a move which ‘undermines its own authority in a way that would be intolerable to Leviathan, or indeed any sovereign worthy of the name.’¹⁰⁷

According to Ramsay, while Hobbes’s state seeks to escape the state of nature through the force and authority of the sovereign’s law, the insecure law of the preventive turn ‘converts at least some of the conditions of the state of nature into the normal conditions of civil society,’¹⁰⁸ thus amounting ‘to an authoritative statement of the law’s lack of authority.’¹⁰⁹ Ramsay’s reasoning relies on Ericson’s perception that, through the use of preventive measures, ‘[t]he Hobbesian Leviathan as a state that expresses the liberal imaginary of physical security and prosperity begins to break down.’¹¹⁰ Furthermore, both Ramsay and Ericson highlight that the authority of the Hobbesian state, ‘though it appears to be the ‘negation’ of the liberal idea of freedom under the rule of law, is in reality ‘its very presupposition.’’¹¹¹ From the assumption that preventive measures compromise the authority of the state, therefore, it would follow that ‘[t]he hollowing out of the state’s sovereign authority’ essentially constitutes ‘an abandonment of liberal tradition.’¹¹²

While I entirely agree that the state’s authority is the very presupposition of the liberal idea of freedom—and Hobbes’s theory especially emphasises that—and that the hollowing out of the state’s sovereign authority compromises the liberal framework to a significant degree, I do not believe that the current state of insecurity in the law represents a breakdown of the Hobbesian model of political authority. But neither do I subscribe to accounts such as David Garland’s, who suggests that the present ‘culture of control’ represents a novel ‘Hobbesian solution’¹¹³ to the problem of authority, or Simon Hallsworth and John Lea’s argument that the ‘security state’ aims at ‘reconstructing Leviathan’¹¹⁴ as an *alternative* to the liberal welfare state.

What I argue instead is that both freedom and insecurity are part of Hobbes’s political model, and the relation between these two conceptions is such that political authority relies on the preservation of one as well as the other within the liberal imaginary. So while Leviathan is predicated on the promise of putting an end to the insecurity of the state of nature, the management of its political authority—including one of its main instruments, punishment—depends on a conception of human nature that betrays the concrete feasibility of this promise. In other words, the core of Hobbes’s normative framework lies not in the security of the sovereign state, but in the insecurity of the natural condition of mankind. When preventive measures are legitimately deployed in the name of the protection of individual freedom and rights, they are fuelled by this logic, which is not only essentially Hobbesian, but also an intrinsic element of the normative structure of the liberal state.

¹⁰⁶ Hobbes, *Leviathan*, 111.

¹⁰⁷ Ramsay, *The Insecurity State*, 5.

¹⁰⁸ *Ibid.*, 217.

¹⁰⁹ *Ibid.*

¹¹⁰ Ericson, *op. cit.*, 202.

¹¹¹ Ramsay, *The Insecurity State*, 218, paraphrasing F. Neumann, ‘The Concept of Political Freedom’ in W. Scheuerman (ed.), *The Rule of Law Under Siege: Selected Essays of Franz Neumann and Otto Kircheimer* (University of California Press, 1996), 213.

¹¹² *Ibid.*

¹¹³ D. Garland, *The Culture of Control* (Oxford: Oxford University Press, 2002), 202.

¹¹⁴ S. Hallsworth, J. Lea, ‘Reconstructing Leviathan: Emerging Contours of the Security State’ (2011) 15(2) *Theoretical Criminology*, 141–157, 141.

The most significant conclusion which can be taken from this analysis, and which diverges from Ramsay and Ericson's interpretation of Hobbes's work, is that, although the main function of the Hobbesian state is to eliminate the insecurity of the state of nature, this is a task that Hobbes was keenly aware that Leviathan could never fully achieve. Instead, Hobbes's radical (and abstract) individualism implies that insecurity is intrinsic to human nature, and it permeates his entire socio-political framework, so that some of the conditions of state of nature are also, by definition, normal conditions of civil society. While the state is supposed to suppress insecurity and reassure individuals of the conditions for legal subjectivity, the structural violence¹¹⁵ inherent to the liberal model of society means that political society is always a tentative compromise, bound to become volatile under conditions of social erosion.

This dialectical relation between nature and society is exposed, not generated, by the justificatory framework of the preventive turn. The preventive turn is thus a manifestation, not subversion, of the social imaginary grounding the authority of the liberal state, so that the main problem expressed by preventive criminal laws is not that they are anti-liberal, but that they expose and magnify the cracks and contradictions in the liberal legal framework. Hobbes's political model thus suggests that the vulnerability of the authority of the neoliberal state stems directly from the vulnerability that is inherent to legal subjectivity, and that is now only coming to the fore under neoliberal socio-political conditions.

5 Conclusion

The sum of virtue is to be sociable with them that will be sociable,
and formidable to them that will not.¹¹⁶

Hobbes's controversial perspective on the nature, function and justification of punishment reveals a 'philosophical problematic' which is not only 'fundamental to an understanding of the modern philosophy of punishment,'¹¹⁷ but also essential to a proper examination of the contemporary state of insecurity in criminal law. This paradox reflects the dialectical relation between criminal law's normative justification and its pragmatic necessity, which perennially compromises the security of individual autonomy. Hobbes's philosophical account of political society provides an analytical framework in which to understand these contradictions, and moreover constitutes one of the main philosophical and ideological grounds for them, as one of the conceptual bases of the liberal social imaginary.

There is a perennial, dynamic relationship between liberty and insecurity within the liberal framework, which directly affects conceptions of responsibility and punishment within criminal law and justice. This relationship, just like that between the liberal ideas of freedom and state authority alluded to by Ramsay and Ericson, has in Hobbes's work its main philosophical foundation. It is the ambivalence within individual liberty that prevents any attempt to recast or safeguard the proper balance between liberty and security from escaping a Hobbesian logic. The normative legitimization of state authority and of its power to punish relies on the existence of a politico-ideological conflict between the juridical and the natural elements of human behaviour. The paradox of punishment, more than a moral

¹¹⁵ Cf. J. Habermas in G. Borradori, *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), 35.

¹¹⁶ Hobbes, *Human Nature and De Corpore Politico*, 99.

¹¹⁷ Norrie, 'Thomas Hobbes and the Philosophy of Punishment,' 299.

problem, reflects a socio-political conflict between the prevalent model of political community (legal subjects and the authority that represents them) and those subjects whose autonomy is not exercised within juridical boundaries.

As long as the internal tension within liberty remains unresolved, both the classic liberal model of criminal law, with its strong defence of the presumption of innocence and due process,¹¹⁸ and the anticipatory perspective increasingly promoted by the preventive state,¹¹⁹ are but two sides of the same coin, derived from a specific moral order which, from its inception, was aimed at advancing the idea of human emancipation whilst still preserving violent conditions of structural inequality. Hobbes himself admonished that, when attempting to trail a path between the defence of liberty and the preservation of authority, ‘tis hard to pass between the points of both unwounded.¹²⁰

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¹¹⁸ Cf. A. Ashworth, L. Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2 *Criminal Law and Philosophy*, 21–51; A. Ashworth, L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).

¹¹⁹ Cf. J. Horder, ‘Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation’ in R. Sullivan, I. Dennis (eds.), *Seeking Security* (Oxford: Hart Publishing, 2012), 79–102.

¹²⁰ Hobbes, *Leviathan*, 3.