"The Grotian Moment: Natural Penal Rights and Republicanism"

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I. Introduction: Political Violence and the Problem of Legality

From the Civil War to the South Sea Bubble, English republican writers endeavored to legitimate various modes of political violence as instances of just punishment despite apparent deficits in regular legal authority and applicable civil law. These political acts – some completed, others merely compassed or threatened – included regicide, assassination, conquest, and impeachment. Each posed an obvious problem of ideological coherence in light of avowed republican commitments to the rule of law.[1] From the ancient Roman republic on, the precept that "there can be no punishment without law" *(*nulla poena sine lege*)* remained one of the enduring basic principles associated with the rule of law. According to this principle, which is sometimes called the principle of legality, in the absence of applicable law or regular legal authority, political violence remains political violence and cannot be deemed to be just punishment. English republicans were therefore obliged to explain how their ostensibly extra-legal acts of political violence could be construed as just punishment and made consistent with the rule of law.

One fairly well known aspect of this ideological project was the republican reinterpretation of the rule of law that Montesquieu later championed. As Montesquieu discerned, English republicans often subordinated the traditional Aristotelian preoccupation with the strict governance of universal reason in public action to a more politically loaded conception of the rule of law as that concrete set of institutions whereby citizens manage to restrain their governors and vindicate an extensive sphere of private prerogative.[2] Still, republican allegiance to this politicized notion of the rule of law rarely initiated an outright

repudiation of the principle of legality. Instead, republicans attempted to avoid the implication that they were subverting public reason and legality by arguing that their acts of seemingly extra-legal violence were in fact rooted in the ethical foundations that make legal order possible. In each case, responding to such political crimes as "tyranny" and "corruption," leading republican punishers (or would-be punishers) justified their efforts on the basis of the radical doctrine that the ethical principles of "natural" or "transcendent" justice that ground the rule of criminal law also ought to complete it by supplying warrant for punitive action when the regular offices and written records of the law are found wanting. Thus, republicans not only politicized the notion of the rule of law, they also invoked recent innovations in natural law theory to extend the justificatory reach of that notion beyond the warrant of established jurisdictions and traditional legal documents.

One of the chief philosophical resources for this latter aspect of republican argument was Hugo Grotius's innovative and influential theory of the natural obligation and right to punish. As English republicans were quick to point out, although the Grotian natural obligation and right to wield the secular sword of justice might be fully alienable to a public magistrate, it is not always fully alienated. When fortune favors the people at the founding moment of their polity, or at the conclusion of a civil war or constitutional crisis, they may reserve to themselves and their parliament a part of their original natural penal rights. Since Machiavellian republicans believed that fortune favors those who exhibit political virtue – those who "prefer the good of the public to any private interest"[3] – they naturally preferred Grotius's moral theory to the more selfish individualism of Thomas Hobbes.

II. Punishment as "the natural right of every individual"

Grotius's primary aim in The Laws of War and Peace (1625) was to provide a theory of just warfare capable of imparting a certain degree of moral order to the conduct of nations, which in recent years had exhibited, to his mind, an unusually ferocious tendency towards "lawlessness in warfare" (Prol, p.28).[4] Once Philip II's dream of pan-European empire had been defeated, it seemed less plausible than ever to suppose, as Francisco de Vitoria had in the previous century, that "the world as a whole" was "a single state" with the authority to create positive international laws that would be "just and fitting for everyone."[5] In the absence of international magistracy, Grotius believed that relations between states could only be intelligently ordered in accordance with universal principles of human morality, or "natural" laws. He therefore construed the right of every nation to defend itself against foreign aggression on analogy with the natural right of every individual, in the absence of civil authority, to preserve and defend herself against harm. And beyond this, he supposed that every nation should also be understood to have an international right of punitive warfare, which derives from an analogous pre-civil right and obligation of every individual to punish anyone who offends against universally valid moral standards of justice.[6]

Grotius's doctrine of the individual's natural right to punish was a conspicuous innovation.[7] He wrote The Laws of War and Peace at a time when philosophical dialectics, being rooted in debates over whether Conciliar or Papal power was supreme, varied between the view that the right to punish belongs originally and chiefly to the community as a unified whole, so that it may govern

the conduct of its parts or members, and the view that the right to punish belongs in the first instance to that part of the community which is set above, and ordained to rule over, the whole. Within an international society which was neither unified nor ruled by any single nation or alliance, both of these competing traditional views failed to invest the several independent nations of the world with the right to punish those guilty of unjust aggression. To Grotius's mind, such a conclusion was morally intolerable. In his view, nation-states, like private persons, are moral agents that should be judged and punished according to natural standards of moral conduct. Accordingly, morally responsible and "brave" nations will not limit their independent use of arms to the requirements of self-defense. Rather, they will also endeavor to enforce natural standards of justice as if violations of those standards were breaches of their own territorial boundary lines (Prol, pp.19, 24). In Grotius's view, not only this right of punitive warfare, but also the state's right of domestic criminal jurisdiction, ultimately derives from each citizen's original right to "the sword of justice." He plainly states that "the liberty of inflicting punishment for the peace and welfare of society, which belonged to individuals in the early ages of the world, was converted into the judicial authority of sovereign states and princes" (II.xx.40).[8]

Grotius systematically draws conclusions about the right conduct of nations from reflections on our natural moral capacities as individuals. Foremost among these capacities, he emphasizes our ability to distinguish between just and unjust violence without appealing to the declared will of any positively instituted civil authority, as well as our ability to resist natural injustices for the sake of our common interest in peaceful and intelligently ordered social life. Thus, it is in large measure as a motive to natural law enforcement that Grotius

posits, as "the source of all law which is properly so called," a uniquely human, paradigmatically rational, and morally "mature" form of social appetite (Prol, pp.7, 8). We are by nature socially inclined but pugnacious beings. We have a natural desire to live together in a peaceful society ordered primarily through the exercise of our intellectual capacities for speech and rule-following. But since we tend naturally to follow our own judgments and to be somewhat partial to our own interests, we are prone to controversy and conflict, or (broadly speaking) "war"(I.i.2).

There are, however, rationally demonstrable and empirically discoverable rules for limiting interpersonal conflict in ways consistent with the "peculiar" bent of the human social appetite; these rules are what Grotius calls "the laws of nature"(I.i.2). According to Grotius, if we are attentive to the claims of human sociability, then we will recognize as unjust forms of action and inaction that are directly inimical to peaceful and intelligently ordered social life. Far from aiming to maximize some highest human good, the Grotian laws of natural justice merely describe the minimal moral conditions that make pre-civil sociability possible. These fundamental injustices include breaking a promise, taking what belongs to another, failing to restore what has been wrongfully taken, and failing to compensate another for a loss negligently caused. At the end of this short list of universal natural injustices, Grotius also includes the claim "that it is right to punish men who deserve it" (Prol, p.8).

When Grotius speaks not only of the "right" but also of the "obligation to punish," he has in mind a moral necessity that arises through coordinate application of the natural laws of justice and beneficence (III.xiii.2). A violation of natural justice creates in the offender an obligation to suffer punishment (II.xx.2,

III.xxii.4). The principles of natural justice also permit that "anyone of competent judgment, who is not implicated in similar or equal offences" may impose this punishment (II.xx.7, 9). Thus, upon murdering his brother, Cain gave expression to his "sense of natural justice" when he acknowledged that "whosoever finds me shall kill me" (I.ii.5). In response to serious injustices, the innocent may indeed throw the first stone. The relative innocence that conditions attributions of natural penal rights is not always a product of self-interested fear, however. Indeed, the fear that arises from the instinct for self-preservation -- which Hobbes would later make the cornerstone of his theory of political subjection -- often figures in Grotius's treatment of the state of natural society as motive of cowardice and a poor excuse for unjust anticipatory attacks on neighbors or neighboring states (II.i.5, 17, 18; II.ii.13; II.iv.6; III.iv.13). We discover other, altruistic motives to justice in those who exhibit such moral qualities as "temperance, fortitude, and discretion," and we are "bound" by the natural law of beneficence to exhibit these virtues in many situations (II.i.9).

Hence, the natural law of beneficence dictates that, quite apart from egoistic concerns, "the very injustice of all offences ought to be a general motive with men, to restrain them from the commission of them" (II.xx.30). The virtuous individual's concern for "the public welfare," "the common good," or "general utility" arises not only for the sake of her own selfish investment in public peace and safety, but also "for the sake of others." Further, "all men of sober judgment and enlarged information deem the public interest of higher moment than their own" (II.i.9). Individuals who exhibit such public virtue are natural punishers, "designed by nature for the office of perpetual magistracy" (II.xx.9). In sum, whereas the natural law of justice grants every relatively innocent person the

right to punish an offender, the natural law of beneficence sometimes makes the exercise of that right a moral necessity for "good men." In this respect, the execution of punitive violence, under certain circumstances, is an obligation-fulfilling natural right.[9] It is for this reason that Grotius thinks that (other things being equal) "neglect" of appropriate punitive action "amounts to a sanction of the offence" and constitutes "a sin against human nature" (III.xx.23, 30). And, in his view, it follows that "the state or nation, which has neglected to punish the aggressions of its own subjects . . . is a proper object of hostility and attack" (I.i.2).

By locating the source of natural law morality in a uniquely human form of social appetite, Grotius was clearly signaling his departure from the classical Roman conception of natural law as that law which nature "has taught all animals."[10] The laws of natural justice are not grounded in an instinct common to all brute creation, such as the instinct of self-preservation.[11] Accordingly, Grotius is very careful to distinguish between the egoistic goals of self-defense and the altruistic goals of punitive justice, and this difference is further reflected in his treatment of the corresponding natural rights. The right of self-defense "derives its origin primarily from the instinct of self-preservation, which nature has given to every creature, and not from the injustice or misconduct of the aggressor" (II.i.3, my emphasis) By contrast, in his treatment of natural penal rights, he claims that "he who punishes, if he is to punish correctly, must have a right to do it, a right growing out of the crime of the offender" (II.xx.2, my emphasis)[12]

Moreover, unlike Hobbes, Grotius does not see self-preservation as a moral absolute under conditions of natural or civil society. The Grotian state of natural society is a "community of goods" in which everyone is entitled, within

the bounds of justice, and from a prudent concern for their own preservation and well-being, to take what is ready to hand and unclaimed by any other. After the formation of civil society, under circumstances of "extreme necessity," exceptions may be made to positive laws of property, and the "primitive right to the use of things" may be "revived" (II.ii.6). Such exceptions to positive law arise not because the right to self-preservation is absolute, as it is for Hobbes, but because it is weightier than the right to property as a means to exalted well-being. Although Grotius famously acknowledges that the instinct to preserve and care for our bodies is our "first duty" (I.ii.1), he means here only that it is first in what was sometimes termed the order of creation as distinct from the order of reasons. The duty of self-preservation is less weighty than our moral duty to live sociably with others in conformity with natural justice. Accordingly, instances in which we can take what belongs to others for the sake of self-preservation are limited and "cannot be granted where the owner is in an equal state of need himself"(II.ii.7). Under circumstances of equal need "the owner's claim is superior." On this point, Grotius quotes Cicero with evident approval:

> Suppose a wise man were starving to death, might he not take the bread of some perfectly useless member of society? Not at all; for my life is not more precious to me than that temper of soul which would keep me from doing wrong to anybody for my own advantage (II.ii.7).[13]

Nothing could be further in spirit from the absolute liberty and purely self-interested calculations of Hobbesian moral agents than this Ciceronian sentiment.

III. Early Grotian Republicanism

Writing at the outbreak of the civil wars, Philip Hunton presented the first substantially Grotian understanding of the conflict between King and Parliament. Although he was not in the habit of citing the sources of his intellectual inspiration, Hunton's Treatise of Monarchy (1643) adhered closely to Grotius's nuanced account of natural right and state-formation. Accordingly, he hung his argument for Parliament's cause upon, first, a moral affirmation of every individual's effective sense of justice and, second, an historical point of constitutional interpretation.

For Hunton, as for Grotius, natural law is neutral as between different forms of government (I.i.1, p.3).[14] For every distinct nation, it is the original historical will of the community, or "the original contract and fundamental constitution," that determines the legitimate form of political subjection (I.i.1, p.6; I.ii.6, p.16). It happens that the ancient constitution of England established a "mixed and limited monarchy"(II.iii.1). Like every other form of government, limited monarchy has its peculiar form of "inconvenience." Whereas democracy, aristocracy, and absolute monarchy involve the risks, respectively, of chronic confusion, destructive faction, and irremediable tyranny, limited monarchy opens the door to constitutional crisis and civil war. This inconvenience of limited monarchy arises from the precarious balance of its constitutional origin and design. On the one hand, "the law of the land" limits the legitimate power of the king and declares that tyranny will have its remedy. On the other hand, for the task of enforcing the king's compliance with the law of the land, "there can be no judge legal and constituted within [a monarchical] frame of government" (I.ii.7, p.17). Parliament could raise a constitutional "tribunal" to depose Charles I

only if it were itself absolutely sovereign. But England was not a constitutional democracy, according to Hunton. Therefore, the constitution that limits the king's power can only have an "extraordinary" mode of enforcement:

> The Fundamental Laws of that Monarchy must judge and pronounce the sentence in every man's conscience; and every man (as far concerns him) must follow the evidence of truth in his own soul, to oppose, or not oppose, according as he can in conscience acquit or condemn the act of carriage of the governour. For I conceive, in a case which transcends the frame and provision of the government they are bound to (I.ii.7, p.18).

The constitution of limited monarchy affords no regular "legal" remedy for tyranny, but it implies, instead, the legitimacy of a "transcendent" and "moral" remedy. In other words, paradoxically, the "law of the land" in England is legitimately enforceable only by means of extra-legal violence, which men dutifully enact as subjects of natural morality, not as subjects of civil law. The people do not fully alienate their natural penal rights when, at the founding moment of their polity, they agree only to a conditional contract of subjection to monarchy. In accordance with natural law, every armed individual may therefore judge the monarch's rule and, if conscience finds cause, reclaim the original right to the sword of justice. The citizen who thus raises arms against an unjust monarchical regime does not exercise the authority of a superior civil office. He exercises, rather, that pre-civil "moral" right that Grotius and Hunton credit to every relatively innocent person.

> This power of judging argues not a superiority in those who judge, over him who is judged; for it is not authoritative and civil, but moral, residing in reasonable creatures, and lawful for them to execute, because never devested and put off by any act in the constitution of a legal government, but rather the reservation of it intended: For when they define the superiour to a law, and constitute no power to judge of his excesses from that law, it is evident they reserve to themselves, not a formal authoritative power, but a moral power, such as they had originally before the constitution of the government; which must needs remain, being not conveyed away in the constitution (I.ii.7, p.18).

Thus, in Hunton's account, the English civil wars could be understood as a conflict between parliamentary and monarchical forces that met as natural equals, and the execution of Charles I could be understood as a morally legitimate act of extra-legal justice.

Repudiating Hunton's relatively moderate view of the ancient constitution, Henry Parker was the first English republican thinker to offer an explicitly Grotian argument for parliamentary sovereignty and penal rights.[15] Moreover, to this end, he was also the first to adopt Grotius's scriptural argument for natural penal rights in opposition to the view (of which Filmer was to become the most famous proponent) that civil magistracy is a patriarchal right, immediately instituted by God.[16] In his Jus Populi (1644), Parker argues that if Adam had possessed the right of magistracy over his sons, then he "ought to have arraigned Cain at his bar, and to have required blood for blood." Instead, as Grotius emphasized, we find that "the whole stock of mankinde then living, were the judges that Cain feared" (p.33).[17] Before the institution of kings or judges among the Israelites, "the people by common consent did rise up to vindicate common trespasses." Thus, like Grotius, Parker emphasized the importance of common consent in the origination and punitive maintenance of private property. In this form of democratic punitive action, the people do not exercise an unbridled self-interested liberty. Rather they exercise a generous, obligation-fulfilling right, for "God so required it at their hands." For Parker, who (like Grotius) repudiated voluntarism, the moral requirement of impartiality in punishment provides the reason for God's universal distribution of the obligation and right to wield the secular sword of justice.

> If judgement should be left to parents only, much injustice might be expected from them, which is not so much to be feared from the people not yet associated: For the offence of the son is either against the father, or some other: If against the father, then is he judge in his own case; and that is dangerous; the father may be partiall to himselfe: If against another, then the father is a stranger to the plaintiffe, not to the defendant: and that is more dangerous (p.33).

Exclusive patriarchal power offers no inherent assurance of impartiality. By contrast, if the obligation and right to punish originally fall to all those who live together as equals, then those who are generous enough to risk taking punitive action will be sure to secure the consent of others in order to avoid being punished themselves for unjust unilateral violence.

Hence, the universal distribution of penal power ensures that its exercise will be based upon broad consent, which in turn ensures that it will be exercised impartially. In the institution of a just civil government, the people's manner of pursuing punishment "flows" to the chief magistrate without loss of its original impartiality and generosity, or, in Parker's preferred vocabulary, without loss of its original "honour and splendor" or "honour and glory" (p.16). In order to ensure that the natural moral quality of punitive action will not be "wasted" when the people invest their power in the office of the "supreme commander," it is necessary that this power should never entirely "passe from the people," but should always ultimately remain their legal possession (p.17). This moral imperative is enshrined in the ancient constitutional rights of the people's parliament. Therefore, contrary to Hunton's contention, there is no reason to suppose that parliament lacks the legal power, during an "inter-regnum," to erect a "Tribunall" for the purpose of prosecuting "all the common disturbers of mankind" (p.10). If parliament had conducted the regicide, it could have been viewed, in light of Parker's theory, as a positive legal enactment of the people's natural rights.

The trial and execution of Charles I were carried out, however, not by parliament, but by Cromwell's New Model Army. In The Tenure of Kings and Magistrates (1649), John Milton would explicitly invoke Grotius's authority on behalf of the Army's proceedings, but he would depart significantly from the orthodox Grotian view of natural penal rights. In particular, Milton did not embrace Grotius's contention that the obligation and right to punish malefactors for the sake of the public interest is already fully constituted in advance of the formation of civil society. Unlike Grotius, he strongly suggests that the "bond of nature" does not reach beyond self-interest. Milton's state of nature is as Hobbes would have it: individuals in that condition have unlimited natural rights of self-preservation and defense. But they apparently have nothing like the Grotian moral faculty for discovering, and responding with duly measured force, to actions that are intrinsically unconformable to the normative conditions of natural society.

Miltonian duties for the vicarious use of coercive and violent force depend, instead, upon the creation by mutual covenants of a civil society which is no longer purely natural, even when it is not yet (or no longer) ruled by duly-appointed governors. With this intermediate stage of social organization, everyone's natural right of self-defense is transformed into a civil obligation and right of mutual defense against common enemies. The legitimate public use of coercive and violent force hinges upon a political criterion of alliance and not upon any moral principles of natural justice other than the duty of promise keeping. Consequently, Milton's account of the right to punish accommodates a remarkably sparing range of moral distinctions. Apart from registering degrees of danger or harmfulness, Miltonian punishers will also distinguish between

enemies simpliciter who were never bound by the covenants of the society they attack (foreign invaders), enemies who have defected from the political contract (domestic criminals), and enemies who have breached the contractual terms of political governance and subjection (domestic tyrants). Of these three, the latter deserve the harshest treatment.

It was, of course, ideologically expedient for Milton to conceive of civil society as a defensive military alliance. Earlier protestant resistance theorists typically maintained that the right to take up arms against a domestic tyrant resides exclusively with parliamentary magistrates. Justification of the military proceedings against Charles I would therefore require a quite different and novel account of the right to punish. Milton set out to provide such an account in his treatise, though he attempted to mask the novelty of it on the title page of the first edition, which asserted:

> That it is lawfull, and hath been held so through the ages, for any, who have the power, to call to account a tyrant, or wicked King, and after due conviction, to depose, and put him to death; if the ordinary magistrate have neglected, or deny'd to doe it.[18]

Milton's theory of state-formation is more philosophically radical than Grotius's, because he did not wish to hang his case against Charles I on the uncertainties of interpreting the ancient constitution of England. Since he did not wish to allow for the possibility that the people of England may have completely and permanently alienated their liberty to punish, he chose a more decisive mode of argument than any appeal to the "primitive will" of the people could provide. In his view, the common public right to punish is a creature of the original pact of civil society that the people can never fully alienate to a sovereign ruler. Accordingly, the legality of tyrannicide is established, not by direct appeal to

pre-civil standards of natural justice, nor by appeal to the historically contingent constitutional settlement of England, but by the implicit promise that is universally inscribed in the very nature of civil society.

Writing after the conclusion of the Civil Wars, in his Case of the Commonwealth of England Stated (1650), Marchamont Nedham invoked Grotius's authority both in order to justify the punitive execution of Charles I for violating parliament's rights (with the purging of Presbyterians from the Commons characterized as the punishment of "accessories") and also in order to justify submission to Cromwell's rule. Unlike Milton, however, Nedham would find in Grotius's theory of "formal" warfare a jus gentium argument that would elude the difficulty of resting the people's claim to the sword of justice upon an uncertain interpretation of the ancient constitution.

As a central tenet of this particular treatise, the mercurial Nedham maintains that England is a mixed monarchy. Speaking of the balance of rights characteristic of such a regime, he quotes from The Laws of War and Peace what would become the favorite passage of English republicans*:*

> If the Authority be divided betwixt a King and his People in Parliament, so that the King hath one part, the People another; the King offering to incroach upon that part which is none of his, may lawfully be opposed by force of Arms, because he exceeds the bounds of his Authority. And not only so, but he may lose his own part likewise, by the Law of Arms (I.iv).

Nedham leaves no doubt that, in a mixed monarchy, the people retain their natural penal rights and that the people of England exercised such rights in the execution of Charles I. To Nedham's morally skeptical mind, however, others might reasonably disagree about the legitimacy of the regicide. Insofar as the legitimacy of parliament's initial cause in the civil wars ultimately hinges upon an "immemorial" point of historical fact, there is room for reasonable doubts

about every effort of Parliament at armed resistance against the King's forces. Nevertheless, in Nedham's view, the moral contestability of the war efforts of Parliament and Cromwell should have no bearing upon the issue of engagement. The civil wars represented a time of "miserable Confusions," in which the determination of constitutional and natural right was uncertain business. Whether or not the initial cause of the Civil Wars was truly just, it was advanced in good faith under conditions of moral uncertainty. Viewed in this light, Cromwell's eventual victory gave him a legitimate right, under the putative jus gentium convention of formal warfare, to impose his preferred conditions of political subjection. Here Nedham cleverly seizes upon a singularly Hobbesian subdivision of Grotius's multifaceted treatment of the laws of war. As Grotius allows, "when for instance, a kingdom is so equally divided between two parties, that it is a matter of doubt which of them constitutes the nation . . . the kingdom may be considered as forming two nations at the same time" (II.xviii.2). In the settlement of such civil wars, Nedham avers, "necessity sometimes gives birth to new rights in violation of former rules."[19] This implies that the new regime may "use such means as nature instructs them in, and erect such a form [of government] as they themselves conceive most convenient for their own preservation." At the conclusion of a formal civil war, the conquered party's duty of obedience is sufficiently grounded in the fact that the conquering party possesses irresistible power and provides the service of protection.[20]

IV. The Machiavellian-Grotian Synthesis

Nedham is best known for the leading role he played in bringing Machiavelli's republican thought to bear upon English political affairs. In frequently citing the authority of both Machiavelli and Grotius, however, he also

appears to have been the first to suggest a philosophical synthesis that would occupy the minds of many later republican thinkers, from Edward Sexby to Algernon Sidney. Notwithstanding the great extent of Grotius's influence, late seventeenth-century English political thought has also been aptly described as the heyday of Machiavellian republicanism. Many English republicans endeavored to bring these two strains of political theory together, despite the apparent tension between them.

According to orthodox Grotian republicans, this was a tension between the view that might makes right and the view that the legitimacy and stability of political power depends upon its conformity with antecedent standards of natural justice. We find this tension in Grotius's own criticisms of Machiavelli, which were published in England in 1654 as Politick Maxims and Observations. In this work, Grotius is concerned at nearly every point to insist upon a fundamental moral difference between Machiavellian "reason of state" and just government on the basis of "equity" (p.32).[21] Similarly, we find that some staunchly Grotian republicans repudiated Machiavellian political thought as divisive, atheistic, and subversive of natural and constitutional law. Parker and Gilbert Burnet, for instance, thought that their Grotian convictions placed them opposite Machiavelli on the heavenly side of the divide between "piety" and "policy."[22] In their view, the trouble with Machiavellian republicans is that they do not properly subordinate the assertion of their civil liberties to obligations of natural law and Christian religion.

Note, however, that when it comes to punishing tyrants for their absolutist pretensions there may be (depending upon the nature of the relevant historical constitution) no fundamental conflict between a pious observation of

Grotian obligations and a shrewd Machiavellian defense of republican liberty. In the face of tyranny, there may be little conflict between having a clean conscience and having dirty hands.

Such was clearly the view of Edward Sexby, who systematically educed the most radical implications of the Grotian notion that every man is naturally equipped to execute justice. In his Killing Noe Murder (1657), Sexby drew upon Grotius's individualistic theory of natural penal rights in order to support his own independent assault upon the protectorate. Sexby was an ally of Cromwell's during the civil war, but he soon came to believe that Oliver had betrayed the republican cause and that his rule was as tyrannical as Charles I's. Accordingly, he plotted to assassinate Cromwell. In justifying his attempt (which failed and ended in his own death), Sexby did not feel compelled to defer to any constitutionally enshrined penal powers or any common convention among nations. Instead, he argued that Cromwell ruled by force and fraud rather than by law, that he lacked any legitimate claim to magistracy, and that he had therefore placed himself in the state of nature, outside the protective cover of the English constitution, and within the moral jurisdiction of Sexby's or anyone else's natural right to punish.[23]

While invoking his Grotian natural obligation and right to punish Cromwell, Sexby also argued that even "his Highness' own Evangelist, Machiavelli" would condemn him (p.367). From a Machiavellian standpoint, he suggests, Cromwell's rule relied too heavily on the excessive timidity and pious self-restraint of the people. One can only realistically expect, in his view, that the people will endeavor to vindicate their civil liberties, once contested, by fierce and violent means. Sexby was not simply grafting a Grotian obligation and right

onto what was already a commonly accepted Machiavellian expectation of actual political behavior. Writing twenty years before the reception of Grotius in England, Barnabe Barnes complained that, when it comes to defending their civil liberties, modern English citizens are not Machiavellian enough.

> The reason why so fewe free people and States are in comparison of former times, and such a defect of true lovers and of valiant champions of liberties in comparison of former ages . . . is, that people in hope of beatitude, and towards the fruition of a second comfortable life, devise in these dayes how to tollerate and not to revenge injuries.[24]

One might reasonably suppose, however, that if this same Christian people were to become convinced that toleration of serious public injuries is, as Grotius put it, "a sin against human nature," then their actual pattern of political behavior might change. Accordingly, in the case of Cromwell, Sexby could embrace a Machiavellian prediction of rebellion, not because he was a deeply Machiavellian thinker (he suggests that he was not), but because he recognized, and he was optimistic that the English people would also recognize, a Grotian obligation and right to punish tyrants.

Nearly a generation later, we find Henry Neville repeating Sexby's Machiavellian warning of the consequences of tyranny in his Plato Redivivus: or, A Dialogue concerning Government (1681).[25] Unlike Sexby, however, Neville was a devoted follower of Machiavelli. In order to answer the complaints of such critics as Burnet (a pious "Court Whig"), he endeavored to convert Machiavellian political thought from atheism to reformed theology. His "divine Machiavelli" was merely the enemy of popish clergy, and was therefore a friend, not only of republicanism, but also of the reformation.[26] Thus, by invoking the account of civil conflicts set forth by Grotius, who was especially popular among the English clergy, Neville could maintain that his brand of republicanism was

compatible with a reformed conception of the duties that citizens owe to God as human beings and as Christians. Like Hunton, Neville holds that no judge could ever have authority to adjudicate civil conflicts between the "coordinate" powers of a mixed government. Therefore, when one civil power has committed an injustice against another, the conflict is best settled by the exercise of natural penal rights. Unfortunately, as Nedham had argued, the English civil wars began, not over a clear "point of right," but over an immemorial and uncertain "matter of fact." In this case, according to Neville, "both parties pretended and believed they were in the right; and that they did fight for, and defend the government" (p.150). The civil wars began with a good-faith disagreement. Thus, citing both Machiavelli and Grotius, Neville endorses an ideological consensus according to which, under the extraordinary circumstances of the civil wars, a legitimate settlement could be achieved only by means of superior arms.

Of all republican thinkers, Algernon Sidney presented the most thorough amalgamation of Grotian natural law and Machiavellian policy. Sidney composed his Discourses Concerning Government (1698) at the time of the Exclusion Crisis (1681-2), and like other leading exclusionists, such as James Tyrrell and John Locke, he rehearsed Grotius's interpretation of the natural law implications of Cain's guilty apprehensions (Ch 2, s2; Ch 3, s1).[27] Following Parker, he held that when the people come together to form a "mixed" or "popular" government, they invest part of their original natural rights in parliamentary penal powers which they institute in order to impose legal limits on the powers of their chosen king and his ministers.

> These are the kingdoms of which Grotius speaks, where the king has his part, and the senate or people their part of the supreme authority; and where the law prescribes such limits, that if the king attempt to seize that part which is not his,

> he may justly be opposed: Which is as much as to say, that the law upholds the power it gives, and turns against those who abuse it (Ch 2, s30; my emphases).

Further, there is a certain natural coordination between the people's right to the punitive enforcement of constitutional limitations of kingly power and their inalienable right to defend themselves. In Sidney's view, the people may justifiably take up arms against their rulers for the very reasons of self-defense that Grotius put forth: "On account of [the rulers'] great savagery" and "when the king hastens to the ruin of his people"(Ch 2, s27).[28] Since the people are disinclined by nature to cause extreme harm to themselves, these "mischiefs and cruelties," and their ensuing defensive rebellions, are much less likely to occur when the people are ultimately in control of their own government. In short, when the people federate their natural penal rights in a parliament and actively prosecute violations of constitutional divisions and limits of power, it is unlikely that they will need to rely upon their monarch's benevolence or to defend themselves against his malevolence.

Moreover, according to Sidney, in adhering more closely than absolutist regimes to Grotian principles of natural right and justice, mixed governments draw upon and foster civic virtue and liberty. When the people retain the right to limit and punish their king and their king's ministers, they are not only much less likely to suffer from the vices of those rulers, they are also much less likely to fall into vice themselves (Ch 2, s19). Of course, any form of civil society can fall into a state of "corruption" in which virtue no longer flourishes. But, according to Sidney, absolute monarchy is "rooted" in the corruption of virtue as a matter of "principle," because the exercise of absolute power can only reach its full extent (as is the tendency of all power) when citizens become passive in the face

of injustice. In his efforts to bring about such passivity in his subjects, the absolute monarch invariably becomes an enemy of virtue: "The absolute monarch always prefers the worst of those who are addicted to him, and cannot subsist unless the prevailing part of the people be base and vicious" (Ch 2, s19). Passivity in the face of injustice would therefore appear to be the first and greatest vice to be found in any people. While it makes them fit for subjection to an absolute monarch, it also makes that very form of government unstable because vulnerable to external aggression. Citizens who lack the moral vigor to resist a domestic tyrant are also likely to make poor soldiers when it comes to resisting the similar injustice of foreign domination (Ch 2, ss11, 15, 21). In sum, both the virtue of the citizenry, and the liberty of the commonwealth (which in the Machiavellian sense is its freedom from external domination), are best maintained when the people invest part of their natural penal rights in an independent parliament.

Sidney was not the only Whig exclusionist to embrace the idea that Grotian principles of natural justice and right describe the basic conditions under which Machiavellian civic virtue and liberty tend to flourish. His thoroughgoing synthesis exemplified and clarified a widespread pattern in English republican thought. By this time, most Machiavellian republicans had acquired a quick sense of Grotian natural justice. Milton's more philosophically radical mode of justifying extraordinary or ostensibly extra-legal violence failed to have a lasting influence on republican thought, in part, for the same reason that Hobbes's political theory was unpopular among Royalists. The unlimited natural right of self-preservation, guided only by the bare criterion of political alliance, is a double-edged sword. In conflicts that exceed the authority of any positive civil

jurisdiction, prudential considerations of allied self-preservation weigh equally on opposing sides. Barring rational mediation by other right-conferring moral criteria (such as the fundamental injustices of Grotian natural law), only superior power can tip the balance in favor of one side or the other. Further, the bare principle of self-preservation was a meager medium for those who wished to appeal directly to natural law morality in order to advertise the legal character of political violence. A reasonably cogent resolution of the problem of legality would require a greater degree of ethical continuity between natural and civil law than the principle of self-preservation could supply. Unlike the law of self-preservation, the natural right to punish implied the existence and relevance of some standard of justice and legal (or quasi-legal) order. According to Grotius and his followers, since the penal powers of civil society accrue from natural penal rights, the legitimacy of any exercise of those powers depends in part upon its conformity with the principles of natural law morality which would give everyone the right to punish under pre-civil conditions. Civil magistrates have a duty to enforce positive (common or statutory) laws, but only insofar as those laws are consistent with natural law. Therefore, according to Grotian thinkers, principles of natural law provide the interpretive framework within which the meanings of positive laws should be determined. This idea would hardly have seemed unusual to magistrates and members of parliament schooled in the thought of Edward Coke, who held that the immemorial customs of the English common law were ultimately grounded in "the immutable law and light of nature, agreeable to the law of God."[29] Not surprisingly therefore, Grotius's influence was particularly pronounced where we find the tendency in republican thought to combine natural law and historical-constitutional arguments in favor

of parliament's right to the sword of justice. And this mode of argumentation was especially popular among Machiavellian republicans who paid the most lip service to the idea of the rule of law.

Shaftesbury's own Letter from a Person of Quality to his Friend in the Country (1675) presented the definitive Machiavellian-Grotian conception of the ancient constitution. The Letter defers to Grotius's understanding of the admonitions contained in natural and ordained law against swearing "oaths promising something in an uncertain future"(p.15).[30] The relevant precept of Grotius's theory of natural law states that "it is best and most useful and most in harmony with a rational nature to refrain from oath-swearing, and to habituate oneself to speaking the truth that one's word may be accepted in place of an oath."[31] Immediately after stating this precept, Grotius proceeds to argue that, as a consequence, "obviously, if a people has set up a king without absolute authority, but restricted by laws, any acts of his contrary to those laws can be rendered void by them, either as a whole or in part, because the people has reserved for itself authority to that extent" (Law, II.xiv.2) On the face of it, this connection between the virtue of truth-telling, the problem of oath-swearing, and the power of the people to "void" kingly acts might seem obscure. But the connection seemed clear to the Shaftesburean Whigs. For the First Earl, the apparent implication of Grotius's account of public oaths was that members of English parliament could not possibly swear oaths of allegiance and, at the same time, speak the truth about their duties and rights under both natural law and the ancient constitution of their limited monarchy. According to the Letter, members of parliament cannot legitimately swear oaths never to take up arms against their king because such oaths would cast doubt on the ancient

constitution itself. The ancient constitution is a "golden chain" which binds together the interest of the king with the interest of his people by placing "his safety . . . in them, as theirs was in him" (pp.16-17). It is a sacred bond of "trust" which conforms to the laws of nature. But it is also a trust that is enforced and made legally binding by mutual "fear."[32] Accordingly, no oath can supplant honest dealing as a guarantee of peace between a people and their government, and the constitutional condition of mutual fear, which provides inducements to honest dealing, can be maintained only if parliamentary representatives retain some part of the original penal rights of the people. In this way, the First Earl's conception of the constitution implies that "they overthrow the government that suppose to place any part of it above the fear of man" (p.16). Therefore, the notion that members of parliament should, by oaths of allegiance, foreswear their obligation and right to take up arms against a tyrannical king "necessarily brings in the debate in every man's mind, how there can be a distinction left between absolute, and bounded monarchys, if monarchs have only the fear of God, and no fear of human resistance to restrain them."[33] Here we see how, at a moment of constitutional crisis, Grotian obligations and natural penal rights could be embraced as complementary to a Machiavellian understanding of the political dynamics involved in a putatively republican constitution.

IV. John Locke's "Strange Doctrine" and the Glorious Revolution

During the last quarter of the seventeenth century, with the emergence of the Machiavellian-Grotian synthesis, the notion that the penal powers of civil society accrue from the aggregation of natural penal rights reached its zenith as an instrument of English oppositional politics. It was in this context that John Locke abandoned the convictions of his earlier systematic reflections on natural

law (his Essays on the Law of Nature) and, following James Tyrrell, jumped on the Grotian bandwagon in asserting what he considered to be the "strange doctrine" of natural penal rights.

In the early 1660s, when he composed his eight Essays, Locke was already familiar with Grotius's theory of natural penal rights.[34] But he did not embrace it. Although he acknowledges in Essay VI that "the laws of the civil magistrate derive their whole force from the constraining power of natural law," he never suggests that any part of this constraining power involves a punitive mode of response between individuals situated in a natural condition of equality (p.189, my emphasis). On the contrary, he allows only that the laws of nature may be enforced immediately through divine sanctions, or mediately through sanctions imposed by human superiors who have acquired rights of "dominion" either by donation or by contract (p.185).[35] Locke's early natural law is not enforceable within a pre-civil community of equals. The obligatoriness of certain actions and forbearances stems not from their intrinsic moral qualities, as in Grotius, nor simply from fearsome threats of sanctions for doing otherwise, as in Hobbes, but from the "authority and rightful power" of superiors to issue commands and prohibitions (pp.187, 189). Whereas natural obligations arise directly from the "intrinsic force" of divine authority, familial and civil obligations arise indirectly from the "delegated power" of parents and kings (p.187). Locke maintains that our moral conscience will tell us "that we deserve punishment" whenever we rationally apprehend that we have transgressed against the declared will and authority of a rightful superior (p.185). So remorse of conscience may combine with the penal powers of superiors in giving force to natural and civil laws. Locke credits no such effect, however, to resentment of injuries arising from the

judgements we are inclined to pass on the actions of our less conscientious equals. Parents may judge their children, kings may judge their subjects, and everyone may judge herself according to the judgements of her superiors. But no one is morally competent to judge her equals, and no one can assert rights of dominion over others simply in virtue of her greater innocence in the eyes of nature.

Locke first argued for the Grotian doctrine of natural penal rights in the second of his Two Treatises of Government (1690), which (if David Wooton's conjecture is correct) he composed immediately after the appearance of James Tyrrell's like-minded Patriarcha Non Monarcha (1681).[36] Like Tyrrell, he adopted the Grotian view as part of what he considered to be the most compelling philosophical alternative to Robert Filmer's patriarchal theory of the origin and rightful succession of sovereign power. From 1679 to 1681 Filmer's theory quickly became the orthodox view of royalists opposed to Exclusion. Although Locke did not publish his Two Treatises until after the Glorious Revolution – perhaps in order to justify revolutionary actions already taken, and perhaps also in order to present his arguments at a moment some distance from the heat of political conflict, when they might plausibly claim to enlighten the reader from a standpoint of cool philosophical detachment – nevertheless, it appears to have been the Exclusion Crisis which provided the occasion for his conversion to the Grotian view that, on the basis of their natural penal rights, the people may determine who shall wield the public sword of justice, how such officials should wield it, and when they may be said to have relinquished it and to have merited punishment themselves.

Locke, however, departed from the emerging republican orthodoxy by repudiating the Grotian method of arguing from a consensus of natural and customary law. He thought it was a mistake to give greater or equal weight to legal history in determining what rights parliament may claim to have against the king. In his view, the actions of "the executive" should be held accountable to the standards of natural law "not by old custom, but by true reason" (Second Treatise, Ch 13).[37] And in virtue of his insistence upon this dichotomy between the real authority of reason and the pseudo-authority of custom – redolent of Hobbes's insistence that "experience concludeth nothing universally"[38] – Locke was perhaps the least Grotian of all the exclusionist writers.

At the time of the Glorious Revolution, shortly before Locke published his Two Treatises, the influence of Grotius on Whig thought was even more pronounced than it had been during the Exclusion Crisis. Indeed, Grotius's authority on natural law and natural penal rights so dominated the scene that Charles Blount, author of a pamphlet entitled Proceedings of the Present Parliament Justified, by the Opinion of the Most Judicious and Learned Hugo Grotius (1689), believed that sufficient justification for the revolution, and for submission to William's regime, could be given simply by stringing together numerous and long quotations from The Law of War and Peace pertaining to the conditions under which a people may justifiably punish an unruly king and reform their government.

Gilbert Burnet's An Enquiry into the Measures of Submission to the Supream Authority (1688) is also an especially important indicator of Grotius's influence in this context because it came closer than any other relevant work to presenting an "official" justification of the Glorious Revolution.[39] Burnet

regularly preached to William of Orange before the revolution, while exiled in Holland, and after the revolution as the Bishop of Salisbury. And during William's invasion, both Burnet and large numbers of his largely Grotian Enquiry accompanied the Prince's landing party. The slender pamphlet they distributed upon arrival all but proclaimed William to be King of England in the name of Grotius.[40] Speaking on behalf of William, Burnet follows Grotius in denying that monarchs ever rule on the basis of "immediate warrants from heaven" (Sect 4). Instead, civil governments are formed when individuals entrust their natural rights to exact "revenges or reparations" to a single person or body of executives (Sect 3). Like Milton, and unlike Grotius, however, Burnet supposes that the natural right to punish the enemies of society is grounded in the "duty of self-preservation" (Sect 2). This departure from Grotius's own doctrine was not uncommon among Whigs who professed their allegiance to the Dutch philosopher-jurist. They rarely accepted or, more likely, rarely discovered his distinction between the instinctual basis for the right of self-defense and the moral basis for the natural right to punish.[41] Also in the typical fashion of the Grotian Whigs, Burnet combines arguments from natural law and immemorial custom in his "Enquiry." His Grotian natural law does not specify which form of government a natural society should institute (Sect 4). He therefore follows Grotius, and not Milton, in maintaining that the limits of monarchical power, and the corresponding obligations of citizens, "must be tken from the express laws of any state . . . or from immemorial prescription" (Sect 7). When those who have been "trusted" with the execution of justice fail to abide by the constitutional laws that specify the terms of their trust there is, however, a real "dissolution of government" (Sect 14). Similarly, the government is dissolved when members of

parliament "corrupt" themselves by swearing and abiding by oaths of non-resistance to the king; for parliament thereby abjures its duty and right to punish an unruly executive (Sect 14).[42]

In light of the widespread influence of Grotius in this period, it is extremely unlikely that, by calling the Grotian doctrine of natural penal rights "strange," Locke meant to signal that he was innovating (as Leo Strauss insists and as Peter Laslett and James Tully seem to allow).[43] When Locke composed his Two Treatises, and especially when he published them, it is difficult to imagine that his readers would have thought the doctrine unusual. It could hardly have been more familiar. It therefore seems more likely that, by calling the doctrine "strange," Locke was giving direct expression to the awkwardness of his newly adopted position, because it did not sit well with his own earlier reflections on the subject of natural law.

VI. Corruption and Popular Resentments

Grotius and his English followers made their case for the natural right to punish in opposition to the traditional view – which, it is worth noting, prevailed as a cultural mentality long before it achieved the status of a formal theory in the seventeenth century – that worldly rulers were appointed directly by God for the execution of His divine wrath. Grotian thinkers who wished to displace this traditional view maintained that God only acts as a remote but providential cause in the natural constitution of the state's power to punish. The immediate cause of legitimate penal power, in their view, is a wholly natural and human form of moral agency. In this context, it would be surprising if we could not find Grotian theorists willing to resort to the obvious alternative notion that the immediate source of this power must be some form of human wrath. Grotius

himself denied that anger was ever a just motive to punishment, and he was otherwise uninterested in conducting a naturalistic examination of moral motivation. But certain of his followers maintained that there must be some connection between affect and action, and consequently between justifiable anger and justifiable punishment. Hence, we find that, in the first quarter of the eighteenth century, Grotian proponents of natural penal rights often drew upon a sentimentalist language of "just resentments," and even "noble and generous resentments."[44] Natural law arguments containing references to popular resentments were especially pertinent to Parliament's use of bills of attainder calling for the impeachment of those who had perpetrated egregious "public crimes" for which there was no regular statutory remedy. So that these popular resentments might escape the charge of being partial to factional interests, leading republican thinkers argued that reflective impartiality could be achieved through a procedural division of powers.

In his Discourse concerning Treasons and Bills of Attainder (1716), Richard West attempted to demonstrate the "natural justice" of bills of attainder on the basis of a thoroughly Grotian theory of natural penal rights. He indicates that "all authors" allow that every individual in the state of nature has a right of self-defense, and that some have endeavored to derive the magistrate's right to punish "from this principle solely" (p.97, his emphasis). Following Grotius, however, he argues that the principle of self-defense is not a "sufficient foundation, for the whole extent of political power." Instead, "the power of the sword" is "fully deriv'd" from a combination of principles: one of self-defense, and the other of mutual consideration and aid.

> Let it be, therefore, farther considered, that the state of nature is not without a law. Reason is that law. And that teaches, that all men being naturally equal; no man ought to prejudice another, either in his person or property; but on the contrary, they ought to assist one another by all means justifiable. For as the law of nature willeth the peace and preservation of all mankind, every man is equally concerned in the observation of it: and therefore, that all men might be restrain'd from acting contrary to it; the execution of the law of nature is in that state vested in every man; and in consequence of that law, every man may punish (that is, inflict pain upon) every transgressor of it, to such a degree, as may hinder its violation for the future (p.97, my emphases).

West then employs this Grotian theory of natural penal rights in order to answer the objection that bills of attainder are unjust because they are used to punish people for actions which are not expressly prohibited by the published laws of civil society. The objection assumes that the legitimate rule of law is limited to the rule of positive laws, and that citizens are justified in feeling secure in doing whatever those laws do not expressly prohibit. According to West, this objection "destroys the very notion of right and wrong, and makes the whole of morality to be purely accidental and political" (p.99). To suppose that there are no moral standards over and above what is established by positive law is not only to suppose that laws can never be unjust; it is also to suppose that the most "monstrous crimes," those crimes which are the most difficult for human legislators to foresee, should pass with impunity (p.101). In West's view, the positivist's objection is sufficiently met by drawing a distinction between actions that are wrong because prohibited by positive law (mala quia prohibita) and actions that are intrinsically wrong (mala in se) because contrary to natural law. The only reason why "notice" is necessary for the former sort of wrong is that "no man can know whether such a particular action be criminal, until he be informed of its being prohibited" (p.102). But since "all mankind" will agree that natural injustices are wrong, no positive enactment is required in order to justify parliament's power to punish those who commit such wrongs. If this power (or the natural penal rights upon which this power is based) is denied, civil society is

"dissolved" because the normative conditions that make such a society possible cannot be upheld.

West's treatise was repeatedly cited with approval in Thomas Gordon's The Justice of Parliaments on Corrupt Ministers, in Impeachments and Bills of Attainder, Consider'd (1725). And Gordon, who is best known as co-author (with John Trenchard) of The Independent Whig (1719) and Cato's Letters (1721) – conjoined West's Grotian theory of punishment with a political analysis of the proper place and limits of popular resentments. Gordon concurs with a common assumption of the Old Whigs in holding that it is most prudent to assume that rulers will not be benevolent and to adopt legal measures to restrain them accordingly, for "men that are above all fear, soon grow above all shame."[45] He also similarly maintains that "places" should be distributed according to an impartial standard of public merit alone, and that contrary practices ought to be severely punished (p.8).[46] But when "delinquents" engage in the treasonous practices that corrupt parliament they often grow "too big and potent for the common process of justice," and they must therefore be punished according to higher laws – the laws of nature and "the laws of nations" (pp.29, 31).

Gordon's reference to the jus gentium is especially striking given that, as Michael Zuckert points out, "in nearly one thousand pages of essays, Cato never once betrays the kind of interest in the laws of nations that forms the very core of Grotius's concerns."[47] The absence of explicitly Grotian ideas in the otherwise synchretistic essays of Cato (which bring the likes of Hobbes, Locke, and Machiavelli into a semi-cohesive political vision) must have been owing to Trenchard's cast of mind. For Gordon not only follows West in grounding parliament's impeachment powers in Grotian laws of nature and of nations (in The Justice of Parliaments), but he also cites Grotius on the question of natural penal rights at the end of his Three Letters to a Noble Lord (1721).

The occasion that animated all of Gordon's forementioned political writings was the scandal of the South Sea Bubble. Certain members of parliament, those with particularly close ties to the court, had enjoyed the "privilege" of receiving shares in the South Sea trading company without having to pay any advance consideration (other than their promise of support for legislation favorable to the company). They then received the difference between the "purchase" price and the value of the rising stock, but they did not share in the burden of the losses when the bubble finally burst.[48] There being no regular legal sanction against these scandalous dealings, opposing members of parliament turned for satisfaction to the "transcendant justice" of natural penal rights.[49] Those who committed this crime against the commonwealth were said to be "guilty by the highest conviction upon the earth, the general consent of mankind." And, in typical Grotian fashion, these Whig opposition writers joined their natural law arguments with historical arguments showing "with what impartiality and rigor our ancestors . . . punished those crimes which had the publick for their object." The claim that Parliament retained the original natural penal rights of the people they supported with numerous historical instances of "the interposition of the legislative power in criminal cases of an extraordinary nature." Consequently, they maintained that it was not unjust for Parliament "to punish facts which are in their own nature criminal, though not within the verge of the law." In their view, only "inferior courts" are "govern'd by the letter of the law." The ancient constitution was itself "above the laws," because it obliged parliament under a higher law of nature "to preserve the commonwealth."[50]

Accordingly, bills of attainder designed to give force to "the just resentments of the people" were not only the most effective available instrument for punishing elite criminals who were far too powerful for the lower courts to confront effectively, but they were also said to be "the highest proceeding known

in the constitution."[51] Robert Molesworth was one of the most outspoken advocates for the impeachment of the South Sea directors and their parliamentary accomplices. Indeed he may very well have been among the anonymous authors quoted in this paragraph. And the fact that he believed the constitutional practice of retaining and exercising a basic part of the people's natural penal rights in Parliament to be of Roman origin (as he averred in his Account of Denmark), would explain why he felt Parliament should declare the leaders of the South Sea scandal guilty of parricide and then impose upon them the peculiar ancient Roman punishment for this crime – being enclosed and drown in a large sack along with a monkey and a snake.[52]

Joining this opposition cause, Gordon argued that even if the civil laws of England should allow the directors of the South Sea scandal "to escape," nevertheless "the law of nature would demand satisfaction." In support of this claim, he cites the usual authority: "Every man, say Grotius, might right himself; and execute the sentence his own uncorrupt judgement should dictate to him." And he agrees with the other opposition writers that, as a product of "arbitrary power," the excesses of the South Sea scandal should inspire "a free people" to give effect, through the powers of Parliament, to their "noble and generous resentments for the publick good."[53]

Four years later, when he presented a more comprehensive account of parliament's impeachment powers in The Justice of Parliaments (1725), Gordon embraced a more nuanced view of the legitimate force of popular resentments. He continued to maintain that, when the government is in "imminent danger," when the offenders are "too big for regular justice," and when the crime in question is "sheltered from the law," parliament ought to execute "that justice which every injur'd people had a right to exact" (pp.32-3) And he continued to base his argument on the Grotian theory of natural penal rights, this time as

elaborated in West's oft-cited Discourse. He was also concerned, however, to answer the objection that in parliamentary impeachment proceedings the accused tends to be judged by those who "out of resentment, and a desire to retaliate the injury, may let their prejudice get the better of their judgement" (p.27). At the time, such allegations of partiality typically went hand in hand with the more pointed complaint that because impeachments are animated by popular resentments they amount to no more than collective acts of disobedience, defiance, and unruly violence against the crown.

Gordon's response to this standard line of objection hinged upon a clear division of the power of impeachment between the two houses of parliament. To his mind, a procedural division between Commons and Lords, as between prosecutors and judges, is sufficient to ensure that the execution of natural justice will embody the kind of impartiality and public-mindedness that virtuous persons are able to achieve by means of moral reflection. In Gordon's view, only the House of Commons is directly beholden to the task of prosecuting popular resentments, whereas the House of Lords is uniquely charged with the duty of rendering a final, impartial judgement concerning the justice of those resentments. Thus, he concedes that "sentiments of grov'ling malice" are incompatible with the nobility and the ties of honor that bind the members of the House of Lords together, but he maintains that this "assumption of integrity" among "persons of their quality" is precisely what makes the Lords the appropriate final judges in all treason trials (p.28). When such trials are conducted within the lower courts, by judges who occupy their offices at the pleasure of the Crown, actions punished as treasonous tend to be those which adversely affect the king "as distinct from the public" (p.30-1). There is even less justice in this manner of proceeding than there is in those cases where the king's ministers are unreflectively sacrificed to "the resentment of the Commons,"

because popular resentments tend more than the King's personal malice to promote the good of the commonwealth as a whole (pp.23, 38).

Popular resentments also tend to support a just distribution of punishments, because they tend to rise to their highest pitch against criminals who occupy privileged and powerful social positions, which is precisely where punishments ought to be the most severe (pp.1-3). It is therefore appropriate that members of the House of Commons should act as "the general inquisitors of the realm," and they should even "prosecute with earnestness," and with "heat and resentment," the crimes of Lords (pp.15, 23-4). But in the end, they must submit their cases to the more reflective and impartial members of the House of Lords for a final approval and execution of their "just resentments." Popular resentments tend to express narrowly self-interested desires for revenge, and therefore cannot alone provide sufficient warrant for the exercise of Grotian natural penal rights. Being essentially a right to punish vicariously, on behalf of the social body as a whole, the natural right to punish must therefore ultimately reside with persons who possess an uncommon "dignity and unbyass'd integrity." And, according to Gordon, this exceptional quality of character is more presumable among persons of "high rank and nobility" (p.27). This expectation that the English nobility will display an extraordinarily high level of civic virtue is, therefore, at once the reason for subjecting them to a higher and "more dreadful" form of justice, and for placing the final execution of that justice in their hands.

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[1] James Harrington, for example, articulated his quarrel with Hobbes by drawing a contrast, in the first "Preliminaries" to Oceana (1656), between "the empire of laws" and "the empire of men." John Wildman, in The Leveller: or the Principles and Maxims concerning Government and Religion (1659), insisted that government should be decided by "laws and not by men" (p. 5). And Henry Vane, in A Needful Corrective or Balance in Popular Government (1660) maintained that a government formed by voluntary association between individuals who are originally in equal possession of natural sovereignty is "that of laws, and not of men" (p. 4).

[2] Judith Shklar, Political Thought and Political Thinkers, ed. Stanley Hoffmann (Chicago: University of Chicago Press, 1998), ch 2.
[3] Niccolo Machiavelli, The Art of War, Bk I, trans. Ellis Farneworth (Cambridge: Da Capo Press, 1990), p. 12.
[4] The quote in the heading is at II.xx.9.
[5] Relectio on The Laws of War, trans. John Pawley Bate (Washington DC: Carnegie Institute, 1917), p. 419.
[6] Separate from both the right of self-defense and the right to punish, there is a third right to reparations, which will not concern us here.
[7] I present detailed arguments for this claim in "Two Essays on Philosophy and Penal Power" (Ph.D. thesis, Johns Hopkins, 2001). In my view, Quentin Skinner is mistaken in attributing the same doctrine to Jacques Almain and George Buchanan (The Foundations of Modern Political Thought [Cambridge: Cambridge University Press, 1978], II). These thinkers held that the right to punish belongs originally and chiefly to the whole community as a unified political body. They did not conceive of punishment, in the later Grotian fashion, as a right that one individual moral agent may exercise over another in a natural state of equality.
[8] Compare James Tully's analysis of this point in An Approach to Political Philosophy: Locke in Contexts (Cambridge: Cambridge University Press, 1993).
[9] This is only one of the many ways in which Grotius's natural law theory belies Knud Haakonssen's characterization of the "subjective rights tradition" in Natural Law and Moral Philosophy, (Cambridge: Cambridge University Press, 1996), pp. 5-6.
[10] The Institutes of Justinian, I.ii, trans. & ed. J. B. Moyle (Oxford: Clarendon Press, 1913), p. 4.
[11] Compare the views presented in RichardTuck, Philosophy and Government, 1572-1651 (Cambridge: Cambridge University Press, 1993), pp. 199-200.
[12] Unfortunately, the great care that Grotius takes here to distinguish the moral basis for the right of self-defense from the moral basis for the right to punish has gone unnoticed in some of the most influential recent secondary literature. Richard Tuck, for example, conflates the two (Philosophy and Government, pp. 199-200).
[13] Here Grotius quotes Marcus Tullius Cicero, De Officiis, trans. Walter Miller, Loeb Edition (Cambridge: Harvard University Press, 1913), II.vi.29.
[14] All page references are to the 1689 edition.
[15] According to M. A. Judson, Parker was the first English writer to offer any sort of argument for Parliamentary sovereignty. See her "Henry Parker and the Theory of Parliamentary Sovereignty", in Carl Frederick Wittke (ed.), Essays in History and Political Theory in Honor of Charles Howard McIlwain (Cambridge, MA: Harvard University Press, 1936). For a qualified reaffirmation of this thesis, see J. W. Gough, Fundamental Law in English Constitution History (Oxford: Oxford University Press, 1955).
[16] Grotius's argument for natural penal rights from Genesis 4.14 was repeated by many prominent republican thinkers, such as: Edmund Ludlow, in A Voyce from the Watch Tower, ed. A. B. Worden (Camden Society Publications, 4th series, XXI; Cambridge: Royal Historical Society/Cambridge University Press, 1978); James Tyrrell, Patriarcha Non Monarcha (1681), I: 11; John Locke, Two Treatises of Government (1690) II.ii.8; and Algernon Sidney, Discourses Concerning Government (1698), I.ii, III.i.
[17] Note that this argument represented a significant departure from the traditional way of distinguishing between patriarchal power and that form of penal power proper to public systems of criminal justice. In drawing this distinction, Marsilius of Padua, and those conciliarists who implicitly followed him, also acknowledged that Cain's impunity would have been inconsistent with the requirements of public justice, if any had been in force at that time. In contradistinction to the new Grotian argument, however, they maintained that Adam had complete discretion and every right to "pardon" Cain precisely because the only legitimate pre-civil punishments are those which belong to the absolute domestic jurisdictions of patriarchs.
[18] Demonstrating the truth of this claim remains the stated aim of the second edition of 1650; but it is no longer given unequivocal support in the text, which now includes the testimonies of protestant divines to the effect that "to doe justice on a lawless king, is to a privat man unlawful, to an inferior Magistrate lawfull" (p. 47).
[19] Case of the Commonwealth, p.19. Here, a truly Grotian statement of the aims of state-formation would add "and for the maintenance of impartial justice.

[20] Case of the Commonwealth, pp. 17-8.
[21] Moreover, a propos of my argument (in section 3 above) that Grotian natural penal rights are obligation-fulfilling rights, Grotius argues that punishment for injustices is "to be commanded" because the "evill of punishment" differs in moral quality from the "evill of offence" in that it alone benefits the public (Maxims, p. 38).
[22] Gilbert Burnet, Sermon before His Highness the Prince of Orange (1689). Parker similarly impugns Machiavelli's authority in Jus Populi (1644), p.30. Felix Raab traces the reception of Machiavelli in early modern England against the background of this discursive dichotomy in The English Face of Machiavelli (London: Routledge and Kegan Paul, 1964).
[23] Reprinted in David Wooton (ed), Divine Right and Democracy: An Anthology of Political Writings in Stuart England (Harmondsworth: Penguin Books, 1986), pp. 360-388, to which edition page references are made.
[24] Foure Books of Offices (1606), p.173; quoted in Raab, English Face, p.85.
[25] Reprinted in Caroline Robbins, Two English Republican Tracts (Cambridge: Cambridge University Press, 1969), to which version all page references are made.
[26] Also see his Nicholas Machiavelli Secretary of Florence His Testimony against the Pope and his Clergy (1698).
[27] Here Sidney cites The Law of War and Peace, I.iv.13.
[28] Here Sidney quotes The Law of War and Peace, I.iv.11.
[29] Quoted in the anonymous Vox Populi: or the People's Claim to Their Parliaments Sitting, to Redress Grievances (1681), p. 3.
[30] This reference is to The Law of War and Peace, II.xiii.21, where Grotius cites Philo's commentary on the Decalogue (as natural law) and Matthew 5: 34, 37 (as ordained or positive divine law).
[31] Here Grotius quotes Philo, On the Decalogue, XVII.
[32] Note that George Buchanan would have been a problematic authority for the proponents of this conception of the English constitution, because he argued that it is inconsistent with "the true representation of a king" that he should be conceived as "ever fearing others, or making others afraid" (The Right of the Kingdom in Scotland, trans. Philolethes, London, 1689, p.30).
[33] A Letter from a Person of Quality to His Friend in the Country (1675), p. lii.
[34] Locke quoted and borrowed citations from the prologue and the first book of The Law of War and Peace, and there is strong evidence in the essay he devoted to refuting Culverwell's neo-Grotian a posteriori method (of demonstrating the existence of natural laws from consensus) that he had at the very least read well into the second book. A complete examination of this evidence is beyond the present scope. But see Wolfgang von Leyden's astute references and comments in the footnotes to Locke's Essays (Oxford: Oxford University Press, 1958), pp.37, 111, 161, 202-4, 282. All page references are to this edition.
[35] As in his previous two tracts on the civil magistrate, he remains agnostic on the question of whether the crown is granted directly by God or indirectly by those who would become its subjects.
[36] The period of composition for Locke's second treatise is controversial. In addition to David Wooton's introduction to John Locke's Political Writings (New York: Mentor, 1993), see Peter Laslett, Two Treatises of Government: Student Edition (Cambridge: Cambridge University Press, 1988) and Richard Ashcraft, Locke's Two Treatises of Government, (Unwin Hymen, 1989).
[37] *Second Treatise*, chapter 13.
[38] Thomas Hobbes, Elements of Law (1640), I.iv.10.
[39] See Lois J. Schwoerer, The Declaration of Rights, 1689 (Baltimore: The Johns Hopkins University Press, 1981), pp. 117-18; and Michael Zuckert, Natural Rights and the New Republicanism (Princeton: Princeton University Press, 1994,) p. 106.
[40] Towards the end of 1687, Burnet had expressed his hope that a "commonwealth" could be established in England as the result of "a rebellion of which [William] should not retain the command" (Christopher Hill, The World Turned Upside Down: Radical Ideas during the English Revolution [Harmondsworth: Penguin Books, 1991], p. 359). But he soon changed his tune and regularly praised God for William's rule.
[41] This error of interpretation was later revealed by Jean Barbeyac in his footnotes to Samuel von Pufendorf's Of the Law of Nature and Nations (1717 ed., Basil Kennet trans., including large notes from Barbeyrac's 1712 Amsterdam ed.). Citing Locke, Barbeyrac defends Grotius's doctrine

of the natural right to punish against Pufendorf's contrary view (which happens to resemble the authoritarian account of the right to punish set forth in Locke's Essays).
[42] According to Burnet, such oaths can only apply to ministers of the king's own executive powers.
[43] See Leo Strauss, Natural Right and History (Chicago: University of Chicago Press, 1953), p. 222; and Laslett's introduction to Locke's Two Treatises, p. 97.
[44] Salus Populi Suprema Lex; Shew'd in the Behavior of Brittish Parliaments Towards Parricides, etc (1721), p. 2; Three Political Letters to a Noble Lord Concerning Liberty and the Constitution (1721), p. 3 of Letter I.
[45] Cato, 17 June 1721.
[46] See also the Independent Whig, p. 24.
[47] Natural Rights and the New Republicanism (Princeton: Princeton University Press, 1994), p. 299.
[48] John Carswell and Nicholas Goodison, The South Sea Bubble, Sutton Publishing, 1997.
[49] A Modest Apology Occasion'd by the Late Unhappy Turn of Affairs with relation to Public Credit (1721), p. 9.
[50] Salus Populi, pp. 5, 35, 35-7.
[51] Modest Apology, p. 9.
[52] Frank McLynn, Crime and Punishment in Eighteenth-Century England (London: Routledge, 1989), p. 152. I suspect Moleworth of being the author of the Salus Populi, which refers to the offenders as "parricides" (p. 5).
[53] Three Political Letters, pp. 9, 1.