Was Hobbes a Legal Positivist?*

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Hobbes's theory of civil law is historically situated in a jurisprudential no-man's-land. The era in which natural law accounts of civil law had enjoyed almost complete dominance had passed; the era in which legal positivism was to receive widespread support had not yet arrived. Recent commentators on Hobbes, however, have asserted without qualification that Hobbes should be counted an adherent of legal positivism. In this article I will challenge this reading of Hobbes's theory of civil law, arguing that Hobbes's theory is much more akin to earlier natural law accounts than to later positivist views. Such an examination of Hobbes's account of law is worthwhile not merely for the sake of placing Hobbes's theory in the proper historical pigeonhole. Rather, examining a theory that on its face may seem to deviate from typical natural law theories will enable us to gain a clearer understanding of the structure of natural law accounts of civil law.

I

In *Leviathan* Hobbes presents a definition of civil law which he claims to contain "nothing that is not at first sight evident."[1] He writes that "CIVILL LAW, Is to every Subject, those Rules, which the Commonwealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule."[2] It seems to be a matter of consensus among commentators on Hobbes that this theory of law is quite straightforwardly a variety

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1. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), chap. 26, p. 137 of the 1651 Head ed. All references to this work are to this edition.

2. Ibid.

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of legal positivism.[3] H. L. A. Hart in *The Concept of Law* treats Hobbes as a positivist; John Watkins describes Hobbes's theory as "peculiar in its . . . stark legal positivism"; Brian Barry, though attempting to distance Hobbes's account of law from that presented by John Austin, does not suggest that Hobbes and Austin differ in their positivism; and the writers of three of the best recent commentaries on Hobbes, Jean Hampton, Gregory Kavka, and Sharon Lloyd, seem to think that it can be asserted with little argument that in *Leviathan* Hobbes was a legal positivist.[4]

What, though, does it mean to assert that Hobbes's theory of law is a variety of positivism? Hampton suggests that it is a positivist view because "law is understood to depend on the sovereign's will. No matter what a law's content, no matter how unjust it seems, if it has been commanded by the sovereign, then and only then is it law."[5] Hampton seems to ascribe two characteristics to Hobbes's legal theory that mark it as a variety of positivism: first, that in Hobbes's theory the pedigree of a norm alone determines whether that norm is legally valid,[6] and second, that there is a conceptual separation between law and morality such that the legal validity of an enactment does not depend on its moral content. Although both of these theses commonly appear in positivist theories of law, I shall, following Hart, David Lyons, Joseph Raz, and Jules Coleman, take the second to be the defining feature of legal positivism.[7] All varieties of legal positivism, that is, necessarily adhere to the separability thesis: "There exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for

3. An exception might be Howard Warrender (*The Political Philosophy of Hobbes: His Theory of Obligation* [Oxford: Clarendon, 1957], pp. 323–29).

4. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), pp. 62–64, but note Hart's indebtedness to Hobbes in Hart's discussion of the minimum content of natural law, pp. 187–95; John Watkins, *Hobbes's System of Ideas*, 2d ed. (London: Gower, 1973), p. 114; Brian Barry, "Warrender and His Critics," *Philosophy* 43 (1968): 117–37, 131–32; Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), pp. 107–10; Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton, N.J.: Princeton University Press, 1986), pp. 248–50; S. A. Lloyd, *Ideals as Interests in Hobbes's "Leviathan": The Power of Mind over Matter* (Cambridge: Cambridge University Press, 1992), p. 15.

5. Hampton, p. 107.

6. I shall throughout this article use the term "legal validity" to refer only to the validity possessed by civil laws.

7. H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629, esp. p. 594; David Lyons, "Principles, Positivism, and Legal Theory," *Yale Law Journal* 87 (1977): 415–35, esp. pp. 417–18; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1978), pp. 39–45; Jules Coleman, "Negative and Positive Positivism," *Journal of Legal Studies* 11 (1982): 139–64, and "Rules and Social Facts," *Harvard Journal of Law and Public Policy* 14 (1991): 703–25, esp. p. 717.

any proposition of law."[8] Hampton's view, then, is that Hobbes's legal theory entails the separability thesis: since all that is necessary for something to be a law is that it be the command of the sovereign, there are no moral constraints on the content of law that could preclude a sovereign's command from attaining the status of law. Hobbes's theory is therefore a variety of legal positivism.

Hampton also claims that Hobbes is committed to the rejection of a natural law view: "Because Hobbes defined law in this way, he opposed the chief competing theory of law during that period: the natural-law view. A natural-law theorist maintains that it is neither necessary nor sufficient for something to be a law that it be commanded by the sovereign; rather, for something to be law, it must be part of (or derived from) a set of 'natural laws' known by human reason."[9] Before we turn to the question of whether Hobbes was indeed a legal positivist, we should note that Hampton is clearly wrong to say that for natural law theorists it is neither necessary nor sufficient for a dictate to be law that it be commanded by a sovereign. No natural law theorist that I know of has ever claimed that it is *sufficient* for something to be a civil law that it be derived from the natural law. That natural law theorists hold that legal validity is reducible without remainder to moral validity is a common image of natural law theory, but as John Finnis has pointed out, it is a mistaken image.[10] Aquinas, for example, explicitly claims that precepts derived from the natural law do not attain the status of civil law until issued by the civil sovereign; Suarez agrees.[11] The thesis that derivability from the natural law is sufficient for a norm to be part of the civil law is therefore no part of natural law theory. How, then, ought we to characterize the natural law position that Hobbes seems to reject? At this point we may offer only a provisional (and, as we shall later

8. Coleman, "Negative and Positive Positivism," p. 141. I don't think "truth as a moral principle" is exactly right here, because even on a view like Thomas Aquinas's there could be a system of laws that consists wholly in *determinations* of general moral principles. Determinations are specifications of general moral principles that are not the result of logical deduction but, rather, a non-rule-governed prudence. See Thomas Aquinas, *Summa theologiae* 1a–2ae.95.2. (All translations from this text are my own.) It is not precise to say that determinations are true as moral principles; rather, they are in some sense in conformity with true moral principles. Hence, Coleman's separability thesis is perhaps more accurately expressed as the claim that there is at least one conceivable rule of recognition that does not specify conformity with a true moral principle among the truth conditions for any proposition of law.

9. Hampton, p. 107.

10. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), pp. 25–29.

11. Aquinas, 1a–2ae.95.3; Francisco Suarez, *De Legibus ac Deo Legislatore* 3.1.7: "Authority to make human laws is identified with the human magistracy endowed with supreme jurisdiction in a state."

see, incomplete) characterization of the natural law view: it is a necessary condition for a norm's being legally valid that it be consistent with the natural law. This thesis constitutes a denial of the separability thesis; legal positivism and natural law theory are therefore incompatible doctrines. Hampton's claim, then, is that for Hobbes a sovereign's enactment may conflict with the natural law yet retain the status of civil law; by advocating this content-independence thesis, Hobbes shows himself to reject natural law theory in favor of legal positivism.

I shall argue that the consensus concerning Hobbes's positivism is in error, that Hobbes's view is more closely allied with natural law understandings of civil law than with legal positivism. Now, the most serious difficulty that natural law theories of civil law encounter is the existence of cases in which there is apparent conflict between the civil and the natural law. To resolve this difficulty, natural law theorists may hold in such cases either that what is apparently the civil law really is not or that what is apparently the natural law really is not. I shall employ both of these strategies to show that for Hobbes there must be congruence between the dictates of the natural and of the civil law. For, according to Hobbes, we can divide the class of commands that the sovereign can issue into two groups: the group of commands which the subject is not obligated to obey and the group of commands which the subject is obligated to obey. Within the former group there is no possibility of conflict between the civil law and the natural law because commands issued by the sovereign which the subject is not obligated to obey are not, strictly speaking, civil laws at all; within the latter group there is no possibility of conflict between the civil law and the natural law because these valid civil laws effect a transformation in what is required by the laws of nature which renders conflict between civil and natural law illusory.

Hobbes clearly recognizes that there are many cases in which subjects are under no obligation to obey the commands of their sovereigns. He allows that one has no obligation to obey commands (1) "to kill, wound, or mayme himself," (2) "not to resist those that assault him," (3) "to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live," (4) to make any confession "concerning a crime done by himselfe," or (5) to serve as a soldier.[12] Roughly, we may say that for Hobbes one is under no obligation to obey a command of the sovereign that requires one either to cause

12. Hobbes, *Leviathan,* chap. 21, pp. 111–12. The subject is under no obligation to serve in battle provided only that certain conditions obtain. First, it must not be the case that the subject has volunteered to serve; second, it must not be the case that the defense of the commonwealth requires everyone's assistance; and third, the subject must endeavor to provide a substitute.

him- or herself great harm or to put him- or herself into a position where such harm is foreseeable. Hobbes's justification for denying the existence of obligations to obey these commands is that one can have an obligation to obey another human's command only if one has laid down a right to that person; however, one's right to protect him- or herself from serious harm is inalienable and one has no right to inflict such harm on him- or herself.[13]

What I am concerned to show is that in all cases in which the sovereign issues a command that the subject is not obligated to obey, the command is not to be accounted part of the civil law for that subject.[14] Consider the important passage which directly precedes Hobbes's allegedly positivistic definition of civil law: "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 the *Persona Civitatis,* the Person of the Common-wealth."[15] The reason that Hobbes invokes for explicitly defining civil law as the rules commanded by the commonwealth is that it is the commonwealth whom one has become obligated to obey by covenant.[16] Hobbes's claim that civil law consists of the commands issued by the sovereign, though, is initially susceptible to two interpretations, one of which is less restrictive than the other. On either reading, the following conditions must be satisfied if a command is to be accounted civil law. A command c is civil law only if

A. There is a person (the subject),
B. who by laying down a certain set of rights (set R)
C. has become obligated to obey any member of a certain set of possible commands (set C)

13. Ibid., chap. 14, pp. 65; 65–66, 69–70; 64.

14. Note that for Hobbes civil law is always a relational notion, where the relata are a command, a particular subject, and that subject's sovereign.

15. Hobbes, *Leviathan,* chap. 26, p. 137.

16. Note that by so defining civil law Hobbes rejects what Joseph Raz calls the "sources thesis," i.e., that "a jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without recourse to moral argument" (Raz, pp. 39–40). By invoking a morally charged definition of the sovereign—the person whom one has become obligated to obey—as part of the definition of law, Hobbes summarily dismisses the possibility that the existence of law depends on facts "capable of being described in value-neutral terms." Raz's sources thesis version of legal positivism, then, cannot succeed as a plausible interpretation of Hobbes's definition of law; as Hobbes clearly did not accept that thesis, it cannot be used to justify Hampton's claim that for Hobbes there are no content restrictions on the commands of the sovereign capable of precluding those commands from attaining the status of law.

D. if that member of set C is issued to the subject by another person (the sovereign), and
E. c is issued to the subject by the sovereign.

Conditions A through D make explicit what is necessary and sufficient for a sovereign-subject relationship to exist: you are my sovereign, and I am your subject, if and only if I have laid down a certain set of rights, the laying down of which places me under an obligation to obey any of a certain set of commands if issued by you. Condition E merely adds to conditions A–D that a command has been issued. Now, on reading 1—what we might call the "extensional" interpretation of Hobbes's definition of civil law—conditions A–E are jointly sufficient for a command to be civil law. However, on reading 2—what we might call the "insofar as" interpretation—a sixth condition is needed, a condition under which a command is a law only if issued by the person who is the sovereign *insofar as that person is the sovereign:*

F. Command c is a member of set C, that is, the set of commands that the subject is obligated to obey if issued by the sovereign.

Reading 1 is the reading that supports the claim that Hobbes was a legal positivist. On this reading, once we have determined who the sovereign is, we know that any command issued by that sovereign is on Hobbes's view law for his or her subjects, regardless of whether or not the subjects would be obligated to obey that command. On reading 2, however, once we have determined who the sovereign is, what commands subjects have placed themselves under an obligation to obey, and what commands have been issued by the sovereign, there is a further step in determining which commands are law: it must be determined whether the particular command under consideration is a member of the set of commands that subjects have obligated themselves to obey. Which of these readings of Hobbes's definition of civil law is preferable?

Let us take as a test case a command issued by the sovereign which would require the subject to kill him- or herself. If reading 1 is correct, then Hobbes must consider this command to be a civil law for that subject; if reading 2 is correct, then Hobbes would have to deny that that command is a civil law for that subject. I claim that Hobbes does not take the commands of the sovereign in such a case to be law. For Hobbes holds that there are certain entailments between claims about law on one hand and claims about right, liberty, and justice on the other; and Hobbes's remarks about the right and liberty of subjects to disobey in such cases and the justice of their doing so makes clear that Hobbes does not take such commands to be laws.

For Hobbes, the following entailments hold between claims about laws and claims about rights, liberties, and justice. If one has a right to ϕ, then there is no law prohibiting one from ϕ-ing; if one has the

liberty to ϕ, then there is no law prohibiting one from ϕ-ing; if one does not act unjustly in ϕ-ing, then there is no law prohibiting one from ϕ-ing.[17] It follows, then, that if the sovereign commands a subject to ϕ, and the subject has the right not to ϕ, has the liberty not to ϕ, and does not act unjustly in not ϕ-ing, then the sovereign's command is not a law. Hobbes is quite clear, though, that for each subject there are "things, which though commanded by the Soveraign, he may nevertheless, without Injustice, refuse to do"; the commands which may be disobeyed are determined by reference to the scope of the rights "we passe away, when we make a Commonwealth" and with regard to these commands the subject has "the Liberty to disobey."[18] If Hobbes is consistent, then, with regard to his account of law and its relation to liberty, right, and justice, he must deny the status of law to some of the commands of the sovereign, namely, those commands that subjects are not obligated to obey.

There is another reason for ascribing this account of law to Hobbes, a reason having to do with his motive for endorsing a certain sort of legal theory. It can be asserted without prejudice that Hobbes endorsed a theory of law in which only commands that sovereigns issue to subjects are candidates for the status of law. Now, one could flesh out such a theory of law by defining the sovereign-subject relationship in nonmoral terms, as Austin did when he defined the sovereign as the person whom others are in the habit of obeying, and who is not in the habit of obeying anyone else; we may label all such theories "Austinian" accounts.[19] On the other hand, one could flesh out such a theory by defining the sovereign-subject relationship in moral terms, as Hobbes clearly did; we may label all such theories "Hobbesian" accounts. We thus can conceive of sovereign-subject theories of law according to the following classification. On the Austinian account, the sovereign is defined in nonmoral terms; any of that sovereign's commands are law. On the extensional reading of the Hobbesian account, the sovereign is defined in moral terms; any of that sovereign's commands are law. And on the "insofar as" reading of the Hobbesian account, the sovereign is defined in moral terms, and only insofar as the sovereign's commands are within the scope of this morally defined authority are those commands law. When we consider, though, why Hobbes might have opted for a definition of law in which sovereignty is defined in moral terms rather than one in which sovereignty is defined in nonmoral terms, it would seem that the insofar as reading

17. Hobbes, *Leviathan,* chap. 14, p. 64; chap. 26, p. 150; chap. 21, p. 113; chap. 26, p. 137.

18. Ibid., chap. 21, p. 111; chap. 21, p. 111; chap. 21, p. 112.

19. John Austin, *Province of Jurisprudence Determined* (London: John Murray, 1861), lecture 6, p. 160.

would be a more plausible construction of Hobbes's account of law than the extensional reading would be. Why would Hobbes opt for such an account?

Hobbes was committed to the view that laws are commands, and for him a command is "where a man saith, *Doe this,* or *Doe not this,* without expecting other reason than the Will of him that sayes it."[20] On Hobbes's view commands are always for the benefit of the person that commands.[21] If commands are always for the benefit of the commander, and the commander offers no reason to obey other than that it is his or her will, why would anyone obey another's commands? This question, if pressed, threatens civil obedience: for all laws are commands, and it seems that there is no good reason to obey another's command. I suggest that Hobbes aimed to avoid this subversive conclusion by presenting a definition of law according to which one may infer from the fact that there is a civil law requiring the performance of a certain action the fact that one has reasons to perform that action. As Hobbes writes in the *Elements of Law,* "COMMANDING . . . is that speech by which we signify to another our appetite or desire to have any thing done, or left undone, for reason contained in the will itself: for it is not properly said, *Sic volo, sic jubeo,* without that other clause, *Stet pro ratione voluntas:* and when the command is a sufficient reason to move us to the action, then is that command called a LAW."[22] How can another's command provide a sufficient reason for action? By entering the covenant that forms political society, one undertakes an open-ended obligation to obey the sovereign's commands, to take his or her will as one's own: the sovereign's commands present reasons for action because one is obligated to act as the sovereign wills.

This explanation, though, seems to militate against the extensional reading rather than for it. For if Hobbes's motive for presenting such a definition of law was to construct an account that explains how another person's commands can constitute sufficient reasons for action, this motive does not extend to all commands of the sovereign, but only to those commands of the sovereign that subjects have reason to obey. And if there is a class of commands that is such that the sovereign's commanding them does not provide a reason to act according to them, then it would seem that Hobbes would have no motive for including these commands as civil laws. Hobbes, therefore, had not reason to opt for an account of law on which commands of the sovereign which subjects had not obligated themselves to obey possess the status of civil law; his reasons for preferring a Hobbesian

20. Hobbes, *Leviathan,* chap. 25, p. 132.

21. Ibid.

22. Thomas Hobbes, *The Elements of Law, Natural and Politic,* ed. Ferdinand Tönnies, 2d ed. (New York: Barnes & Noble, 1969), pt. 1, chap. 8, sec. 6.

to an Austinian definition of law weigh in favor of the insofar as rather than the extensional interpretation of his theory of law.

Thus far I have argued that on Hobbes's definition of civil law, commands issued by the sovereign which subjects are not obligated to obey do not belong to the civil law. If conflict between natural and civil law is possible, then, it must be the case that commands that subjects are obligated to obey can be inconsistent with the laws of nature. It would seem that Hobbes flatly denies such a possibility in his argument for what Kavka calls the "mutual containment thesis."[23]

> The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature, which consist in Equity, Justice, Gratitude, and other morall Vertues on these depending, in the condition of meer Nature . . . are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is established, then are they actually Lawes, and not before; as being then the commands of the Common-wealth; and therefore also Civill Lawes: For it is the Soveraign Power that obliges men to obey them. . . . The Law of Nature therefore is a part of the Civill Law in all Common-wealths of the world. Reciprocally also, the Civill Law is a part of the Dictates of Nature. For Justice, that is to say, Performance of Covenant, and giving to every man his own, is a Dictate of the Law of Nature. But every subject in a Common-wealth, hath covenanted to obey the Civill Law. . . . And therefore Obedience to the Civill Law is part also of the Law of Nature.[24]

One part of the mutual containment thesis—that the civil law is contained in the natural law—is fairly straightforward: it consists of the claims that each person in a commonwealth has contracted to obey the civil law and that the contract's binding power is underwritten by the third law of nature, "That men performe their Covenants made."[25] The other part of the mutual containment thesis, however, is a bit more puzzling. Hobbes's argument that the natural law is contained in the civil law rests on the claim that prior to being embodied in civil law, the laws of nature are not really laws:[26] "These dictates of Reason, men used to call by the name of Lawes, but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the

23. Kavka, p. 248.

24. Hobbes, *Leviathan,* chap. 26, p. 138.

25. Ibid., chap. 15, p. 71.

26. In his argument for the mutual containment thesis, Hobbes ignores an important disclaimer that he had earlier made, i.e., that the laws of nature are laws prior to the institution of commonwealths inasmuch as they are commands issued by God (ibid., p. 90).

word of him, that by right hath command over others."[27] Because the laws of nature are not really laws until they are laid down by the sovereign, the civil law contains the laws of nature. As Kavka points out, though, this argument seems open to an obvious objection: "Read at face value, Hobbes's claim that the civil law contains natural law faces the objection that a sovereign could explicitly disavow a natural law or enunciate civil laws that contradict it. Given Hobbes's legal positivism, and his firm doctrine that the sovereign, not the lawyers or philosophers, is the final authority on what the civil law says, it would be difficult for him to answer this objection."[28] Although it might be that the natural law is not really law until commanded by the sovereign, that does not suffice to show that the civil law contains the natural law, for it seems clearly possible that the sovereign could forbear from legislating the laws of nature, or actually legislate that which is inconsistent with them. In such a case, it would be quite peculiar to say that the civil law contains the natural law.

This objection to Hobbes's mutual containment thesis can be answered by appealing to resources present in Hobbes's theory of the laws of nature. Specifically, the promulgation of a law by the sovereign alters what is required by the natural law such that any civil law will be consistent with the laws of nature. Before we turn to this argument, though, we need to make clear precisely what is meant by the notion of consistency between the natural and the civil law. Up to this point I have allowed myself the use of the phrase "the civil law is consistent with the natural law" without being very rigorous about what it would mean for a command issued by a political authority to be consistent with a rule that enjoins persons from doing that which would bring about their own destruction. Both civil and natural laws impose practical requirements on all those subject to them. Practical requirements, though, are such that certain quasi-logical relationships hold between them: for example, as the performance of certain actions may preclude the performance of others, some practical requirements may be inconsistent with others. Generally speaking, then, a practical requirement A is inconsistent with a practical requirement B if there is an action ϕ which A requires and B forbids or which A forbids and B requires. My claim, then, is that on Hobbes's view there are no cases in which the civil law requires the subject to perform an action which the natural law forbids that subject to perform, or vice versa.

What is needed first is an examination of the kind of practical requirement that the laws of nature impose. In a curious passage, Hobbes writes that

27. Ibid.
28. Kavka, p. 249.

> 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 will observe the same Lawes toward him, observes them not himselfe, seeketh not Peace, but War; & consequently the destruction of his Nature by violence.[29]

Hobbes is distinguishing here between two different practical requirements that the laws of nature are capable of imposing. The laws of nature always impose the requirement that each person desire that there be general observance of the laws of nature and put forth some effort toward the goal of such general observance. This is the *in foro interno* obligation imposed by the laws of nature, and it is "Immutable and Eternall."[30] The *in foro externo* obligation generated by the laws of nature, though, holds only when one knows that others will abide by them as well. Since outside of the commonwealth there exists a state of war in which there is no central authority with sufficient power to ensure compliance with the laws of nature, those do not bind *in foro externo* in the state of nature; they only bind *in foro externo* when there is security against transgressors.

It is this distinction between the *in foro interno* and the *in foro externo* binding power of the laws of nature upon which I will rely in arguing that for Hobbes the civil and the natural law must be consistent. For the consistency of the civil and the natural law requires nothing more than that there can be no action the performance of which the civil law requires and the natural law forbids. Now, if it can be shown that in every case in which a civil law requires the performance of a certain action, the natural law does not forbid *in foro externo* the performance of that action, then it follows that there can be no conflict between the civil and the natural law. There are two ways, though, that the performance of an action can fail to be forbidden *in foro externo*. Either the natural law does not forbid it *in foro interno,* or it does forbid it *in foro interno,* but the circumstances are such that the law of nature does not bind *in foro externo* in this particular case. The former situation, presenting no tension at all between civil and natural law, is irrelevant for our purposes. It is the latter situation which causes concern for those who would reject the claim that Hobbes was a legal positivist. How can it be shown in every case in which a civil law

29. Hobbes, *Leviathan,* chap. 15, p. 79.
30. Ibid.

requires the performance of an action that the natural law forbids *in foro interno* that the natural law does not forbid the performance of that action *in foro externo?* If it could be shown that the very existence of the sovereign's command to perform that action suffices to transform the situation from one in which that law of nature binds *in foro externo* to one in which that law of nature binds only *in foro interno,* then an absence of conflict between natural and civil law is guaranteed.

If the laws of nature lose their *in foro externo* validity when the performance of an action contrary to them is commanded by the sovereign, then there must be relevant similarities between the state of nature condition under which the laws of nature are valid only *in foro interno* and the situation in which the sovereign issues a command that seems inconsistent with the laws of nature. What are the relevant features of the state of nature condition which cause the laws of nature to be valid there only *in foro interno?* The relevant feature seems to be this: that a denizen of the state of nature has good reason to believe that others will deviate from those laws. It is only after a sovereign is instituted who has the power to tie subjects to obedience to the laws of nature by threat of punishment that those laws bind not only *in foro interno* but *in foro externo* as well; that is why Hobbes says that the laws of nature bind *in foro externo* only when one has "sufficient Security, that others will observe the same Lawes toward him."[31] It seems, though, that this feature of the state of nature condition is also exhibited in the case in which a sovereign issues a command to violate a law of nature. For not only would a subject under such a command have no guarantee that others will follow the law of nature, but that subject will also have a good reason to think that others will violate the law of nature because of the coercive threat wielded by the sovereign.

Suppose that a general condition of peace prevails, and the sovereign has sufficient power to compel potential lawbreakers to keep the laws of nature. In such a situation the laws of nature oblige *in foro externo.* If, for example, a mediator were to pass by, I would be obligated not to harm him or her by the fifteenth law of nature, for that law mandates that mediators "be allowed safe Conduct."[32] Now, suppose that the sovereign issues a standing order: "Kill every mediator." I want to claim that by issuing such a command the sovereign transforms the situation from one in which the fifteenth law of nature binds *in foro externo* into one in which that law binds only *in foro interno.* By issuing such a law, the sovereign strips me of the security that I previously possessed that other subjects would abide by that law; indeed, the sovereign's command gives me reason to believe that others

31. Ibid.
32. Ibid., p. 78.

will act contrary to the law of nature. Since I have no security that there will be general compliance with the law of nature, it does not bind me *in foro externo*. As that law does not possess *in foro externo* validity, it cannot present to me a practical requirement that conflicts with the civil law.

The reasoning that shows the seeming inconsistency between a command of the sovereign requiring the killing of mediators and a law of nature barring me from killing mediators to be illusory may be extended to all other seeming inconsistencies between civil and natural law. In any case in which a binding civil law seems to conflict with a law of nature, it is the case that the sovereign's command has rendered the obligation to obey that law of nature *in foro externo* invalid. Without an *in foro externo* obligation to obey that law of nature, no conflict in practical requirements between civil and natural law can arise; Kavka's objection to the mutual containment thesis can be answered.

I have argued that for Hobbes commands of the sovereign that subjects are not obligated to obey are not civil laws, and that civil laws contrary to the laws of nature strip those laws of their *in foro externo* obligating power with the result that no conflict between civil law and natural law can arise. The conclusion to be reached, then, is that commentators such as Hampton and Kavka cannot rely on the possibility of inconsistency between civil and natural law within Hobbesian legal theory to defend their assertion that Hobbes was a legal positivist. Even if one accepts the claim that for Hobbes civil law cannot conflict with natural law, though, he or she might take the truth of that claim not to be dispositive of one of the issues at hand, that is, whether Hobbes's view is more akin to natural law theories of civil law than to legal positivism. "Natural law theorists," this interlocutor might respond, "do not claim only that the civil law must be consistent with the natural law; they also typically claim that a putative civil law is denied the status of law *because* it would conflict with the natural law. All you have shown is that due to some rather peculiar features of Hobbes's theory, there is no conflict; you do not show that in situations of conflict it is always the laws of nature and never the commands of the sovereign that retain the status of law. Unless Hobbes's account of law endorses these claims, it cannot purport to be a natural law account of civil law."

This interlocutor is correct on three points. First, the interlocutor is right to say that the fact that Hobbesian legal theory precludes conflict between the civil and the natural law is not sufficient justification for labeling Hobbes's theory a natural law account of civil law. As Finnis has written, the "lex iniusta non est lex" thesis is never more than "a subordinate theorem" in theories of natural law.[33] Our early

33. Finnis, p. 351.

characterization of natural law theory is therefore incomplete; to have sufficient justification for labeling a theory a natural law account, there must be a particular kind of explanation for why the civil and natural laws are necessarily consistent, a kind of explanation that marks that theory as a natural law view. It might seem, though, that such an explanation is unavailable to Hobbes. For—and this is the second point on which the interlocutor is right—typical natural law theories begin their explanation of the necessary consistency of natural and civil law by asserting that any putative positive law that conflicts with the natural law is ipso facto denied the status of law. But such a route is not open to Hobbes, due to the third point on which the interlocutor's assessment is accurate: my argument requires me to reject an interpretation of Hobbes on which he holds that civil law always loses the status of law because it would conflict with natural law; if my earlier argument is correct, then in many cases natural law loses it *in foro externo* binding power because it conflicts with civil law. It might seem, then, that Hobbes's theory cannot be characterized as a natural law view of civil law.

There is another possibility, though. It is clear from the interlocutor's remarks that in providing an explanation for the consistency of the civil and the natural law, Hobbes's and the typical natural law theorist's first moves will be different. The typical natural law theorist's first move is to claim that natural law determines what commands of the sovereign can attain the status of civil law; Hobbes's first moves are to claim that some commands of the sovereign—those adherence to which would cause the subject great harm—are not civil law, but in all cases in which the sovereign's commands do attain the status of civil law those commands determine which natural laws have *in foro externo* binding power. Presumably, though, it may be asked of both Hobbes and the typical natural law theorist what considerations justify these explanatory first moves. If both Hobbes and the typical natural law theorist provide responses of a sort that is a trademark of the natural law view, then it may plausibly be said that Hobbes's view is a kind of natural law theory of civil law.

What I propose to do for the remainder of this article is to show that Hobbes's and the typical natural law theorist's justifications for their first moves in explaining the consistency of natural and civil law—what I will hereafter call their ultimate explanations for the consistency of natural and civil law—are of the same sort and that this sort of justification marks Hobbes's view as a natural law theory of civil law. I will first sketch a typical natural law theorist's ultimate explanation for the consistency of the natural and the civil law—that provided by Thomas Aquinas—and show that it rests on three crucial premises. I will then discuss why Aquinas offers such an explanation, paying particular attention to the relationship between Aquinas's ac-

ceptance of the third of these premises and his account of goods. I will then argue that although Hobbes accepts the first two premises employed in Aquinas's ultimate explanation, he rejects the third; that Hobbes rejects this premise, I shall show, is due to his rival account of goods. Given that their ultimate explanations are so similar and differ only because of their accounts of goods, it seems that if Hobbes is to be denied the label of natural law theorist of civil law, it must be due to his account of goods. I will conclude by arguing that neither Hobbes's account of what things are goods nor his account of what goodness consists in is sufficient to deny him that label.

II

What is Aquinas's ultimate explanation for the consistency of natural and civil law? Why does he hold that in cases in which there is conflict between the commands of the sovereign and the precepts of the natural law, it is always the case that the commands of the sovereign are denied legal validity?[34]

Recall that Hobbes's theory of law was designed to handle the problem of why one would obey another's commands; by framing an account of law in which one is obligated to obey any command issued by the lawgiver, Hobbes offers a general reason to obey the law. Although Aquinas was responding to a different set of issues than that which confronted Hobbes, it is clear that he also held that any satisfactory account of law would have to be such that a dictate can only be a law insofar as it provides reasons for action. The dictates issued by a political authority, then, can be accounted laws only insofar as those

34. We should note here that Aquinas's claim that the sovereign's enactments are denied legal validity if they conflict with the natural law does not mean that there cannot be some *attenuated* sense in which such enactments are legally valid. As Finnis notes, the issue is not whether there is some sense in which unjust laws are laws; there surely is some such sense, or the claim that unjust laws are not laws would be self-contradictory nonsense rather than a substantive thesis of legal theory (Finnis, pp. 364–65). The issue is whether laws that are inconsistent with the natural law are defective *precisely as law,* i.e., whether they fail to be legally valid in the focal sense of legal validity (ibid., pp. 24, 364–66; for the notion of focal meaning, see pp. 9–11). The admission by the natural law theorist that unjust dictates can be legally valid in some derivative sense is not much of a concession to the positivist, however. Coleman has remarked that the separability thesis, which I have taken to be the hallmark of positivism, is an unassailable though trivial and uninteresting claim ("Rules and Social Facts," pp. 716–17). It becomes a far more contentious claim when it is interpreted as entailing that it is possible that there be civil laws that are unjust yet legally valid in the focal sense of legal validity. The positivist, though, is committed to this claim. Although he or she may concede that enactments that are contrary to the natural law are necessarily defective as pieces of moral guidance, he or she is nonetheless committed to holding that they are not defective as laws. I owe thanks to an anonymous reviewer at *Ethics* who pointed out the need to comment on this matter.

dictates provide good reasons for action. Any dictate that prescribes that one do something that is contrary to his or her good, however, is a dictate that one has no good reason to act upon; and thus any dictate that prescribes that one do something that is contrary to his or her good cannot be accounted law. For Aquinas, though, the precepts of the natural law are rules such that in any situation one's good can only be achieved by following them. Any dictate that prescribes something contrary to the natural law, then, prescribes that one do something that is contrary to his or her good. Such a dictate, therefore, cannot be accounted law. Thus, Aquinas has explained why the civil law must be consistent with the natural law: any putative civil law that is contrary to the natural law is denied the status of law, for there are no good reasons for acting according to it.

Aquinas's ultimate explanation for the consistency of the natural and the civil law contains three premises: that a dictate can be accounted law only if there are good reasons for acting upon it; that any dictate that prescribes something contrary to one's good is a dictate upon which one has no good reason to act; and that one's good can only be achieved by acting according to the precepts of the natural law in every case. What deserves our notice at present is the crucial role played by an account of goods in this explanation for the consistency of natural and civil law. In this explanation, it is an account of goods that will specify what are good reasons for acting. Further, these goods have to be such that it is possible to formulate precepts that are to be followed without exception if these goods are to be achieved. We will shortly consider how Aquinas's account of goods satisfies these requirements. Consider the following possibility, though. The first two premises of Aquinas's ultimate explanation are logically distinct from the third. Suppose that a natural law thinker holds Aquinas's first two premises but rejects the third because his or her account of goods is such that most of the precepts that dictate how to achieve one's good are valid only under certain conditions. Aquinas's ultimate explanation of the consistency of natural and civil law would be unavailable to such a thinker—that thinker could not rely upon the absolute character of the precepts of the natural law in order to formulate the argument for necessary consistency—but it may be the case that an alternative explanation would be available. Such an explanation might rely, for example, on the fact that one of the conditions under which the precepts of the natural law are not applicable is that there is a civil law prescribing behavior contrary to the natural law. This explanation is, of course, the explanation that I attribute to Hobbes. But if one of those conditions is that there be no civil law to the contrary, then it would seem that the existence of such a condition on the validity of the precepts of the natural law would have to be explained in terms of an account of goods. I shall first, then, discuss the relationship

between Aquinas's account of goods and his ultimate explanation for the consistency of the natural and the civil law; I will then sketch Hobbes's ultimate explanation for that consistency and show how Hobbes's rejection of Aquinas's account of goods determines the content of that explanation.

I shall not examine in detail Aquinas's reasons for holding that law must be such that it presents reasons for action and that there is no reason to act according to a dictate that prescribes something contrary to one's good. Suffice it to say that for Aquinas, law is "a sort of rule and measure of acts, according to which one is induced to act or is restrained from acting"; however, he argues that for one to be induced to act, or restrained from acting, depends on the reasons one has for acting or forbearing from action, as "the rule and measure of human acts is reason."[35] Thus, any dictate that presents no reasons for action cannot attain the status of law. As to the claim that no dictate the following of which is contrary to one's good can present reasons for action, the justification for this premise is the fact that on Aquinas's account all rational action is ordered to the achievement of the agent's good, that is, his or her perfection;[36] as being ordered to that end is a necessary feature of rational action, no dictate that prescribes something contrary to one's good can be one upon which one has reason to act.

What shall concern us is the premise upon which Hobbes and Aquinas disagree, that is, whether natural law dictates are such that in every case it is only by acting according to them that one's good may be achieved. Why is it the case that one must always follow the precepts of the natural law if one's good is to be achieved? Two features of Aquinas's account of what the human good consists in together guarantee this result: first, that for Aquinas acting according to the dictates of the natural law is not merely an instrumental means for producing an independently specifiable good but rather is itself constitutive of that good; and second, that for Aquinas the goods that constitute the human's natural good are ordered in such a way that, properly understood, no conflict arises between them. The former feature guarantees that every action that is contrary to the natural law is ipso facto damaging to some aspect of the agent's good; the latter feature guarantees that there can be no conflict between the achieving of goods and, thus, no possibility that one would have to violate a natural law precept the following of which is constitutive of one's good in order to secure another good.

Aquinas's account of the relationship of naturally known human goods to the precepts of the natural law is contained in question 94,

35. Aquinas, 1a–2ae.90.1.
36. Ibid., 1a–2ae.1 passim; see also 1a.5 passim.

article 2 of the Prima Secundae. There he writes that "because . . . good has the nature of an end, whereas evil has the nature of its contrary, thus it is the case that reason apprehends all things to which the human has a natural *inclinatio*[37] as good, and consequently as objects to be pursued, and their contraries as evil and to be avoided. Therefore, the order of natural *inclinationes* corresponds to the order of the precepts of the natural law."[38] The *inclinationes* that are so ordered include the *inclinationes* toward the good that humans share with all substances, that is, being; toward the good that humans share with animals, that is, reproduction and education of offspring; and toward the good that humans alone have, that is, life in society and knowledge of God. Hence, in the human person's attempt to formulate the principles of the natural law he or she is guided by the fundamental *inclinationes* toward the good in general, toward certain particular goods, and toward an ordering of those goods. What places the objects of these *inclinationes*, though, in an order of value?

What gives the *inclinationes* their order is the fact that each *inclinatio* is toward a good with a different level of comprehensiveness, and thus, for Aquinas, with a different level of desirability. Consider the first three goods that Aquinas lists as naturally known: preservation of oneself in being "according to [one's] nature," procreation (construed broadly as to include both reproduction and education of offspring), and life in community. On Aquinas's view, then, the good of an individual's persistence in being is subordinated to the good of family life, because family life embraces a more comprehensive good; the good of family life is subordinated to the good of life in communities, because community life embraces a more comprehensive good.[39]

37. In this passage and elsewhere in my text I decline to translate the term *inclinatio*. The most natural English translation of this word would be "inclination," but I do not want to mislead by giving the impression that what Aquinas is speaking of here is inclination in the Kantian sense. What is translated as "inclination" in Kant's work is *Neigung*, which Kant characterizes as "the dependence of the faculty of desire on sensation" (*Grounding for the Metaphysics of Morals*, trans. James W. Ellington [Indianapolis: Hackett, 1981], p. 413n.). This is not what Aquinas means by the term *inclinatio*. If one had to translate *inclinatio* into English, the best translation would be "directedness," denoting a tendency of agents to act purposively to secure certain objects (see Alasdair MacIntyre, *Whose Justice? Which Rationality?* [Notre Dame, Ind.: University of Notre Dame Press, 1988], pp. 173–74).

38. Aquinas, 1a–2ae.94.2.

39. What of the other good that Aquinas lists as naturally known, i.e., knowledge of God? Knowledge of God does not seem to exhibit the part-whole relationship displayed in the relationships of individual to family and family to political community. On Aquinas's view, though, God is the end to which all creatures are directed as their final cause (1a–2ae.1.8). If the attainment of God in the way proper to rational creatures—i.e., knowledge of Him—is to be the ultimate good, the good to which all other goods are subordinated, how can this subordination relation be described? "Although

It is clear that Aquinas does take these more comprehensive goods to be superior to the more particular goods: right reason "judges that the common good is better than the good of an individual."[40] He writes that "the common good of many is more divine that the good of an individual. Hence for either the spiritual or the temporal common good of the country it is virtuous for one even to risk his or her life."[41] The superiority of the common good over one's particular good is illustrated in this passage by the soldier who places his life at risk for the common weal. Aquinas, then, holds that the common good is more choiceworthy than one's particular good, and thus further provides evidence for the claim that certain goods are subordinated to others. He holds that the *inclinatio* toward the common good is something that is natural to all creatures: "Every part naturally loves the common good of the whole more than its own particular good. This is manifested in its operation: for every part has a principal *inclinatio* toward common action for the advantage of the whole. This also appears in political virtues, on account of which citizens bear the loss of both their property and their persons for the sake of the common good."[42] What I am suggesting is that it is Aquinas's view that the good of the whole of which a thing is a part is naturally more desirable to that thing than its own particular good—or, as Aquinas puts it, "the natural appetite of each part is ordered to the common good of the whole."[43]

The claim that the naturally known goods display this ordering, though, should not be taken to mean that the preservation of oneself in being and the securing of the common good are two independently specifiable ends, the latter of which in cases of conflict always trumps the former. Consider once again the part-whole relationship that Aquinas invokes to explain why the common good is more choiceworthy than one's particular good. Aquinas at many points in the *Summa* treats the relationship between individuals and the communities of

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the good of the multitude is greater than the good of an individual in that multitude . . . yet [the good of the multitude] is less than the extrinsic good to which that multitude is directed, just as the good of a rank in the army is less than the good of the general [i.e., military victory]" (2a–2ae.39.2, ad 2). The point of Aquinas's example is that, no matter what level of goodness an army manages to display, this goodness fall short of the good of victory, to which these lesser goods are directed. Similarly, although the goods of individual, family, and community are genuine goods, they are not the ultimate good; they have their goodness only through participation in the divine goodness (1a.6.4). Hence, no matter how comprehensive the created good to which the human can attain, that goodness falls short of the good that stands outside the created world: God, who is universal goodness (1a–2ae.2.8).

40. Ibid., 2a–2ae.47.10.
41. Ibid., 2a–2ae.31.3, ad 2.
42. Ibid., 2a–2ae.26.3.
43. Ibid., 1a–2ae.19.10.

which they are members as an instantiation of a part-whole relationship, not in the uninteresting sense in which an object is a member of a set but in the sense in which something is a working part of a functioning whole.[44] Just as the good condition of a part can only be characterized by reference to the functioning whole of which it is a part—"the good disposition of parts is determined by their condition with regard to the whole"[45]—the human's persistence in being "according to its nature" cannot be adequately characterized except by reference to the good of the community of which it is a member. Because such an ordered relationship exists among the naturally known goods, the precepts of the natural law that are formulated with an eye to achieving those goods are ordered as well. Conflict between precepts of the natural law is thus ruled out.

As the order of the *inclinationes* results from the fact that individuals are parts of functional wholes, the character of the natural law precepts as exceptionless is also made evident by noting that Aquinas takes to be the goods that are naturally known not to be end states that are produced but activities to be engaged in. The natural law precepts are not rules that dictate how to bring about an independently characterized end state. Rather, they prescribe the activities that are constitutive of the proper functioning of individuals with regard to the preservation of their being, procreation, and life in community.[46] As Aquinas argues in the article immediately following the discussion of naturally known goods, all acts of virtue are prescribed by the natural law; I take him to be claiming here that what the natural law prescribes are all those activities that are constitutive of the agent's good.[47]

Aquinas's account of goods, then, provides the justification for his claim that it is only by acting according the precepts of the natural law in all circumstances that one's good is achieved. Their character as exceptionless is due to the fact that the goods that are constitutive of one's overall good are ordered so that no conflict among them is possible and to the fact that the actions prescribed by the precepts of the natural law are actually constitutive of those goods.

Thus far I have argued that Aquinas's ultimate explanation for the consistency of the natural and the civil law rests on three premises and that Aquinas's defense of the last of these three premises depends on the account of goods that he advocates. We may now return to

44. See, e.g., ibid., 1a–2ae.90.2, 2a–2ae.47.10, 2a–2ae.64.2, 2a–2ae.65.1.

45. Ibid., 2a–2ae.47.10, ad 2.

46. See Ralph McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (Washington, D.C.: Catholic University of America Press, 1982), p. 47; and Alasdair MacIntyre, "The Privatization of Good," *Review of Politics* 52 (1990): 344–61, p. 344.

47. Aquinas, 1a–2ae.94.3.

Hobbes's view. As I argued above, Hobbes does hold that it is necessary for a dictate to be a law that there be good reasons for acting according to it. The sovereign's commands, then, are accounted laws only insofar as these commands provide good reasons for action. Now Hobbes, like Aquinas, accepts the claim that any dictate that prescribes that one do something that is contrary to his or her good is a dictate that one has no good reason to act upon; and thus any dictate that prescribes that one do something that is contrary to his or her good cannot be accounted law. So far, then, Hobbes's and Aquinas's ultimate explanations for the consistency of the natural and the civil law are exactly alike. At this point, though, Hobbes's ultimate explanation diverges from Aquinas's. For Hobbes, the precepts of the natural law are not such that one must always act in accordance with them; Aquinas's conclusion that any dictate that is contrary to a natural law precept is precluded from attaining the status of law is thus unavailable to Hobbes. Hobbes instead takes the following route: in cases of conflict between the natural law and the command of the sovereign, it is either the case that obeying the sovereign's command will preclude the achieving of one's good or the case that following the natural law will not further the achieving of one's good. If obeying the sovereign's command would preclude the achieving of one's good, then the command of the sovereign is not civil law; if following the natural law would not further the achieving of one's good, then that precept of the natural law is not binding *in foro externo*. Thus, no conflict between the civil and the natural law can arise.

I want to suggest that Hobbes's differences with Aquinas with regard to the ultimate explanation for the consistency of the natural and the civil law are due to his rejection of Aquinas's account of goods. For Hobbes there is but one natural good that plays a role in his formulation of the precepts of the natural law, and that is self-preservation. Unlike Aquinas's account, in which one's preservation in being is treated as an activity, Hobbes's account treats self-preservation as merely an end state to be achieved, that is, *not being dead*. The fear of death is the human's chief aversion, one to which all other appetites and aversions yield: "Every man is desirous of what is good for him, and shuns what is evill, but chiefly the chiefest of naturall evills, which is Death; and this he doth, by a certain impulsion of nature, no less than that whereby a stone moves downward."[48] Even the desire for glory—that is, "Joy, arising from the imagination of a mans own power and ability"—gives way in situations in which one's life is seriously threatened, for although the loss of one's honor is such that it may

48. Thomas Hobbes, *De Cive: The English Version*, ed. Howard Warrender (Oxford: Clarendon, 1983), chap. 1, sec. 7.

be "salved with an excuse," the loss of life is such that "no salve is sufficient."[49] (That the fear of death is able to dominate the desire for glory is impressive indeed, for that appetite is so powerful that Hobbes lays it down as one explanation for the massive conflict that characterizes the state of nature.)

Different explanations have been offered as to why death avoidance is such a dominant desire for Hobbesian persons, but these critical quarrels may be put to the side.[50] What is important to note here is that for Hobbes the avoidance of death is the good that is ordered over the attainment of any delight or the suffering of any pain: the end humans seek is "principally their owne conservation."[51] Goods that Aquinas takes to be naturally known, such as procreation and life in society, are demoted by Hobbes to a merely instrumental status. Hobbes suggests that the only reason one would bear and raise children is the benefit that they may later generate: "Nor would there be any reason, why any man should desire to have children, and take care to nourish and instruct them, if they were afterwards to have no benefit from them, than from other men."[52] Life in society is likewise a merely instrumental good: "We doe not therefore by nature seek Society for its own sake, but that we may receive some Honour or Profit from it."[53] All the goods that Aquinas takes to be more choiceworthy than one's particular good are relegated by Hobbes to the status of mere means to one's particular good.

49. Hobbes, *Leviathan,* chap. 6, pp. 26–27; chap. 11, p. 49.

50. For the view that the dominance of the fear of death is the result of the fact that life is the sine qua non for the satisfaction of all other desires, see Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Genesis,* trans. Elsa M. Sinclair (Oxford: Clarendon, 1936), p. 15; for the view that the dominance of the fear of death is due to the intrinsic bodily aversion to decreases in vital motion, see Hampton, pp. 14–15. Nothing precludes the possibility that both of these accounts are correct; the dominance of death aversion might be overdetermined. Indeed, Hobbes does seem to refer to both of these accounts in a single passage: "Necessity of nature maketh men . . . to avoid that which is hurtful; but most of all that terrible enemy of nature, death, from whom we expect both the loss of all power, and also the greatest of bodily pains in the losing" (*The Elements of Law, Natural and Politic,* pt. 1, chap. 7, sec. 4). Clearly Hobbes is offering two reasons here for the primacy of the fear of death: death is accompanied both by "the loss of all power" and "the greatest of bodily pains." The former of these considerations is the focus of Strauss's reading; the latter is the focus of Hampton's. For, as power is "one's present means, to obtain some future apparent good" (Hobbes, *Leviathan,* chap. 10, p. 41), it would seem that the loss of power that accompanies death is feared because being alive is a necessary condition for securing future goods; as Hobbes identifies pain with the hindering of vital motion (*The Elements of Law, Natural and Politic,* pt. 1, chap. 7, sec. 1), death—the ultimate hindering of vital motion—would be feared as the most painful thing that can happen to one.

51. Hobbes, *Leviathan,* chap. 13, p. 61.

52. Ibid., chap. 30, p. 178.

53. Hobbes, *De Cive,* chap. 1, sec. 2.

Although Hobbes's account of goods differs radically from Aquinas's, the structure of Hobbes's natural law is quite similar to Aquinas's. Consider the following question: How would Aquinas have proceeded in giving an account of natural law if self-preservation were the good that trumped all others? Clearly, the primary precept of that system of laws would be that self-preservation is to be sought; any secondary precepts would prescribe actions that are instrumentally valuable toward the attaining of the goal of self-preservation. And this is the kind of account we find in *Leviathan:* "A LAW OF NATURE, (*Lex Naturalis*,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved."[54] Two features of this definition deserve immediate notice. First, Hobbes explicitly holds that it is with means to self-preservation that the laws of nature are concerned; indeed, later he refers to self-preservation as "the ground of all Lawes of Nature."[55] All laws of nature are directives that forbid one from doing that which will cause his or her destruction. Second, they are general rules found out by reason. Reason, for Hobbes, is such that when it is correctly used the result is science; science consists of universally true judgments.[56] Hence, in calling each law of nature "a generall Rule, found out by Reason," Hobbes is claiming that such a precept is an infallible guide to be followed in order to preserve one's life. Such a definition of laws of nature at least approximates what Aquinas would lay down were he working under the assumption that self-preservation conceived as death avoidance is the good that is ordered above all others. Laws of nature would be concerned with how that end state is to be attained and would absolutely proscribe any action which would undercut the goal of obtaining this good.

Hobbes's catalog of the laws of nature, then, is a list of precepts the following of which is instrumentally valuable to the preserving of one's life. The most fundamental of these laws is that one ought to seek peace, and when peace is not to be found, to use all advantages of war;[57] all of the other laws of nature are deduced by reference to their conduciveness to peace. The difficulty that Hobbes confronts, though, is that, as stated, the laws of nature that Hobbes presents do not seem to be infallible precepts the following of which is necessary to secure the agent's life. For, if other persons are not following those precepts as well, one might very well be (as Hume was later to put it) "the cully of [his or her] integrity" if one were to act according to

54. Hobbes, *Leviathan,* chap. 14, p. 64.
55. Ibid., chap. 15, p. 79.
56. Ibid., chap. 5, p. 22.
57. Ibid., chap. 14, p. 64.

them.[58] If I honor my contracts in keeping with the third law of nature while others do not, I am at best doing something that is useless for securing my life and at worst making my existence rather more precarious. How, then, can Hobbes say that the laws of nature are infallible precepts?

Hobbes preserves the status of the laws of nature as infallible guides to conduct by invoking a distinction that played a crucial role in my earlier argument, that is, the distinction between *in foro interno* validity and *in foro externo* validity. Hobbes holds that the *in foro interno* obligation imposed by the laws of nature is "Immutable and Eternall"; the *in foro externo* obligation is imposed by the laws of nature only when there is "sufficient Security."[59] Consider once again why Hobbes rejects the universal *in foro externo* obligatory character of these laws: "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 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."[60] Hobbes here rejects an ever-present *in foro externo* obligation to obey the laws of nature because acting according to those laws when others do not does not further the aim of self-preservation that the laws of nature are formulated in order to secure. (Indeed, one who resolutely adheres to those precepts in the face of massive noncompliance puts one's life into grave danger.) Similarly, he characterizes the conditions under which there is an *in foro externo* obligation to obey those laws by referring to the aim of self-preservation: "He that having sufficient Security, that others shall observe the same Lawes toward him, observes them not himselfe, seeketh not Peace, but War; and consequently the destruction of his Nature by Violence."[61] The obligation to act according to the laws of nature when one has security that others will do so as well is explained by the fact that were one not to do so, he or she would be pursuing a course that instigates war and thus brings about one's own violent death. Although Hobbes does not provide an explanation for why the laws of nature always oblige *in foro interno,* I imagine he would say that having a "readinesse of mind" to act on the laws of nature if others were to do so as well places one in no danger and that being willing to follow them in the right circumstances is a necessary condition for peace ever to be attained.[62] It is clear, then, that it is the fact that self-preservation

58. David Hume, *A Treatise of Human Nature,* ed. Ernest Mossner (Baltimore: Penguin, 1969), 3.2.7.

59. Hobbes, *Leviathan,* chap. 15, p. 79.

60. Ibid.

61. Ibid.

62. The quoted material comes from Hobbes, *De Cive,* chap. 3, sec. 27.

is the good on the basis of which the laws of nature are formulated that leads Hobbes to distinguish between the *in foro interno* and *in foro externo* binding power of the laws of nature—a distinction that has no place in Aquinas's account of the natural law.

We are now in a position to make explicit the source of the differences between Aquinas's and Hobbes's ultimate explanations for the consistency of the natural and the civil law. Consider the division that was made at the beginning of this article between the commands of the sovereign that one is not obligated to obey and the commands of the sovereign that one is obligated to obey. The reason that commands of the sovereign that subjects are not obligated to obey are denied the status of law is that one has no good reason to act according to them; the reason that commands of the sovereign that subjects are obligated to obey can never conflict with civil law is that the sovereign's command contrary to the law of nature renders that law *in foro externo* invalid. In both of these cases it is the place of self-preservation in Hobbes's account of goods that guarantees the consistency of the natural and civil law.

Note that all of the commands of the sovereign that subjects are not obligated to obey—that is, commands to kill or maim oneself, not to resist assaults, to abstain from use of items necessary for life, to confess to crimes (except if pardon is guaranteed), and to serve as a soldier (unless certain conditions obtain)[63]—are dictates prescribing those actions the performance of which is likely to cause death or other serious bodily harm to the subject. As such, these are actions that subjects have no good reason to perform under any circumstances. (Indeed, one could formulate laws of nature proscribing such actions that would always be *in foro externo* valid.) Hobbes makes clear that is because of the foreseeability of death resulting from these actions that no one can undertake an obligation to perform them: "No man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment, (the avoyding whereof is the onely End of laying down any Right)."[64] The commands of the sovereign that subjects are not obligated to obey, then, are those commands the obeying of which would be contrary to the good that is ordered above all others, that is, self-preservation.

If the commands of the sovereign are obligatory and therefore civil law, then it is once more the status of self-preservation as the ground of the laws of nature that guarantees that those laws will not be valid *in foro externo* and thus will not conflict with the civil law. As we saw above, the laws of nature are *in foro externo* invalid when there

63. Hobbes, *Leviathan*, chap. 21, pp. 111–12.
64. Ibid., chap. 14, pp. 69–70.

is no guarantee that there will be general compliance with those laws, because only when there is general compliance with them are they infallible precepts dictating how one must act in order to secure one's life. But if the sovereign issues a command that subjects disobey the laws of nature, though, one has good reason to believe that there will not be general compliance with those laws. Once more, then, it seems as though it is the status of self-preservation as a dominant good that rules out a class of possible conflicts between civil and natural law. For the status of natural laws as valid *in foro externo* only under certain conditions results from those laws' being instrumental means to the end of self-preservation; and those laws are not instrumental means to the end of self-preservation when a sovereign issues the command to act against them.[65]

I have shown that Aquinas's and Hobbes's ultimate explanations for the consistency of natural and civil law are quite similar and that the only differences between them are a result of their different accounts of goods. It seems, then, that if Hobbes is to be denied the title of natural law theorist of civil law, it must be due to some feature or other of his account of goods. But what would this feature be? It might be argued that it is Hobbes's catalog of goods that precludes him from being a natural law theorist, or it might be argued that it is his account of what goodness consists in that precludes him from being so classified. Both of these options, though, seem unpromising. With regard to the former option, I do not know what criteria one would apply to determine what goods must be included in or excluded from one's catalog of goods if one is to be a genuine natural law theorist. (To be a genuine natural law theorist is, of course, not necessarily to be in possession of the correct natural law theory.) But I imagine that the criteria are or should be rather loose; perhaps there are no content restrictions at all, or perhaps the restrictions on goods should only extend to those which are obviously not goods at all or those which are obviously merely instrumental goods. At any rate, it does not seem

65. Indeed, the failure of adherence to the laws of nature to promote one's preservation when the sovereign issues a command to act against them is on Hobbes's view probably even more radical than I have portrayed it here. Hobbes holds that each person must suppose that violation of the civil law will be met with punishment—or else the sovereign's command will be "not a Law, but vain words" (ibid., chap. 27, p. 152). So not only does the sovereign's command strip one of the guarantee of coordination that makes adherence to the law of nature conducive to one's preservation, it also gives one reason to believe that violating the civil law will unleash the power of the sovereign against one, thus putting one's preservation into great danger. Given the sort of response that he makes to the Foole, it seems that Hobbes would think that the prospect of disobeying the sovereign's commands while managing to avoid detection and punishment is something that a subject can neither "foresee, nor reckon upon" (ibid., chap. 15, p. 73).

peculiar that there would be a genuine natural law theorist whose theory of goods placed self-preservation as the dominant good. We should note, however, that although Hobbes's rather short list of natural human goods does not disqualify his theory as a natural law account of civil law, this feature of his theory explains why his view could easily be taken to be a variety of positivism. A typical natural law theory, such as Aquinas's or Finnis's, provides a catalog of human goods much richer than Hobbes's,[66] and as a result provides a correspondingly longer list of ways that a norm could violate these goods and therefore be denied legal validity. On Hobbes's view, though, it is much more difficult for a sovereign's command to violate the requirements of the natural law. It is the weakness of the restraint that the natural law places on a sovereign's commands that gives Hobbes's legal theory a false appearance of positivism.[67]

The latter option, that Hobbes's account of goodness should preclude him from being considered a natural law theorist, might appear closer to the mark. Hobbes is notorious for holding that goodness is defined in terms of the appetites and aversions that one has: "But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth Good: And the object of his Hate, and Aversion, Evill."[68] It follows from his view that good and evil are relative concepts: "These words of Good, [and] Evill . . . are ever used with relation to the person that useth them."[69] One might think, following Jean Hampton, that this account of goodness is incompatible with any natural law theory.[70] On her view, only those who hold objectivist accounts of goodness can be natural law theorists. It is unclear, though, why one would assert such a connection between natural law views and objectivist accounts of goodness. It would seem that it would be sufficient that one's account of goodness allow the possibility that for all human beings there are certain things that are indeed naturally good. And it is clear that the existence of such natural goods is compatible with Hobbes's account of goodness: although good is a relative notion, due to the basic similarity of their constitutions people have a natural appetite for certain things (e.g., food, excretion, and exoneration) and a natural aversion for others (e.g., death and wounds).[71] Hobbes's account of goodness does allow for the presence of such natural goods, and it is unclear why anything further would be required for him to be counted a natural law theorist.

66. See, e.g., Aquinas, 1a–2ae.10.1 and 1a–2ae.94.2; Finnis, pp. 86–90.

67. I am indebted to an anonymous reviewer at *Ethics* who suggested that I remark on this point.

68. Hobbes, *Leviathan,* chap. 6, p. 24.

69. Ibid.

70. Hampton, p. 33.

71. Hobbes, *Leviathan,* chap. 6, p. 24; chap. 13, p. 63.

In the first part of this article, I argued that it is a mistake to think that the possibility of conflict between natural and civil law marks Hobbes's view as a variety of legal positivism; on Hobbes's account, there can be no such conflict. In the second part of this article, I argued that Hobbes's explanation for the consistency of natural and civil law is quite similar to the explanation offered by Aquinas, who is undoubtedly a natural law theorist of civil law; I also argued that the divergence of Hobbes's account from Aquinas's is due only to the fact that Hobbes and Aquinas hold different accounts of goods. If Hobbes's account of goods does not preclude him from being considered a natural law theorist—and I have suggested that it does not—then it is reasonable to think that in matters of jurisprudence Hobbes was more a latter-day Thomas Aquinas than an early version of John Austin.