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Punishing the poor and the limits of legality.

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Abstract: Many of us feel that there is something distinctly wrong about punishing people who are extremely poor. Criminal law theorists have offered different explanations for this disquietude, among these is the idea that punishing the poor may be unwarranted because extreme poverty undermines the authority of the state to punish. This paper argues that the issue of authority is indeed the heart of the matter, but unlike most views it argues that extreme poverty completely subverts the meaning of punishment and renders it into an instance of pure force. By looking into foundational ideas of punishment and legality in literary resources like *The Oresteia* as well as in early modern philosophical discourse, the paper argues that punishment requires a context of authority to be a part of legal and political justice, and even in a minimal account of political legitimacy such as that formulated by Hobbes, extreme poverty undermines such context.

I.

We often describe punishment as a principled legal institution that embodies a triumph of reason over passion.[1] Punishment, unlike brute violence, is widely understood as an institution of justice. Yet, it is within this very same practice that many identify the most embarrassing brutalities of our societies and reasons to think that we have failed yet to

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[1] Neil MacCormick and David Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish', in *Fundamentals of Sentencing Theory*, ed. by Andrew Ashworth and Martin Wasik (New York: Oxford University Press, 1998), pp. 11–30.

become civilized. Criminal law and criminology scholars are increasingly troubled by the overuse of criminal justice through punishing too much and too harshly.[2] This concern is particularly pronounced because we punish too much precisely those who have been systematically denied sufficient access to the benefits of a political life, most typically, the extreme poor.[3]

Regarding the legitimacy of punishing the extreme poor, criminal law theory and political philosophers have provided two sets of answers. According to the first of these, punishing the poor makes us uneasy because poverty undermines the conditions of individual responsibility thus making punishment unfair.[4] The second set of answers considers that the central problem of punishing the poor has to do with the state´s lack of authority or standing to do so. In these theories the issue is usually presented as a moral

[2] Robert A. Ferguson, *Inferno* (Harvard University Press, 2014); Douglas Husak, *Overcriminalization* (New York: Oxford University Press, 2008); William J. Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press, 2011).

[3] Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, USA, 2001); Antony Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial', *Ratio*, 23.2 (2010), 123–140; Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (duke university Press, 2009); *Free Will*, ed. by Gary Watson (Oxford University Press, 2003); Sarah Buss, 'Justified Wrongdoing', *Noûs*, 31.3 (1997), 337–369; Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Mc Graw Hill, 1976), III; Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (Oxford University Press US, 1996); William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (The Univ. of Chicago Press, 1996); Bruce Western, *Punishment and Inequality in America* (Russell Sage Foundation, 2006); Rocío Lorca, 'Pobreza y Responsabilidad Penal', in *El Castigo Penal En Sociedades Desiguales*, ed. by Roberto Gargarella, 2012, pp. 173–203.

[4] Affirmative answers to this question have been occasionally defended in legal theory and practice. One of the most important examples can be found in the dissenting opinion of Judge David L. Bazelon in *United States V. Alexander*, 471 F.2d 923, 957 (D.C. Cir. 1973). After Bazelon´s opinion Richard Delgado analyzed systematically the effects of a deprived background on individual responsibility coining the influential term of a "rotten social background." See Richard Delgado, 'Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation', *Law & Ineq.*, 3 (1985), 9. Both these works can be made accountable for reigniting the concern about the fairness of punishing the poor, though it has a much longer story. Indeed, under the doctrine of necessity it has long been argued that extreme poverty can be grounds for justifying certain crimes, specially crimes against property. This was formulated as a legal doctrine in Aquinas, *Summa Theologiae*, 2.2ae. 66.7., also in the work of medieval canonists who during the 13th century developed a doctrine according to which the poor were not guilty of theft when they seized the excess of property of the rich in order to sustain their life. See Brian Tierney, *The Idea of Natural Rights.*, 5 (Wm. B. Eerdmans Publishing, 1997), pp. 70–73.

problem where extreme poverty either undermines the normativity of the criminal law or it undermines the moral standing of a community to call an offender to answer.[5]

Both individual responsibility and authority are necessary factors for punishment to be justified, and I do believe that they can both be undermined by extreme poverty. However, most scholars who are willing to concede that extreme poverty undermines the authority of the state to punish tend to find reasons to argue that the state can still punish, either because they argue that in certain cases the state has a duty to punish even without authority, or because they argue that some residue of authority is still standing.[6] But perhaps the impact of extreme poverty runs deeper, not only completely undermining authority but also changing punishment´s meaning by cancelling the very features that allow us to understand punishment as a civilized practice which expands the space of legality. Perhaps when we punish the extreme poor what we are doing does not ultimately fit our own conception of what punishment is.

In this paper I will argue that punishing the extreme poor is troubling because beyond whether the practice can be justified or not, when we punish the extreme poor we

[5] Antony Duff, for example has argued in both ways. He sees that there might be both a problem of authority that impinges in the normativity of the criminal law, but also a problem of standing that undermines the permission of a community to punish even regarding laws that are perfectly binding (this would be the case of certain crimes that constitute uncontroversial *mala in se*). See Duff, *Punishment, Communication, and Community*, pp. 181–84. In a more nuanced account, Stephen Garvey has also argued that regarding people who are treated as what he calls "second-class citizens" the nature of the authority of the state changes. While it still retain a weak kind of authority to "issue demands and enforce those demands" it loses a thicker sense of authority where the state can impose duties and punish their violation. It is thus the moral or normative linkage between the individual and the state what is undermined *vis a vis* members of a community that have been deprived their fair share of the benefits of social cooperation. See Stephen P. Garvey, 'Injustice, Authority, and the Criminal Law.', in *The Punitive Imagination* (Tuscaloosa: The University of Alabama Press, 2015), pp. 42–81 (pp. 60–63).

[6] Antony Duff, for example, argues that in crimes that represent uncontroversial *mala in se* victims have a right of recognition that may give reason to the state to punish despite its lack of political authority. See Duff, *ibid*. Stephen Garvey and Matt Matravers, on the other hand, argue that some level of authority remains standing. See Garvey, Ibid., and Matt Matravers, '"Who"s Still Standing?'A Comment on Antony Duff's Preconditions of Criminal Liability', *Journal of Moral Philosophy*, 3.3 (2006), 320–330.

are not acting in the higher realm of justice and legality but instead have fallen back into the space of hostility. In order to do this I will first distinguish some of the features of punishment that make it an institution of legality as opposed to brute violence. Here my aim is to show that the importance of authority for punishment is not just a moral issue regarding the rights of the state and the duties of the citizen, but also that authority is a necessary feature of punishment to be distinguished from brute violence. I will then look at how extreme poverty may undermine the possibility of punishment being an institution of legality.

II.

What makes punishment a practice of legality? From our earliest ideas of punishment, we have understood it as a civilized practice of justice that can be distinguished from the excessive and unruly nature of vindictive passions. In one of our oldest myths about the emergence of punishment and legal institutions, *The Oresteia,* a cycle of revenge is brought to an end through the institution of a court of justice. In *The Eumenides,* the third play of the cycle, we see this through the transformation of the Furies into the Eumenides.[7] But as the story shows, it is the context in which the punishment takes place rather than its specific form that sets it apart from brute violence. What the context provides is not the justification for punishment but the conditions that make punishment intelligible as an institution of law.

The Furies, repulsive gorgon-like entities with blood dripping from their eyes, are chasing Orestes to avenge Clytemnestra´s murder. The goddess Athena intervenes by establishing an impartial and permanent court, the Aeropagus, to adjudicate their

[7] Aeschylus, *Aeschylus*, ed. by David Grene and Richmond Lattimore (University of Chicago Press, 1953), p. 129.

conflict.[8] After a trial, the case is decided in favor of Orestes by Athena´s deciding vote, but the Furies "heavy with anger" have yet to be persuaded.[9] In order to convince them to accept the Aeropagus judgment, Athena offers the Furies a place in her city where they will be treated and honored as goddesses. Though she also threatens them with violence, her main offer is glory, power, privilege and sharing the country and its good life.[10] When the Furies are finally persuaded to accept the judgment of the Aeropagus and stay in Athena´s city, they no longer look angry, but benevolent, no longer looking like beasts, but like humans.

Although the ending of *The Oresteia*, marks the beginning of Athena´s political justice, it is worth noting that the depth of the transformation that the Furies undergo is ambiguous.[11] It is not clear whether they actually become essentially benevolent, or whether their nature has merely been domesticated and they remain internally angry and resentful. Their new name seems to suggest that they have gone through a complete transformation into peaceful benevolent beings, but the terms of the negotiation with Athena suggest that the second is true, i.e., that there is a change in their manners and mode of acting but that they remain vindictive.[12]

Indeed, in the story violence and fear are considered necessary to secure the normative order of the community, but this violence and fear must be organized by law

[8] Aeschylus, p. 152.
[9] Aeschylus, p. 163.
[10] Aeschylus, pp. 163–70.
[11] Martha C. Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press, 2016), p. 3.
[12] Indeed, by the end of *Eumenides*, as the Furies are being persuaded by Athena, they declare that their "hate is going" and yet in the dialogue with Athena that closes the play, it is clear that the passions of the furies and their anger will still play an important role in the new political order, even if they are now tamed by their commitment to help the peace and prosperity of the city of Athena requires. See Aeschylus, pp. 160–70; Paul Gewirtz, 'Aeschylus' Law', *Harvard Law Review*, 101.5 (1988), 1043–1055 (p. 1054).

and by the judgment of the Aeropagus.[13] As Eumenides, the Furies behave and look different, but they still instill fear, a fear which is now at the service of the institutions of justice that Athena has set up.[14] In consequence, the transformation of the Furies into Eumenides does not mark the end of coercion, but a new context that allows violence to become an institution of political justice. This is the transition from revenge to punishment.[15]

What made this transition possible? Why did the Furies choose to become Eumenides? Possibly the answer lies in the terms of their negotiation with Athena, where there is something real that is perceived as valuable for both parties. Athena is more powerful than the Furies and did not need to convince them in order to save Orestes, she did so because she perceived the Furies being transformed into Eumenides as valuable for strengthening her political institutions.[16] The Furies, on the other hand were persuaded by the real possibility of enjoying a place in her prosperous city. What ultimately allowed for the success of this agreement is that both Athena and the Furies had something of real value to offer and this provided the context that made the transformation possible.

III.

The story of the transformation of the Eumenides provides many insights into our own understanding of punishment. As with the Furies, the goods of social cooperation seem to

[13] Aeschylus, pp. 150–60.

[14] Aeschylus, pp. 169–70.

[15] Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton University Press, 2000), pp. 21–22; Gewirtz, pp. 1047–48; Nussbaum, pp. 2–5.

[16] In fact, in Aeschylus play, Athena says: "I have Zeus behind me Do we need to speak of that? I am the only god who know the keys to where his thunderbolts are locked. We do not need such, do we?" Implying that the reasons she has to convince the Furies are not the threat of violence, but the goods they will receive if they stay: "Put to sleep the bitter strength in the black wave and live with me and share my pride of worship." Aeschylus, p. 164.

have persuaded us to give up vengeance and private feud for the goods of civil order.[17] And just like Athena, we believe that we cannot completely let go of coercion because we need punishment to secure the efficacy of our institutions.[18] Given that we retain coercion in our legal institutions, it is the context of punishment rather than its objective features that allows it to inhabit the world of law and justice instead of that of brute violence.

A brief comparison between punishment and revenge may clarify the idea that what distinguishes punishment from revenge is the context rather than any objective aspects of the practice itself. Both punishment and revenge consist of the imposition of hard treatment. Central to the story of the Eumenides and our own view about punishment and law is that we cannot fully dispose of imposing hardship on each other, and part of the reason for this is that the violence of punishment has the capacity of pacifying the vindictive emotions of victims.[19] If we punish too little or if we do not punish at all, the argument goes, the state´s monopoly of violence could be risked.[20] Even if there is a hope that legal punishment will overall yield less violence, each instance of the practice will still consist of an imposition of hard treatment, just as happens with revenge.[21]

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[17] John Gardner, 'Crime: In Proportion and in Perspective', in *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch. Oxford: Clarendon*, 1998, pp. 31–52.

[18] Even if conceptually a legal organization does not require coercion, just like the constitution of the Aeropagus did not require Eumenides, it seems hard to understand law without a reference to coercion and more specifically, without a reference to punishment. See Paul Hirst, 'The Concept of Punishment', *Law Context: A Socio-Legal J.*, 2 (1984), 73; H. L.A Hart, *The Concept of Law* (Clarendon Press, 1994); Leslie Green, 'The Forces of Law: Duty, Coercion, and Power', *Ratio Juris*, 29.2 (2016), 164–181.

[19] Vid. Supra, note 15.

[20] Gardner, 'Crime: In Proportion and Perspective'.

[21] In most contemporary legal systems one finds a variety of modes of punishment, which have also varied over time. See for example, M. Foucault, 'The History of Sexuality, Volume 1: An Introduction. 1976', *Trans. Robert Hurley. New York: Vintage*, 1990; M. Foucault, *Discipline & Punish: The Birth of the Prison* (Vintage, 1995). Thus, one can distinguish certain modes of punishment as less burdensome than others, yet this does not change the fact that, no matter how burdensome it will be, punishment will always be an imposition of hardship. Gardner, 'Crime: In Proportion and Perspective'; John Gardner, 'Punishment and Compensation: A Comment', *SSRN ELibrary*, 2011, p. 8. H. L. A. Hart, 'Prolegomenon to the

A second feature of punishment, also present in revenge, is that the hard treatment must be part of a practice of individual responsibility, in the sense that it must be a response to past misconduct.[22] The punishment that the Aeropagus is discussing is a response to what Orestes allegedly did. Likewise, what drives the anger of the Furies and the specter of Clytemnestra are the past deeds of Orestes. When an imposition of hard treatment does not refer to someone´s past deeds, it is neither punishment nor revenge.[23] As a consequence, the idea of responsibility and wrongdoing is not what makes punishment an institution of justice, because revenge shares this aspect and it is precisely by abandoning revenge that hard treatment can enter the world of law.

A third option could be to establish the distinctiveness of punishment as opposed to revenge as a matter of deliberation. We know through the *Oresteia* that punishment is deliberated upon and is not an impulsive reaction to misconduct. Punishment is a reaction which is calculated and considered through a detailed procedure, ideally based on evidence.[24] But while punishment needs to be deliberated to become an institution of justice, this is not what sets it apart from brute violence, because violence need not be impulsive in order to be contrary to the spirit of law. Indeed, most of the acts of vengeance in the *Oresteia* take place a long time after the offenses.[25] Deliberation was

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Principles of Punishment', in *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968), pp. 1–27 (pp. 4–6).

[22] It is generally thought that any plausible theory of punishment will find a reason to require a judgment of culpability for what an agent did. In this sense, see Douglas Husak, 'Mistake of Law and Culpability', *Criminal Law and Philosophy*, 4.2 (2010), 135–59. See also H. L. A. Hart, pp. 4–6.

[23] Here we find a genuine definitional stop, according to the idea formulated by Hart, H. L. A. Hart, pp. 4–6. Either punishment is imposed in view of past misconduct or we should call it something else, maybe "telishment" as John Rawls once suggested. See John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (January 1955): 3–32.

[24] Rocio Lorca, 'Book Review: Castigar Al Prójimo. Por Una Refundación Democrática Del Derecho Penal', *International Journal of Constitutional Law*, 15.2 (2017), 573–577.

[25] Everyone in the Oresteia has to wait for revenge. Especially Clytemnestra and Orestes. The fact that Clytemnestra, Aegisthus and Orestes carefully planned their actions and waited patiently to execute them, does not make them less an instance of revenge or aggression.

present in our world long before the emergence of punishment and political justice, and although it is true that unpersuaded or undeliberated violence can generally not be part of a rule of law, this cannot be what makes punishment an institution of justice because even a well-planned vengeance would not be able to embody an idea of legality.[26]

These similarities between punishment and revenge suggest that the transformational feature of punishment that distinguish it from revenge may not lie primarily in its objective aspects, but rather in the context in which punishment takes place and the meaning that this context allows. Following Nozick´s distinction between revenge and retribution, one may say that while punishment appeals to a notion of public justice, where the point of reference of the reaction is the social and general meaning of what the agent did, revenge and hostility more generally appeal to a personal judgment, the point of reference being a private idea of what an agent deserves.[27] Perhaps what allows punishment to have a legal status is that, unlike vengeance or aggression, it presents itself as a legitimate act of a public authority, a response from a legal order.[28]

If punishment aspires to be an expression of what a civil order rightfully requires, then there must be a social and political context already in place. In *The Eumenides*, this is represented by the fact that the establishment of the court of justice is prior to the Furies' transformation, as is the existence of a city ruled by Athena and constituted by citizens who share an identity and common aspirations.[29] Athena sets up the court before

[26] For a traditional set of features that our modern idea of legality include, see Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969), CLII, pp. 46–94; Marc Galanter, 'The Modernization of Law', in *Law and the Behavioral Sciences*, ed. by L. M Friedman and S. Macaulay (Bobbs-Merrill, 1969), pp. 989–98.

[27] Robert Nozick, *Philosophical Explanations* (Belknap Press, 1981), pp. 366–70. To be sure, Nozick here is comparing revenge to retribution, but for our purposes the comparison is still helpful because the feature that he identifies as not being present in revenge, is present in any aim of punishment.

[28] Allen.

[29] Aeschylus, pp. 167–70.

knowing whether she can count on the support of the Furies, but it was the social and institutional context already in place which she used to persuade the Furies and which ultimately allowed for their transformation. It is within this context that punishment came to be; without it, it could not have emerged. And while punishment can strengthen the ties of a community and thus strengthen its own conditions of existence, it cannot by itself constitute from scratch either a community or an institutionalized project of justice.

What determines the transition of hostility to punishment is the punisher having a claim of authority to punish, in the sense of there being a context that makes it plausible for people to understand punishment as a practice of justice.[30] In hostility there is no such claim, or the claim is not plausible. Of course, claiming legitimacy will on its own set some constraints on punishment´s forms, but what the story of the transformation of the Furies illuminates is that these formal constraints are not what essentially constitute punishment as an institution of justice. Punishment, like the Eumenides, is meant to serve and secure the political project of the community in which it takes place.[31] Just like paying taxes, enforcing a contract or voting in an election, punishing crimes is a way in which justice is served in a given community. It requires a public authority and its value and meaning are partly a reflection of the quality of the social project it serves.[32] If authority is undermined the issue is not just whether this will entail that punishment is

[30] Allen, p. 23. In the context of criminal law theory, this is an aspect of punishment that has been largely explored and developed in the work of Antony Duff, *Punishment, Communication, and Community*, chap. 5; Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial'; Antony Duff, 'I Might Be Guilty, but You Can't Try Me: Extoppel and Other Bars to Trial', *Ohio St. J. Crim. L.*, 1 (2003), 245.

[31] Gewirtz, pp. 1047–48.

[32] A full justification of the practice will also require that punishment is provided with a positive justificatory aim. As Anscombe has suggested, punishment´s justification demands that we account for the appropriateness of punishment as a response as well as for the question of who has authority to punish. Here we are discussing this second issue, the first issue is usually discussed under the terms of theories of punishment (deterrence, retribution, rehabilitation, etc.). See G. E. M. Anscombe, 'On the Source of the Authority of the State', in *Authority*, ed. by J. Raz (NYU Press, 1990), pp. 142–73.

unjustified, rather it puts the very existence of punishment at stake. Talk about punishment just becomes inappropriate or misleading.

IV.

Early modern philosophers viewed clearly this distinctive aspect of punishment, although this view lost relevance after the seventeenth century due to the influence of the idea that punishment was sourced on individual natural rights. For Hobbes, punishment was an act of authority. The constitution of sovereign power provides the basic condition of assurance that makes possible normative standards and expectations, as well as the very idea of justice. As a result punishment could only take place in the context of political authority.[33] The only possible legal punishment was that which was organized or authorized by the sovereign over one of its subjects. Outside the bond of political authority, the violence of punishment had to be understood as something else: in Hobbe´s own terminology, as an act of hostility.[34]

This may seem to go against Hobbes's own idea that the source of the sovereign's right to punish is his own natural right to do everything that is necessary for his own preservation and not the context of political authority.[35] However, the sovereign´s right of nature and right to punish, unlike everyone else´s right of nature, is governed by justice because the institution of the sovereign had transformed the meaning of the sovereign´s

[33] In Hobbes words: To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Thomas Hobbes, 'Leviathan', *Indianapolis, Ind.: Hackett.*, 1994, p. Ch. XIII, 78. See also the conceptual restrictions to the idea of punishment that one can find in chapter XXVIII of *Leviathan*, all these restrictions begin from the assumption that punishment can only be exercised by a public authority, and these are not *definitional stops,* in the Hartian sense, but logical consequences of the substantive claim that there is no right to punish in a state of nature. See H. L. A. Hart, p. 5.

[34] Hobbes, chap. XIV and XXVIII. In the world of Hobbes, acts of hostility are regulated by our right of nature to do whatever we consider necessary to secure our survival.

[35] Hobbes, chap. XXVIII.

right of nature into an act of authority.[36] As a consequence, in the Hobbesian story punishment was considered an institution of justice which could only be decided and imposed in the name of a public authority.

The idea that the right to punish was sourced on political authority was not a new view in Western Philosophy. A century before Hobbes, the Scholastic philosopher Francisco de Vitoria made an important defense of this same idea. In the context of the European colonization of the New World, there arose a question of whether Europeans could colonize the New World under the pretense of punishing the sins of America's indigenous people. In Vitoria´s view, this was generally not an appropriate ground for colonization because punishment was primarily tied to the existence of a relationship of justified political authority, therefore any violence deployed outside of such relationship had to be either hostility or a legitimate exercise of a right of self-defense.[37]

By the end of the seventeenth century, and possibly under the influence of Locke´s theory of government and individual rights, this political view of punishment was replaced by the idea that individuals have a natural right to punish. According to Locke, converging with an idea formulated earlier by Grotius, punishment was not grounded on political authority but on individual´s natural right to punish serious violations of the natural law.[38] In Locke´s view, punishment had to be administered by political authority not because punishment was essentially a political practice, but for

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[36] Hobbes, chap. XXVIII, 204.

[37] According to Vitoria, the question about punishment is a matter of political and not divine power, and there is no civil jurisdiction regarding the inhabitants of the new world. Francisco de Vitoria, *Political Writings* (Cambridge University Press, 1992), p. Ch. xii-xiv. The pope's temporal powers, on the other hand, are limited to those who have subjected themselves to faith, thus he is powerless over nonbelievers, Vitoria, pp. 258–64.

[38] John Locke, *Second Treatise of Government* (Hackett Publishing Company, 1980), chap. II; Hugo Grotius, *Commentary on the Law of Prize and Booty* (Liberty Fund Inc., 2006), p. 19; H. Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (MW Dunne, 1901), p. 222.

reasons of expediency and to allow for the constitution of a civil government.[39] As a consequence, according to the view put forward by Locke and Grotius, the community is not primarily responsible for the practice of punishment but rather it is the criminal who, by violating someone´s rights has brought punishment upon to herself.[40]

Most contemporary views, however, seem to be turning back to a political understanding of punishment.[41] While I cannot here fully argue for this turn, a brief review of Locke´s and Grotius account of punishment may show that, at least in this case, Hobbes was right, and that what makes punishment an institution of justice is not a matter of individual´s natural rights but a context of authority.[42]

Grotius and Locke defended the idea that individuals have a natural right to punish on three grounds. First, they held individuals must have a natural right to punish due to the superfluous character of political authority. Second, they held that without a natural right to punish governments would not have a right to punish foreigners for the crimes they commit on their territories. And third, a natural power to punish was fundamental to make sense of the idea of individual rights and natural law.

The first argument stems from the idea that political power is based in the consent of the governed. According to Locke and Grotius a consent-based theory of political

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[39] Locke, chap. II.

[40] H. Grotius, p. 222.

[41] See for example, Antony Duff, 'Punishment, Citizenship and Responsibility', in *Philosophical Foundations of Criminal Law*, ed. by Antony Duff and Stuart P. Green, 1996, pp. 125–48; Alice Ristroph, 'Responsibility for the Criminal Law - Oxford Scholarship', in *Philosophical Foundations of Criminal Law*, ed. by Antony Duff and Stuart Green, pp. 107–23; Markus D. Dubber, 'Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law - Oxford Scholarship', in *Philosophical Foundaitions of Criminal Law*, ed. by Antony Duff and Stuart P. Green, pp. 84–106; Nicola Lacey, *State Punishment* (Routledge, 2012); Rocio Lorca, 'The Presumption of Punishment: A Critical Review of Its Early Modern Origins', *The Canadian Journal of Law & Jurisprudence*, 29.2 (2016), 385–402.

[42] For a full review of these arguments, see Rocio Lorca, 'The Presumption of Punishment'. And for a more detailed account on their historical context, see Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, USA, 1999).

power yields a superfluous understanding of political authority in the sense that all legitimate political powers must have been first possessed by individuals because we can only transfer what we already possess. If the state can punish, so the argument goes, individuals must have had this capacity in the first place.[43] But it is not at all convincing that a consent-based theory of political authority must understand political authority as being superfluous. Even if political powers are sourced on the rights transferred by individuals, the specific capacities of political authorities may be very different from the capacities that individuals had before the civil pact. There are indeed important consent-based theories of the state that argue that the transference of individual rights may give rise to new normative possibilities, and punishment is among them.[44] Indeed, both Pufendorf and Hobbes argued that the right to punish requires a relationship of authority that is absent before the civil pact, and both also defended a consent-based view of political authority.[45]

Grotius and Locke also argued that without a natural right to punish there would be no ground to punish foreigners who commit crimes in a state's territory, although we do this all the time.[46] It is surprising, however, that both these philosophers thought it impossible to find a ground for such authority over foreigners, because consent-based

[43] Hugo Grotius, p. at Prolegomena, 136-37; Tuck, p. 85.

[44] In Pufendorf´s view, there is nothing problematic about the idea that a power that is sourced in a transfer can be different from the thing that was transferred because the transfer creates a new reality, paraphrasing him, just as the mixture of material bodies can give rise to completely new substances, so can moral bodies give rise to entities that are not reducible to their parts. Samuel Pufendorf, 'Of the Law of Nature and Nations, Trans', *CH and WA Oldfather (Oxford: Oxford University Press, 1934)*, p. VIII, Ch. III, Sec. 1, 249.

[45] Pufendorf, p. Ch. III, Section 1, 1160. Hobbes argues that it is the very constitution of sovereign power and its provision of assurance that makes possible certain normative standards and expectations, transforming our basic right of self-preservation into a practice of justice. Hobbes, chap. XIII and XIV.

[46] Locke, p. 47; Hugo Grotius, p. 137. It is striking how similar their arguments are, yet it is not clear they had a chance to read each other's works. Regarding the possibility that this is just a case of intellectual convergence, see Tuck, p. 82.

theories of political authority, like the ones defended by them, have good resources to claim the opposite.[47] Arguably, by voluntarily entering the territory of a given state, aliens tacitly consent to respecting its rules, and since both Grotius and Locke thought that tacit consent was a sufficient ground for political authority, it is not clear why they would consider the case of punishing foreigners problematic.[48] Indeed, as Hume argued, even if one disagrees with the capacity of tacit consent to ground political authority over a regular citizen, it appears as a more plausible theory of authority for the specific case of a state's authority to punish a foreigner.[49]

Finally, and perhaps more importantly, both Grotius and Locke thought that natural law must be enforceable to be genuine law and, for this purpose, punishment must be available as a means of enforcement.[50] Without an individual natural right to punish, natural law and individual rights would be rendered hollow intellectual creations with no real efficacy or meaning.[51] But do rights need to come with a power to punish in order not to be vain? The answer to this question lies in the distinction between defensive and punitive force, because the concern about efficacy can be sufficiently met by granting rights with a general permission to protect them through force, without assigning them with a power to punish their actual violation.[52]

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[47] Locke, pp. 10–11; Hugo Grotius, p. 137.

[48] A. John Simmons, 'Locke and the Right to Punish', in *Punishment: A Philosophy & Public Affairs Reader*, ed. by Marshall Cohen and others (Princeton University Press, 1995), p. 236.

[49] As Hume argued, the circumstance of living under someone's dominion makes the idea of consent implausible, but he himself later argued that the opposite is true regarding foreigners: "The truest tacit consent of this kind, that is ever observed, is when a foreigner settles in any country, and is beforehand acquainted with the prince, and government, and laws, to which he must submit (…)." David Hume, *Moral Philosophy* (Hackett Publishing Company, 2006), p. Essay VII, On the Original Contract, 368.

[50] Locke, chap. II, 9-10; Hugo Grotius, p. Prolegomena, 21, 27, 30-32. For a clarifying analysis of the way this argument appears in Grotius, see Tuck, pp. 84–86.

[51] Locke, pp. 9–10.

[52] Rocio Lorca, 'The Presumption of Punishment', pp. 396–400.

Unlike defensive force, punishment is not an exercise of coercion primarily meant to protect someone's right but a response to an aggression that already took place. From the point of view of protecting and enforcing rights, punitive force, unlike defense, always comes late. And even if one can draw a continuum between punishment and defense as means for protecting rights, the fact that these practices converge in their aims does not make them equal as modes of human interaction and, accordingly, they can be governed by different rules. In punishment the aim of protection, if it exists, is much more distant and indirect than in defense. This explains why, for example, while the legal permission for self-defense and the punishment for murder can both work as means to protect an individual's right to life, they are still very different as modes of interaction and are thus regulated under extremely different standards.[53] Indeed, in the views of those who argued against a natural right to punish it was the non-defensive aspect of punishment that triggered the requirement of political authority.[54]

If rights entail a permission to use violence to secure or protect them, but not to punish their violation, would rights be in vain? At least the point can be made that if I am morally entitled to repel by force a certain action because it infringes on some kind of

[53] In most legal orders self-defense is considered permissible while private punishment is not. And to use force against someone in self-defense a person need not go through a complicated process of showing that his or her life is at risk beyond a reasonable doubt. There have been some attempts to understand punishment as self-defense in the sense of being an instance of societal defense, see in this sense Phillip Montague, Punishment as Societal-Defense (Rowman & Littlefield, 1995). Unfortunately I have not time or space to give fair consideration of such views, but I will say that it seems very unconvincing to argue that societies have rights of their own.

[54] In Vitoria's reasoning, for example, this difference between the power to defend and the power to punish appears very clear, as only the defensive use of force is a natural moral entitlement of individuals, i.e., it is permissible outside a political relationship. Vitoria, pp. 287–88. Pufendorf also differentiated between the right to exact punishment and the right of self-preservation as distinct forms of response to offense, as punishment was unavailable in a pre-political moment while defensive force was permitted. Pufendorf, p. Book VIII, Ch. 3.

interest I have, then such interest is not a hollow moral idea but something of significance.[55]

In sum, it seems that the arguments raised by Locke and Grotius are not completely convincing and while much more could be said about this debate, I hope to have showed that there is no clear case to be made for seeing punishment as a natural right of individuals instead of as a practice of public authority. Punishment must take place in a context of authority in order to be a practice of justice and legality instead of brute violence.

But what will provide certain agency with authority over someone else? There are many theories of political authority which offer different answers to this question, but for our purposes perhaps we can use a minimal account of political authority such as the one formulated by Hobbes. If extreme poverty undermines the conditions of authority that enable punishment to inhabit the world of justice even in a Hobbesian account, then this may pose a challenge for any theory of political authority that claims to be more demanding.

V.

From a Hobbesian perspective, the bond of authority is essentially grounded on the individual´s best interest: we need peace and security to better secure our survival and only the constitution of a sovereign can provide this context. According to Hobbes, even well-ordered societies need a coercive sovereign to secure the stability of social

[55] In sum, to put it in Kantian terms, maybe for a right to be recognizable as such it must come with the authority to exercise the amount of coercion that is necessary to limit any infringement of its rightful exercise. If the violation of the right already took place, the foundation of the right to respond through punishment cannot be found in the right itself but must reside somewhere else. The locus of this justification resides in the second part of punishment's justification, i.e., in the question of what gives someone the standing to punish someone else. Immanuel Kant, 'The Philosophy of Law, Trans', *W. Hastie (Edinburgh: T. and T. Clark, 1887)*, 218 (1887), p. Introduction, D., 47.

cooperation, because even if we share a common sense of justice we might lack confidence in one another and we might find a reason not to abide by our duties.[56] Political power is thus justified because we need a powerful sovereign to provide a minimal security that will allow for cooperation and protect us against the risks of living in a state of nature.[57] As a consequence, what constitutes the bond of authority between the sovereign and its subjects is the provision of minimal conditions of security which give the individual self-interested reasons to respect the authority of the state.

In the context where *Leviathan* was written, this minimal security was a matter of life and death: as long as the sovereign secured an individual´s immediate survival, the individual had reason to respect its authority.[58] Thus, at first sight, this might not appear an interesting theory for us today. If all we can ask from the sovereign is that it secures our survival, we will not see authority undermined by many things we consider deeply problematic, such as political disenfranchisement, gender inequalities or other forms of injustice. In the case that concerns us here, i.e., extreme poverty, everything in Hobbes

[56] This is what Rawls calls "Hobbes' thesis", John Rawls, *A Theory of Justice* (Harvard University Press, 2005), p. 240.

[57] Hobbes's assumptions are that individuals have a tendency to privilege their own self-interest over the interest of others, or at least that we cannot count on the fact that they will not privilege their self-interest. Thus, individuals are not naturally inclined to act virtuously towards each other but to compete for material goods as well as prestige. In addition, individuals are roughly equal in terms of their physical and intellectual capacities so no one is naturally placed in a privileged position to rule or solve conflicts. These circumstances plus a general condition of scarcity will inevitably lead the individuals to mistrust each other to the point where a social life based on cooperation is impossible to envision. Hence, absent a sovereign that would provide assurance over the behavior of the members of a community, individuals would live in a permanent state of conflict, which will be inevitably violent and where everyone is at risk. This is why even egoistical individuals should prefer peace to war, and thus on self-interested grounds individuals have reason to lay down their right of nature to do anything they would consider necessary for self-preservation, and subject themselves to a sovereign that monopolizes the exercise of violence. See Hobbes, chap. xiii and xiv.

[58] Jerome B. Schneewind, *La Invención de La Autonomía: Una Historia de La Filosofía Moral Moderna* (Fondo de Cultura Economica, 2012), p. 115.

seems to suggest that this is not an issue for political authority because he only seems to care about imminent threat to life.[59] Thus, unless the deprivations of extreme poverty put someone´s life in imminent danger, the extreme poor would have reason to respect the authority of the sovereign.[60] If this interpretation is correct, a Hobbesian thesis of authority will either show that there is nothing particularly inconsistent in punishing the poor or that Hobbes´s theory of authority is too thin to help us understand our intuitions about justice. Scholars who, like Garvey and Matravers, have shown a concern about the state´s authority to punish the poor have fallen short of arguing that the state lacks authority because they seem to have been persuaded by this understanding of Hobbes´s political theory.[61]

But the Hobbesian thesis need not be taken so literally. Instead of transposing Hobbes´s specific definition of security as a protection against imminent threats to life, one can choose to interpret his idea of security more dynamically so that we can honor Hobbes´s most important point: that political institutions are legitimate because they are established for the individual´s best interest such that a reasonable person would have reason to respect the authority of the sovereign. According to Hobbes, individuals are generally better off living under the institutions of a civil order because only a civil order can secure the conditions we need for flourishing instead of perishing. The sovereign must protect the civil order from threats that may come not only from outside but also from within, using power in a way that makes it unreasonable for the individual to

[59] Hobbes, chap. XIV.

[60] Matravers, p. 329. This is not necessarily Matravers´s own view but the one he seems to attribute to Hobbes.

[61] Garvey; Matravers.

disobey the sovereign and exit civil society.[62] From this perspective, it seems perfectly valid to question whether today extreme poverty would be a condition that falls below the minimal levels of security that the sovereign must provide.

Security, as Lucia Zedner has claimed, is a 'promiscuous concept' and if it is going to have the purchase that Hobbes wanted it to have, it cannot imply today what it implied in the 17th century, and will possibly imply different things in different societies.[63] In the context of Western liberal democracies, our institutional realities and capacities have changed so dramatically since Hobbes wrote that the content of our normative standards for their evaluation cannot remain unchanged. The critical problems of civil war and state-building present in Hobbes´s times are no longer pressing for most of our communities.[64]

A very simple yet compelling example of this kind of evolution to consider is the way in which the role of government has evolved in the last three centuries in terms of the kinds of individual rights that it must respect, protect and actualize. In T.H. Marshall's well known view, the eighteenth century was the time for the modern articulation and actualization of political rights, the nineteenth century the time for civil rights, and the twentieth century the moment for the actualization of social rights. All these changes were expressed in actual institutional practices that enabled a sort of

[62] A full argument about the legitimacy constraints that Hobbes provides for the legal order can be found in David Dyzenhaus, 'Hobbes and the Legitimacy of Law', *Law and Philosophy*, 20.5 (2001), 461–498.

[63] Lucia Zedner, *Security* (Florence, KY, USA: Routledge, 2009), p. 9.

[64] Arguably, there is more social and political stability today than in Hobbes´s time. Hobbes was writing in the context of a civil war in England, and during his time Europe was immersed in a violent expansion through colonization. There was a permanent threat of war among European polities, possibly the result of the new political order of Europe in which the church no longer had a unifying role. Europe was organized into several polities that had yet to find a common normative language that would help them deal with their conflicts without resorting to war or brute force. Tierney, pp. 288–89.

historical renaissance of the idea of citizenship. The institutional actualizations of each of these kinds of rights altered our normative reality and made possible the actualization of their next generation. In this progress the very idea of citizenship was transformed, certain things became minimal conditions and it became unimaginable that these secured conditions would ever be brought back into question.[65] It would thus be a mistake to think that we could limit our social rights without undermining our political rights, because by the articulation of social rights as dimensions of our idea of citizenship, political rights were themselves transformed.

For example, it is hard to imagine having a discussion today about whether there should be slavery or about whether women should have a right to vote. Not too long ago these questions were far from obvious, yet once these issues were settled, and the idea of equality changed institutionally so as to recognize all members of the species, it became unimaginable that we could again consider to establish such a horrible practice as slavery or that we would describe as a democracy a political order where women cannot vote.

Changes in values, manners and technologies alter the minimal conditions that the social order must secure, even altering what is considered to be a basic need.[66] As a consequence, from a Hobbesian framework, these changes can alter the baseline for authority and legality, by altering the minimal conditions of security that give the

[65] Thomas H. Marshall, *Citizenship and Social Class* (Cambridge, 1950), XI.

[66] In this sense see for example Adam Smith: By necessaries I understand not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without. A linen shirt, for example, is, strictly speaking, not a necessary of life. The Greeks and Romans lived, I suppose, very comfortably though they had no linen. But in the present times, through the greater part of Europe, a creditable day-labourer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty which, it is presumed, nobody can well fall into without extreme bad conduct. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (University of Chicago Press, 2008), p. 1168.

individual reason to respect the authority of the state. It is possible that in Hobbes´s context the sovereign did not need to alleviate extreme poverty in order to have a claim of authority over those who suffered from it, but perhaps the stakes can now be raised as to include the alleviation of extreme poverty in the terms of negotiation with the sovereign.[67] If this is the case, punishing the extreme poor might not be a practice of law and justice, but an act of hostility. There will be no "pale and pallid" form of authority left standing but only brute force. In order to argue further for this understanding let us look into how it is that extreme poverty upsets the Hobbesian minimal conditions of security.

VI.

Extreme poverty is a concept whose precise determination is very hard to establish. For the sake of the argument I will stipulate one definition: extreme poverty consists of lacking the means to secure a normal biological or physical subsistence, including not only the means for immediate survival but also the means to secure survival for a short-term period.[68] According to this definition someone is extremely poor if they cannot secure food, shelter, access to medical treatments and medicines, appropriate systems to endure the weather, etc., for a short period of time.

Following the logic of a Hobbesian account of the state, there are at least two perspectives through which we can understand this kind of poverty as entailing that a political order has not provided the conditions for minimal security that give reason to

[67] In a similar way, Williams argues that a thin notion of security like the one provided by Hobbes cannot provide legitimacy to the state's claim of authority when it coerces the extremely disadvantaged members of the polity. B.A.O. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton Univ Pr, 2005), pp. 6–8.

[68] Jiwei Ci, 'Agency and Other Stakes of Poverty*', *Journal of Political Philosophy*, 21.2 (2013), 125–150.

individuals to respect its authority and makes it unreasonable to exit civil society. First we can think of extreme poverty in absolute terms and ask whether the objective conditions of extreme poverty undermine the bond of authority. Second, we can think of extreme poverty in a relational way and ask whether understood in relative terms, extreme poverty can have an impact in the state´s claim of authority.

From an absolute perspective, extreme poverty is determined by the inability to satisfy certain specific needs which are determined objectively as being so basic that the individual's capacity to enjoy any other goods to which he or she may be entitled to will not be available until he or she has satisfied these more primary needs.[69] The relevance of such a conception of extreme poverty to a Hobbesian theory of the state is relatively straightforward. Hobbes is undeniably concerned about survival and it is not a big stretch to argue that extreme poverty, understood in an objective way, entails a kind of absolute vulnerability which, even when it falls short of imminent threat to life, is sufficiently intense as to make our survival highly unstable. Extreme poverty imposes a precarious life which does not appear clearly better than being in a state of nature, and it becomes fairly implausible to argue that the extreme poor are still better off in the context of a civil order.

The lack of basic needs increase the risk of the individual to see her rights violated and even to die.[70] Extremely poor people are indeed more likely to be victims of

[69] The list is certainly hard to establish and its discussion goes well beyond the scope of this article. But once can see this as a concern that has been fundamental in considerations about poverty. See for example, Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1996); Peter Singer, 'Famine, Affluence, and Morality', *Philosophy and Public Affairs*, 1.3 (1972), 229–243.

[70] In the structure of capitalist exploitation, it is precisely the needs of the individual to obtain the means for survival that explains why we enter labor relationships in which the rate of exploitation is very high, i.e., the difference between what the worker gets from what he or she produces. See in this sense, Cohen, Gerald A. 1995. Self-ownership, freedom, and equality. Cambridge: Cambridge University Press,

violent crimes and to engage in kinds of activities that are more risky in terms of their physical and emotional integrity.[71] More concretely, at least in the context of a capitalist economy, the urgency of the needs of the extreme poor makes it very hard for them to avoid being exploited and someone who lives in a social context that forces him to be exploited in order to secure his own survival can hardly be said to have self-interested reasons to abide by the very social order that forces him to endure high levels of exploitation. [72] It seems likely that the more needs one has, the more vulnerable one is to exploitative relations and therefore the greater the hazards for our health and survival.[73] Poverty in this sense can put an individual´s life at stake to the point that it may become unreasonable to respect the authority of the social order that maintains him or her in this situation.

Unlike the account just presented, a relative approach to extreme poverty requires a more revisionary account of Hobbes´ theory but can still be accommodated under his own terms. This perspective determines the idea of basic needs for survival not against a fixed measure of risk but against what is possible in a given community with specific ideas about needs and with specific technological capacities. Extreme poverty is thus partially ascertained from the point of view of equality rather than from an abstract idea of biological or even social needs for survival.[74]

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pp. 197-207.

[71] According to the Report on Household Poverty and Non Fatal Violent Victimization, elaborated by the American Bureau of Crime and Justice, people who live under the Federal poverty levels are twice as much likely to be victim of a violent crime, see: https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5137.

[72] Marxist and Neo-Marxist theories of exploitation have compellingly argued that what allows exploitation is the lack of means forces that the worker suffers and which push him or her to enter an extremely unequal relationship of exchange. Gerald A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge Univ Pr, 1995), pp. 196–97, 202–6.

[73] Cohen. pp. 197-207.

[74] See Peter Townsend, 'The Meaning of Poverty', *The British Journal of Sociology*, 13.3 (1962), 210–227.

Contemporary descriptions about the way in which wealth and social resources are distributed today suggest that the problem of inequality is no longer a matter of the difference of income but of the social problems that are created by an extreme concentration of power and financial resources into the hands of a few.[75] This concentration has created different social worlds that coexist under the authority of one sovereign state and it becomes much safer to live in one world than the other. Indeed, wealthier people have a much longer life expectancy than people who are poor, and the gap is growing. In the United States a person who belongs to the richest 1% can expect to live almost 15 years more than a person who belongs to the poorest 1%.[76]

When we look at extreme poverty in this more relational way, we can see that in our societies some lives are more protected than others. To the extent that some people cannot access the available means that would secure their survival, the state cannot be said to provide the conditions of security that would make it reasonable for them to respect its authority.

Both absolute and relative perspectives on poverty offer reason to undermine a Hobbesian account of state authority. They are not meant to show all that is wrong with poverty, but only that even under the minimal terms of a Hobbesian theory of the state, extreme poverty could undermine the bond of authority pushing state coercion out of the realm of legality and into the realm of violence or hostility.

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[75] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014), pp. 430–67.

[76] In the case of women the difference is lower but it is still very high, reaching an average of 10 years, see Chetty, Raj, et al. "The association between income and life expectancy in the United States, 2001-2014." *Jama* 315.16 (2016): 1750-1766.

One could argue that extreme poverty, from either of these perspectives, would not undermine the state´s authority because the state is not actively endangering the person´s integrity, but by and large, poverty is the result of the working of institutions and not the result of luck or merit. The fact that a person is extremely poor is not so much due to his or her personal traits, but to the way in which society is organized.[77] Even without arguing that social structure is the whole of the story about why a person is poor, it is hard to deny that it plays a fundamental role.[78]

If it is true that the state and its political order helps to produce and secure extreme poverty, and if it is true, as I argued above, that extreme poverty puts one´s lives at risk both absolutely and relatively, then extreme poverty would undermine the Hobbesian bond of authority and upset the conditions of legality *vis a vis* the extreme poor. In Hobbes´ terms, this would be a case where punishment could no longer be considered an act of law and authority but what he calls an act of hostility.[79] Here the issue is not that the state´s authority is merely undermined in the sense that extreme poverty would leave us with a "pale and pallid" kind of authority where the state retains a right to coerce the extreme poor on prudential terms but has lost its moral power to impose real duties, as Stephen Garvey has argued.[80] Instead, in this account there is no form of authority standing, all that remains is the law of the strongest that organizes the state of nature, where there is no space for punishment or legality.

[77] See a description in Edward Royce, *Poverty and Power: The Problem of Structural Inequality* (Rowman & Littlefield, 2015). This also seems to be the view of Rawls, pp. 7–11, 90–100.

[78] For a very interesting analysis about some of the ways in which poverty relates with the legal structure, see Jeremy Waldron, 'Why Indigence Is Not a Justification', in *From Social Justice to Criminal Justice*, ed. by William C. Heffernan and John Kleinig (Oxford University Press US, 2000), pp. 98–113.

[79] In Hobbes´ own words, "[T]he evil inflicted by usurped power, and judges without authority from the sovereign, is not punishment, but an act of hostility, because the acts of power usurped have not for author the person condemned, and therefore are not acts of public authority." Hobbes, chap. XXVIII [6].

[80] Garvey.

That punishing the extreme poor constitutes an act of hostility need not entail that it is always morally wrong, because we may find reasons to justify being hostile to others. The most common context where hostility becomes acceptable or even justified is a context of enmity which generally entails that someone who is separated from a community threatens its existence.[81] But will this give us a good ground to punish the extreme poor? Possibly not. We are too closely connected to the extreme poor to imagine them as enemies.[82] A victim of extreme poverty is not "the other" in the sense of being a stranger or an alien. Instead, she is factually placed in an otherness by being excluded from a kind of treatment which would minimally consider her wellbeing.

VII.

Ultimately, wondering whether hostility is lawful or not misses the point. Even if we are justified in being hostile, in the end we must come to terms with the fact that in too many cases we can no longer speak in the name of legality. Because we have failed to provide the conditions that make punishment an institution of law, we have rendered our criminal laws an instrument of violence rather than political justice.

In his essay "Violence and the Word," Robert Cover illuminates an essential aspect of the law, arguing that law and its categories create meanings for experiences of violence. Legal interpretation authorizes acts of violence in a way that prevents us from understanding ourselves as inflicting pain on others. Law domesticates violence by altering its meaning, and the possibility of this transformation depends on the

[81] Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 1996), pp. 26–29. Arguably, there are some cases in which this is not true, like in the context of acts of terrorism or some instances of the so called political crimes. Regarding the possibility of a criminal law for enemies, see Günther Jakobs and M. Cancio Meliá, *Derecho Penal Del Enemigo*, 2003.

[82] Their exclusion thus exemplifies Schmitt´s idea that it is only regarding those with whom we are united where exclusion can represent a negation of their equal moral worth (Ibid.).

commitment that the interpreter has with the legal order. When this commitment fails, our legal words cannot alter the meaning of violence.[83]

Something like this happens when we punish the extreme poor. The legal order can transform brute violence into an institution of justice, but this transformation is only possible in a context of political authority. Such context is not available for the extreme poor because extreme poverty completely undermines the conditions of authority and legality. It returns a person to the state of nature and in so doing, it rips off all the legality of our public practices of coercion. Even if the power of ideology may obscure this fact, we must restore our political bonds and the legitimacy of our practices of responsibility by acknowledging the context of hostility in which some people are situated. Just as happened with the Furies, our acts of violence can transition into practices of justice, if we make sure that everyone who is addressed by them can also access the values that allow for this transformation.

[83]Robert M. Cover, 'Violence and the Word', *Yale Law Journal*, 1986, 1601–1629.