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HOBBS AND THE LEGITIMACY OF LAW¹

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ABSTRACT. Legal positivism dominates in the debate between it and natural law, but close attention to the work of Thomas Hobbes – the “founder” of the positivist tradition – reveals a version of anti-positivism with the potential to change the contours of that debate. Hobbes’s account of law ties law to legitimacy through the legal constraints of the rule of law. Legal order is essential to maintaining the order of civil society; and the institutions of legal order are structured in such a way that government in accordance with the rule of law is intrinsically legitimate.

I focus on Hobbes’s neglected catalogue of the laws of nature. Only the first group gets much attention. Its function is to facilitate exit from the state of nature, an exit which Hobbes seems to make impossible. The second group sets out the moral psychology of both legislators and subjects necessary to sustain a properly functioning legal order. The third sets out the formal institutional requirements of such an order. The second and third groups show Hobbes not concerned with solving an insoluble problem of exit from the state of nature but with the construction of legitimate order. Because a sovereign is by definition one who governs through law, Hobbes’s absolutism is constrained. Government in accordance with the rule of law is government subject to the moral constraints of the institutions of legal order.

Legal positivism dominates today in the great debate in legal philosophy between it and natural law. I will argue that close attention to the work of Thomas Hobbes – generally regarded as the founder of the positivist tradition – reveals a version of anti-positivism with the potential to change the contours of that debate.

In HLA Hart’s contemporary version, positivism puts forward two central theses. The Separation Thesis holds that there is no necessary connection between law and morality. The Identification

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Thesis holds that the law of a legal order is its positive law, law whose content can be determined without resort to moral argument.²

Hart saw these two theses, especially the first, as the hallmark of the positivist tradition. But he also argued that the tradition had gone wrong in several respects, including in its idea that law is the product of an “uncommanded commander”, of a legally unconstrained sovereign. Hart argued that that idea fails to account for the fact that every sovereign who wishes to rule through law is constrained in the following way.³ The sovereign has to comply with the fundamental rule of the legal order – the “rule of recognition” – which stipulates when judgments about the common good will be recognised as law.

Hobbes is not only supposed to be the founder of the positivist tradition, but the idea of the sovereign as uncommanded commander is central to his understanding of law. However, I will argue that Hobbes offers an account of law which ties law to legitimacy through the legal constraints of the rule of law. For Hobbes, legal order is essential to maintaining the order of civil society; and the institutions of legal order are structured in such a way that government in accordance with the rule of law is intrinsically legitimate.⁴

² Both of these theses are articulated in H.L.A. Hart, “Positivism and the Separation of Law and Morals,” reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), pp. 49–87 and in Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). In a posthumously published “Post-script” to the second edition of the latter work, Hart qualified the second thesis by joining the “incorporationist” camp within legal positivism; see *Concept of Law* (Oxford: Clarendon Press, 1994), pp. 250–254. I will not go into this issue here but I explore it in detail in “Positivism’s Stagnant Research Programme”, *Oxford Journal of Legal Studies* 20 (2000), pp. 703–722.

³ See Hart, “Positivism and the Separation of Law and Morals,” pp. 58–60 and *The Concept of Law*, chap. 6.

⁴ As I will indicate later, Hobbes’s closest ally in contemporary debates is Lon L. Fuller. See Fuller, *The Morality of Law* (New Haven: Yale University Press, rev. edn., 1969). Fuller, however, adopted the Hobbist reading of Hobbes sketched below – see Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966), pp. 19–30, although he did note (at pp. 22–23) that Hobbes’s principles of natural reason complicate the reading. In earlier work, I accepted Fuller’s Hobbist reading – see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South*

It is this understanding of legal order that makes the label “anti-positivist” preferable to the standard alternatives of either “positivist” or “natural law” when describing Hobbes’s position. While there are natural law elements in his position, Hobbes does not subscribe to the natural law tenet that there is an independent moral good which must triumph in a clash with the positive law by stripping the law of its character as such.⁵ So “anti-positivist” better conveys the thought that Hobbes neither founded legal positivism nor worked within the terms set by the natural law tradition.

The basis for my argument is Hobbes’s own catalogue of the laws of nature. Hobbes explicitly sets out these laws in such a way that each and every one of them can be explained as a further development of our understanding of what self-interest requires, once we perceive the fundamental importance of peace and stability. And this procedure gives rise to the “Hobbist” interpretation of his work – that self-interest compels us to see that any order is legitimate because order is preferable to chaos and law is merely the vehicle for an unconstrained ruler to issue his commands.

But while Hobbes did suppose that whatever keeps us out of the state of nature and in civil society is by definition legitimate, this is an argument from an external perspective on civil society, one designed to appeal to individuals who have in common only that

African Law in the Perspective of Legal Philosophy (Oxford: Clarendon Press, 1991), chapter 9.

⁵ It might be more accurate to say that the natural law tradition – say from Aquinas to John Finnis – argues both that there is an independent, divinely willed, moral good and that the structure of that good is reflected in the reason of the law. The second argument is in a sense one about the immanent morality of law, one which ties law to legitimacy. The difference between Hobbes and the natural law tradition is, then, that Hobbes does not make the second argument in any way dependent on the first, though some Hobbes scholars – most notably Howard Warrender – hold that the whole structure of Hobbes’s theory depends on a version of the first argument. See Howard Warrender, *The Political Theory of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press, 1957). However, the major impulse for the Warrender line is that without such dependence one cannot find a basis in Hobbes for his full-blooded account of political and legal obligation. And my argument in this essay is that there is an immanent basis, so there is no need for an external validation in divine will or in any other source of morality; for example, the morality of equal concern and respect in Ronald Dworkin’s secular natural law.

they are all motivated by self-interest. From the internal perspective of sovereign or subject in civil society the law has a very different character. Even if it is important, as Hobbes supposes, to justify on the basis of self-interest establishing a society in which the laws can be effective, once effective they oblige in a way that transcends self-interested judgments.

This distinction between external justification and internal or immanent character has not been addressed because Hobbes scholarship neglects most of Hobbes's catalogue of the laws of nature, so that the different functions Hobbes had in mind in setting these laws out have not been noticed.⁶ In particular, attention has focussed on the first group of laws, whose function is to facilitate exit from the state of nature, an exit which Hobbes himself seems to make impossible. The second group has to do with the moral psychology of both legislators and subjects which is necessary to sustain a properly functioning legal order. The third has to do with the formal institutional requirements of such an order.

Once we see the importance of the second and third groups, we can also see how Hobbes was not so much concerned with solving an insoluble problem of exit from the state of nature as with the construction of a well-functioning order. The primary problem for him is not exit from the state of nature but the proper construction of political and legal order. And while the constraints of such order are in an important sense formal rather than substantive, form links to substance in his theory in a way that makes legal order legitimate. Because a sovereign is by definition one who governs through law, Hobbes's absolutism is constrained. Government in accordance with

⁶ The closest account to my own is in the following passage in Michael Oakeshott, "The Rule of Law", in M. Oakeshott, *On History and Other Essays* (Totowa: New Jersey: Barnes and Noble, 1983), pp. 119–164: "But first, this *lex naturalis* turns out not to be composed of genuine laws capable of imposing obligations (even *in foro interno*); it is composed of maxims that indicate the necessary causal conditions of peaceful association. And secondly, on inspection it transpires that these maxims of rational conduct are not independent principles which, if followed by legislators, would endow their laws with a quality of 'justice'; they are no more than an analytic break-down of the intrinsic character of law, what I have called the *jus* inherent in genuine law which distinguishes it from a command addressed to an assignable agent or a managerial instruction concerned with the promotion of interests" [footnote omitted, spelling of *fore* corrected].

the rule of law is government subject to the moral constraints of the institutions of legal order.

I

While the claim that Hobbes is not a positivist is still a minority claim in Hobbes scholarship, it is gaining more currency. But the way in which the claim is made puts Hobbes into a slot dictated by the contemporary debate in legal philosophy, one in which positivists dominate over natural lawyers for the reason that the terms on which debate is conducted work in their favour.

As I show in this section, as a matter of textual interpretation it seems at first that Hobbes supplies evidence which allows us to think of him as both a natural lawyer, though a rather odd one, and as a decidedly positivist thinker. Since he cannot be made into a natural lawyer as a matter of philosophical argument, it then seems that we should classify him as a positivist. However, I will proceed to show that close interpretive attention to the text of *Leviathan* leads to a different conclusion.

As the purported founder of legal positivism, Hobbes wrote at a time when the natural law tradition provided the terms for legal theory. He himself gives a catalogue of the laws of nature a prominent role in his general political theory and he makes the striking claim in *Leviathan* that “The Law of Nature, and the Civill Law, contain each other and are of equall extent”.⁷ He also says that “whatsoever is not against the Law of Nature, may be made Law in the name of them that have the Sovereign power”.⁸ So he seems to adopt the classic premise of the natural law tradition that there can be no conflict between the laws of nature – the moral law – and the positive law. And Hobbes’s definition of law in chapter 26 of *Leviathan* supposes both that those subject to the law are under a prior moral obligation to obey it and that the law, properly so called, is positive law:

⁷ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (London: Penguin Classics, 1986), chap. 26 [138], p. 314. All references to this work are to this edition with the page numbers in square brackets being to the original edition of 1651.

⁸ *Leviathan*, chap 26 [150], p. 333.

And first it is manifest, that Law in generall, is not Counsell, but Command; nor a Command of any man to any man; but only of him, whose command is addressed to one formerly obliged to obey him. And as for Civill Law, it addeth only the name of the person Commanding, which is *Persona Civitatis*, the Person of the Common-wealth.⁹

From the contemporary perspective, Hobbes seems to deny one of the two central theses of legal positivism – the Separation Thesis that there is no necessary connection between law and morality. But he does seem to subscribe to the other thesis – the Identification Thesis that the law of a legal order is its positive law.

The Identification Thesis is implied in Hobbes's distinction between counsell and command, since one of the features of a command is that one can identify its content without resort to the considerations which underlay the commander's judgment about what he ought to command. As Hobbes tells us in chapter 25, for a command to function as such, the reason one obeys has to do not with its content but with the authority of the commander, and that requires that its content be determinate and thus determinable without resort to moral argument:

COMMAND is, where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it. From this it followeth manifestly, that he that Commandeth, pretendeth thereby his own benefit: For the reason of his Command is his own Will onely, and the proper object of every mans Will, is some Good to himselfe.¹⁰

I will leave until later Hobbes's rather odd claim that the commander has only his own benefit in mind, noting only the neglected movement in his definition of command from the idea of a natural commander in chapter 25 to the idea of the artificial legislator or sovereign in his chapter 26 definition of civil law. First I want to get clear the puzzle about how to place Hobbes.

Hobbes seems part of the natural law tradition because he denies the Separation Thesis; there can, according to him, be no conflict between positive law and morality or natural law. But he also seems to subscribe to the Identification Thesis, which says that all law is positive law. Moreover, it can be argued that if Hobbes's position is

⁹ Hobbes, *Leviathan*, chap. 26 [137], p. 312.

¹⁰ Hobbes, *Leviathan*, chap. 25 [131–132], p. 303.

understood as natural law, it is unique in the tradition since for him any apparent conflict between natural law and positive law is to be resolved in favour of the positive law of the legal order in question. As Norberto Bobbio put it, “the true function of the natural law, and the only one that cannot be eliminated, is to provide the most absolute ground to the norm according to which there is no other valid law than positive law”.¹¹

Hence, if one rejects with contemporary positivists the idea that there is any prior moral obligation to obey positive law, it will seem that Hobbes’s legal theory is positivist, once it is extracted from the political theory which he thought gave rise to prior obligation. It will also seem that any attempt to make Hobbes into a natural lawyer must show that at least some conflicts between natural law and positive law are resolved in favour of natural law. The attempt will have to show that there is at least one moral good that is the basis of legal obligation such that when the sovereign legislates in violation of that good, his laws are stripped of legal force.¹²

The obvious candidate for such a good is the natural good of individual self-preservation, which in Hobbes seems both the basis for the transition from the state of nature to civil society – the explicit basis of the laws of nature – and gives to those subject to the law a right to resist the sovereign when he threatens them with death or other severe harms. It might seem that at least in this one case Hobbes resolves the conflict between positive law and natural law in favour of the latter.

But in this case the sovereign’s command will have all of the formal attributes of a valid law, and so will not appear any different from any other valid law of the legal order. And so positivists can

¹¹ Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. Daniela Gobetti (Chicago: Chicago University Press, 1993), “Natural Law and Civil Law in the Political Philosophy of Thomas Hobbes”, pp. 114–148, at p. 148.

¹² The most sophisticated attempt so far to put Hobbes back in the natural law tradition is to be found in Mark C. Murphy, “Was Hobbes a Legal Positivist?” *Ethics* 105 (1995), pp. 846–873. On my account, Murphy’s attempt fails, first, because he accepts the terms set by the contemporary debate and second, because he, like almost all other participants in the discussion about how to place Hobbes, discusses the relationship between the laws of nature and positive law without giving any real attention to Hobbes’s catalogue of natural law.

ask both whether it assists our understanding of the nature of law to strip the command of its legal character and whether, from the perspective of moral or political theory, it would not be clearer to say that the law is valid but iniquitous. Further, positivists would want to know more about the scope or implications of the conclusion that the sovereign's command is not law when it so conflicts. Is it not law only for the affected subject on that particular occasion, or not law for subjects in general, and if the latter, what are judges and other legal officials to make of the failure of the command to achieve legal status?

In short, Hobbes's natural law position seems to fail in the face of the positivist response to any position which denies the Separation Thesis by asserting a necessary connection between *positive* law and some *substantive* moral good. If the sovereign exercises his law-making power in a technically appropriate fashion to make a law in conflict with that good, it will seem that there is every reason to condemn him for his iniquity, but no reason to deny that he made a valid law.

Moreover, it is important to take into account that part of the difficulty in exiting from the state of nature is precisely that the first two laws of nature while determinate in aim – self-preservation – are so indeterminate as to method that Hobbes seems to despair of individuals in the state of nature ever agreeing about how to exit. Since the sovereign exists in order to give content in particular to these two laws, a serious problem attends any attempt to set up a conflict between these laws and the positive law. In this regard, any natural law account has to address Hobbes's "regress" argument, that the sovereign has to be the supreme judge of right and wrong, unlimited by any law if he is to fulfil his role.¹³

¹³ "A fourth opinion, repugnant to the nature of a Common-wealth, is this, *That he that hath the Sovereign Power, is subject to the Civill Lawes*. It is true, that Sovereigns are all subjects to the Lawes of Nature; because such lawes be Divine, and cannot by any man, or Common-wealth be abrogated. But to those Lawes which the Sovereign himselfe, that is, which the Common-wealth maketh, he is not subject. For to be subject to Lawes, is to be subject to the Common-wealth, that is to the Sovereign Representative, that is, to himselfe; which is not subjection, but freedome from the Lawes. Which error, because it setteth the Lawes above the Sovereign, setteth also a Judge above him, and a Power to punish him; which is to make a new Sovereign; and again for the same reason

On that argument, it seems that in the situation where the subject has a right of resistance, that right is matched by the sovereign's right.¹⁴ The conflict here is one between right and right and not natural law and positive law. Were it the latter conflict, the subject would have to give way to the sovereign since in civil society the sovereign's judgment about what natural law requires is definitive. And on the assumption that the sovereign has irresistible power, one can predict both his victory in fact and that the positive law under which he or his officials act will remain in force.

But that one cannot make Hobbes into a natural lawyer on the basis of the first two laws of nature does not conclude the debate about his positivism. A curious fact about Hobbes scholarship is that it, by and large, neglects detailed discussion of his catalogue of the laws of nature. One effect is that scholars have not noted that severe indeterminacy affects only laws 1 and 2, but not the others to the same degree and often not at all. Of course, laws 1 and 2, that we should endeavour to attain peace and that we should lay down as much of our right of nature as is necessary to achieve that end, as long as others lay down an equivalent amount, are – with law 3 that we should abide by our covenants – the most fundamental of the laws. So there seems more than enough to discuss in the fact that indeterminacy severely affects laws 1 and 2, which are the transitional laws of the state of nature. For their indeterminacy seems to present a great, perhaps insurmountable, obstacle in the way of law 3 propelling us into civil society.

But that all the other laws are much more determinate in content might suggest that if we wish to find conflicts between natural law and positive law which Hobbes should or did resolve in favour of natural law, these other laws are far more likely candidates. And it is worth noting that one of the few laws that gets a fair amount of discussion – law 11 which requires that a man trusted to judge between man and man must deal with them equally – gets that atten-

a third, to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth". *Leviathan*, chap. 29 [169], p. 367. For the label "regress argument", see Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1988), pp. 97 ff.

¹⁴ Hence, Hobbes's curious position on punishment, in which punishment is an act of public authority, but which the sovereign exercises as a kind of residue of the right of nature – *Leviathan*, chap. 28 [161–162], pp. 353–354.

tion because Hobbes does suggest in some well known passages that the sovereign can commit iniquity, though not injustice. In other words, the law about equity seems to provide a standard for judging the sovereign which is not dependent for its content on the sovereign's interpretation.¹⁵ Nor is this the only example. When Hobbes says in chapter 28 of *Leviathan* that the sovereign's right to punish is subject to limits set by natural law, he must at least have in mind law 7, which directs revenge to focus on the greatness of the good to follow and not on past evil.¹⁶

I will now show how once we have Hobbes's complete catalogue of the laws of nature before us, we can see that it is the laws other than the first two that are the most likely candidates for establishing Hobbes's anti-positivist credentials. Moreover, while to some extent the examples work by showing why a conflict between the positive law and these natural laws brings the validity of the positive law into question, this is far from the whole or even the most important part of the story.

Hobbes's anti-positivism rests much more on the fact that the majority of the laws of nature are beyond the authority of the sovereign. The laws are beyond authority in that they are both conceptually and empirically constitutive of sovereign authority. A sovereign who systematically violates the laws of nature will at the same time undermine the ability of civil society to function and put himself on the slippery slope to not "counting" as a sovereign.

II

Scholarly neglect of the laws of nature has effects well beyond lack of attention to the issue of degrees of indeterminacy. It has meant

¹⁵ "It is true that they that have Sovereigne power, may commit Iniquity; but not Injustice, or Injury in the proper signification"; *Leviathan*, chap. 18 [90], p. 232. "Now the Intention of the Legislator is alwayes supposed to be Equity: For it were a great contumely for a judge to think otherwise of the Sovereigne. He ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply it with the Law of Nature . . ."; *Leviathan*, chap. 26 [145], p. 326. "For in this consisteth Equity; to which, as being a Precept of the Law of Nature, a Sovereign is as much subject, as any of the meanest of his people"; *Leviathan*, chap. 30 [180], p. 385.

¹⁶ *Leviathan*, chap. 28 [162], p. 354; and for the law, see chap. 15 [76], p. 210. Hobbes makes the connection plain in his fifth inference in chap. 28 [162], p. 355.

that the different functions Hobbes might have had in mind for the laws of nature have hardly been discussed.

I have already suggested that laws 1, 2 and 3 are fundamental. Law 1 enjoins us to seek peace as long as there is hope of attaining it.¹⁷ Law 2 tells us “*That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.*”¹⁸ Law 3 says simply that “*men performe their Covenants made*” and Hobbes tells us that in this law of nature is to be found the “Fountain and Originall of JUSTICE” since the definition of injustice is “*the not Performance of Covenant*”.¹⁹

Once he has set out law 3, Hobbes immediately draws our attention to the fact that the pervasive fear of the state of nature renders any covenant therein invalid, so that for justice and injustice to come into being, it must be the case that there already exists a sovereign coercive power which can guarantee performance. Here we get the problem that exit from the state of nature by mutual covenant seems impossible, which then seems to make superfluous Hobbes’s discussion in chapter 18 of sovereignty by institution. And the conundrum Hobbes raises here is only made worse by the fact that for him sovereignty by institution – by covenant – is at least as important a mode of establishing sovereignty as sovereignty by acquisition – where you assent to the authority of a sovereign who has captured you.²⁰

¹⁷ Hobbes adds that when one cannot obtain peace, one may “*seek, and use, all helps, and advantages of Warre*”; *Leviathan*, chap. 14 [65], p. 190.

¹⁸ *Leviathan*, chap. 14 [64–65], p. 190.

¹⁹ *Leviathan*, chap. 15 [71], pp. 201–202.

²⁰ Indeed, one could argue, though I will not do so here, that for Hobbes sovereignty by institution is paradigmatic for understanding the problems in constructing civil society while sovereignty by acquisition is deviant. Not only does he deal with sovereignty by institution first, but his initial contrast between the two makes it clear that sovereignty by institution coheres with his idea that obligations are generally incurred through an unforced covenant, while sovereignty by acquisition is forced; *Leviathan*, chap. 17 [88], p. 228. The latter of course raises no problem about an impossible transition from a state of nature since it involves giving one’s consent to an already existing sovereign. But it is at first sight problematic because of the dubious legitimacy of a situation where your consent is given to a foreign sovereign who has you by the throat. Hobbes is

The laws immediately following law 3 are laws which are expressive of what Hobbes refers to in *De Cive* as an obligation in the state of nature to a “readiness of mind” to observe the laws of nature “whensoever their observation shall seem to conduce to the end for which they were ordained”.²¹ Law 4 is the law of gratitude, which requires “*That a man which receiveth Benefit from another of meer Grace, Endeavour that he which giveth it, have no reasonable cause to repent him of his good will.*”²² Law 5 is the law of “Mutuall accomodation” or “Compleasance” and it requires “*That every man strive to accomodate himselfe to the rest*”. Hobbes suggests that he who opposes this law “for things superfluous, is guilty of the warre that thereupon is to follow; and therefore doth that, which is contrary to the fundamentall Law of Nature, which commandeth *to seek Peace*”.²³ More briefly, law 6 requires “*Facility to Pardon*”, law 7 is the law about revenge which requires that one focus not on the past but on future good, law 8 is “*against Contumely*” or contempt, law 9 “*against Pride*”, “*That every man acknowledge other for his Equall by Nature*”, and law 10 is against arrogance – “*That at the entrance into conditions of Peace, no man require to reserve to himselfe any Right, which he is not content should be reserved to every one of the rest.*”²⁴

All of these laws are clearly derivatives of the first three fundamental laws in that each can be explained as furthering the good of self-preservation. But there is more to them than that. They also set out what we can think of as the moral psychology of the just, righteous or virtuous man – the subject who does not require the threat

clear that in both cases fear is the ground of assent to sovereign authority – fear of others in the state of nature in the case of institution, and fear of the existing sovereign in the case of acquisition. *Leviathan*, chap. 20 [102], p. 252. And he expressly argues that duress in and of itself did not invalidate a covenant. But he is still concerned about the issue of legitimacy, since he returns to it in the “Review and Conclusion” to *Leviathan*, [390], p. 719. (He had though, it must be pointed out, personal reasons for emphasizing the basis for his own allegiance to a political regime he had opposed.)

²¹ Hobbes, *De Cive*, in Bernard Gert (ed.), *Man and Citizen* (Indianapolis: Hackett Publishing Company, 1991), chap. 3, paragraph 27, p. 149. All references to *De Cive* will be to this edition.

²² *Leviathan*, chap. 15 [75], p. 209.

²³ *Leviathan*, chap. 15 [76], pp. 209–210.

²⁴ *Leviathan*, chap. 15 [76–77], pp. 210–212.

of punishment since he obeys the positive law for the right reason. They are not about the psychological state of readiness of mind to obey, but about the obligation that stems from having reasons for obedience. And here one should note that the text between law 3 and law 4 contains not only Hobbes's attempt at a response to the Foole who in civil society says that there is "no such thing as Justice", which means that he decides whether or not to obey the law on the basis of what he thinks will maximise his self-interest.²⁵ It also contains Hobbes's discussion of the "just man", the man whose will is "framed by justice". Hobbes says that one whose actions are just because he fears the consequences of acting unjustly, is not a just or "righteous man".²⁶

The last group of laws are about the institution of legal order in that they pertain to the interpretation and implementation of the law, both natural and positive. And so they are unlike the second group – the laws which need to be observed if legal order is to be sustained – and the first group, which tells us how to establish a legal order.

Law 11 is the law of equity, that "*if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deal Equally between them*".²⁷ The next three laws are applications of law 11. Law 12 requires the equal use of things common, law 13 requires division by lot if the thing can be neither divided nor enjoyed in common, and law 14 is the law of primogeniture or first seizure, which Hobbes regards as a natural lottery. Law 15 requires safe passage for mediators.²⁸ Law 16 requires "*That they that are at controversie, submit their Right to the judgement of an Arbitrator*".²⁹ And because, says Hobbes, "every man is presumed to do all things in order to his own benefit, no man is a fit Arbitrator in his own cause", which gives us law 17.³⁰ For the same reason, law 18 holds that no man is to be judge who "*has in him a natural cause of partiality*". Law 19 – the last – is that in controversies of fact, the judge must give credit to the witnesses.

²⁵ *Leviathan*, chap 15. [72–73], pp. 203–204.

²⁶ *Leviathan*, chap. 15 [74], pp. 206–207.

²⁷ *Leviathan*, chap. 15 [77], p. 212.

²⁸ *Leviathan*, chap. 15 [77–78], pp. 212–213.

²⁹ *Leviathan*, chap. 15 [78], p. 213.

³⁰ *Leviathan*, chap 15. [78], p. 213.

Note that the distinction between the third and the second group is not very sharp. Law 15 is in the third group because the reason for it is closely tied to the reason for submission of controversies to arbitration. But it could be in the second group as a requirement of the “readiness of mind” of subjects who understand their obligations to natural law, just as the acknowledgment of the obligation to submit one’s controversies to arbitration is also part and parcel of that same readiness of mind. Moreover, laws in groups two and three are united by the fact that their observance is clearly required in order to sustain civil society, even if the groups have different functions.

Nor is the distinction between the first and second group very sharp, since, while it is the sovereign’s task to give content to the first two laws of nature, he must give content in such a way that he makes it possible for subjects to maintain their readiness to obey.³¹ It is not insignificant that when Hobbes tells us that the “Lawes of Nature are Immutable and Eternall”, it is laws in the second group together with law 3 that he specifically names, saying that their violation “can never be made lawfull. For it can never be that Warre shall preserve life, and Peace destroy it.”³² For here Hobbes is telling us that a sovereign’s command that any one of these laws be violated would be equivalent to a positive law which commanded subjects to seek conflict rather than peace. Indeed, it seems clear that Hobbes thinks that these laws cannot be commanded – are beyond authority – for the same reason that it is superfluous for the sovereign to command his subjects to obey his positive laws: “For except subjects were before obliged to obedience, that is to say, not to rebel, all law is of no force. Now the obligation which obligeth to what we were before obliged to, is superfluous.”³³

³¹ This creates yet another link between Hobbes and Fuller, if one understands Fuller’s legal theory in the way proposed by Daniel Brudney, “Two Links of Law and Morality”, *Ethics* 103 (1993), pp. 280–301. Only somewhat ironically, Brudney’s contrast class for subjects with the right psychology is the “Hobbesian creatures, concerned solely for survival depicted by [H.L.A.] Hart in his discussion of what he calls ‘the minimum content of natural law’” . . . ; p. 288.

³² *Leviathan*, chap. 15 [79], p. 215.

³³ *De Cive*, chap. 14, paragraph 21, p. 287. And see *Leviathan*, chap. 28 [163], p. 356 and chap. 30 [175–176], p. 377. I say in some sense not subject to command, because it is clear that the sovereign can outlaw classes of what

In addition, even when a law of nature is highly indeterminate as to content, it is never indeterminate as to intention or purpose.³⁴ In both *Leviathan* and *De Cive*, Hobbes makes a distinction between *in foro interno* and *in foro externo* obligation, between the obligations of conscience and obligation that have an external source. And while this distinction is somewhat elusive, he is clear that there is a breach of one's obligation *in foro interno* – the obligation imposed by conscience – when one's "Purpose was against the Law".³⁵ Indeed, Hobbes suggests that even when one's action is in accordance with the law of nature, one's purpose to violate the law of nature constitutes a breach. And this obligation is stated as part of law 1.

It can then be said that every command of the sovereign has a tacit rider to the effect that the sovereign's judgment is that this command will serve the common good of peace. It is unnecessary to state this rider, since subjects must always presume that the sovereign has this intention. But for the sovereign expressly to state that his intention is the opposite would make his command into something crazy – not something a sovereign could be taken to have said.³⁶

he considers to be seditious acts, even if it is superfluous to enjoin subjects to obey the law. Similarly, while it is superfluous for him to enjoin by law subjects to refrain from contempt of others, certain contemptuous acts can no doubt be outlawed, for example, by the law of libel or of contempt of court.

³⁴ See Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Genesis* (Chicago: University of Chicago Press, 1984), pp. 24–25, including note 1 at p. 24, referring to *Leviathan*, chap. 13 [63], p. 188 (Strauss gets the reference wrong).

³⁵ *Leviathan*, chap. 15 [78], p. 215. Hobbes, *De Cive*, chap. 3, paragraph 28, p. 149. See further the discussion in *Leviathan*, chap. 15 [74], pp. 206–207, of the just man.

³⁶ Compare Robert Alexy's argument about a constitutional assembly which enacts as its first provision: "X is a sovereign federal and unjust Republic": Alexy, "A Defence of Radbruch's Formula", in David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999), pp. 15–39.

Alexy suggests that Fuller's criteria or principles of legality can "complement but not replace" Gustav Radbruch's famous formula that extreme injustice is no law; p. 35. On my account, the Fullerian argument has more of a role to play.

Hobbes, note, is even concerned about the status of the obligation the subject has to fight in a war whose object is to preserve or attain peace, since that obligation carries the risk of death, and so raises the same kind of problem for Hobbes

The constraint on sovereign authority here is in a sense purely formal, since it seems that as long as the sovereign does not state an intention to violate the laws of nature, any command he utters will be valid. But while formal, the constraint is not empty. It arises for substantive reasons, since the command contradicts the substantive basis of the authority to issue commands. At the least, the constraint distinguishes Hobbes's legal theory from contemporary positivism. For from the positivist perspective, an express intention in a law to violate some substantive consideration which is claimed to be the moral or political basis for obedience to law cannot by itself make that law suspect as law.

The kind of command in issue here is one where the sovereign explicitly states that his intention is to violate the first law of nature. The sovereign could of course issue particular commands whose effect cumulatively would be the same without stating or even having that intention. These commands might both be valid and obligation-creating. But there are other commands which are on their face suspect for reasons other than that they state an intention to violate the laws of nature.³⁷

as submission to lawful execution. See *Leviathan*, chap. 21, [112], pp. 269–270, though in “A Review, and Conclusion”, Hobbes adds a further law to his laws of nature “*to protect in Warre, the Authority, by which he is himself protected in time of Peace*”; [390], pp. 718–719.

³⁷ Daniel Brudney provided me with a useful list of situations to test my argument, including: (a) regardless of his intent, the sovereign fails to bring peace; (b) regardless of his intent, the tendency of the sovereign's actions will not – in the not too distant future – bring peace; (c) the sovereign declares his intent not to bring peace, but circumstances are such that peace obtains – the sovereign is wicked but ineffective. Without going into detail, I suggest that the distinction (one which Brudney also pointed out) between the ways in which the laws of nature are empirically constitutive of sovereign authority and conceptually constitutive, is helpful here precisely because it shows how in practice the two are linked.

With (a) and (b), if the sovereign does intend to bring peace, but his laws contradict his intentions, then authority is in fact undermined. And at a certain point in this process, conceptual or normative issues about authority will perforce arise because the factual is connected to the normative. For example, consider the issue about whether judges should be entitled to scrutinise the reasonableness of the executive's judgment that circumstances are such that declaration of a state of emergency is warranted. (For an instructive decision during the apartheid era in South Africa, see Friedman J.'s judgment for a full bench of the Natal court in *Tsenoli v. State President*, discussed and overruled in *State President v. Tsenoli*

The second is where the sovereign contradicts both the intention of the law of nature and the content of particular laws because the command violates the more or less determinate content of a particular law whose role is clearly to assist the operation of the most fundamental laws. For example, the sovereign commands, in violation of law 15, that one kill all mediators.³⁸ In both this case and the first, suspicion arises for substantive reasons, since the command contradicts the substantive basis of the authority to issue commands. But in this second case, one does not need the formal expression of intention to violate the laws of nature, because of the determinate content of the law in question. The sovereign who commands his subjects to kill all mediators issues a command that is tantamount to an express statement that the sovereign's purpose is not to endeavour peace.³⁹

The third ground of suspicion arises when the sovereign issues a command which subverts the institutional structure of legal order, thus subverting the institution which makes it possible for the sover-

1986 (4) SA 1150 (A). For discussion, see Etienne Mureinik, "Security and Integrity, *Acta Juridica* (1987), pp. 197–219, and David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, p. 167. In South Africa's post-apartheid Constitution, the courts are now given explicit authority to test this issue.)

Conversely, in regard to (c), laws which explicitly contradict the duty to seek peace will always be suspect in part because one can never predict that stability will not be undermined by a public declaration of this sort. Consider, for example, what the public would make in the United Kingdom of the enactment of the Group Areas Act, discussed in the text below, even if one would have predicted that such a statute could never be enforced in the United Kingdom. Put differently, the prediction depends also on the judgment that no Parliament would ever enact such a statute. The other part of the response to (c) is, of course, that efficacy is a precondition for the existence of legal order, but not for the validity of particular laws.

³⁸ Murphy argues that such a command would be valid; see Murphy, "Was Hobbes a Legal Positivist?", p. 857.

³⁹ Suppose, however, that the sovereign wishes mediators to be killed because that will cause conflicts in other parts of the world to persist which will then ensure his ability to withstand attack from without, thus making peace within more secure. This problem is one about tensions between Hobbes's theory of international relations, which holds that such relations are like the relations between individuals in the state of nature, and his account of domestic order. I will not go into this issue here.

eign to issue successful commands. This third ground is somewhat analogous to the fourth, where the command fails because it is so indeterminate that it has no real content. Imagine, for example, a sovereign whose only command to his subjects is “Be moral!”. The difference is that for less severe cases of indeterminacy than in my example, Hobbes puts in place judges part of whose job description is to cure indeterminacy, while in the third there is no institutional solution since it is the institution of law itself that is in issue. But in both cases the problem here is in a sense formal rather than substantive, since it is not so much the basis of the sovereign’s authority that is in issue, but the formal conditions for the exercise of that authority.

For example, the sovereign who commands that his judges are entitled to give judgment to the party who can offer the biggest bribe issues a command which subverts entirely the office of judicature, and so contradicts part of what Hobbes concedes to be a “Fundamentall Law” of sovereignty.⁴⁰ And it is also clear for Hobbes that law 19, that in controversies of fact the judge must give credit to the witnesses, places constraints on a sovereign’s authority to intervene in criminal justice. For he says both that “’Tis against the Law of Nature, *To punish the Innocent*; and Innocent is he that acquitteth himselfe Judicially” and that “It is also against Law, to say that no Prooffe shall be admitted against a Presumption of Law. For all Judges, Sovereign and subordinate, if they refuse to heare Prooffe, refuse to do Justice.”⁴¹

⁴⁰ “For a Fundamentall Law in every Common-wealth is that, which being taken away, the Common-wealth faileth, and is utterly dissolved; as a building whose Foundation is destroyed. And therefore a Fundamentall Law is that, by which Subjects are bound to uphold whatsoever power is given to the Sovereign, whether a Monarch, or a Sovereign Assembly, without which the Common-wealth cannot stand, such as is the power of War and Peace, and Judicature, of Election of Officers, and of doing whatsoever he shall think necessary for the Publique good. Not Fundamentall is that the abrogating whereof, draweth not with it the dissolution of the Common-Wealth; such as are the Lawes concerning Controversies between subject and subject.” *Leviathan*, chap 26 [150], p. 334.

⁴¹ *Leviathan*, chap. 26 [144–145], pp. 324–325. While these last constraints are about the process of fact-finding, and so might seem procedural or formal in nature, they are also substantive, since they in effect protect the right of an accused to fair trial.

In sum, particular commands must be capable, first, of being asserted as the commands of one whose will is directed at subjects whose attitude to the law is, as we saw Hobbes put it, “framed by justice”.⁴² And that requires that the sovereign not expressly contradict the implicit assertion that he is always operating within that same frame, whether that contradiction comes about through the expression of a contrary intention or through the violation of a law of nature which has determinate content. Second, the commands must be capable of achieving the quality of legality, of being filtered through the institutions of legal order.⁴³

My argument, then, is that Hobbes’s anti-positivism manifests itself in requirements of form rather than substance, and, in particular in the second and third groups of natural laws. Now the distinction between form and substance is notoriously tricky in law as well as elsewhere; and I will not assume that it is less so in this context. Indeed, it is important for my argument to see both how formal requirements connect to substantive requirements and that the distinction between them is fruitful. Further, it is important to see that formal requirements can amount to substantive moral constraints without it being the case that failure to comply with such requirements must issue in judicial declarations of invalidity. And that brings me to the question of Hobbes’s view of the constraints on sovereign authority and the limited role he gives to judges in policing those constraints.

⁴² *Leviathan*, chap. 15 [74], pp. 206–207.

⁴³ A contemporary example is the way that common law courts have grappled with privative or ouster clauses – statutory provisions which command the courts to refrain from reviewing the decisions of administrative bodies or officials. If these provisions were interpreted literally, the administration would be uncontrolled by law. Courts thus said that the legislature could not have intended to oust their review jurisdiction entirely, which left them with the problem of making sense of the text of the provisions within a theory of what standard of review to apply to the decisions. For my own account of the struggle of Canadian courts to develop such a theory, see David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), pp. 279–307.

III

I have already alluded to Hobbes's elusive distinction between *in foro interno* and *in foro externo* obligation, which is standardly interpreted to mean that the laws of nature are binding as a matter of conscience in the state of nature:

The Lawes of Nature oblige *in foro interno*; that is to say, they bind to a desire they should take place; but *in foro externo*; that is, to the putting them in act, not alwayes. For he that should be modest, and tractable, and performe all he promises, in such time, and place, where no man els should do so, should but make himselfe a prey to others, and procure his own certain ruine, contrary to the ground of all Lawes of Nature, which tend to Natures preservation. And again, he that having sufficient Security, that others shall observe the same Lawes towards him, observes them not himselfe, seeketh not Peace, but War; & consequently the destruction of his Nature by Violence.⁴⁴

Some Hobbes scholars doubt that Hobbes could really have meant that the laws of nature have any force whatsoever in the state of nature.⁴⁵ But things have to be different in civil society, as Hobbes suggests in a passage just prior to the one in which he makes his distinction, when he says that “These are the Lawes of Nature,

⁴⁴ *Leviathan*, chap. 15 [79], p. 215. An analogous problem arises because Hobbes asserts both that no covenants can be binding outside of civil society and that covenants can be binding in the state of nature after first performance has been made; compare *Leviathan*, chap. 14 [68], p. 196 with chap. 15 [74], pp. 206–207.

⁴⁵ As Michael Oakeshott observed, nothing in the passage directly authorises the standard interpretation. It assumes what is at stake – that for Hobbes the laws of nature are laws properly so called. And proper law requires (among other things) an author to whom subjects are already obliged. The only candidate for such an author is God. And while Hobbes does claim divine authority for the laws of nature, and suggests that mortal sovereigns are accountable to the immortal Sovereign, it is also clear that in the state of nature there is no such thing as an authentic interpretation of God's will; nothing more worthy than the claim that this is what I want. See Oakeshott, “The Moral Life in the Writings of Thomas Hobbes”, pp. 327–330, Michael Oakeshott, “The Moral Life in the Writings of Thomas Hobbes”, in Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991), pp. 295–350, note 92, and pp. 327–330. The corresponding passages in *De Cive* might seem even less supportive of the standard interpretation; see *De Cive*, chap. 3, paragraph 27, pp. 148–149, including the note at p. 149.

dictating Peace, for a means of the conservation of men in multitudes; and which onely concern the doctrine of Civill Society".⁴⁶ They bind that is, both internally and externally at least when civil society is instituted, that is, when subjects have sufficient security to know that the laws will be observed.⁴⁷

Now if we confine our discussion to the bindingness of the laws of nature in civil society, it might still seem that their force is conditional on the sovereign's tacit decision not to issue commands which contradict them. Their authority, then, is like that of the positive law issued by a past sovereign, which Hobbes says is law only because the present sovereign has silently commanded that these commands from the past continue to have force.⁴⁸ Hence, if the sovereign chooses to issue commands inconsistent with the laws of nature, subjects should take these commands as definitive of their obligation, *in foro interno* as well as *in foro externo*.

In my view, this basically positivist understanding of the bindingness of the laws of nature goes wrong precisely because it says that obligation is what is either declared by positive law or both recognised as a source of law by positive law and not contradicted by it.⁴⁹ It fails to see that natural laws in groups two and three are integral to legal order so that they are beyond the sovereign's authority. They are beyond authority, and not potential sources of conflict with it, because they are, in rather different ways, constitutive of authority.

Recall that when Hobbes defines "command" part of his definition is that "he that Commandeth, pretendeth thereby his own benefit: For the reason of his Command is his own Will onely; and the proper object of every mans Will, is some Good to himselfe."⁵⁰ It

⁴⁶ *Leviathan*, chap. 15 [78], p. 214.

⁴⁷ For discussion of the exceptions when Hobbes thinks that the laws of nature apply even during war, see *De Cive*, chap. 3, the note to paragraph 27, p. 149. In *Leviathan*, chap. 27 [152], pp. 337–338, Hobbes claims that ignorance of the law of nature cannot excuse one from being found guilty of committing a crime since "every man that hath attained to the use of Reason, is supposed to know, he ought not to do to another, what he would not have done to himselfe." From this he draws the conclusion that a stranger should be excused because of lack of knowledge of the civil law but not of the law of nature.

⁴⁸ *Leviathan*, chap. 26 [138], p. 313.

⁴⁹ This positivist position is basically the one recently articulated by "soft" or "incorporationist" legal positivists.

⁵⁰ *Leviathan*, chap. 25 [131–132], p. 303.

would be odd, of course, for subjects to have to say to themselves as they sought to understand Hobbes's argument for their obligation to obey the law that they should obey commands whose consequence was by definition some other person's good. It would also be odd if Hobbes's law 17, a law which requires that no man be judge in his own cause because every individual is "presumed to do all things in order to his own benefit",⁵¹ added as a rider that the parties should know that the judge intended his own benefit in the judgment. Not only would this rider introduce a rank inconsistency into law 17, it would also empty law 11 – that the judge has to judge equitably – of all meaning. Indeed, Hobbes tells us that a "good Judge" is one who has a "*right understanding* of that principall Law of Nature called *Equity . . .*", and is, among other things, "*able in judgement to devest himselfe of all feare, anger, hatred, love, and compassion*".⁵² However, as I will now show, the oddness disappears once one sees that Hobbes's definition of command first contemplates a natural person commanding another, but the sovereign who issues commands as supreme judge of a commonwealth is an artificial person.

Hobbes always talks of the sovereign as one individual, as "he", perhaps because of his own prejudice for monarchy as the form of government best suited to maintain the commonwealth. But his personification of the sovereign cannot escape the general theme of *Leviathan*. As he tells us in his Introduction on the very first page of the book, the sovereign is an artificial person, a creation of human artifice, and, moreover, not even the reasoning head of the great monster, but its soul:

For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE (in latine CIVITAS), which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the *Soveraignty* is an Artificiall *Soul*, as giving life and motion to the whole body.⁵³

It follows that the benefit intended by the sovereign in issuing commands can only be the benefit of the commonwealth, which is to say that all commands by definition aim at the common good of

⁵¹ *Leviathan*, chap. 15 [78], p. 213.

⁵² *Leviathan*, chap. 26 [146–147], p. 328.

⁵³ *Leviathan*, "The Introduction" [1], p. 81.

protection of those subject to the law, the good which in turn is the justification for the sovereign's existence.⁵⁴

Commands will of course have their origins in some person's or some body's judgment about a particular aspect of the common good. But in order for that judgment to be a successful command, it must be filtered through legal order, for as Hobbes also tells us on the first page of *Leviathan* the equity and laws of the sovereign are an "artificiall *Reason* and *Will*."⁵⁵ No judgment as to the common good counts as a command unless it meets whatever criteria are stipulated within legal order for a command to be recognised as such.

It follows that Hart was wrong when he claimed that Hobbes's idea that the sovereign is an uncommanded commander cannot take into account that any sovereign has to comply with the fundamental rule of the legal order – the rule of recognition – which stipulates when judgments about the common good will be recognised as law.⁵⁶ While it is true that for Hobbes the sovereign commander is not subject to commands, this does not show that he is not subject to other sorts of constraints, including legal ones.

The essence of sovereignty for Hobbes is that the sovereign be able to make public his judgments and to have them recognised as law. And so when Hobbes said that sovereignty is legally unconstrained he could not have meant to exclude rule of recognition type constraints.⁵⁷ Moreover, in his account of the rule of law,

⁵⁴ See *Leviathan*, chap. 30 [182], p. 388: "A Law may be conceived to be Good, when it is for the benefit of the Sovereign; though it be not necessary for the People; but it is not so. For the good of the Sovereign and People, cannot be separated."

⁵⁵ Ibid.

⁵⁶ See note 3 above.

⁵⁷ Howard Warrender explained just why Hobbes must allow for rule of recognition type constraints before Hart had articulated the idea for which his legal theory is famous – Warrender, *The Political Theory of Hobbes: His Theory of Obligation*, pp. 258–263. For discussion of Hobbes and the rule of recognition, see Robert Ladenson, "In Defense of a Hobbesian Conception of the Rule of Law", *Philosophy and Public Affairs* 9 (1990), pp. 134–159 and Jean Hampton, "Democracy and the Rule of Law" in Ian Shapiro, ed., *Nomos XXXVI: The Rule of Law* (New York: New York University Press, 1994), pp. 13–44.

Indeed, it is clear that Hobbes has in mind not only that freedom from legal constraint is freedom from the constraint of particular positive laws, but freedom in the sense that particular positive laws are always subject to repeal; and the

these constraints at their most minimal are much thicker than the constraints of manner and form which Hart had in mind.

As we have seen, Hobbes in contrast to contemporary positivists supposes there is one substantive constraint on the sovereign. By definition, civil law is law which the subject has a prior obligation to obey, and so, if the basis for that obligation is missing, then the sovereign's commands are suspect.

Now there are two interpretations about how to cash out this constraint. The first is that the constraint is illusory, since whatever the sovereign commands must be taken as conforming to the natural law. The second is that the constraint does have cash value. For natural law interpretations of Hobbes the cash value of the constraint is the subject's right to resist the sovereign in particular circumstances, while in contemporary debates it is more or less assumed that it is judges who are the guardians of constraints on sovereign authority.

I mentioned above reasons for doubting the natural law interpretation of that constraint. Another way of putting those reasons is to say that it is a mistake to think that a substantive constraint in order to be a genuine constraint has to cash out in something substantive. In other words, a constraint that starts in something substantive might turn out to be formal in nature but still genuinely constraining.

Recall my claim that for Hobbes it has to be the case that a sovereign who issues a command which expressly contradicts the purpose of law 1 would have issued a command that is on its face suspect. I also suggested that the same might be true of commands which expressly violate the purpose of any of the laws of nature, of commands which require actions in violation of the content of the

person or body who has power to initiate repeal of a law is only bound by that law in that he or it chooses not to repeal it. "The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will . . ."; *Leviathan*, chap. 26. [137–138], p. 313. Compare the passage which contains the "regress" argument: *Leviathan*, chap. 29 [169], p. 367. Note that Hobbes does permit the subject to challenge the sovereign in court for violating the law – *Leviathan*, chap. 21 [113], pp. 271–272.

laws of nature when the laws have a content sufficiently determinate to make sense of the claim that there is a violation, and of commands which subvert the institution of law.

Now, as I have mentioned, the sovereign can make particular judgments about what will serve peace and about any of the other tasks of sovereignty which might turn out to have the opposite of the intended effect. Generally speaking, though, even if subjects suspect this to be the case, they must obey the law, reserving their doubts to their hearts. "Private Reason must submit to the Publique", as Hobbes says on the issue of faith if the sovereign establishes a religion.⁵⁸

But Hobbes is not only opposed to subjects' second-guessing the sovereign, he is also hostile to judges making themselves into guardians of morality. Hence he is opposed to the common law tradition because it asserts the common law to be a source of law not only independent of the supreme legislature, but prior to – and thus perhaps superior to – it. However, he is in no doubt that any sovereign would have to delegate interpretative authority to a staff of judges, because, as he says, "All Laws, written, and unwritten, have need of Interpretation."⁵⁹ Moreover, it is clear that for him this fact means that the laws of nature play a role in interpretation because they are part of the law of a civil society: "Civill, and Naturall Law are not different kinds, but different parts of Law; whereof one part being written, is called Civill, the other unwritten, Naturall".⁶⁰ Hence his claim that judges must be able interpreters of the laws of nature, particularly equity.

Hobbes is also quick to emphasize that the stamp of authority for such interpretations comes from the sovereign and he limits the legal force of any particular judgment to the parties in a bid to avoid judges building their interpretations of the law into a system of common law.⁶¹ But the point is that when judges interpret the positive law, they are under an obligation to give it content in accordance with their understanding of the laws of nature, which are – at

⁵⁸ *Leviathan*, chap. 38 [238], p. 478.

⁵⁹ *Leviathan*, chap. 26 [143], p. 322.

⁶⁰ *Leviathan*, chap. 26 [138], pp. 314–315.

⁶¹ "The Interpretation of the Lawes of Nature, in a Common-wealth, dependeth not on the books of Morall Philosophy." They are only law by sovereign power, which means that

least in civil society – as much law as positive law. And Hobbes enjoins judges to operate on the interpretative assumption that the intention of the “Legislator is alwayes supposed to be Equity; For it were great contumely for a Judge to think otherwise of the Sovereign.” The judge “ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply it with the Law of Nature; or if the case be difficult, to respite Judgment till he have received more ample authority.”⁶²

In other words, judges must lean in the direction of finding the positive law to be in accordance with the laws of nature, though not so far that they usurp for themselves the authority to judge what is good for the Common-wealth: “though no Incommodity can warrant a Sentence against the Law. For every Judge of Right, and Wrong, is not Judge of what is Commodious, or Incommodious to the Common-wealth.”⁶³ Indeed, it is important to see that Hobbes sets out for judges an alternative to interpretation as the way to cure apparent inconsistencies with natural law – reserving judgment pending enlightenment from above. And that suggests a means for judges to alert the commonwealth to suspect laws which does not bring them into institutional conflict with the legislature.⁶⁴

It is only when we appreciate the important though restricted role of judges in Hobbes’s account of legal order that we can make sense of the second definition of law he offers in *Leviathan*, this time in his discussion in chapter 30 of the duties inherent in the office of the

The Interpretation of the Law of Nature, is the Sentence of the Judge constituted by the Sovereign Authority, to heare and determine such controversies, as depend thereon; and consisteth in the application of the Law to the present case. For in the act of Judicature, the Judge doth no more but consider, whither the demand of the party, be consonant to naturall reason, and Equity; and the Sentence he giveth, is therefore the Interpretation of the Law of Nature; which Interpretation is Authentique; not because it is his private Sentence; but because he giveth it by Authority of the Sovereign, whereby it becomes the Sovereigns Sentence; which is Law for that time, to the parties pleading.

Leviathan, chap. 26 [143], pp. 322–323.

⁶² *Leviathan*, chap. 26 [145], p. 326.

⁶³ *Leviathan*, chap. 26 [146], p. 327.

⁶⁴ Such alternative institutional possibilities were explored in detail by Jeremy Bentham; see Gerald J. Postema, *Bentham and the Common Law Tradition* (Clarendon Press: Oxford, 1986).

sovereign representative, that is, the bearers of sovereign authority. Hobbes says that the sovereign is entrusted with making “Good Lawes” but a good law is “not a Just Law: for no Law can be Unjust . . . A good Law is that which is *Needfull*, for the *Good of the People*, and withall *Perspicuous*”.⁶⁵

While the sovereign is clearly the judge of what is both “need-full” and for the good of the people, and while Hobbes also directs sovereigns to be as clear as possible in making public their judgments about these issues through the law to those subject to the law, it must also be the case that judges have a role in bringing the law into a perspicuous state. In other words, perspicuousness or publicity for Hobbes is not a matter just of clear statement of what the law requires subjects to do, but of providing a reasoned justification of that requirement, in whose light what the law actually requires is to be understood: “The Perspicuity, consisteth not so much in the words of the Law it self, as in a Declaration of the Causes, and Motives, for which it was made.”⁶⁶ And in making the law perspicuous, judges are not particularly directed to a doctrine of “original intent”, a recovery of what an actual legislator or group of legislators had in mind. Rather, judges are supposed to interpret the law as if the legislators intended to observe the laws of nature.⁶⁷

⁶⁵ *Leviathan*, chap. 30 [181–182], pp. 387–388.

⁶⁶ *Leviathan*, chap. 30 [182], pp. 388–389, at p. 388.

⁶⁷ Hobbes is a little ambiguous on this issue:

For it is not the Letter, but the Intendment, or Meaning; that is to say, the authentic Interpretation of the Law (which is in the sense of the Legislators), in which the nature of the Law consisteth; And therefore the Interpretation of all Lawes dependeth on the Authority Sovereign; and the Interpreters can be none but those, which the Sovereign (to whom only the Subject oweth obedience), shall appoint. For else, by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator;

Leviathan, Chap. 26 [142–143], pp. 321–322.

But Hobbes’s concern here is clearly with judicial usurpation of power, which will happen if judges think that the interpretation of the laws of nature depends on “the books of Morall Philosophy” rather than the authority of the sovereign. And at the same time he asserts that it is judges whose interpretations of the laws of nature are authentic, at least in particular cases, *Leviathan*, chap. 26 [143], pp. 322–323.

A useful example here comes from one on the key statutes of the *apartheid* state, the *Group Areas Act* of 1957. This Act clearly contemplated differentiation between racial groups in that it provided that areas would be reserved for the exclusive ownership and/or occupation of a particular group; but there was no statement of its object which indicated or implied that the differentiation might be unequal.

In *Minister of the Interior v. Lockhat*⁶⁸ (1961), the Appellate Division, South Africa's highest court of appeal during *apartheid*, was faced with a challenge to the validity of a proclamation dividing the city of Durban into group areas on the ground that whites had been given the best areas while only the poorer areas were available to Indians and that suitable accommodation in these areas would not be available for some time. Lockhat, an Indian, argued that the effect of the division was to discriminate to a substantial and therefore unreasonable degree against Indians and such unreasonable discrimination had to be expressly authorized by the enabling legislation to be valid.

In the Court which first heard this challenge,⁶⁹ Judge Henochsberg acknowledged that the Act did contemplate some degree of "differentiation". But he said that he could find no express authorization in the statute of discrimination coupled with partiality and inequality to a substantial degree. He thus upheld the challenge because, in the absence of specific authority in the statute to the contrary, common law presumptions of equality and reasonableness must prevail. He said that "the exercise of a power to proclaim group areas can and should . . . be exercised without the inevitable result that members of different races are treated on a footing of partiality and inequality to a substantial degree".⁷⁰

Henochsberg's decision was taken on appeal to the Appellate Division. Judge Holmes, in delivering the unanimous decision of the Appellate Division, rejected the challenge. He accepted that the power to discriminate unreasonably had to be given expressly or by necessary implication. But though the power to discriminate

⁶⁸ 1961 (2) SA 587 (A).

⁶⁹ *Lockhat v. Minister of the Interior* 1960 (3) SA 765 (D).

⁷⁰ *Ibid.*, p. 786.

unreasonably was not expressly given in the Act, he thought that it was “clearly implied”:

The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will prove to be for the common weal of all the inhabitants is not for the Court to decide. . . . The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given, it manifestly does.⁷¹

Holmes’s reasoning seems Hobbesian in so far as he makes it clear that it is not a judge’s role to make judgments about what serves the “common weal”. Rather, a judge should confine himself to “purely legal” questions. But the opposite is true. A judge, as we have seen, insults his sovereign when he ascribes to the sovereign the intention to deal inequitably with his subjects. The Appellate Division should have required, as Henochsberg did, that the sovereign explicitly state any intention to act inequitably.

Further, once such an intention is stated, the sovereign has declared that he does not understand his task as promoting the health of the commonwealth in general, since he will prefer certain groups.⁷² In making that declaration, he undermines his authority empirically, because the disfavoured groups can no longer be expected to manifest the kind of moral psychology which sustains sovereign authority. At the same time, he undermines his authority conceptually – from the point of view of law itself – because the

⁷¹ *Minister of the Interior v. Lockhat*, p. 602.

⁷² I leave aside here the question about what a Hobbesian judge should make of a “separate but equal” doctrine. In *Minister of Posts and Telegraphs v. Rasool*, 1934 AD 167, the Appellate Division, with one very strong dissent, upheld such a doctrine when the Postmaster-General in the Transvaal divided post offices into sections for “Europeans” and “non-Europeans”. In three decisions in the 1950s, the same Court, while not overruling *Rasool*, clearly indicated its view that a separate but equal doctrine should be required by judges to be explicitly stated in legislation because it is a derogation from equality. See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, chapter 3.

sovereign has put into question the prior obligation to obey the law which is part of law's definition.

And once this double aspect is seen, one can also see that it does not matter very much for legal theory whether, once the sovereign states his intention to act inequitably, judges have a substantive review authority which permits them to strike down the legislation or not. The details of such authority will depend on the institutional history of the particular legal order. But that legal order itself is in issue is not in question even if the law that puts it in issue remains on the statute book.

This account might make Hobbes seem like a proto-Dworkinian, but my claim is not that Hobbes invented Dworkin's theory of adjudication in 1651. That would make nonsense of Hobbes's opposition to the common law tradition in which judges are taken to have a particular kind of substantive review authority. Dworkin clearly belongs to that tradition though the fact that he presupposes a backdrop of a written constitution in much of his work makes his theory of judicial review even more ambitious than his more venerable predecessors in that tradition, such as Coke and Hale.⁷³

My claim is rather that Hobbes supposes that the basis for the legitimacy of legal order is one which both gives structure to legal

⁷³ My claim in the text is not in tension with the fact that Henochsberg did rely on the common law of judicial review. It is quite significant, in my view, that Hobbes – the great opponent of the common law tradition – in giving a catalogue of the values of legality also put forward some of the central values of that tradition, most notably, the principles of natural justice and of jurisdictional boundaries which are the mainstays of the common law of judicial review. (See on related issues, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1998), p. 137, criticising J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987).) But in confining those principles to bringing substantive judgments made elsewhere into the state of perspicuity, Hobbes kept judges away from the usurpation of the legislative role which comes about when the common law is conceived as a law which first and foremost protects a catalogue of substantive rights. It may even be that Hobbes can support a limited doctrine of constitutional adjudication, that is one which regards constitutional review as legitimate as long as it confines itself to judgments about proportionality of means adopted to implement legitimate objectives, where what is a legitimate objective is decided – with few exceptions – legislatively.

order and which constrains judges in their interpretation of the law. But it also constrains sovereignty, that is, if those who have power *wish* to rule through law, rather than by some other means, for example, by decree and arbitrary exercises of power. Put differently, and in Lon L. Fuller's terms, legal order is not mere order or stability, it is a particular way of constructing order which has its own internal or institutional morality and constraints.⁷⁴

As I will now explain, Hobbes provides us with a moral vocabulary for civil society, nothing of which is concealed from any subject.⁷⁵ It is a vocabulary of role, the role of sovereignty, the role of the judiciary, and the role of the good subject, all three of which are transparently connected to each other.⁷⁶

IV

The idea of morality of roles builds on links between several parts of *Leviathan*. The first link is between the fact that Hobbes takes sovereignty by institution at least as seriously as sovereignty by acquisition and the first paragraph of chapter 29, where Hobbes talks about the way in which a Common-wealth can be secured against perishing from "internall diseases". He says there that if men are to escape the state of nature they need the "help of a very able Architect". Without such help, they will not make other than a "craſie building, ſuch as hardly laſting out of their own time, muſt aſſuredly fall upon the heads of their poſterity".⁷⁷

⁷⁴ Fuller, *The Morality of Law*.

⁷⁵ For the "Straussian" thesis that Hobbes concealed his true meaning, reserving it for the select few, see Strauss, *The Political Philosophy of Hobbes*, chapter 2; Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. by George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996), p. 26; Oakeshott, "The Moral Life in the Writings of Thomas Hobbes", pp. 337–338.

⁷⁶ Compare Fuller, *The Morality of Law*, pp. 204–207, esp. p. 206: "If respect for the principles of legality is essential to produce such a system, then it certainly does not seem absurd to suggest that those principles constitute a special morality of role attaching to the office of law-maker and law-administrator."

⁷⁷ *Leviathan*, chap 29. [167], p. 363. Note that this paragraph follows one of the few explicit mentions of Leviathan in the text, at the end of chapter 28, where Hobbes talks of Leviathan as king of pride, and then says that he will now set out

Out of that link comes the idea that sovereignty by institution has to do not so much with creating sovereignty from the impossible conditions of the state of nature, as with the proper construction of a sovereign legal order – with the design of institutions in such a way as to fulfil the ultimate ends for which we want order at all. And this idea tells us that sovereignty is not just something that springs into being, like Hobbes’s mushroom men,⁷⁸ but is a human creation or artifice which can be improved as we go along, as long as those charged with the task understand its goals and duties properly.⁷⁹

The second link is between these passages and the passage in chapter 29 where Hobbes talks about public conscience:

Therefore, though he is that is subject to no Civill Law, sinneth in all he does against his Conscience, because he has no other rule to follow but his own reason; yet it is not so with him that lives in a Common-wealth; because the Law is the publique Conscience, by which he hath already undertaken to be guided. Otherwise in such diversity, as there is of private Consciences, which are but private opinions, the Common-wealth must needs be distracted, and no man dare to obey the Sovereign power, farther than it shall seem good in his own eyes.⁸⁰

I have already noted that Hobbes reserves to the subject the right to believe that the sovereign is wrong on matters of faith, although the subject must submit his private reason to the public by confining his belief to his heart.⁸¹ And I suggested that Hobbes must think that the same is true of a subject’s sense that a particular positive law is a mistake, that is, the subject must subordinate his private reason to the reason of the sovereign.

The passage just quoted might seem to conflict with this suggestion, since it says that the subject must take the law as a public

the “Lawes of Nature which he is bound to obey”; *Leviathan*, chap 28 [167–168], pp. 362–363. Hobbes does in this passage say that the sovereign’s obligation to obey arises because he should fear God. But he offers first another reason, which seems clearly in itself sufficient: “But because he is mortall, and subject to decay, as all other Earthly creatures are; . . .”; *ibid.*

⁷⁸ Hobbes, *De Cive*, chap. 8, p. 205, para. 1.

⁷⁹ It is the case that Hobbes, at the time of writing *Leviathan* was not in point of fact concerned with creating order out of nothing but with a problem of “transitional justice” – the creation of order during an interregnum when there exists some basis for stability.

⁸⁰ *Leviathan*, chap. 29 [168–169], p. 366.

⁸¹ *Leviathan*, chap. 38 [238], p. 478.

conscience. However, Hobbes is not talking in this passage about a subject's sense of the rightness or wrongness of a particular law, but of a subject's understanding of the reasons which require general obedience to law. As Hobbes tells us, one of the duties of sovereignty is to instruct subjects "in the Essential Rights (which are the Naturall, and Fundamentall Lawes) of Sovereignty", an instruction which Hobbes seems optimistic about – "there is no difficulty".⁸² The understanding of these rights will yield the conclusion that even if one strongly disagrees with a particular law, the reasons which require general obedience to law require that one refrains from violating the law.

Once that distinction is in place, one can start to make sense of the passage in chapter 21, in which the whole of Hobbes's argument in *Leviathan* might otherwise seem to unravel since it provides – wholly in contradiction to his intentions – a "rebel's catechism":

No man is bound by the words themselves, either to kill himselfe, or any other man; And consequently, that the Obligation a man may sometimes have, upon the Command of the Sovereign to execute any dangerous, or dishonourable Office, dependeth not on the Words of our Submission; but on the Intention; which is to be understood by the End thereof. When therefore our refusall to obey, frustrates the End for which the Sovereignty was ordained; then there is no Liberty to refuse: otherwise there is.⁸³

That is, if it is left to private judgment to decide when the sovereign is frustrating the end of sovereignty, then subjects can disobey the law when it seems inconsistent with their sense of what best serves the end of sovereignty.

Hobbes's argument, however, does not unravel unless the reasons for obedience to law are like a ladder which the subject must climb only to kick it away as he reaches the top, thus leaving him with no vocabulary to evaluate sovereignty except at the limit when the subject's life is endangered by the sovereign. On the contrary, short of that limit the subject has no right of resistance, but does have a moral vocabulary which can be used to evaluate sovereignty. Any

⁸² *Leviathan*, chap. 30 [177], p. 379. John Austin, in my view the true founder of contemporary legal positivism, thought that Hobbes's optimism had been proved wrong – see Austin, *Lectures on Jurisprudence*, 2 vols., London, John Murray, 5th edn. 1885, vol. i, 134.

⁸³ *Leviathan*, chap. 21 [112], p. 269.

command of the sovereign must be capable of being represented as in accordance with the general purpose of the laws of nature (law 1), and as not calculated to undermine the very moral psychology which the subject must possess in order to make rule following for the right reasons possible (laws in the second group). Moreover, a successful command is one capable of being filtered through the legal order, that is, subject to the laws in the third group. As Hobbes understood it, this is not a vocabulary which requires freedom of expression to articulate public criticism of the sovereign. Rather, it is a vocabulary which will be used by judges, as they seek to understand how the positive law can be represented as an articulation of the laws of nature in the particular case.

It is true that Hobbes is anxious to stress that the idea of tyranny has no role in his political theory: it is a mistake to describe any sovereign as a tyrant.⁸⁴ But a sovereign is not a natural but an artificial man, one whose commands have to take a legal form which makes it possible for subjects to obey the commands for the right reasons – those which tell one why one had a prior obligation to obey. A ruler whose rule strains the understanding of those reasons risks dissolving the very foundation of his rule.⁸⁵

The claim here is not that judges have a review authority to resist tyranny. Rather, it is that the more the sovereign's commands are suspect in the ways outlined above, the harder the judicial job will be to make those commands perspicuous in the right way. It will become clear that the sovereign is increasingly frustrating the ends of sovereignty. As more or less formal requirements are breached, so the violation of substance comes into view.⁸⁶

⁸⁴ “And because the name of Tyranny, signifieth nothing more, nor lesse, than the name of Sovereignty, be it in one, or many men, saving that they that use the former word, are understood to bee angry with them they call Tyrants”; *Leviathan*, “A Review and Conclusion” [392], p. 722. And see chap. 19 [95], pp. 239–240.

⁸⁵ See the text to note 83 above.

⁸⁶ It is plausible to understand the role of judges as completing exercises of sovereign authority rather than as in potential competition with the particular body or person which has law-making power, if one takes seriously Hobbes's claim in the “Introduction” to *Leviathan* that the sovereign is the soul which gives “life and motion to the whole body” while the officers of “Judicature” are the body's “Joynts”; *Leviathan* [1], p. 81.

In my view, this understanding of the judicial role helps to clarify an important ambiguity in the general argument of *Leviathan*. Hobbes gives to the subject the right to resist the sovereign when the sovereign threatens the subject with serious harm and he says, as we have just seen, that if the sovereign can no longer offer protection to the subject, then the obligation of obedience ceases.⁸⁷ In both these cases, he is often taken to be making an empirical rather than a conceptual or normative claim. It is not a matter of the subject making a judgment but of finding himself as a matter of fact in the situation of an individual in the state of nature – an individual who has therefore the full right of nature. In my view, however, Hobbes's claim is somewhere between facts and norms.

A helpful image is Hobbes's thought in chapter 13 that the state of war in the state of nature need not be actual fighting, but the "known disposition thereto", just as the "nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many days together . . ."⁸⁸ The judicial role, that is, in situations in which the sovereign issues commands that are suspect in any of the ways discussed above is to alert the commonwealth to the storm clouds on the horizon.

This is quite a modest role for judges. It leaves to the ruler the authority to decide how best to make life commodious for his subjects. It does not say that the first virtue of political and legal institutions is justice, so that principles of justice give us an independent resource of liberal principles whose natural guardian is the judiciary. Instead, it says that the first virtue of political and legal institutions is to provide us with peace and stability, so that our ruler might make appropriate judgments about how best to promote commodious living. But in order for us to recognise his judgments as appropriate, he has to govern through the medium of those institutions.

The idea of the public conscience, institutionalised in the legal order, gives no legally recognised right of resistance to the subject.⁸⁹ But it does seek to make legal order into something which channels

⁸⁷ Hobbes, *Leviathan*, chap. 14 [69–70], p. 199, and the text to note 83 above.

⁸⁸ *Leviathan*, chap. 13 [62], p. 186.

⁸⁹ See Edward G. Andrew, "Hobbes on Conscience within the Law and Without", *Canadian Journal of Political Science* 32 (1999), pp. 203–225.

public judgments about the good in such a way that resistance is by and large not an option, morally speaking. For those who cannot appreciate the moral issues at stake in putting such an order in place, and the moral obligations one has once such an order is in place, there is always the argument that it is at least in everyone's self interest to prefer order to chaos. But once one is in civil society, arguments from self-interest are no longer relevant – to think that they are is to be a "Foole".

As David Gauthier has argued, the Foole differs from the ordinary law breaker in not seeing the general reason for obedience, which then means that his calculation of law-breaking is one done purely in the language of private reason.⁹⁰ However, while Gauthier argues convincingly that in civil society private judgment is subordinated and rationality in some real way transformed, he finds himself stuck with the difficulty that arises from supposing that the sole basis for the obligations of civil society is private reason. For if the basis is private reason alone, and obedience to law requires the continual exercise of reason (not its obliteration at the moment of entry to civil society), Hobbes unwittingly provides the basis for the rebel's catechism.

My interpretation seeks to escape this difficulty by giving private reason and self-interest an ancillary, even rhetorical role in *Leviathan*. And it suggests that Hobbes does not provide against his intentions the basis for a rebel's catechism. Hobbes does not seek to provide us with a catalogue of rights and liberties – the content of public reason – which amount to constraints on sovereign authority. Rather, he gives us an account of the rule of law in constituting civil society and it is the fact that one finds oneself in such a society that provides one with the basis for obedience.

While Hobbes often puts forward the Hobbist claim that any order – any guarantee of minimal peace and stability – is to be preferred no matter the character of its sovereign to the chaos of the state of nature, his account of legal order is not Hobbist. In perhaps the best known passage on this topic, he contrasts the "miserable" subjection to the "lusts, and other irregular passions of him, or them that have so unlimited a Power in their hands" with the "dissolute

⁹⁰ David Gauthier, "Public Reason", *Social Philosophy* 19–42 (1995), pp. 36–37; and see *Leviathan*, chap. 15 [72–73], pp. 203–204.

condition of masterlesse men, without subjection to Lawes”, arguing that the former is to be preferred to the latter. His argument is that all “men are by nature provided of notable multiplying glasses (that is their Passions and Self-love), through which, every little payment appeareth a great grievance; but are destitute of these prospective glasses (namely Morall and Civill Science,) to see a farre off the miseries that hang over them, and cannot without such payments be avoyded.”⁹¹

This argument is for those incapable of absorbing the lesson of *Leviathan*, of mastering the reasoning which later in *Leviathan* he says, as we have seen, there should be “no difficulty” in teaching to all subjects.⁹² The argument is then a reiteration of Hobbes’s argument against the Foole. More important, however, is that a properly functioning legal order is one in which individuals will not be subject to irregular lusts and passions but to the rule of law. And the rule of law is not instrumental, as contemporary positivists have it, to particular judgments about the good made by those who wield political power. It is not, as Fuller pointed out, a means for “managerial” direction, for channelling “one way projections of authority”. Rather, it is the institutional expression of a relationship of reciprocity between ruler and ruled, or, as Hobbes himself put it, of the “mutuall Relation between Protection and Obedience”.⁹³

⁹¹ *Leviathan*, chap. 18 [94], pp. 238–239.

⁹² See text to note 82. Note that to say that Hobbes is putting forward two arguments, one for those who are obsessed with self-interest, and one for those who are participants in the moral conversation of mankind, does not suggest that he concealed his true meaning. As I indicated above, the point of the first argument is to give the self-interested sorts an explicit reason to get involved in the second, but if they do not accept that reason they will be coerced on the occasions when self-interested calculation leads them to violate the law.

⁹³ See Fuller, *The Morality of Law*, pp. 215–216 for the idea that legal order is a co-operative enterprise between ruler and subject and for the quotation, see *Leviathan*, “A Review, and Conclusion” [395–396], p. 728. I thus agree with David Gauthier that in *Leviathan* when the subjects authorise the sovereign they do not surrender their rights, but merely appoint him their agent – see David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969), pp. 120 ff. I suspect that Gauthier’s difficulties in supporting this claim, as pointed out for example in Hampton, *Hobbes and the Social Contract Tradition*, pp. 114 ff., stem from the fact that he (and Hampton) start from the premise that self-interest is the foundation stone of Hobbes’s argument. Objections to Gauthier’s argument include that he turned

As such, the rule of law is far short of a complete theory of liberal justice, but it is much more than the success over time of a “gunman situation writ large”.⁹⁴ It is a very particular way of achieving the civil peace and stability required before highly contested judgments about substantive concerns – including issues of justice – can be legitimately made. And it is particular because it provides an institutional morality of rule following, of rule formation, and of rule implementation and interpretation, which speaks not so much to the content of judgments, as to the way in which they must be framed so as to sustain rather than subvert the moral basis of political and legal order.⁹⁵

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Hobbes into Locke, which is against the grain of much else in *Leviathan*. But on my account the constraints on the sovereign are not the “kick the bastards out” constraints which Locke envisages, but the constraints that necessarily attend the exercise of power through law. It is these constraints that explain why there is a mutual, ongoing relationship between protection and obedience in civil society, and not the complete subjection to power which the Hobbist interpretation requires.

⁹⁴ Hart, “Positivism and the Separation of Law and Morals”, p. 59

⁹⁵ One might naturally raise a challenge here which if successful undermines the argument of the whole essay – that the constraints I identify do not amount to a morality. But that challenge assumes a particular conception of morality, for example, a liberal list of individual rights and liberties. Although I will not defend this claim here, Hobbes’s conception of morality seems much closer to what we might think of as a democratic conception of morality in the standard debates between liberals and democrats.