COVENANTS FOR THE SWORD

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Covenants, without the sword, are but words, and of no strength to secure a man at all.

[T]here can happen no breach of the covenant on the part of the sovereign…. [H]e which is made sovereign makes no covenant with his subjects beforehand….

~ Thomas Hobbes, Leviathan, Ch. 18

Constitutional democracies use violence widely and regularly. They use it against other states in military conflicts, and, of particular interest in this essay, they use it against their own citizens in the context of policing and punishment. But citizens of constitutional democracies tend not to think of their rulers as violent. To the contrary, they see the violence of the criminal justice system as distinctively *legitimate* and perhaps not properly called violence at all, though similar acts would be labeled violent if conducted by private citizens. Police and punitive force are understood to be distinctive acts of public authority, rendered normatively legitimate by the political and legal context in which they take place.

Contemporary constitutions and the subordinate laws they authorize can be understood as forms of social contracts, and uses of force by constitutional governments can be understood to illustrate Hobbes's claim that covenants require enforcement by sword. Beyond this level of abstraction, however, Hobbes is not often consulted for

insights into modern constitutional theory. There seems a clear conflict between the modern view of constitutional government as limited government, on one hand, and on the other hand Hobbes's claim that the social contract is an agreement among citizens that imposes no obligations or restraints on the sovereign. Indeed, the empirical legitimacy of a constitutional democracy—that is, the fact that its citizens accept and endorse the government—rests in no small part on the perception that government power is meaningfully limited by constitutional text and principle. The absolutist strains of Hobbes's political theory seem antithetical to now-unquestioned principles of limited government.

For two important reasons, one to do primarily with Hobbes and the other to do primarily with modern constitutionalism, Hobbes's political theory is a surprisingly rich resource for studies of the constitutional regulation of state violence. First, Hobbes's endorsement of absolutism is often overstated; he is in fact the originator of many of the concepts that underlie theories of liberal constitutionalism. In returning to Hobbes, we can see where some of our most basic liberal ideas came from, and we may develop a renewed understanding of the difficulties of translating those ideas into stable political institutions. Second, constitutions have successfully regulated violence only, again, at a very high level of abstraction. Any close scrutiny of constitutional restraints on policing and punishment quickly exposes the impotence of those restraints. In many respects, the two provisions of the United States Constitution that most directly regulate the state's use of force against its own citizens—the Fourth and Eighth Amendments—are "but words." Scholars of constitutional criminal procedure return to this issue again and again, with

ever new proposals to reinterpret constitutional text, reform constitutional doctrine, and develop restraints with teeth.[1] But perhaps these efforts to reinterpret the covenant are misguided; perhaps our error lies in the assumption that a covenant, or constitutional provision, could restrain the very sword that seems to protect and enforce the social contract.[2]

My aim here is to show how Hobbes can illuminate some of the difficulties we have in fact encountered in using constitutional provisions to regulate use of force in the criminal justice system. Especially in the United States, constitutional law is notoriously under-determined across the board. Still, courts have produced some relatively clear rules restricting state conduct in the regulation of speech or religion, or prohibiting certain forms of official discrimination. It seems that constitutional criminal law—both procedural and substantive—is among the least precise of constitutional doctrines. This essay asks whether violence might be more difficult to regulate than other kinds of state action, or whether constitutional nonviolence norms might be weaker than constitutional nondiscrimination norms.

By framing my inquiry as one about the *legal regulation of violence*, I may seem to ignore a number of distinctions that often structure discussions of policing and punishment. First, some scholars have emphasized the difference between law, as a system of rules, and regulation or administration, as an inherently discretionary

[1] Examples: Avery, Harmon, Loewy, Rubenfeld, Stuntz, Wasserstrom (4th Amendment); Frase, Lee, Ristroph (8th Amendment).

[2] A recent article by Jack Goldsmith and Daryl Levinson raises similar, but broader, questions about the ability of law to bind states. See Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791 (2009). Goldsmith and Levinson argue that the same factors that have led scholars to doubt that international law can bind states—the lack of an authoritative interpreter or an effective enforcer, for example—also describe domestic constitutional law.

enterprise.[3] Second, in laws and institutions as well as scholarly literature, policing is often distinguished from punishment. The use of force by police officers typically takes place before a subject is convicted of a crime, and police force is subject to different rules, different constitutional provisions, and different conceptual justifications than the use of force as duly authorized, post-conviction punishment.[4] And finally, as suggested in the first paragraph, many commentators would distinguish between the physical force that may be used, with authority, by officials within the criminal justice system (whether policing or punishing), and the incidents of physical force by non-state actors that we commonly call violence.

All of these distinctions—between law and discretionary regulation, between policing and punishment, and between force and violence—merit attention, and scrutiny. Each distinction helps us understand something about the world, but each also obscures at times, and each tends to enforce normative presumptions that I want to question. To insist on a strict dichotomy between law and administrative regulation, for example, may lead us to ignore ways in which law inevitably entails discretion. It may lead us to pretend that law operates independently of its human administrators. To insist that policing is different than punishment may lead us to ignore ways in which judgments about the culpability of (never-convicted) suspects can shape courts' assessments of

[3] E.g., Markus Dubber, The Police Power (law distinguished from police).
[4] There is a vast literature on the theoretical justifications of punishment, but relatively few discussions of the theoretical justification of police force. A notable treatment of the latter issue is Rachel Harmon, When is Police Violence Justifed?, 102 Nw. U. L. Rev. 1119 (2008). Harmon argues that "the traditional retributive and utilitarian justifications of punishment—the paradigmatic form of state coercion—fail to provide an adequate justification for state force exercised through the police." Id. at 1124.

police conduct,[5] and it may lead us to overlook the considerable extent to which post-conviction uses of force are shaped by preventive "policing" concerns. And the difference between force and violence is largely a matter of normative commitments, and those normative commitments should be made explicit. Again, there are surely differences between law and regulation, between policing and punishment, and between the concept of force and the concept of violence. But there are continuities as well, and I frame my inquiry so as to study both distinctions and continuities.

And perhaps one other distinction is worth noting: that between covenants (or contracts)[6] as a specific source of restraint, and the concept of restraint or limitation more broadly. To show that constitutions-as-contracts do not restrain the sword is not necessarily to show that the sword is wholly unrestrained. As individual persons may be subject to noncontractual restraints—physical limitations, for example, or nonvoluntarist moral obligations—so too might states be restricted by empirical limitations or moral considerations that have nothing to do with contracts. If, in fact, constitutions do little to regulate state violence, then one should ask whether other factors restrict or regulate that violence and what, if anything, justifies the perceived distinctive legitimacy of state violence. These are important issues, but the focus here is on *constitutions*, and my specific question is whether the sword itself may be subjected to covenant.

I begin with a brief review of Hobbes's account of the establishment of the sovereign, and his claim that the sovereign is not itself subject to covenant. In the course

[5] Scott v. Harris, 550 U.S. 372, 384 (2007).
[6] I make no distinction between covenants and contracts in this essay, but some readers of Hobbes argue that a covenant is a particular kind of contract. Claire Finkelstein, Hobbes's Legal Theory.

of this discussion, I identify reasons that Hobbes is neglected in modern constitutional theory, and reasons that he should not be. The remainder of the essay explores modern manifestations of the two primary obstacles to covenants for the sword: the difficulty of identifying the sovereign's violations, and the difficulty of implementing a remedy for identified violations.

Personation, Authorization, and Sovereignty

To understand Hobbes's claim that the sovereign is not bound by covenant to his subjects, and to see the implications of this claim for contemporary constitutionalism, we must review a few key elements of his theory of sovereignty and authorization. First, it is useful to know what problems the sovereign is supposed to solve. Briefly, Hobbes claims that human relationships in the absence of governmental authority are plagued by a dangerous plurality of wills, judgments, and interests.[7] More specifically, each individual reasonably pursues her own self-preservation and in so doing, poses threats to other individuals also seeking to preserve themselves. Every person is at least a potential threat to everyone else, and individuals understandably use violence to defend their own interests at the expense of others. According to Hobbes, rational individuals eventually realize that to secure peace, they must renounce their individual discretion over the use of

[7] Hobbes, Leviathan, 86-90. For a slightly more detailed, but still brief, discussion of Hobbes's state of nature and the way out of it, see Alice Ristroph, Respect and Resistance in Punishment Theory, 97 Cal. L. Rev. 601, 607-11 (2009). The five (or six) most famous words in *Leviathan* are probably "solitary, poor, nasty, brutish, and short," and this phrase is often invoked to show that Hobbes considered humans to be evil or at least dangerous and violent beings. But "nasty" and "brutish" describe the human condition, not humans themselves, and these adjectives apply to the human condition only in the absence of civil government. See id. at 607-08.

violence, and in its place they empower a sovereign to decide how best to preserve them all.[8]

This sovereign may well be a single human—Hobbes repeatedly emphasizes the virtues of monarchy—but whether one ruler or a more complex assembly, the sovereign is best understood as an artificial person. An artificial *person* is not the same thing as an artificial *man*; Hobbes has a precise and nuanced account of personhood.[9] That account merits close scrutiny, for it will prove to illuminate conceptions of state actors and authorized agents central to constitutional law. What, then, is a person? Hobbes offers this definition:

> A Person, is he, whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction. When they are considered as his own, then he is called a Natural Person: And when they are considered as representing the words and actions of another, then is he a Feigned or Artificial person.[10]

Two claims here must be emphasized. First, a person is a being capable of speech and action. Second, a person speaks and acts on behalf of some conceptually distinct being: the man behind the person (if the words and actions are "his own"); or some other man; or some other, possibly non-human, entity. A man who speaks for himself is called a natural person; one who speaks for some other man or being is a "feigned or artificial

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[8] Hobbes, 120-21.

[9] In Leviathan, Hobbes does sometimes refer to the commonwealth as an artificial *man*, but the sovereign is described as an artificial *person*. By the term *man*, Hobbes appears to refer to all human beings. Notably, Part One of Leviathan is called "Of Man" and sets forth Hobbes's account of human psychology, but only the last chapter of that Part takes up the specific subject "Of Persons, Authors, and things Personated." See id. at 111.

[10] Hobbes, 111. Here and elsewhere, I have modernized Hobbes's spelling but retained his capitalization.

person."[11] Hobbes refers to theatrical language and the Latin *persona* to emphasize the distinction between the person—the representative or signifier—and the man or other entity who is represented or signified. A *persona* is a "disguise, or outward appearance of a man, counterfeited on the stage."[12] A person-as-*persona* is an actor, "and to Personate, is to Act, or Represent himself, or another; and he that acteth another, is said to bear his Person, or act in his name."[13]

Hobbesian personhood links the concept of representation to the concept of authority. "Of Persons Artificial, some have their words and actions Owned by those whom they represent. And then the Person is the Actor; and he that owneth his words and actions is the Author: In which case the Actor acteth by Authority."[14] To authorize is to allow oneself to be represented, or impersonated, by some separate actor. And this, according to Hobbes, is precisely what individuals do when they contract among themselves to create a sovereign. They "appoint one Man, or Assembly of men, to bear their Person," and each individual is "to own, and acknowledge himself to be the Author of whatsoever he that bear their Person, shall Act, or cause to be Acted, in those things which concern the Common Peace and Safety."[15] More specifically, a multitude of disparate individuals with potentially adverse interests reconstitutes itself into "a real

[11] Quentin Skinner has advanced an alternative interpretation of this passage. Skinner appeals to strict grammatical construction as well as the revisions that Hobbes made for the Latin *Leviathan* to support the claim that an artificial person is an entity who is *represented* by another; that is, Skinner claims that the "artificial person" is the signified rather than the signifier (Skinner 2002; Skinner 1999; for a critique, see Runciman 2000). I do not think that Hobbes's text—even the specific passages identified by Skinner—can support this reading. But my focus here is on the sovereign, and there does not appear to be any dispute that Hobbes's *sovereign* is an artificial person. Skinner's account does draw attention to the important question of the distinction, and relation, between state and sovereign, which I discuss in more detail below.
[12] Hobbes 112.
[13] Id.
[14] Id.
[15] Id. at 120.

Unity of them all, in one and the same Person."[16] Hobbes imagines the precise content of the covenant thus: "[It is] as if every man should say to every man, *I Authorize and give up my Right of Governing myself, to this Man, or this Assembly of men, on this condition, that thou give up thy Right to him, and Authorize all his Actions in like manner*."[17]

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

Hobbes would answer these last two questions in the negative, for several reasons. First, the origin of the sovereign makes it logically impossible that he (or it) would be bound by covenant to his subjects. The sovereign is not a party to the social contract, and could not be, since he does not exist qua sovereign until the moment the contract is made. Instead, the sovereign is a kind of third-party beneficiary to a contract that is made among private individuals. "Because the Right of bearing the Person of them all, is given to him they make Sovereign, by Covenant only of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Sovereign."[18]

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[16] Id.
[17] Id. (italics in original).
[18] Id. at 122. Hobbes argues more specifically that even if the office of the sovereign is occupied by a single natural person, we should not think that natural person covenants with the subjects. He cannot contract with all subjects as a single party, because "they are not yet one Person" before the sovereign has been appointed, and if the natural-person-who-will-become-sovereign contracts with each future subject individually, those contracts will be void once sovereignty is established. [I am not convinced by this argument.]

A second reason to doubt that the sovereign could be restricted by covenant draws upon a standard interpretation of Hobbes: namely, that the sovereign's authority is unlimited, or else he (or it) is not properly called a sovereign. There is considerable textual support for this reading: for example, Hobbes says that the sovereign power "is as great, as possibly men can be imagined to make it," and adds, "though of so unlimited a Power, men may fancy many evil consequences, yet the consequences of the want of it … are much worse."[19] Hobbes rejects mixed government as unstable—"a Kingdom divided in itself cannot stand"—and insists that a single, undivided sovereign must have ultimate authority to make, interpret, and enforce the laws of the commonwealth.[20] Some of these tasks may be delegated to subordinates, but Hobbes makes clear that the subordinates are *subordinates*, not independent agents with the authority to check the sovereign power. And Hobbes is explicit that the sovereign is not himself bound by the laws he makes: "Nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound."[21]

Drawing on the language of legal positivism (which is often and with reason traced to Hobbes), we could identify two obstacles to covenants *for* the sword, or positive laws that restrict the sovereign himself. First is a challenge of legal uncertainty: there is no entity or institution empowered to determine the meaning and application of the covenants that restrict the sovereign. Hobbes rejects any separation-of-powers theory that might place ultimate authority over the meaning of covenants in an institution

[19] Id. 144-45.
[20] Id. at 124-27.
[21] Id. at 184.

separate from the institution charged with enforcing the law. So who, other than the sovereign himself, could say with authority that the sovereign had violated the covenant?[22] And second, covenants for the sword would face a problem of enforcement.[23] Who, other than the sovereign himself, would sanction a sovereign who violated the covenant?[24]

This apparent absolutism is doubtless one of the reasons that Hobbes is not often consulted by modern constitutional theorists. But the account of unlimited sovereignty sketched above is a bit too crude. Read closely, Hobbes in fact gives a more nuanced description of sovereign power. Perhaps most importantly for legal theorists, Hobbes's sovereign is one that rules by law rather than by fiat or decree. *Leviathan* is through and through an account of law, establishing Hobbes as a rule of law theorist.[25] Like modern constitutionalists and champions of the rule of law, Hobbes emphasizes consistency and predictability as virtues of a stable legal code. Moreover, even if the sovereign is not subject to *civil* law, he or it is bound by the *laws of nature*.[26] To be sure, problems of uncertainty/interpretation and enforcement persist. It is not clear who can enforce the sovereign's obligations to honor the laws of nature, and for that reason some have

[22] See id. at 123 ("Besides, if any [subject] pretend a breach of the Covenant made by the Sovereign…, and others [or the sovereign himself] pretend there was no such breach, there is in this case, no Judge to decide the controversy: it returns therefore to the Sword again; and every man recovers the right of Protecting himself by his own strength, contrary to the design they had in the Institution.").
[23] Goldsmith and Levinson also discuss the problems of uncertainty and enforcement, along with a third obstacle they call "the problem of sovereignty"—the view, which they attribute to Hobbes, that any true sovereign must be an absolute one. See Goldsmith & Levinson, supra n. __.
[24] Hobbes says that the sovereign is answerable for breaches of the law of nature, but only to God.
[25] Ristroph, Respect and Resistance, 611-12; see also David Dyzenhaus, Hobbes's Constitutional Theory, in Leviathan (Ian Shapiro ed., forthcoming Yale Univ. Press); David Dyzenhaus, How Hobbes Met the 'Hobbes Challenge,' 72 Modern L. Rev. 488 (2009).
[26] Hobbes, 224 ("It is true, that Sovereigns are all subject to the Laws of Nature; because such laws be Divine, and cannot by any man, or Commonwealth be abrogated.").

questioned the status of these laws as true law.[27] But Hobbes himself views these laws as real laws, binding on the sovereign, even if it is only God that can address the sovereign's violations.

Hobbes's sovereign may also face practical and moral constraints, if not legal ones, by the subjects' right to resist any use of force against them. As I have explored elsewhere, Hobbes's apparent absolutism is severely undermined by his crystal clear insistence that subjects, even guilty and duly convicted subjects, have a right to resist punishment.[28] The "right" to resist punishment is a peculiarly Hobbesian right, one that imposes no duties on the sovereign and indeed does not disrupt the sovereign's right to punish. Yet Hobbes's insistence on this right, peculiar as it may be, demonstrates commitments to individual liberty and equality far more robust than those offered by many later liberal theories of punishment.

To read Hobbes as an "Hobbist," or as a proponent of extralegal absolutism, is to overlook substantial and important portions of his theory. But Hobbesian exegesis, while of instrumental value to my inquiry, is not my central focus here. The question is whether Hobbes can illuminate modern constitutionalism. The likelihood may seem slight, given that even the less absolutist Hobbesian sovereign does not exist in modern constitutional democracies.[29] Most obviously, constitutional governments do not unify

[27] E.g., John Deigh in J. Hist. Phil. [On the problem of uncertainty/enforcement: to what extent do subordinate judges or other subjects have "independent access" (Dyzenhaus) to determine the content of laws of nature?]

[28] Ristroph, Respect and Resistance.

[29] Indeed, I suspect a perfect Hobbesian sovereign has never existed anywhere. By perfect, I mean a sovereign that actually satisfies all the criteria identified in *Leviathan*, especially the requirement of consent. On my reading, Hobbes is not a theorist of hypothetical consent. That is, he does not permit a sovereign's authority to be based on a judgment (by whom?) that subjects *would have* authorized the

legislative, executive, and judicial power in a single person or assembly. Instead of a true Hobbesian sovereign, in modern constitutional democracies we find multiple quasi-sovereigns: distinct institutions among whom power is shifted and shared.

I think it is safe to say that as an empirical matter, Hobbes has been proven wrong insofar as he claimed that political stability requires a single decider with combined legislative, executive, and judicial authority. The fact of divided sovereignty seems to solve the problem of legal uncertainty identified above, and maybe also the problem of enforcement: an independent judiciary might be endowed with the final authority to interpret the covenants that bind the sovereign, as American courts are empowered to interpret the United States Constitution. Even if courts lack swords or other means to enforce their findings of unconstitutionality, perhaps constitutional culture has rendered such enforcement unnecessary. So long as the executive and legislative branches do in fact respect the judgments of courts with respect to the constitution, there is a sense in which the constitution should function as a covenant for the sword.

And yet, we rarely see judicial judgments that the legislative or executive branch has exceeded its power to use physical force. In the next two sections, I argue that Hobbes helps explain why, even in a system of divided sovereignty, covenants restricting the sword may turn out to be little more than words. Even if we do not find—and do not expect to find—a Hobbesian sovereign in a contemporary constitutional government,

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sovereign, had they been fully rational. (This point too is disputed by Hobbes scholars; [sources on H as theorist of hypothetical consent].) Indeed, I see Hobbes's emphasis on actual consent as one reason his theory is more compelling than later liberal accounts that explicitly base political authority on hypothesized consent. As a deep egalitarian and individualist, Hobbes thought it normatively important whether individuals actually consented—not whether the sovereign or his apologists could plausibly assert that subjects should have consented, if they'd only understood their interests properly.

Hobbes's account of political authority and "personation" remains powerful. At least some uses of force by state actors are easily understood as incidents of authorized violence: citizens endow an artificial person as their agent and expect that agent to administer a criminal justice system (among other things). As will become clear shortly, the distinction between natural persons and artificial ones is especially helpful in explaining the constitutional remedies actually available under existing law. And on the substantive question of what counts as a constitutional violation, existing doctrine is heavily dependent on the concept of a personified sovereign. This aspect of Hobbes—the sovereign viewed as a person, or what might be called constitutional anthropomorphism—may have produced considerable obstacles to devising covenants for the sword.

Conceptualizing Constitutional Violations

Covenants for the sword, to be effective, must address the issues of interpretation and enforcement. We need to know what actor or institution will have ultimate interpretive authority to determine that a given act is in fact a constitutional violation. And we need know what follows from a determination that a constitutional violation has occurred. I take up the second issue first, for it turns out that the question of remedies is closely linked to the way in which we conceptualize a constitutional violation in the first place.

Consider the structure of modern constitutions. With some isolated exceptions, including the Preamble to the U.S. Constitution, these documents are not written in the

voice of contracting subjects.[30] Instead, they are phrased as descriptive statements of government powers and individual rights, or as commands or prohibitions directed at the government. Consider, in particular, the two provisions of the U.S. Constitution that seem most directly to restrict the state's use of force against its own citizens. The relevant Fourth Amendment language reads: "The right of the people to be secure in their persons… against unreasonable searches and seizures, shall not be violated…." And the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Like almost all of the U.S. Bill of Rights, these provisions are written in the passive voice. Without a specified actor as their subject, it is unclear who or what might violate these provisions. More importantly, perhaps, the provisions themselves tell us nothing about what should happen if the right of the people to be secure *is* violated, or if cruel and unusual punishments *are* inflicted.[31]

This language could yield (at least) two very different ways of conceptualizing a constitutional violation. On one view, the constitution describes the parameters of sovereign power, and acts beyond those parameters are not properly attributed to the sovereign at all. This view is the inverse of Richard Nixon's famous claim that if the President does it, it's not illegal. On this view of constitutional violation, if an act is

[30] "We the people of the United States, in order to form a more perfect union … do ordain and establish this Constitution for the United States of America."

[31] The Canadian Charter of Rights and Freedom contains ostensibly similar substantive provisions, but also includes an enforcement provision. See Charter Section 8 ("Everyone has the right to be secure against unreasonable search or seizure."); Section 12 ("Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."); Section 24(1) ("Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."); Section 24(2) (exclusionary rule).

unconstitutional, it is not really the act of the true sovereign. The artificial person of the sovereign exists only insofar as he (or it) complies with the constitution. When a putative sovereign conducts an unreasonable seizure, or imposes a cruel and unusual punishment, that putative sovereign is revealed as an impostor.[32] So we might call this concept of constitutional violation *the impostor theory*.

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

At different times and in different contexts, U.S. constitutional law has relied on each of these conceptions of a constitutional violation. The sovereign misconduct theory seems to be the official, and more frequently visible, approach. Indeed, state action doctrine in the United States seems to make clear that it is always the state, and only the

[32] A similar argument was made, and rejected, in Monroe v. Pape, 365 U.S. 167 (1961). Monroe sued the city of Chicago and thirteen of its police officers under 42 U.S.C. 1983, alleging violations of his Fourth Amendment rights. Section 1983 permits lawsuits against persons who violate the Constitution while acting "under color of law." The city and police officers argued that if the challenged actions were in fact unauthorized, those actions could not possibly have been "under color of law." Monroe, 365 U.S. at 172. The Court rejected this argument. It held that "state action" includes the acts of "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Id.; see also Home Telegraph & Tel. Co. v. Los Angeles, 227 U.S. 278, 288 (1913) ("[A] state officer cannot on one hand … proceed on the assumption of the possession of state power and at the same time, for the purpose of avoiding the application of the [Fourteenth] Amendment, deny the power….").

state, that violates the constitution. Under state action doctrine, if some private individual breaks into my home to search for evidence of a crime, that private individual has not violated the Fourth Amendment (though he has probably violated criminal burglary and trespass laws). In contrast, when a police officer breaks into my home without a warrant and without probable cause, he has violated the Fourth Amendment. There remains the question, of course, what is to be done about the constitutional violation. In some instances, courts have devised what might be called equitable constitutional remedies. For example, the usual remedy for a Fourth Amendment violation is the exclusion of illegally seized evidence. This remedy is less applicable to the kind of Fourth Amendment violation of most interest in this essay—the use of physical force against a person. Use-of-force claims are more often litigated in the context of suits for monetary damages, as discussed below.

Some Eighth Amendment violations are also understood as sovereign misconduct. For example, a state legislature that authorized the death penalty for non-homicide offenses would violate the cruel and unusual punishments clause,[33] and it would be clear that the duly authorized legislature was the agent of the violation. And again, equitable remedies are sometimes available: in the case of the statute authorizing death for non-homicide offenses, a court should simply strike down any death sentences imposed under the statute. Other Eighth Amendment violations, such as the use of excessive force by prison officials, are less amenable to equitable remedies. In this context, suits for monetary damages are again more common.

[33] E.g., Kennedy v. Louisiana, Coker v. Georgia.

When a victim of a constitutional violation seeks monetary damages, a notably Hobbesian concept called sovereign immunity has led American constitutional doctrine to tilt toward a theory of constitutional violation more like the impostor theory. Sovereign immunity is a sovereign's prerogative to decline to be sued. Under American law, both the federal government and state governments enjoy sovereign immunity.[34] Either the federal or a state government may waive its immunity and permit itself to be sued, but it is immune until such waiver.[35] One natural law explanation of sovereign immunity is traced to Samuel von Pufendorf, "disciple" to Hobbes. Hobbes claimed that the sovereign makes no contract with his subjects; Pufendorf rephrased this argument as one about the invalidity and unenforceability of such contracts.

> [If a king] has discovered any fault in a pact of his making, he can of his own authority serve notice upon the other party that he refuses to be obligated by the reason of that fault, he can of his own authority serve notice upon the other party that he refuses to be obligated by reason of that fault; nor does he have to secure of the other a release from a thing which, of its own nature, is incapable of producing an obligation or right.[36]

The doctrine of sovereign immunity would seem to rule out damage actions as means of enforcing constitutional provisions. But American law has found a way around this. Illustrating, perhaps, the fact that sovereignty is plural rather than unified, shortly after the Civil War Congress enacted a federal statute permitting lawsuits against government officials who violate the federal constitution. Under this statute, Section 1983, "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

[34] McMahon v. United States (federal); Alden v. Maine (state).
[35] [abrogation of state sovereign immunity by Congress]
[36] Samuel Pufendorf, De Jure Naturare et Gentium.

rights, privileges, or immunities secured by the Constitution … shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[37] As interpreted by U.S. courts, this statute holds government officials accountable as private individuals—or in Hobbesian terms, as natural persons rather than artificial ones.[38] Here we see traces of the impostor theory of constitutional violation. A government agent who violates the constitution acts "under color of law," but not with genuine legal authority. When such an agent steps beyond constitutional bounds, he cannot be understood as the artificial person of the sovereign; he is instead a natural person usurping the mantle of public authority.

Many police abuses lead to the seizure of evidence and thus a motion to suppress under the exclusionary rule. Challenges to state actors' uses of force, in contrast, are much more likely to take the form of a Section 1983 claim. In some extreme cases, uses of force may even lead to criminal liability.[39] Conceptually, there are important distinctions between equitable remedies, such as the exclusion of evidence or the reversal of a sentence, and civil damages or criminal sanctions. The equitable remedies involve a pronouncement that the sovereign has exceeded its power. At the same time, they are forward-looking, in that they put a stop to an otherwise continuing violation.[40] Damages

[37] 42 U.S.C. § 1983; Bivens creates parallel cause of action against federal officials.
[38] In practice, though, many government agencies indemnify their employees, taking responsibility both to defend § 1983 suits and to pay any damage award. Additionally, the doctrine of qualified immunity operates as a kind of safe harbor for the natural persons who act as agents of the sovereign. Under this doctrine, a government official is immune from suit under § 1983 unless his or her conduct violated a "clearly established" right. Given the indeterminancy, or at least the underdeterminancy, of constitutional law, courts find that few rights against the use of force are sufficiently "clearly established" to permit a § 1983 suit to proceed. See Harmon, supra n. --, at 1140-43.
[39] Federal law provides a criminal equivalent to § 1983. See 18 U.S.C. § 242.
[40] It has been a major mistake, in my view, to explain the exclusionary rule in terms of sanctioning or punishing police misconduct, or in terms of deterrence. In the context of criminal proceedings, an illegal

and criminal sanctions, in contrast, are predicated on the theory that it was not the true sovereign, but an impostor, who violated the constitution. And as remedies, they look back to the past, to a violation that has already taken place.

Hobbes's distinction between natural and artificial persons helps explain this distinction between equitable constitutional remedies and other remedies. When a court applies the Fourth Amendment exclusionary rule, or strikes down a punishment as inconsistent with the Eighth Amendment, there is no doubt that the artificial person of the sovereign is restrained. But when a court finds a § 242 violation or awards § 1983 damages, it is the natural person employed by the state who is deemed liable.[41]

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

But incidents of actual enforcement are quite rare, and become rarer. Courts don't often award § 1983 damages for Fourth or Eighth Amendment violations. They exclude illegally seized evidence somewhat more often, but successful suppression motions are in decline, and at any rate, exclusion is rarely a remedy for a use-of-force

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search or seizure (or other police misconduct) that produces evidence is a continuing violation. When other state actors rely on the illegally seized evidence, they perpetuate the violation. Exclusion of evidence puts a (partial) stop to the violation, and exclusion is justified independent of any deterrent effect on the police.

[41] I do not wish to overstate this distinction. As noted above, in most use-of-force challenges, the government provides some indemnity to the natural person in its employ, and the doctrine of qualified immunity gives that natural person a safe harbor in which to avoid liability. See supra n. __.

violation. And Eighth Amendment equitable remedies—judicial invalidation of a "cruel and unusual" sentence, for example—are almost never awarded.[42]

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

And when they do so, they almost never find that a state actor has used force in violation of the Fourth or Eighth Amendments. Almost every executive and legislative use of (domestic) force falls within the scope of the covenant as interpreted by the judiciary. One explanation, consistent with the claim that the constitution restrains the state's uses of force, is that these amendments do in fact impose determinate limits on executive or legislative discretion, but actors within the executive or legislature then internalize the constraints and therefore exercise their discretion within the independent limitations of the covenant. Constitutional violations are rarely found, on this account, because the constitution is in fact rarely violated. A second explanation, more pessimistic, is that courts tend to interpret the Fourth and Eighth Amendments to permit whatever conduct executive and legislative officials do in fact take. In the following

[42] See Alice Ristroph, State Intentions and the Law of Punishment, 98 J. Crim. L. Criminology 1353 (2008); Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263 (2005).

section, I defend the latter interpretation. And once again, Hobbes helps us understand why this is so.

Identifying Constitutional Violations

Claims that a state actor has used force in excess of constitutional parameters are usually grounded in either the Fourth Amendment's prohibition of unreasonable seizures or the Eighth Amendment's prohibition of cruel and unusual punishments.[43] The Fourth Amendment excessive force doctrine, in marked contrast to other areas of Fourth Amendment law, is relatively undeveloped and offers only very general principles of reasonableness. Eighth Amendment doctrine is somewhat more intricate. Both doctrinal areas are characterized by frequent invocations of judicial deference—to legislatures, police officers, or prison officials—and by an emphasis on the need to protect discretion—again, the discretion of legislatures, police officers, and prison officials. After a very quick review of the contours of these doctrines, I suggest that the apparent solution to the problem of interpretive authority—judicial review—is largely illusory.

One preliminary observation about the term "force" is in order. When I speak of the use of force by state actors, I mean exercises or threats of physical harm or physical constraint. A custodial arrest is a use of force, as is a prison sentence. And I count among those who "use" force not just the "violence specialists"[44]—the individual officers who place a suspect in handcuffs or in a prison cell—but also the more distant political

[43] Another possible constitutional basis for a use-of-force challenge is the due process clause. See Rochin v. California (forced vomiting to retrieve swallowed pills "shocks the conscience" and thus violates due process). The Supreme Court has since held that use-of-force claims against police officers are to be adjudicated under the Fourth Amendment. See below.

[44] Douglass C. North, John Joseph Wallis & Barry R. Weingast, Violence and Social Orders (2009).

and judicial actors who empower the violence specialists. On both issues, my use of the term *force* is considerably broader than the usage of courts and most commentators. For example, police force is typically defined so as to exclude most custodial arrests.[45] In the discussion of the Fourth Amendment below, I focus on the incidents that fall even within the narrower understanding of a "use of force."

Under existing doctrine, a police officer's use of force is constitutional so long as it is reasonable.[46] The Court has held that what constitutes reasonableness is "not capable of precise definition or mechanical application"[47]; reasonableness analysis is instead a "factbound morass" through which judges must slosh.[48] There really is not much more to the doctrine than that. Courts have often relied on the same list of factors to assess reasonableness—severity of the offense, the extent to which the suspect is thought to pose a threat to the officer or others, and whether the suspect resists or evades arrest—but no factor is dispositive as a matter of law.[49] And importantly, courts emphasize that they will not judge a use of force with "the 20/20 vision of hindsight."[50] Instead, "[t]he calculus of reasonableness must embody allowance for the fact that police

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[45] Harmon quotes the following judicial definition of police force:

> [A]ny physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds or hard hands; the taking of a subject to the ground; or the deployment of a canine. *The term does not include escorting or handcuffing a person, with no or minimal resistance*.

Harmon, supra n. __, at n. 14 (quoting Consent Judgment, Conditions of Confinement at 1-2, United States v. City of Detroit, No. 03-72258 (E.D. Mich., July 18, 2003)) (emphasis mine).
The view that "force" occurs only when the subject resists is one with a sordid history in the law of rape. See Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953.
[46] Graham v. Connor, 490 U.S. 386, 395 (1989).
[47] Id. at 396.
[48] Scott v. Harris, 550 U.S. 372 (2007).
[49] Graham, 409 U.S. at 396.
[50] Id.

officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[51] Analysis of Fourth Amendment excessive force claims is characterized by deference to discretion—of judicial deference to the police officer's on-the-ground discretionary judgment about the reasonableness of force.[52]

Eighth Amendment doctrine is similarly characterized by appeals to judicial deference to the discretion of other state actors. The Eighth Amendment does not refer to reasonableness but instead to "cruel and unusual punishments." What makes a punishment cruel and unusual depends on the nature of the claim. An individual who challenges his formal sentence—as explicitly authorized by a legislature and imposed by a trial court—must frame his challenge as a claim of disproportionality. The Eighth Amendment has been interpreted to encompass a "narrow proportionality principle" that prohibits sentences "grossly disproportionate" to the offense of conviction.[53] Proportionality analysis, perhaps even more so than Fourth Amendment excessive force analysis, emphasizes the limited competence of courts to determine the appropriate use of physical force. To determine proportionality (or gross disproportionality), courts identify the state's "penological purposes" and ask whether the sentence is excessive in relation to those purposes. Penological purposes may be pitched at a very high level of abstraction—"deterrence" or "incapacitation"—and courts do not require a rigorous

[51] Id. at 396-97.
[52] See, e.g., McCullough v. Antolini, 559 F.3d 1201, 1208 (2009) (emphasizing "the deference we afford the split-second police judgments in the field"); Pace v. City of Palmetto, 489 F. Supp.2d 1325 (2007) (need for a "measure of deference to police judgment").
[53] Ewing v. California, 538 U.S. 11 (2003); see Ristroph, Proportionality as a Principle of Limited Government, supra.

demonstration that a given sentence actually achieves the stated purpose. Instead, courts emphasize their own deference to legislative prerogative.[54]

When the Eighth Amendment claim is an allegation that a prison official has used excessive force, the doctrinal inquiry is into the official's state of mind. The question is whether the official used force "in a good faith effort to maintain or restore discipline[,] or maliciously and sadistically for the very purpose of causing harm."[55] The Supreme Court self-consciously adopted this "malicious and sadistic" standard over the "deliberate indifference" intent requirement that applies to challenges to conditions of confinement.[56] The Court's rationale for the higher intent threshold in the use of force context was one of deference to prison officials' discretionary violence: with respect to uses of force, "a deliberate indifference standard does not … convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and without the luxury of a second chance."[57]

Arguably, choices made "in haste" and "under pressure," or under "tense and uncertain" circumstances, are more, not less, deserving of ex post review. But the Court implies that to subject such decisions to searching judicial scrutiny would produce a flood of litigation, some of which would lead to successful judgments against the state. And that, apparently, the Court will not countenance. A flood of litigation, and some successful judgments against the state, is what it would mean to have covenants for the

[54] See Ewing, 538 U.S. at 25 (deference to legislative policy choices); id. at 29; id. at 30.
[55] Hudson v. McMillian, 503 U.S. 1, 6 (1992).
[56] Whitley v. Albers, 475 U.S. 312, 320 (1986).
[57] Id.

sword. Hobbes did not think such a state of affairs was consistent with a stable sovereign, and perhaps the Court agrees.

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

Courts could address their methodological deficit by further developing Fourth and Eighth Amendment doctrines—by articulating more specific factors that determine reasonableness or proportionality.[58] Instead, judicial opinions have actively resisted more precise legal standards for the use of force.[59] It seems that judges do not want to get into the business of regulating violence too closely.[60] I suggested in the first section

[58] Rachel Harmon suggests ways to do this in the Fourth Amendment context. See Harmon, When Is Police Violence Justified?, supra. And several scholars have suggested ways to develop Eighth Amendment proportionality and excessive force doctrine. [cites]

[59] [note on 1983 doctrine and the avoidance of "clearly established" law; Saucier to Pearson]

[60] Of course, as Robert Cover famously argued, judges inevitably do give orders that other state officials exercise violence to enforce. But this is most directly true of trial judges; appellate judges and especially the Justices of the U.S. Supreme Court may more easily imagine themselves distanced from the state's uses of violence.

that we could think of the separate branches of a divided government as plural quasi-sovereigns, but perhaps this depiction needs modification. With respect to the use of the sword, which is arguably the quintessential exercise of sovereign power, the judiciary makes no claim to sovereignty and indeed explicitly eschews it. Here one must think of the Schmittean reading of Hobbes: sovereign is he who decides the exception—he who makes discretionary judgments unbounded by rules. Schmitt argued that ultimate questions about the use of violence are beyond law. And while no U.S. court would openly endorse this claim, the judicial deference to executive and legislative choices suggests that the use of force is in practice largely beyond the law.

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