HOBBES TODAY

Insights for the 21st Century

Edited by S. A. LLOYD

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Hobbes Today: Insights for the 21st Century brings together an impressive group of political philosophers, legal theorists, and political scientists to investigate the many ways in which the work of Thomas Hobbes, the famed 17th-century English philosopher, can illuminate the political and social problems we face today. Its essays demonstrate the contemporary relevance of Hobbes's political thought on such issues as justice, human rights, public reason, international warfare, punishment, fiscal policy, and the design of positive law. The volume's contributors include both Hobbes specialists and philosophers bringing their expertise to consideration of Hobbes's texts for the first time. This volume will stimulate renewed interest in Hobbes studies among a new generation of thinkers.

S. A. Lloyd is Professor of Philosophy, Law, and Political Science at the University of Southern California. She is the author of *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge, 2009) and *Ideals as Interests in Hobbes's* Leviathan (Cambridge, 1992).

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Editor's Introduction

S. A. Lloyd

The purpose of the present volume is to help to energize a new generation of North American Hobbes studies by recruiting some talented political philosophers, both established authorities and emerging scholars, to turn their attention to the relevance of Hobbesian theory to the problems we confront today. Some of the writers are Hobbes scholars, but many are applying their specialties to Hobbes for the first time. Our common hope is that by showing the continuing relevance and usefulness of Hobbes to 21st-century open problems, others may consider investigating whether study of Hobbes may be useful in addressing the problems that concern them.

North American Hobbes studies zoomed to international prominence in the 1980s with the nearly simultaneous publication of the game-theoretic interpretations by Gregory S. Kavka and Jean Hampton, developing the approach pioneered by Gauthier in his seminal work of 1969. It received a second wave of interpretive attention in the 1990s by scholars such as Edwin Curley, this author, and A. P. Martinich, seeking to integrate Hobbes's extensive discussions of religion into his larger political theory. Both of these movements, though in different ways, challenged the orthodoxy of traditional interpretations attributing to Hobbes an unrealistic and narrowly truncated human psychology, with its patently false conclusion that order can always be maintained by mere brute force.

But when that familiar yet barren Hobbes is discarded, does he have anything of use to us today? The authors in this volume answer with a resounding "Yes!" From the structure of political institutions and the authority of law; to domestic problems of punishment, fiscal policy, public reason, and the duty of military service; to just relations on an international scale, human rights, and the ethics of war, Hobbes continues to provide resources to refine our thinking.

Joshua Cohen's chapter, "Getting Past Hobbes," which presents an element of his forthcoming larger work on Hobbes, *Protection for Obedience*, critically assesses Hobbes's argument that it would be irrational to impose

normative limits and institutional constraints on sovereign authority. He explores Hobbes's case against such limits and constraints – his case against what Cohen calls a "normative order" – and shows how that case depends on a very restrictive and highly controversial set of assumptions about the conditions of human interdependence and what we can expect from politics, rather than merely on a widely accepted set of claims about human nature and the circumstances of human life. When applied to more realistic assumptions, Hobbesian reasoning in fact supports a normative order.

David Braybrooke's chapter offers a much needed thumbnail overview of the intended arc of Hobbes's political writings. Hobbes was not a champion of democracy. Nonetheless, he made full allowance for democracy as one type in his typology of sovereignty. The allowance not only accommodates democracy, it accommodates democracy in its representative form, and as remarkably stable, as modeled, for instance, by Schattschneider, capable through party competition of peacefully changing a regime by changing parties. Braybrooke sets in context the practical project with which Hobbes engaged, and suggests that he largely succeeded.

In "Hobbes's Theory of Rights: A New Application," Eleanor Curran notes that although the seemingly extensive and centrally important individual rights that Hobbes describes in *Leviathan* have often been seen by modern Hobbes scholars as stalling in the face of absolutism, not all of Hobbes's contemporaries were so convinced. Critics such as Bramhall (1658) and Clarendon (1676) saw the infamous chapter 21 of *Leviathan,* where Hobbes discusses "the true Liberty of a Subject," as an undoing of the carefully constructed absolute power of the sovereign or, even worse, as John Bramhall memorably termed it, as a rebel's catechism.

But on close examination, Curran maintains, Hobbes's theory of rights is revealed as a striking and conceptually elegant theory that looks forward to the modern, secular rights theories of the 20th century, rather than backward to traditional theories of natural rights and natural law, as is the case, for example, with Locke's far more famous theory. The argument of her chapter is that Hobbes breaks with the natural law tradition of the early modern theories of *natural rights*, and moves instead to justify the rights of each individual without recourse to the theological or metaphysical premises of traditional natural law theory. Presaging the modern, secular "will" and "interest" theories of rights of the 20th and early 21st centuries, Hobbes seeks to ground the notion of a right in a concept that requires no such contestable premises and relies rather on nothing more than a careful analysis of what we mean when we use the term "right." The concept that Hobbes picks out as foundational for rights is that of liberty. In ridding himself of the reliance on the premises of traditional natural law, Hobbes gives us a theory of rights that is credible today and that, Curran suggests, may point the way to tackling some of the seemingly intractable problems faced by modern rights theories.

Claire Finkelstein writes, in "Hobbesian Legal Reasoning and the Problem of Wicked Laws," that no jurisprudential question is more important, and at the same time more difficult, than that of the status of morally repugnant laws. Indeed, one might say that this question has come to define postwar jurisprudence, as it is the central manifestation of the debate between the natural lawyers, those who think that the concept of law is limited by that of moral obligation, and the legal positivists, those who rather think it defined by the authority of political sovereigns over their subjects.

Finkelstein maintains that the standoff between natural lawyers and positivists on wicked laws, and the correlated question of the legitimacy of prosecuting individuals who act under such laws, is as timely a question today as it was when Gustav Radbruch first attacked H. L. A. Hart and other positivists for having contributed to the rise of Nazi law by espousing a view of law that disconnected it from its moral roots. In our own time, the problem has recently made itself felt in concerns about the legality of the way in which the United States is waging the War on Terror, and in particular the question of whether former officials of the Bush administration should be prosecuted for authorizing the torture of suspected terrorists. From the standpoint of natural law, the legal opinions of Justice Department officials authorizing this treatment arguably cannot be given the status of law, given their violation of basic principles of human rights. Like the German lawyers and judges of the Third Reich, they are subject to prosecution for their distortions of law, and those who acted in accordance with these legal opinions cannot shield themselves from prosecution by purporting to act in accordance with law. On a positivistic approach, by contrast, such prosecutions would be difficult to justify. Whatever the wisdom of such policies, their legality may be difficult to question. This is particularly so with regard to the actions of those acting on the legal directives of higher officials.

Finkelstein argues that an examination of the legal philosophy of Hobbes sheds light on this well-worn but important debate between positivists and natural law theorists. Hobbes's approach to law presents a middle road between the two standard theories: It incorporates content-based restrictions on the notion of law without embracing tendentious natural law commitments. Although Hobbesian jurisprudence contains a number of elements of both positivist and natural law theory, if understood correctly, it would provide a third alternative to the traditional array of jurisprudential approaches to the nature of law. Legal contractarians garner the central benefit of the naturalistic approach on this question – they are able to deny evil regimes the status of law – but do so on the basis of rationalistic, rather than moralistic, assumptions. For this reason, the problem of wicked laws and legal regimes that has so vexed legal theorists of both natural and positivistic orientation is better resolved in a contractarian theory of the sort Hobbes proposes.

Kinch Hoekstra investigates, in his chapter "Hobbesian Equality," Hobbes's famous assertion that human beings are naturally equal. Examining Hobbes's views on the equality of liberty, right, and ability, Hoekstra offers a novel account

of why Hobbes makes the assertion. Although his analysis raises doubts about the widely accepted view that natural equality is a foundational premise of Hobbes's moral and political philosophy, it suggests an understanding of Hobbesian equality that is arguably more worthy of our contemporary consideration.

Arash Abizadeh offers, in his "The Representation of Hobbesian Sovereignty: *Leviathan* as Mythology," an argument that readers of Hobbes have often seen his *Leviathan* as a deeply paradoxical work. On the one hand, recognizing that no sovereign could ever wield enough coercive power to maintain social order, the text recommends that the state enhance its power ideologically, by tightly controlling the apparatuses of public discourse and socialization. The state must cultivate an image of itself as a mortal god of nearly unlimited power, to overpower its subjects and instill enough fear to win obedience. On the other hand, by drawing explicit attention to the ideological and partly illusory bases of the state's power, *Leviathan*, itself construed as a political intervention designed to appeal to a broad English readership, appears to undermine the very program it recommends. Indeed, many have argued that *Leviathan*'s substantive political–philosophical doctrine is flatly at odds with the authority that Hobbes claimed for himself in order to advance that doctrine. The paradox, Abizadeh argues, is only an apparent one. Precisely because Hobbes believed that in practice no one could ever become the mortal god that sovereignty requires, that is, that the seat of sovereignty could never actually be securely occupied and fully represented by a mere mortal, he sought constantly to remind his readers of the precariousness of earthly sovereignty by pointing to its illusory basis. Far from seeking to undermine the sovereign, however, this reminder was designed to enhance readers' fears, especially the fear that, despite the security they may enjoy today, the slightest misstep may lead them straight into the horrors of the state of nature. Hobbes's purpose was, in other words, to enhance the sovereign's power by enhancing not our fear of *him*, but out fear of his absence. Ironically, this is also in part why Hobbes insisted on the individual's inalienable right of self-defense, an insistence that has puzzled many of his readers, given Hobbes's obvious wish to defend absolute, unlimited sovereignty. Its political function is not to provide a covert *justification* for resistance theories. Rather, by reminding his readers of their right but doing so while addressing them as isolated atoms whose resistance would be hopeless, Hobbes sought to remind each one of the ultimate impossibility of securely filling the seat of sovereignty, without encouraging anyone actually to resist the most promising pretender. Like God-talk, Hobbes's representations of sovereign power do not ultimately comprise descriptive propositions at all: they are expressions of praise and honor designed to help create the very thing they purport to describe. Abizadeh concludes that Hobbes was keenly aware that indivisible state sovereignty is an ideological construct whose terms are never fully realized in practice.

In Part II of this collection, Application to Civil Society and Domestic Institutions, scholars address contemporary problems internal to states using Hobbesian resources.

Gerald Gaus, in his chapter "Hobbes's Challenge to Public Reason Liberalism: Public Reason and Religious Convictions in *Leviathan*," argues that in the last twenty years we have witnessed a resurgence of claims by religious citizens that they must be free to express, and act upon, their faith in the political arena when deciding what is just and unjust, right and wrong. Many citizens of faith have particularly objected to the doctrine that politics and reasoning about justice should be conducted in terms of a "public reason" that all citizens share, and that can instruct a citizen to restrict appeal to his or her religious convictions.

Hobbes, who was reacting to what he saw as the extreme claims of conscience by some parties in the English Civil War, developed a doctrine of public conscience that, at least *prima facie*, presents a radical rejoinder to claims of the public status of private conscience. In *Leviathan* Hobbes writes that one disease of the commonwealth derives from what he calls the poison of the seditious doctrine "*That every private man is judge of good and evil actions*." Another doctrine repugnant to civil society is that "*whatsoever a man does against his conscience, is sin;* and it dependeth on the presumption of making himself judge of good and evil." Hobbes appears to see diversity of private conscience as a threat to political order, and so citizens must follow "public conscience" – the law – in judging good and evil (when it is available).

Gaus's chapter focuses on two issues, one of Hobbes interpretation and one of broader political philosophy. The interpretative question is what Hobbes can mean by a "public conscience" about good and evil. Hobbes denies that belief can be commanded, even by the sovereign. Given this, what is "public conscience" and how can it override the individual's private conscience based on what his reason endorses? The wider question is whether Hobbes's doctrine is as radical as it seems. Citizens of faith stress that fidelity to their convictions and conscience requires that, when deliberating about politics, they speak what they see as the whole truth – their judgment of what God requires. But what happens after the political process has concluded and a law has been passed that they opposed? If the integrity of religious citizens required that they *speak* against the law as their private conscience demands, does not this same appeal to integrity show they must *act* on their private conscience, even if the law commands otherwise? Does God insist that people speak the truth as He reveals it, but not act on it? If, however, religious integrity demands not simply political speech, but also action in conformity to what one sees as the whole truth, Hobbes seems right to say that defending such integrity is a "seditious doctrine."

Neil McArthur tackles issues closer to the pocketbook. In his chapter, "'Thrown amongst Many': Hobbes on Taxation and Fiscal Policy," he provides a general survey of Hobbes's views on taxation and trade, followed by a detailed philosophical discussion of (what we would now call) fiscal policy. He shines a bright light on Hobbes's view that government should usurp the role of the church and private charities in providing for its citizens' basic economic needs. McArthur analyzes Hobbes's argument as based on three propositions:

1. Contrary to those who see the unfettered right to property as rooted in nature, property rights are a creation of government, which therefore may abridge them where this is necessary.
2. To ensure social order, the government must ensure citizens are provided with a minimum level of sustenance.
3. Taxation and public spending – to which the state is entitled, as per (1) – are the most efficient means of accomplishing (2).

McArthur argues that Hobbes's argument remains a compelling justification of the welfare state, and concludes by arguing that Hobbes's views on the dangers of luxury and the need for individual thrift, which appear to be rooted in a now-outdated moralism, actually speak directly to one of the pressing problems with the modern welfare state: its tendency to discourage individual savings.

Alice Ristroph, in her chapter, "The Imperfect Legitimacy of Punishment," finds in Hobbes a resource to correct our presently unjust system of punishment. She argues that close observers of criminal justice systems in contemporary liberal democracies tend to agree about two things. They agree that some form of punishment is normatively legitimate, and they agree that existing punishment practices are far from the normative ideal. The U.S. criminal justice system is the target of the greatest criticisms, but, increasingly, the penal systems of Britain and continental Europe are also coming under fire. According to the majority view, there is a right way for liberal constitutional democracies to punish – but no one is getting it right, and over time the failures are multiplying rather than decreasing.

Ristroph's chapter explores the possibility that punishment is not only not justified in practice, but also not justifiable in theory. Perhaps modern forms of punishment – incarceration and, much more rarely, execution – cannot be fully reconciled with the criteria for political legitimacy set forth in modern liberal theory. This conclusion is suggested by a study of punishment at the birth of liberalism: punishment as explained by Thomas Hobbes. According to Hobbes, the sovereign's power to punish is derived from a natural right of self-defense, and buttressed by the authorization of citizens who are not themselves punished. But to the condemned man, punishment is an act of violence, and Hobbes insists that the condemned person has a right to resist punishment. In exploring the tensions between the sovereign's right to punish and the subject's right to resist, we find an account of punishment arguably more honest and egalitarian – and more liberal – than the better-known theories of punishment. Reconsidering Hobbes on punishment should provoke new questions about Hobbes's political theory. No less urgently, Ristroph argues, it should steer contemporary punishment theory and contemporary penal practices in a radically different and more promising direction.

Susanne Sreedhar's contribution, "In Harm's Way: Hobbes on the Duty to Fight for One's Country," considers the questions of whether and under what

circumstances a subject has a duty to risk her life for her country. The issue of military service brings into conflict two central aspects of Hobbes's political doctrine: his claim that political obligation is grounded in, and limited by, rational self-interest and his claim that subjects can be obligated to perform acts that are clearly *not* in their rational self-interest. Sreedhar explores the tension between these two claims, evaluates two ways of reconciling them, and argues that this clash is unavoidable in Hobbes's philosophy.

Hobbes is commonly taken to ground political obligation (i.e., the obligation to obey the laws of the state or "the commands of the sovereign") in rational self-interest; only by submitting to the authority of an absolute – undivided and unlimited – sovereign power can we truly escape the horrors of the state of nature. Hobbes is also very clear that one's obligation to obey the sovereign's commands is nullified when one's life is in danger, and his argument for an inalienable right of self-defense has been heralded as one of the main achievements of his social contract theory. On Hobbes's account, the right of self-defense is construed very widely to include not only the right to resist the sovereign in the face of immediate and certain death but also, under certain circumstances, to disobey commands that are simply dangerous.

Sreedhar notes that Hobbes insists that all subjects have a duty to serve when the help of all is needed for the preservation of the commonwealth, but provides little argument for this claim. Given that political obligation is grounded in the subject's interest in self-preservation, it is unclear how Hobbes can ever justify an obligation to risk one's life at the command of the sovereign. But how can there be an effective and stable Hobbesian commonwealth if none of its subjects are obligated to undertake dangerous or risky behavior? After all, law enforcement and military service are essential for the maintenance of domestic peace and national security. Since the justification for Hobbes's absolutist state is that only an unlimited and undivided government can provide security, how can Hobbesian subjects be obligated to engage in activities that will make their lives fundamentally insecure?

Gregory Kavka and Deborah Baumgold are the two commentators who have paid the most attention to this issue, and both try to defend Hobbes on this point. Kavka's approach is to argue that people, as Hobbes conceives them, would show a general willingness to fight and die for their country. For example, he argues that the dishonor of being a deserter or a draft-dodger will motivate people to join and remain in armies. While Kavka's account does justice to Hobbes's claim that people are essentially preoccupied with reputation and honor, Sreedhar argues that Kavka's argument misses the point: The question is not whether or not people will be able or willing to obey a command that would seriously threaten their lives, but rather whether or not people can, on Hobbes's picture, be *obligated* to do so. Baumgold, on the other hand, attempts to ground a possible Hobbesian obligation to serve in a military by way of Hobbes's notion of authorization. The idea that subjects authorize the sovereign appears only in *Leviathan*, and Baumgold argues that

Hobbes includes it in order to answer this very question. However, a careful analysis of Hobbesian authorization reveals that it cannot do the work Baumgold wishes it to do. Sreedhar concludes that justifying the obligation subjects may have to defend their countries is a real, if not a unique, problem for Hobbes.

Maryam Qudrat's chapter, "Confronting *Jihad*: A Defect in the Hobbesian Educational Strategy," begins by describing the rise of the Taliban in the mid-1990s in Afghanistan and situating it in Hobbesian terms. The particular content and methods of its educational system are described in detail. Qudrat then explains the features of that system that made it vulnerable to such an easy overturning by invading forces. She argues that this vulnerability is an ineliminable defect of the educational model Hobbes proposed. Hobbes insisted that only pervasive and uniform education – we might rather think of it as indoctrination – could force the internalization of attitudes of willing deference needed to ensure stability. But mere deference is not a principled commitment, and sheepish followers beaten down by an "educational system" that compels them uncritically to parrot whatever they are told will not have the wherewithal to defend their regime against any threat, whether external or internal. The very sort of charismatic "seducers of the people" that so exercised Hobbes find easy prey in a society of sheepish Hobbesian followers. Hobbes's educational system proves self-defeating.

Qudrat concludes by offering a sketch of a more useful educational model that preserves Hobbes's insights about the importance of education in any stable theocracy, while incorporating elements of John Stuart Mill's "marketplace of ideas" to enable citizens to forge a principled attachment to the system that sustains social order.

Part III of this volume turns to the Application of Hobbes to problems of global scope.

Chris Naticchia argues, in his "Hobbesian Realism in International Relations: A Reappraisal," that Hobbesian realism in international relations refers to a family of views that have come under heavy attack: the view that it is inappropriate to make moral judgments about international affairs; that it is wrong to criticize leaders of state for their foreign policy decisions; that international affairs is a state of nature that must issue in a state of war; that there is a national right to self-preservation; that leaders of state may do whatever is in the national interest; and finally, that, as trustees, they may act solely in pursuit of their national self-interest. Naticchia offers a qualified defense of Hobbesian realism in international relations. He distinguishes these various views and argues that one of them – the view that leaders of state are trustees who may act solely in pursuit of their national self-interest – best extends the spirit of Hobbes's philosophy and has the virtue of being independently plausible as well. Finally, Naticchia explores the limits of this view, arguing that what limits there are derive from the limits of consent theory generally and are not unique to Hobbes's particular version of it.

Aaron James writes on "Hobbesian Assurance Problems and Global Justice." He argues that one of Hobbes's enduring insights is the importance of assurance problems for the basic nature of social justice. They remain particularly important for currently unresolved questions about whether or how justice applies in the global context. Though problems of assurance have been much discussed in the debate between anarchists and institutionalists about international relations, both schools assume that states are egoistic, and consequently fail to appreciate their full force. Assurance problems equally arise among altruistic actors – perhaps only because of known differences in moral situation, interpretation, and judgment. Hobbes's insight is that such differences in "private judgment" require public resolution. James argues that, while this does not quite require sovereign rule, as Hobbes claimed, it does imply, contrary to "cosmopolitan" views, that basic issues of human rights and global distributive justice must take a fundamentally international and institutional form.

In my chapter, "International Relations, World Government, and the Ethics of War: A Hobbesian Perspective," I construct a scaffold to support a Hobbesian system of international relations. What, I ask, is the relationship between democratic citizenship and responsibility for those policies of one's government that are morally indefensible? Might terrorist attacks on the citizens of democratic states aimed at motivating those states to cease their wrongful policies be justifiable, while attacks on armed conscripts under an autocratic state for similar policies might not be? Hobbes proves a surprisingly helpful resource for investigating these questions. He provides an elaborate argument that might sustain Michael Walzer's under-argued position that those who act wrongfully but only in response to the government's command are not to be held responsible in a way that would legitimate targeting them with violence. If Hobbes is right, our status as democratic citizens will not usually expose us to greater moral liability than subjects of autocratic regimes bear.

Jeff McMahan, in his chapter "Hobbesian Defenses of Orthodox Just War Theory," explores the pervasive assumption that morality applies differently in war than the way it does in other contexts. Hobbes is taken as perhaps the most influential progenitor of this general view. He argues that morality can arise only through agreement enforced by an absolute sovereign and hence that there can be no morality in a state of nature. Because war is a relation between states and states exist in a state of nature vis-à-vis one another, there can be no morality of war. An argument of this sort is probably the best foundation for the view of the political realists that morality has no application in conditions of war. Some Hobbesians, however, might accept a weaker conception than Hobbes's of the conditions in which a contract is binding and enforceable, and thus might argue that international law has reached or is leading to a point at which principles of morality can apply to war and its conduct. Some might – as many people do, at least implicitly – identify the morality of war with the law of war. Another and more common view is that while war is governed by moral

principles, these principles are different from those that govern other areas of life, including lesser forms of violent conflict. Views of this sort often have a basis in Hobbesian concerns about the absence in war of a common authority over all belligerents, and the absence of an impartial source of enforcement. McMahan's chapter explores the plausibility of these views and considers the rival view that war is continuous with other aspects of human life and is governed by the same moral principles that govern lesser forms of conflict, such as individual self-defense.

Michael Green argues, in "Hobbes and Human Rights," that there is a line of argument in Hobbes that runs between two unattractive ways of thinking about human rights and other moral values in international affairs. One of these alternatives is the naïve thought that human rights are independent of security. Hobbes, by contrast, insisted that what we call human rights depend on the circumstances of those who are asked to respect them. Human rights for me depend on security for you. Green believes that Hobbes's point is an improvement on the naive view but that his argument for it is too strong. One of his concerns is to give a plausible weaker version of Hobbes's argument.

With that in hand, Green turns to the other unattractive way of thinking about human rights, the realist assertion that there are no moral constraints at all in the insecure realm of international affairs. But the contrast realists draw with the domestic realm is too sharp. Why, Green asks, would our values change so drastically at the border? Hobbes has more persuasive grounds for doubt about the use of morality in international relations that do not depend on dismissing moral values altogether. These include the more plausible version of the argument against the naive view of human rights.

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PART I

APPLICATION TO GOVERNMENTAL POWERS AND THEIR LIMITS

I

Getting Past Hobbes

Joshua Cohen

In *Leviathan*, Hobbes defends absolute political authority – authority both institutionally undivided and normatively unlimited. He argues that such authority is preferred to alternative forms of political authority by all rational individuals (insofar as they are rational). The principal advantage of absolute political authority — whether monarchical, aristocratic, or democratic in form – lies in its greater capacity to ensure lasting internal peace. Absolute authority can keep the state from "perishing by internal diseases."[1,2]

However, a political order subject to absolute authority—what I shall call an "authoritative order" – carries, as Locke famously noted, serious risks. Drawing on premises that Hobbes and Locke plausibly shared, I argue that these risks outweigh the benefits of an authoritative order: Hobbesian foundations do not demand Hobbes's absolutist conclusions. Moreover, an authoritative order sharply limits self-government. I suggest that a Rousseauean variant of the sense of self-worth so central to Hobbesian psychology and politics makes a normative order – a political order defined by shared public norms – a real alternative to an authoritative order. Such an order can achieve the reconciliation of self-government and authority that Hobbes thinks is humanly unavailable.

Taking the Lockean and Rousseauean points together, we should not be surprised that many people who find great insight in Hobbes's core assumptions nevertheless reject his political conclusions.

This essay draws from my *Protection for Obedience* (manuscript on file with the author, available on request). I am very grateful to Sharon Lloyd for her wonderfully generous editorial work in extracting this essay from the larger manuscript. I am also grateful to the many graduate students at MIT and Stanford who have been in classes in which I presented the larger argument on which the essay draws.

[1] In the footnotes, references to *Leviathan* are given by chapter and paragraph number, followed by page number(s) in Thomas Hobbes, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991).

[2] *Leviathan*, XXIX.1, p. 221.

PROTECTION FOR OBEDIENCE

Hobbes's political theory is founded on an account of human nature – the "known natural inclinations of mankind"[3] – and the natural facts of human interdependence. He draws two important conclusions from those foundations. First, it is rational for individuals to cooperate peacefully with others – to follow the laws of nature, which together provide a code for the peaceful cooperation of a multitude of individuals – *on condition that* they expect peaceful cooperation from others. Second, despite this conditional rationality of peaceful cooperation, conflict may arise from three sources: *ignorance* of the laws of nature and of the conditional rationality of compliance with those laws; the *temptations* to irrationally short-sighted conduct associated with myopic passions such as pride, envy, covetousness, and jealousy; and lack of *assurance* that others will comply with the laws of nature, despite the conditional rationality of such compliance.

These three sources of conflict – problems of ignorance, temptation, and assurance – are exacerbated by competition for scarce means (what Hobbes generically calls "powers") for satisfying desires. Further pressure to conflict arises from by rationally unresolvable disagreements about which particular specification of the abstract requirements of natural law is best. Because the desire for self-preservation is so fundamental, neither *competition* for scarce means nor the need for *coordination* around a particular specification of the natural laws will by itself generate violent conflict. But they will encourage the passions that do.

Although cooperation is conditionally rational, then, actual cooperation faces serious hurdles. Still, the most pressing human desires are for self-preservation and felicity or happiness (the satisfaction of desires over the course of a whole life). Because the failure of peaceful cooperation presents calamitous threats to both preservation and felicity, these desires give each person strong reasons to want the three sources of conflict resolved. But the only resolution, Hobbes argues, demands a troubling sacrifice of autonomy or self-government. Troubling, because each person "naturally love[s] liberty and dominion over others".[4] Indeed, "there are very few so foolish, that had not rather govern themselves, than be governed by others."[5] However, preferring preservation and felicity above all, thus aiming to secure "their own preservation and a more contented life," all individuals have good reason to support the introduction of "restraint upon themselves".[6] Such (self-)restraint is achieved by subordinating one's own individual will and judgment to the will and judgment of an absolute authority, thus submitting to the constraints on

[3] Ibid., Review and Conclusion, p. 489.
[4] Ibid., XVII.1, p. 117.
[5] Ibid., XV.21, p. 107.
[6] Ibid., XVII.1, p. 117.

liberty imposed by that authority and acknowledging its judgment as taking precedence over one's own. Because our nature and circumstances put us so deeply at odds with each other, because reason only instructs in the pursuit of our separate aims, and because our passions get in the way of rational conduct, we can overcome tendencies to conflict and the attendant misery only by establishing an authority premised on our common subordination: only if I "give up my right of governing myself."[7] Thus the "mutual relation between protection and obedience": a promise of obedience for an assurance of protection.

Hobbes's idea about the need for subordination – more particularly, subordination to an authority that is unified and unlimited – can be understood in terms of the interconnected roles of power and authority in addressing the three sources of conflict. Peace requires an agent with power because power is required to tame or "bridle" the passions and so to resolve the problems of temptation[8] and assurance.[9] Because the laws of nature are "contrary to

[7] Ibid., XVII.13, p. 120.

[8] The theory of natural law in *Leviathan*, XIV–XV tells us that natural laws are elements in a code of peace and that peaceful cooperation is conditionally rational. But those laws run "contrary to our natural passions, that carry us to partiality, pride, revenge, and the like." See *Leviathan*, XVII.2, p. 117. So conflict may arise because (at least some) people fail to act rationally. Even if they expect others to act peacefully, these people are led by such passions as pride (and the anger it characteristically produces), hate, lust, ambition, and covetousness into distorted (short-term and partial) estimates of the consequences of a course of action. Thus blinded by "some sudden force of the passions," agents may (irrationally) fail to cooperate even under conditions in which they expect others to comply, and, therefore, in which rationality dictates their own compliance. The passion of pride is a particularly important source of conflict. Like all passions, pride leads individuals to act with insufficiently prudent concern for their own long-term advantage – and that means without sufficient concern for the long-term personal advantage of peaceful cooperation. Moreover, it leads more immediately to efforts to dominate others and appropriate their powers. For the prideful person has a nonderivative desire to dominate others, experiences joy in such domination, and feels anger from wounded pride at the failure to achieve it. The best response by rational agents in a population that includes agents moved by pride is to take preventive and preemptive measures of self-protection.

[9] Even among fully rational agents, peaceful cooperation may also fail for want of assurance, reflecting mistrust or "diffidence." See *Leviathan*, XIII.4, p. 87. Suppose that everyone recognizes that cooperation is rational if they can count on the cooperation of (most) others. Suppose as well that everyone is in fact fully rational. Still, in the face of uncertainty about the rationality of others (or about their beliefs about the rationality of others) and in the absence of guarantees that others will in fact behave cooperatively, it may be rational to refrain from cooperative behavior oneself, and, anticipating their attacks, to protect oneself by whatever means are available (including preemption). The need for assurance does not depend on the actual irrationality of others. I may think that others are irrational, or that there is some chance that they are irrational (though in fact they are not). If I think they are (or might be), then I will need assurance of my own protection, and if it is not provided by a third party, I will provide it through preemption. Or suppose I think (correctly) that others are rational; and suppose they think I am rational, but I think that they think that I am not rational (whether or not they do makes no difference here). Then I should expect preemptive belligerence from them because I think they expect attacks from me. But if I have that expectation, then it is

our natural passions, that carry us to partiality, pride, revenge, and the like",[10] power is required "to keep them [people] in awe, and tie them by fear of punishment to the performance of their covenants and observation of those laws of nature …".[11] But keeping people in awe requires a lasting power of considerable magnitude. God has such power naturally, and His overwhelming, awe-inspiring power is the source of His authority: "The right of nature, whereby God reigneth over men, and punisheth those that break his laws, is to be derived, not from his creating them as if he required obedience, as of gratitude for His benefits; but from his irresistible power".[12] But the fact of human equality – our equal vulnerability to injury from others – means that no human being naturally has power of this magnitude. So we have to construct an artificial power of sufficient magnitude to address the sources of conflict. And we construct that awe-inspiring power by creating an authority with command over our powers – by each of us submitting our control over our own powers to the will and judgment of an agent. What must this authority be like, then, if, by creating it, we ensure a power of sufficient magnitude to solve the problems of ignorance, temptation, and assurance?

AUTHORITATIVE AND NORMATIVE ORDERS

Consider three ways to construct the power needed to address the sources of conflict.

First, with a "normative order," an association with a shared set of public values and norms such that everyone regards him- or herself (and knows that others regard themselves) as having a supreme obligation to act on those values and norms on condition that others act on them as well. For example, the norms might be that the society should be fair; that everyone should have certain basic liberties; that there should be equal protection under the laws; and that it is impermissible for the government to make laws that conflict with

fully rational for me to act belligerently: and if I do, I confirm others' view about me. There are infinitely many cases here; the general point is that even if all agents are fully rational, there may be conflict rather than cooperation, and therefore a need for assurance. Notice, however, that while cooperation among rational agents fails in many cases, pursuing conflict is not a "dominant strategy": Conflict, that is, is not the best response to the actions of others whatever those actions may be. The state of nature is not a prisoner's dilemma. The mutually disadvantageous outcome of conflict does not result from each doing what is best no matter what the other person does. On the contrary, if I am assured of the cooperation of (most) others, then my best response is to comply with the laws of nature, not to defect from them. That is the thrust of Hobbes's response to the fool, and, in general, of the derivation of the laws of nature. See ibid., XV.4–10, pp. 101–4. The problem of assurance (or diffidence) is that since I am uncertain about the willingness of others to reply to my cooperation with their own, I may need to protect myself by pursuing conflict rather than cooperation.

[10] *Leviathan*, XVII.2, p. 117.

[11] Ibid., XVII.1, p. 117.

[12] Ibid., XXXI.5, pp. 246–7.

the requirements of fairness, liberty, and equality. Alternatively, the shared norms might simply be the laws of nature. Individuals would compact with one another to comply with those laws; they would in effect assign an agent the responsibility to interpret and enforce the laws; and the authority would be acceptable if it remained within the bounds of those laws, reasonably interpreted. In a normative order, it is common knowledge that everyone takes these norms or principles to be the final authority. Political authority in a normative order is understood to be legitimate only if it satisfies these norms. In short, in a normative order, we have limited or conditional authority – limited, because the authority would be legitimate only if it complied with the common understanding of the terms of its proper exercise.

Second, with a political order under divided authority. Intuitively, the idea is not that there is system of agreed norms but an organization of authority – a set of institutions – that is not unified around a single agent. So there might be separate branches of government, each of which is acknowledged by the population to have supreme authority in a specified sphere – for example, one in foreign policy, another in raising revenue, a third in adjudication, and several together in legislation. (Here, I focus on the case of horizontal division, but federal-style vertical division is another possibility.) Policies would then require coordination across these separate spheres of responsibility. For example, foreign policy decisions would require coordination between the policymaking authority and the revenue authority. This might involve constitutionally defined procedures that effectively require the agreement of the different powers before any action is taken.

Third, with Hobbes's authoritative order. By contrast with the normative order, final authority does not lie in a system of norms that each person aims to interpret and follow, but with a determinate agent: not a sovereign scheme of laws, rules, or principles, but a sovereign lawmaker capable of acting. By contrast with the scheme of divided authority, the authoritative order does not have distinct authorities who are understood to be supreme in separate spheres and whose coordination is necessary for state action. Instead, supreme authority is held by an individual (in a monarchy) or group of individuals (in an aristocracy or democracy) who has or have the authority to make the rules, enforce them, and conduct relations with other states (with subordinate officials standing in an agency relation to the supreme authority). That agent is authoritative in that each subject accepts the right of that agent to rule, and so accepts the judgment and will of that one agent as his or her own.

The authoritative order differs from the normative order because it subordinates norms to an agent with authority. It thus rejects the "error of Aristotle's Politics, that in a well-ordered commonwealth, not men should govern but the laws".[13] The authority itself is unconditional or unlimited in that it

[13] Ibid., XLV1.36, p. 471.

stands juridically superior to the laws and norms of the society: Will, not law or reason, is the basis of the state. So there are, for example, no constitutional laws defining the legitimate scope and limits of sovereign authority – thus imposing legal limits on political authority – because all the laws are themselves the commands of and so subject to alteration by the will of the sovereign: "The sovereign of a commonwealth … is not subject to the civil laws. For having the power to make, and repeal laws, he may when he pleaseth, free himself from that subjection, by repealing those laws that trouble him, and making of new; and consequently he was free before."[14]

Two apparent limits on sovereign authority, as Hobbes describes it, may appear to qualify this description of the authoritative order. First, the "true liberties of subjects" are defined as areas of conduct in which subjects are morally at liberty not to comply.[15] Thus, subjects are not obliged, for example, to kill themselves if the sovereign orders them to, nor is a person required to refrain from taking from others when his or her survival is at stake, nor is there any obligation of self-incrimination. But the true liberties do not limit authority because they are not claim-rights that the sovereign or other subjects are required to respect.

Second, Hobbes presents a set of responsibilities associated with the office of sovereign, which include a responsibility to make good laws, which serve the public benefit.[16] But the sovereign's authority is not limited to making good laws. Thus a law's failure to be good has no bearing on its validity as law. And this observation generalizes to all the responsibilities of the sovereign office.

In an authoritative order, then, the test for legal validity looks entirely to a regulation's source, not at all to its content: Whatever the substance of the requirements it imposes, it is valid law, and falls within the legitimate authority of the sovereign, just in case it issues from the sovereign's will. Moreover, in the authoritative order, we have a way to identify the sovereign, the sovereign's will, and the legitimate acts of the sovereign, quite apart from the content of what the sovereign wills. In contrast, the normative order involves

[14] Ibid., XXVI.6, p. 184. On the legal illimitability of sovereignty, see John Austin, *The Province of Jurisprudence Determined*, and the criticisms of legal illimitability in H.L.A. Hart, *The Concept of Law*, chapter 4, and "Sovereignty and Legally Limited Government," in *Essays on Bentham*, chapter 9. According to Austin, "Supreme power limited by positive law is a flat contradiction in terms." Like Austin, Hobbes argues against legal limitation by showing that such limitation is inconsistent with the nature of civil law as a system of sovereign commands. But in the end Hobbes is moved less by considerations of analytical jurisprudence than by the substantive thesis that legal limits on sovereign authority would have destructive implications. So Hart's replacement of commands with rules as the "key to the science of jurisprudence" is much less damaging to Hobbes than to Austin. In any case, my own reconstruction of Hobbes's case for political absolutism does not appeal at all to considerations about the incoherence of legal limitations.

[15] Ibid., XXI.10–7, pp. 150–2.

[16] Ibid., XXX.1, p. 231.

content constraints on legitimate law: An enactment counts as legitimate only if it meets those constraints (or at least, meeting them counts in favor of its standing as legitimate law).

The rationale for a system of divided authority is reasonably clear (I will put the normative order aside for now).[17] Recall that the idea of a scheme of divided authority is to establish several bodies with authority in different spheres – for example, an elected parliament with the authority to control revenue and an independent executive with the authority to enforce the rules and conduct relations with other states. A system of this kind might, first, provide good governance by vesting different sorts of authority in bodies especially suited to its exercise – foreign policy in the hands of a unified and therefore energetic executive, control of revenue in the hands of a body closely attentive to popular concerns, legislation jointly in the hands of a legislature with information about local interests, and an executive with a sense of the demands of enforceability and prospects of compliance.

Second, we might hope that the division of public authority would limit public power, thus leaving greater scope for individual liberty. Now we all "love liberty" because, *ceteris paribus*, more liberty means more opportunity for achieving our aims. So the scheme of divided authority would be preferred by everyone to a system that is equally likely to keep the peace but less protective of liberty.

The problem, of course, lies in "equally likely." Preservation and felicity (and therefore peace) are more fundamental goods than liberty. Liberty is desired as a means; preservation and felicity are the ends. So if divided authority is less likely to keep the peace than an order that leaves less scope for liberty, then it would be collectively rejected in favor of that alternative. To be sure, limits on liberty are undesirable. But the "condition of man in this life shall never be without inconveniences".[18]

The central problem with dividing authority might be understood in two ways. One problem is that such division may be seen as establishing separate fundamental allegiances within a single territory. In effect, we have separate states within a single territory – "not one independent commonwealth, but three independent factions" – comprising those who acknowledge the legislative as supreme, those who acknowledge the executive as supreme, and those who accept the authority of the two operating in concert.[19] Thus, when the predictable conflicts between authorities emerge, when they need to coordinate but disagree, different subjects will ally with different sides in that conflict, and the political society may degenerate into civil war. Alternatively, the

[17] On the distinction between mixed government and a normative order, see Hobbes, *Elements of Law* II.1.13–6. The first two paragraphs describe a normative order; the second two are about mixed government.

[18] *Leviathan*, XX.18, p. 145.

[19] Ibid., XXIX.16, p. 228.

problem might be that when the predictable conflicts emerge, subjects have no fundamental allegiance at all. Either way, civic life threatens to degenerate into civil war.

With favorable circumstances, systems with divided authority may of course (as Hobbes acknowledges) have considerable longevity, providing subjects with conditions of security and felicity. But, as the contention that they are not really one commonwealth but several is meant to suggest, they bear the seeds of their own dissolution into open conflict of the kind experienced in the English civil war. Indeed, the widespread idea that political powers were properly divided "between the King, and the Lords, and the House of Commons" was, Hobbes claims, the principal cause of the English Civil War.[20] Systems with divided powers suffer – as Hobbes thought was evident in England – from a failure to solve the problem of coordinating around a determinate interpretation of the abstract laws of nature. Thus, there are a "diversity of opinions"[21] about the terms of cooperation, with none of the bodies fully having the authority to fix those terms. Moreover, and more fundamentally, because the division of authority (and allegiance) limits public power, problems of temptation and assurance are not adequately resolved. By limiting power and thus reducing the capacity to overawe subjects into obedience, they increase the chances that some – perhaps united by one of the recognized authorities – will be tempted to act against others. Recognizing the increased likelihood of temptations, others lack assurance. Recognizing that lack, others must prepare themselves for conflict.

In short, dividing authority (like limiting authority) limits power. And limiting power diminishes the capacity of the sovereign to address the main sources of conflict.

One final point before proceeding to Hobbes's solution. I have described the defects in schemes of divided authority (parallel points apply to limited authority). But the mere presence of defects is insufficient ground for rational agents to reject them: life is never without inconveniences. Both normative order and divided authority have some advantages over a state of nature with no political authority at all, even if each might, under certain strains, slide back into a calamitous state of nature. Furthermore, each gives greater scope to the good of self-government than an authoritative order. To show, then, that it would nevertheless be rational to reject them, it needs to be shown that the unchained authority of the authoritative order promises to create public power of a kind that is more likely to motivate compliance, therefore more likely to keep the peace, and so more likely to ensure preservation and felicity than the alternatives. If it is, and certainly if the likelihoods are large

[20] Ibid., XXVIII.16, p. 127. In *Behemoth*, Hobbes presents a different diagnosis, with more emphasis on religious authority. See *Behemoth*, *Or The Long Parliament* (Chicago: University of Chicago Press, 1990).

[21] Ibid., XVI.17, p. 115.

enough, then the gains in preservation and felicity arguably outweigh the loss in self-government.

In the authoritative order, then, the unbound sovereign has the right (and the responsibility) to fix a determinate interpretation of the laws of nature, thus addressing the problem of coordination. Moreover, the sovereign has the right and responsibility to inform the subjects of the foundations of their duties, thus addressing the problem of ignorance. Furthermore, each person accepts the authority of the sovereign by authorizing the sovereign to provide supreme guidance for the use of his or her powers. Each thus agrees to subject the use of his or her powers to the supreme direction of the sovereign will. The implication of this common authorization is that the sovereign has the sum of the powers of all members at his or her or its disposal, thus as great a power as is possible within the territory. Given this aggregation of all powers, the sovereign has considerably greater power than any subject. The magnitude of that power, created by authorization, should be sufficient power to overawe individual subjects (with fear) into obedience, should they be tempted to depart from the commands of the sovereign. And because individuals will not be tempted, others will be assured of compliance. People will comply from fear of sovereign power, as the passion of fear is pitted against the conflict-inducing passions. And they will comply because reason recommends compliance, on condition that one expects others to comply.

The establishment (through authorization) of absolute authority, then, better addresses the motivational problems of assurance and temptation than either conditional or divided authority. The essential idea is that unconditional and unified authority maximizes sovereign power, by putting the powers of each individual at sovereign command. And that power in turn is most likely to generate the obedience necessary for protection. "For by this authority, given him by every particular man in the commonwealth, he hath the use of so much strength and power conferred on him, that by terror thereof, he is enabled to conform the will of them all, to peace at home, and mutual aid against their enemies abroad."[22] Limits on or divisions of political authority would not deprive the authority of all power. But lesser power would decrease the level of awe, thus increase the level of temptation, thus weaken the assurance to those who are prepared to obey that their obedience will not be exploited.

To be sure, subjects prefer stronger guarantees that the sovereign will act responsibly, by fostering the public welfare: stronger guarantees that the sovereign will make *good* laws.[23] And they prefer more liberty. But any attempt to impose such guarantees – in the form of basic norms or institutions limiting the authority of the sovereign – would also limit the power of the sovereign. But in limiting that power, they would threaten to undermine its capacity to motivate

[22] Ibid., XVII.13, p. 120.
[23] Ibid., XXX.20–2, pp. 239–40.

people to cooperate by overawing them, taming their disruptive passions. Thus the unification of authority and the absence of any limits on it provide the surest way to construct a power that can prevent the "intestine disorders" that have historically undermined states.

LOCKEAN AND ROUSSEAUEAN TROUBLES

With this sketch of Hobbes's argument for absolutism in place, I now consider two lines of objection to the contention that we must subordinate ourselves to the will of an absolute sovereign, sacrificing autonomy in the name of preservation and felicity.

The first objection begins by stipulating Hobbes's conception of our nature and circumstances, and asks whether, assuming people are as Hobbes describes them, an authoritative order is so clearly the solution to Hobbes's problem. To show that it is, Hobbes must argue successfully that an authoritative order can reasonably be expected to be more stable than a normative order, or a system with divided authority. This problem, I call – following Locke's description of it – the "polecats and lions problem."

Locke writes:

> To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.[24]

Sovereigns are human, given to the same passions as subjects. What good is it, then, to be protected against other individuals who are as powerful as you, if that protection comes from someone who is much more powerful and at least as prone to destructive behavior? If destructive conflicts emerge because of a lack of assurance about the behavior of others, then we face a much more compelling problem of being assured of the sovereign's willingness to be cooperative.

Anticipating this objection, Hobbes proposes a coincidence of interests among sovereign and subjects: "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. It is a weak sovereign that has a weak people; and a weak people whose sovereign wanteth power to rule them at will".[25] Hobbes's case for this coincidence of interests is not that sovereigns undergo or ought to be made to

[24] *Second Treatise*, paragraph 93.
[25] *Leviathan*, XXX.21, p. 240.

submit to a process of education and soul-formation that will lead – as with Plato's guardians – to the identification of their own good with the good of the commonwealth. Rather, the sovereign wants the state to do well because the honor, wealth, command, and other powers of the sovereign derive from – are the accumulated expression of – the honor, wealth, command, and other powers of the subjects.

The case for a coincidence of interests applies, Hobbes says, with special force to monarchies, where "the private interest is the same with the public .... For no king can be rich, nor glorious, nor secure, whose subjects are either poor or contemptible; or too weak through want or dissension to maintain a war against their enemies".[26] But this coincidence pertains in some degree to all forms of commonwealth. For that reason, we should expect sovereigns to fulfill the responsibilities of the office, as natural law requires. Thus, in his discussion of the sovereign's office (*Leviathan* chap. 30), Hobbes argues that over the long term, the sovereign's failure to ensure the preservation of the people and the public welfare will bring on the destruction of the state – rebellion and slaughter. But the destruction of the artificial body that constitutes the state threatens the destruction of the natural person(s) of the sovereign. This is the force of the contention that, in fulfilling the terms of the sovereign office, those who hold sovereign power are acting faithfully to the natural law.

But this response is doubly unsatisfactory. First, it is implausible that, as a general matter, the interest of the sovereign will coincide with the interests of the people, if only because the sovereign may act to benefit some of the persons who make up the people at the expense of others. For example, the sovereign might enforce the exploitation or enslavement of racial, national, or religious minorities, or of the poor, or of everyone outside the military, even driving them below the "solitary, poor, nasty, brutish, and short" expectations of the state of nature. If sufficiently many and sufficiently powerful others are benefited by this suppression, the position of the sovereign might be quite secure. Absent some more persuasive argument about the identification of the interests of sovereigns and subjects, an argument of sufficient generality to cover all or virtually all cases of human interdependence, it is not clear why it is rational *ex ante* for each person to take a chance with an authoritative order rather than with a limited sovereign or a normative order.

Second, assume a coincidence of interests. Still, it would not follow that subjects could rationally expect the sovereign to act for the public welfare. Those who hold sovereign power have passions as well as interests. Thus Locke's worry about power "made licentious by impunity." A Hobbesian might similarly worry that absolute power pushes pride to extremes of arrogance and the rage and fury associated with it.[27] Because of their all-too-human susceptibility

[26] Ibid., XIX.4, p. 131.
[27] Ibid., VIII.18–9, p. 54.

to such passions, occupants of the office of sovereign can be expected (like the rest of us) to be irrationally myopic even at a cost to their own good. The fact – if it is a fact – that such abuses of office can reasonably be expected to lead to the destruction of the state may provide no motivation for refraining from them, because the passions will blind absolute sovereigns to the destructive impact of their own policies, just as the passions can blind subjects to the destructive consequences of their own conduct.

Even, then, if an agreement to absolutism were rational, on the assumption that sovereigns fulfill the responsibilities of office, we have no grounds for making that assumption. Indeed, Hobbes provides powerful ammunition against it. That assumption conflicts with his account of human passions, and any institutional effort to ensure that sovereigns do meet their responsibilities would defeat the claim to unlimited authority.

Hobbes's premises, then, create troubles for his case for absolutism. We have no reason in general to expect the sovereign to conform to the terms of the sovereign's office – to ensure the "safety of the people" — despite the natural law obligation to do so.[28] I am not suggesting that a Hobbesian sovereign predictably will fail, for example, to make good laws, which are "needful, for the good of the people, and withall perspicuous."[29] But we do not need anything as strong as predictable failure to create problems for an agreement to absolutism. After all, absolutism imposes substantial restrictions on self-government, and that suffices to establish a *prima facie* case against it. Given that case, the justification of an authoritative order turns on its being uniquely rational to agree to it because only it fully resolves the problems of conflict. But there is no case for a complete solution to "intestine disorders." Hobbes's justification runs into trouble because of a weak case for coincidence of interests and because of the absence of assurance against sovereign temptation. If it is rational for individuals to expect the sovereign to act according to the terms of his office, then the authoritative order has the special immunity to "intestine disorder" – that is, to troubles that arise from sources internal to the commonwealth – that separates it from the alternative choices. But such expectation is irrational, even if – as is manifestly implausible – the interests of sovereign and all subjects coincide.

I emphasize that the problem for absolutism is not simply that there appear to be equally good alternatives – equally good by reference to achieving security. That fact by itself would suffice to make the choice between the authoritative order and divided authority a toss-up. But liberty is more secure under divided authority and men "naturally love liberty." So if there is indeed nothing to choose from the point of view of protection – no clear advantage in terms of the fundamental interests in preservation and felicity – then divided

[28] Ibid., XXX.1, p. 231.
[29] Ibid., XXX.20, p. 239.

authority is the rational choice. If absolutism does not come out a winner on the dimension on which it is alleged to have the greatest advantage (peace, security), then it must lose. That is why some people who find Hobbesian views about individuals compelling – not that that is true of Locke himself – nevertheless reject an authoritative order.

I come now to a second line of objection, whose roots lie in Rousseau's critique of Hobbes's philosophical anthropology.[30] I begin with four points about Hobbes's views of the desire for honor and the passion of pride.

First, Hobbes thinks that people not only desire preservation and happiness but also desire to be honored by others, or at least that others not dishonor them. To be honored by others is to be valued by them at a "high rate"; to be dishonored is to be valued at a "low rate."[31] High and low here are to be understood relatively, in particular relative to the value that we place on ourselves: "by comparison to the rate each man setteth on himself."[32] So we are dishonored when others assign to us a value lower than the value we place on ourselves. So a person's desire not to be dishonored is the desire that "his companion should value him, at the same rate he sets upon himself."[33] In desiring not to be dishonored, then, I desire that others value me at the same level that I value myself.

Second, Hobbes thinks that people are naturally equal in fundamental powers of body and mind.[34] Moreover, he thinks that the worth of a person is "his price, that is to say, so much as would be given for the use of his power."[35] From which it follows that people are of more or less equal natural worth. A democratic conception of honor – a conception that assigns equal natural worth to each person – rests, then, on a true self-valuation: it assigns people the equal worth that corresponds to their natural equality of mental and physical powers. In contrast, an aristocratic conception of honor – which assumes unequal natural worth – rests on a false (and irrational) belief in natural inequalities of worth. This aristocratic conception of natural inequalities of worth is the view embraced by people who are gripped by the passion of pride. Hobbes associates this conception with Aristotle and condemns it in the ninth law of nature, which requires that each person "acknowledge other for his equal by nature."[36]

Third, although Hobbes does not develop a detailed account of the genesis of the prideful-aristocratic form of self-valuation, he does suggest that it arises

[30] For a fuller discussion, see Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford: Oxford University Press, 2011).
[31] *Leviathan*, X.17, p. 63.
[32] Idem.
[33] Ibid., XIII.5, p. 88.
[34] Ibid., XIII.1, pp. 86–7; XV.21, p. 107.
[35] Ibid., X.16, p. 63.
[36] Ibid., XV.21, p. 107.

in part from hasty, ill-considered inferences about oneself and one's powers that are prompted either by the flattery of others or past good fortune. The prideful "estimate their sufficiency by the flattery of other men, or the fortune of some precedent action, without assured ground of hope from the true knowledge of themselves."[37] Thus prompted, the prideful are brought to an inflated judgment of their own natural powers – an overestimation of their "sufficiency," "a foolish overrating of their own worth,"[38] an exaggerated view of their invulnerability. Because the sense of self-worth is at bottom a judgment about the proper price of one's powers, an overestimation of those powers and what should be paid for them leads to a high estimation of one's worth. Insofar as that high estimate attaches to one's natural powers, it is associated with the Aristotelian view that "master and servant were not introduced by consent of men but by difference of wit."[39] Thus the prideful sense of honor is generated by naturalizing good fortune, by attributing contingent and socially created advantages to one's intrinsic nature.

Whatever its source, the aristocratic view is false because human beings are naturally equal in powers: equal with respect to vulnerability of person and possessions and prudence. Since worth is the price put on powers, the rough equality of powers establishes a rough equality of true worth. Moreover, because the inferences that support it are "hasty," the belief is cognitively irrational.

Fourth, I interpret Hobbes as supposing that the desire for honor is a nonderivative (or "original") desire: that we desire, originally, life, felicity, and honor. Hobbes's discussion of honor (in chapter X of *Leviathan*) presents it as a form of power – a means to satisfying desires – suggesting that the desire for honor derives from the desire for felicity. And that suggestion has force. To be honored is to have others place a high price on one's powers; and when they do, they are willing to give up a great deal in exchange for the use of those powers. The greater the honor, the more they are willing to give; and the more they are willing to give, the more likely one is to satisfy one's desires. So being honored is itself a form of power – a means to satisfying desires – and being dishonored – having the price of your power reduced – diminishes your ability to achieve your aims. It might therefore be understood as simply derivative.

Still, the desire for honor is not entirely derivative. (At least this appears to be the case in *Leviathan*. The psychology in the earlier accounts of human nature seems different on this point.) Although I derivatively desire that others put as high a value on me as possible – high valuation is a form of power, so I desire more of it – nevertheless Hobbes appears to think – and to think correctly – that the desire to avoid dishonor has a qualitative structure that is not captured simply by the fact that one desires to be valued higher rather

[37] *Leviathan*, XI.12, p. 72; *De Homine*, XIII.5–6.
[38] *Leviathan*, XXVII.13, p. 205.
[39] Ibid., XV.21, p. 107.

than lower: it involves a threshold. Thus, dishonoring is valuing a person below a certain standard, in particular the standard fixed by the value that the person sets on him- or herself. So while it may be true that individuals instrumentally desire, for the sake of preservation and felicity, that they are assigned as high a value as possible by others, they also desire intrinsically that that value not be lower than the value that they place on themselves. There is no instrumental reason to attach so much importance to achieving the threshold level.

Which brings me to Rousseau's objection to Hobbes. In his *Discourse on Inequality*, Rousseau challenges the generality of Hobbes's statement of the problem of political justification. According to Rousseau, Hobbes's conception of human nature and the circumstances of human interdependence accurately describes human beings and human circumstances under existing conditions. But he denies that this accurate description provides a correct account of human nature – of the way that human beings naturally are. "Men are wicked; a sad and constant experience makes proof unnecessary; yet man is naturally good."[40]

Denying that Hobbes has our nature right, Rousseau thinks that what is needed is an explanation of how people came to be as Hobbes thinks we naturally are. Indeed, he describes his *Discourse on Inequality* as a "genealogy" [41] of vice, and offers it as an explanation of how passions such as pride, greed, hatred, jealousy, envy, covetousness, and vanity arose. Rousseau's explanation is social: "It is not necessary to suppose that man is evil by his nature," since the conflict between "our social order" and our nature "explains by itself all the vices of men and the evils of society." And he emphasizes in particular the evolution of private property and the development of conditions of manifest inequality. Thus, while Rousseau affirms the importance of the destructive passions that Hobbes emphasizes – envy, pride, the desire to dominate – he denies that these passions directly reflect human nature. Instead, they are the specific ways that certain more fundamental aspects of our nature are expressed under unequal conditions.

Thus, Rousseau supposes that each of us is naturally concerned with his or her own welfare. He refers to this concern as *amour de soi meme*, or self-love. One aspect of this self-love is that we have a sense of self-worth that animates our more specific concerns and aims. And when we develop relations with others, this natural concern for one's own well-being – understood to include a sense of self-worth – is naturally extended to include a concern that others value us and so affirm our worth.

As Hobbes indicates in his discussion of the desire for honor, this natural human concern for how others regard us can take either of two forms. The

[40] Rousseau, *Discourse on Inequality*, in *The Discourses and Other Political Writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), p. 197.

[41] Letter to Archbishop Beaumont, in *Jean-Jacques Rousseau: Collected Writings*, vol. 9, trans. Christopher Kelly and Judith Bush (Hanover: University Press of New England), p. 28.

first – the democratic form – is that others regard me as an equal, take my interests into account, and treat my concerns as being as worthy as theirs. The second – the aristocratic or prideful form – is that I think of myself as more worthy of regard than others are, and take it as an insult if others fail to regard me as more worthy of consideration and respect than they are themselves. Rousseau refers to this second, aristocratic form of self-regard as "inflamed *amour propre*,"[42] and argues that it provides the foundation for the vices and is an important source of human conflict. So the crucial point in the genealogy of vice will be the point at which natural self-love and the associated concern to have one's worth acknowledged by others takes aristocratic form, with a concern for relative advantage – the point at which the absence of such advantage is an insult to our worth, and at which we observe "an ardent desire to raise one's relative fortune less out of genuine need than in order to place oneself above others."[43] And Rousseau's claim – as I indicated earlier – is that this form of expression of natural self-love reflects the emergence of public inequalities and circumstances in which appropriate regard from others requires that those others think I am of greater worth.

Although the Hobbesian passion of pride is, then, a fundamental source of vice and conflict, that passion is not intrinsic to our nature. The desire for the social affirmation of worth is natural: on this, Hobbes and Rousseau agree. But that very feature of our nature (expressed in the form of the passion of pride and related vices) can perfectly well be expressed in the democratic form of a concern to be acknowledged as of equal worth with others. And if it is expressed in that form, then the desire for the affirmation of one's worth need no longer lead to vice and conflict. For when it takes the democratic form, each person's worth can be affirmed since no one requires for such affirmation that he or she be regarded as intrinsically more worthy than others and that others regard themselves as natural inferiors.

To achieve this alternative form of expression would require that the affirmation of the worth of each be rendered independent of a person's position in the social and political distribution of advantage. Rousseau thought that the establishment of a political order of equal citizens – a normative order whose members are committed to treating one another as equals – was necessary for that separation. Under such conditions, the potentialities of the species could be realized without constraint, vice, and misery, because such realization need no longer take the form of seeking the subordination of others.

Rousseau's complaint, then, is that Hobbes mistakenly naturalizes socially engendered passions. He mistakes a particular, determinate expression of the features that define our nature for that nature itself. Rousseau's point might be true but irrelevant if Hobbes's argument were not importantly dependent on

[42] Rousseau, *Emile*, trans. Allan Bloom (New York: Basic Books, 1979), pp. 92, 235.
[43] *Discourse on Inequality*, p. 171.

the passions as sources of conflict and as grounds for favoring the absolutist solution and for promoting monkish obedience as a condition for political protection. But the passions are central to Hobbes's argument. In view of that role, and assuming that Rousseau's contention is right, then changing the circumstances could alter the motivations that generate the conflicts that fuel Hobbes's political doctrine. And that alteration might allow us – contrary to Hobbes's thesis about the necessity of absolutism for peace – to see at least the human possibility of a form of normative order in which a shared commitment among equals to cooperating for the common advantage proceeds without such a sacrifice of autonomy: Rousseau's society of the general will. A theory characterizing the terms of that order would not seek to set forth the mutual relations of protection and obedience. It would instead aim to "Find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each one, uniting with all, nevertheless obeys only himself and remains as free as before."[44]

[44] Rousseau, *Social Contract*, trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), Book 1, chapter 6.

2

A Note on Hobbesian Lessons on Bipartisanship

David Braybrooke

On Hobbes's own account, arriving at the social contract that he has in mind is so difficult that it hardly counts as a practical guide for forming a state from scratch. Difficult – It may be impossible.[1] Most states, perhaps all, have a different origin, as Hobbes was well aware. They originated not in a contract between men who can be taken as equal in power but in conquest and submission.

How then are we to understand the minute care with which Hobbes elaborates the idea of a social contract and of arriving at one to form a state? One possibility is that he shows us that if (as is to be expected) we find ourselves in a state already formed, perhaps one with cruel autocratic features, we can reconcile ourselves to the situation by recognizing that we would be no better off if we had organized the state ourselves under a contract in which we all sought the best for ourselves. For then, too, it would be foolish, given the horrific alternative of the state of nature, for us to settle for anything less than the unified absolute sovereign, taking our chances with his (its) being or becoming cruel.

Does he mean to show us this? I cannot say, but this interpretation makes sense of the time and effort that he spends on the social contract. He can, on this interpretation, perfectly well admit that few states, if any, have originated in such a contract. That fact, on this interpretation, does not matter at all to his argument. If the interpretation does answer to his intention, so understood, though the intention is more than a little oblique, the point that he is making is important and trenchant.

Put another way, the lesson that we can draw from Hobbes here emphasizes the difficulty of forming a reliably effective state; and this lesson applies

This chapter has had the benefit of being tested on my Texas colleague Al Martinich, which has resulted in the incorporation of some nuances and grace notes.

[1] See David Braybrooke, "The Insoluble Problem of the Social Contract," *Dialogue* XV (March 1976): 3–37, which may do more to show the limits to using an exactingly precise version of rational choice theory in interpreting Hobbes than to show realistically what Hobbes meant.

with as much force to reconstituting a state once it has failed. "Failed states" is the current phrase for talking about situations, all too frequent in our day as in Hobbes's, that approach being the state of nature as Hobbes portrays it: Bosnia, Rwanda, Darfur, Iraq, Afghanistan, and (more than approaching) Somalia.

The main point of the lesson about difficulty may be the warning that the state of nature or a failed state are to be avoided at any cost.

We can draw more from the lesson about difficulty than a warning. Hobbes shows us, in the elaborated hypothesis of arriving at the social contract, the attitude that we must adopt toward one another in order to have a state and a sovereign. It is an attitude of mutual trust, but we must be ready to make do, in keeping with Hobbes's minimal sentimentalism, with minimal mutual trust, not depending on fellow-feeling: We must, at a minimum, have mutual expectations of mutual forbearance.[2] I must be able to leave my asparagus patch unguarded while I go about cultivating other crops in another part of the farm; you must be able to pass by me as you come down the path alongside my hut without my cracking your head open with my shillelagh.

This attitude, which Hobbes makes explicit as a condition of arriving at the social contract, is also a condition for the day-to-day success of the sovereign once established.

We are still with Hobbes and still dealing with him in the perspective that he had in the 17th century when we fill in his teaching under this point. Hobbes does not expressly state the condition in this connection. However, it would be perverse to foist upon him the supposition that the sovereign or the officers of the sovereign, for example, the police, are in any literal way continuously active in resolving issues. It must suffice for any realistic treatment of the sovereign to have the sovereign present and ready to act to resolve contentious issues when they come up. In a successful state, will they come up very often? People will usually avoid issues that arouse contention. They will go about their daily business in fields, pastures, mills, and shops relying on mutual expectations of mutual forbearance.

The lesson or lessons that can be gathered from the construction of the social contract do not specially favor autocracy; nor does Hobbes suppose they do. Hobbes gets to favoring autocracy in a second stage, by another argument. He sets up three possible forms for the sovereign – autocracy, aristocracy, and democracy – and allows (as I think many people forget) that the sovereign might take any of these forms and still be in principle absolute. Then he argues

[2] I offer Hobbes's insistence on mutual forbearance as a freely expressed version of what he intended in the combination of the fundamental law of nature, the first law, and the second law. It is difficult to determine exactly what Hobbes meant by the combination. For an effort to do so, see the discussion of Hobbes's teaching in the chapter on Hobbes and Saint Thomas in my *Natural Law Modernized* (Toronto: University of Toronto Press, 2001), pp. 90–124, especially the Appendix (4.1), "Minute Scholarship on Hobbes's First Law," pp. 114–7.

that autocracy (monarchy) is to be preferred to the other forms because it is more stable. Treating democracy in this connection, he assumes that he is dealing with a direct democracy of the ancient Greek sort or the late medieval instances in Italy. I think he underestimated the record of stability that those regimes achieved and overestimated the stability of autocracies. Consulting Herodotus more or reflecting more on the history of the Roman Republic, successful as such through many centuries, would perhaps have deterred him from doing this. So would consulting Gibbon, on problems of succession in the Roman Empire, though he could not have done this in his time. He did indeed think succession was a big problem for autocracies – their main drawback – and hereditary provisions did not solve the problem; the best that one could hope for is that the autocrat, like the Mughal Emperor Akbar, would reign a good long time (50 years in Akbar's case) and give a respite from wars about the succession as long as he reigned.

Nor, in his time, could Hobbes have reflected on the record in the last several centuries, after his time, of representative democracy as we understand it: more stable and long-lasting than the autocracies, among them the Thousand Year Reich, with its cheap and degrading ideology and a dozen years of perpetrating horrors at home and abroad. Since he thought that the cruelty that autocracies might practice are real (though never causing so much misery as the absence of a sovereign, any form of sovereign), he would think that the advantages in personal liberty, for example, and economic incentives that come with a democratic sovereign, now a representative democratic sovereign, given stability, would after all tip the balance of choice in favor of democracy. We are surely not to suppose that he could not have learned from the historical experience of the last 350 years.

Hobbes does have a place in his theories for representative democracies, though as one would expect, given his low opinion of the democratic form, he does not spell out how they would fit among the alternative forms of the sovereign. The sovereign may appoint an assembly to act for it, as the sovereign in England did when it set up assemblies in London to govern colonies in North America through governors chosen by the assemblies.[3] The sovereign may also bring together a Council of advisors (e.g., Parliament). There is no barrier to assuming that from this Council the sovereign may choose the individuals that are to serve him as "Publique Ministers" in one connection or another, carrying out the sovereign's will as prefects in the provinces or as administrators of one department or another of the state. Moreover, the Council itself may become, not merely a collection of advisors, but a collectivity that is a Publique Minister itself.[4] It could be given the duty of providing for detailed applications of the laws authorized by the sovereign, choosing, for example, what forms of punishment should enforce those laws that invite provisions for punishment. With a

[3] *Leviathan*, XXII.

[4] Ibid., XXIII, at the end.

democratic sovereign, this issues in a representative democracy in the form of a parliamentary government.

Hobbes did not foresee, any more than Adams, Jefferson, or Madison foresaw, that the factions that have typically divided peoples and prevented them from acting for very long as unified sovereigns, even just unified enough to do the job,[5] could be transformed into persistent political parties, peacefully taking turns as ministers in running the state between one election and another in which they are endorsed as ministers by a sovereign people.

In this connection, political theory needs to combine Hobbes on the democratic form of sovereign with the incisive work of E. E. Schattschneider, *Party Government*, the greatest contribution of American political science to our understanding how political peace and liberty may be jointly realized.[6] "The people are a sovereign [who] can speak only when it is spoken to. As interlocutors of the people the parties frame the question and elicit the answers."[7] The parties offer within a settled framework of civil debate alternative policies that they are ready to carry out.

With this combination we move away from Hobbes's 17th-century perspective, but we are keeping Hobbes with us as we supplement his doctrine, using his conception of the relevant *problematique* (issue-space) and using his criterion for answering the issue about the form that the sovereign had best take, thus carrying out the second stage of his argument in what Hobbes would recognize as a uniquely fitting way even as we modify the answer arrived at there. The criterion for answering the issue about the form of the sovereign is effectiveness, with stability its chief foundation. Representative democracy can now be seen to be more stable than autocracy, or at least as stable, with advantages in avoiding oppression; and its stability is achieved in practice by party competition carried on within a persistently civil framework.

Parties will typically compete both in elections and between elections by offering platforms – combinations of policies and positions on policies rather than one position each on one policy. This poses a problem, not yet fully digested by political philosophy, for democratic theory and democratic practice about eliciting from the electorate an unambiguous mandate. A successful platform may include policy positions that do not have the support of a majority of the electorate; at the extreme it may include no policy positions that do have majority support (see Dahl[8]). But this is not necessarily a problem

[5] The unity does not need to be perfect or continuous – just enough to resolve one kind of issue or another for the time being, as the President, the Congress, and the Supreme Court do in various combinations at various times in the United States.

[6] New York: Holt, Rinehart, & Winston (1942). Schumpeter, Pareto, and Michels made similar contributions, but not with the enthusiasm that Schattschneider expresses for party competition within limits being benign as well as essential to making representative democracy work.

[7] Schattschneider, p. 52.

[8] See R. A. Dahl, *A Preface to Democracy* (Chicago: University of Chicago Press, 1956), p. 128.

about stability. Of the several minorities in a victorious coalition, every one may obtain the position that it feels most strongly about. The combination in question may be as firmly enacted and as firmly carried out as any other decision by the sovereign.

From Hobbes's doctrine regarding the social contract we can carry forward to party competition within a civil framework the condition of mutual trust, or (to be in keeping with Hobbes's minimal sentimentalism) mutual expectations of mutual forbearance. As citizens and as members of parties we (or at least most of us most of the time) must forbear not only from violence but also from creating so much ill-feeling and discord that our commitment to the system falters. We must not stop supporters of a party opposed to ours from voting or prevent members of that party from having a say in the legislature or its committees as a bill proceeds to enactment. Otherwise, instead of having one party displace another peacefully – solving the problem of succession without the drawbacks of autocracy – we risk having deadlock at least and maybe civil war.

Along with the condition of mutual forbearance, we may suppose, strengthening over time, will be a shared commitment to uphold the state, and if this is the form that the state takes, to uphold representative democracy and the system of peaceful party competition. We can think of this commitment as beginning with a primitive realization of the condition of mutual expectations of mutual forbearance, and then in turn having this condition strengthening with increases in the commitment. To succeed, Hobbes joined with Schattschneider might say that representative democracy must operate under a civil framework in which political parties peacefully conflict; and the basic condition that the conflict will remain peaceful is mutual expectations of mutual forbearance. When Gore accepted in 2000, without further contention, that Bush had won the Electoral College votes, he ushered in a presidency disastrous for the United States and for the world, but he gave an example of how to observe limits to party competition consistent with the basic condition of mutual forbearance.

Thus the same condition essential to having a social contract transposes into a condition essential for having a state and then into a condition for having a successful representative democracy. Hobbes, at Obama's elbow, thus teaches us to be ready to practice an approach to bipartisanship when it is necessary to save the state.

3

Hobbes's Theory of Rights

A New Application

Eleanor Curran

In this chapter I examine Hobbes's theory of rights with a view to its application to recent and current rights theory. Such an exercise is, in my view, not only possible but also potentially fruitful, and this alone betrays a reading of his theory of rights that clashes substantially with that given by many commentators. Much Hobbes scholarship of the last sixty years or more has tended to see any rights accorded to individuals by Hobbes as worth little in the face of the absolute power of the sovereign. The standard argument has been that any rights that individuals may be said to hold, fail to qualify as substantive political rights because they are not protected. Indeed, absolute sovereignty is seen to *preclude* individual rights as a matter of principle. An absolute sovereign does, of course, by definition hold all the power, and such a sovereign, we might say, therefore also holds all the rights, which leaves the subjects powerless, or without any rights.

Hobbes's argument, however, is more complex and more subtle than this. Instead of pursuing the absolutist argument in a straightforward way and providing a clear denunciation of the possibility that subjects might hold any substantive rights, as other absolutists had done before him, Hobbes confounds expectations and hangs the entire argument on the right of the individual to preserve herself. This individual right to self-preservation drives the political theory at every stage of the argument and, most importantly, it is not given up; it is retained and held, even against the sovereign.

I argue below that Hobbes has something useful to say to current rights theorists and I will start by making the case that Hobbes's theory of rights breaks with traditional theories of natural law that gave rise to theories of natural

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rights,[1] the most influential of which would be published by Locke[2] not quite forty years after the publication of *Leviathan*. I argue that Hobbes's theory of rights can be seen as a forerunner of the modern, secular theories of rights that were to replace those traditional theories in the 20th century. My argument is that the theory of rights Hobbes offers has a different starting point and relies on different philosophical foundations from the theories of *natural rights* that were to dominate political theory for another 200 years or more.[3] And it is because his theory of rights has already broken with the *natural rights* tradition that it can speak to those modern theories that have also attempted to find a sound philosophical basis for individual rights without reliance on the theological or metaphysical premises of traditional theories of natural rights and natural law.

The most well known attempts to do this are those of the "interest" or "benefit" theory and those of the "will" or "choice" theory (of rights). Alongside these developments, the jurisprudential analysis of rights given in the early 20th century by Wesley Hohfeld has also been profoundly influential. In particular, the designation of four different uses of the term "right" in the legal literature, as proposed by Hohfeld, has influenced the way that political rights are analyzed today and specifically the notion of a right as a *claim*, which has come to be seen by many as the best characterization of a political right. As Jeremy Waldron puts it, "Hohfeld's claim-right is generally regarded as coming closest to capturing the concept of individual rights used in political morality."[4] This and much else in current thinking on rights is challenged by Hobbes's theory, which takes the notion of *liberty* rather than *claim* to ground that of a right. To provide some background to my arguments I shall start with a brief discussion of what characterizes Hobbes's theory of rights.

INDIVIDUAL RIGHTS IN HOBBES'S POLITICAL THEORY

Hobbes says a great deal about the rights of individuals; his argument for government in *Leviathan* is permeated with references to and discussion of the subjects' rights. At the beginning of the political argument, Hobbes articulates one of the great dilemmas of good governance – how to protect the liberties of individuals, while at the same time providing for their security. And he sets out the terms of reference for his analysis with great conceptual clarity by pointing

[1] The claim that theories of natural law gave rise to theories of natural rights is a common one but it has its critics, one notable example being A. P. d'Entrèves in *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson and Co., 1951).

[2] Locke, J., *Second Treatise of Government* (Indianapolis: Hackett, 1980, originally published in *Two Treatise of Government*, 1690).

[3] The notion of "natural rights" continues to be influential in political discussions of rights today, in the guise of discussions of "human rights."

[4] Waldron, J., ed., *Theories of Rights* (New York: Oxford University Press, 1984), p. 8.

out that if each individual has total liberty, that is, has no restrictions on her actions – physical, legal, or moral – then the result of that freedom will be an equally total insecurity.

> And because the condition of Man, ... is a condition of Warre of every one against every one; in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a Right to every thing, even to one another's body. And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man (how strong or wise soever he be), of living out the time, which Nature ordinarily alloweth men to live.[5]

And he continues by setting himself the task of somehow resolving the tension between what is required to enable peace and security and what is required if we are to hold on to our right to preserve ourselves.

> And consequently it is a precept, or generall rule of Reason, *That every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre*. The first branch of which Rule, containeth the first, and Fundamental Law of Nature; which is, *to seek Peace, and follow it*. The Second, the summe of the Right of Nature; which is, *By all means we can, to defend ourselves*.[6]

The tension Hobbes is tackling may seem to be resolved with the institution of an all-powerful sovereign, thereby ensuring the obedience of each subject and guaranteeing peace and security by subverting the subjects' rights, but the required surrender of individual rights is never delivered. Contrary to the views of commentators who have declared that the Hobbesian subject has "given up his rights,"[7] Hobbes makes it clear that this is not the case. He does acknowledge the necessity for individuals to give up their *invasive rights*: "it is necessary for all men that seek peace, to lay down certain Rights of Nature; that is to say, not to have liberty to do all they list;" but at the same time, he insists on the equal necessity for individuals to hold onto many of their rights, as he continues, "so it is necessarie for mans life, to retaine some; as right to governe their owne bodies; enjoy aire, water, motion, waies to go from place to place; and *all things else without which a man cannot live, or not live well*."[8]

We are familiar with Hobbes's grappling with the problem of insecurity in the guise of the infamous war of each against each and of his solution in terms of the kind of sovereignty that is required, in his view, to maintain the peace.

[5] *Leviathan* (1651), ed. C. B. Macpherson, (London: Penguin Books, 1968), XIV, pp. 189/190 (hereafter, *Leviathan;* references are given by chapter number followed by page numbers).

[6] Ibid.

[7] Ryan, A., "Hobbes's Political Philosophy," in ed. Tom Sorell, *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 1996), p. 235.

[8] *Leviathan*, XV, pp. 211/212, my emphasis.

What receives less attention is the extent to which he insists on the retention of a slew of rights for the individual subject. When the extent of the rights is recognized and discussed, it is inclined to be analyzed as a puzzle, a piece of the jigsaw that doesn't fit with the absolutism of the sovereign. And often, in recent Hobbes scholarship, the rights are said to be weak or of no real substance, because, in addition to the problem of absolutism, the rights themselves are analyzed by commentators as being *Hohfeldian liberty rights*, with no correlative duties.[9] I argue against this later, but first I briefly set out the crucial definitions that Hobbes uses at the start of his discussion of the rights of individuals, which form the architecture of his theory of rights. I follow this with a brief overview of my analysis of his theory.

Hobbes famously starts chapter XIV of *Leviathan* with definitions of: the right of nature, liberty, a law of nature, and a right. The definition of liberty he gives here is perhaps more infamous than famous with its legendary restriction to "the absence of externall Impediments."[10] I explain below why I think we are justified in seeing Hobbes's use of the term liberty as being broader than this definition implies, to the extent that it can apply to an absence of legal or moral impediments as well as physical ones, but for now I just set out the definitions as Hobbes gives them. His definition of a right follows on from that of a law of nature which 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.

And a right, defined in the following way,

> For though they that speak of this subject, use to confound *Jus* and *Lex*, *Right* and *Law;* yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbeare; Wheras LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.[11]

These definitions make clear the structure of Hobbes's notion of a right. The grounding notion is that of liberty. All rights are liberties. Then, more specifically, a right is a liberty to do or to forebear and it is to be contrasted with the notion of law, which obligates one. So, at the core of Hobbes's idea of a right is that of freedom.

Hobbes uses the device of the state of nature to produce the thought of freedom or liberty unlimited. Another way of putting this is the idea of a

[9] See, for example, Hampton, J., *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986); Finkelstein, C., "A Puzzle about Hobbes on Self-Defense," *Pacific Philosophical Quarterly*, 82.3–4 (2001): 332–61.

[10] *Leviathan*, XIV, p. 189.

[11] Ibid.

complete set of liberties held by each individual. This is the starting point for the theory of rights. Each individual has unlimited freedom to do or not do anything and everything. "There is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a Right to every thing; even to one anothers body."[12]

The right of nature is the right to everything, literally. And in discussing this aggregate right, commentators are often struck by the implied aggression toward others of "the right to every thing even to one anothers body" and of the "pessimism" about human nature that seems to lie behind it. But if we put that aside and focus instead on the argument that follows we can see the structure that emerges.

As always with Hobbes's political theory, the lynch pin is self-preservation. Whatever the individual thinks may aid her preservation she is free to do or to forbear from doing, in the state of nature. As earlier, though, this will only lead to conflict and insecurity and so individuals must agree to start laying down some of the rights they hold in the state of nature. The first law of nature commands us to "*seek Peace and follow it*"; the second law of nature tells us how:.

That a man be willing, when others are so too, as farre forth, as for Peace, and defence of himself he shall think it necessary, 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.[13]

So, individuals must give up those rights (liberties) that they would not wish others to hold in relation to themselves. The first that springs to mind of course is that of the right to one another's bodies, along with all similarly invasive rights. The way in which Hobbes describes the process by which we transfer over to each other these invasive rights is very interesting and significant but is not discussed in any detail here.[14] The important point to be stressed for this argument is that all harmful, invasive rights must be given up and Hobbes describes that this is done by transferring over to each other these rights and taking on duties not to interfere with or hinder the right holder's exercise of her own right.

...when a man hath ... granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such right is granted.... from the benefit of it:[15]

[12] Ibid., XIV, p. 190.

[13] Ibid.

[14] For a full discussion of this process, see Curran, E., "Hobbes's Theory of Rights – A Modern Interest Theory," *The Journal of Ethics* 6 (2002): 63–86; and Curran, E., *Reclaiming the Rights of the Hobbesian Subject* (Basingstoke: Palgrave Macmillan, 2007), chapter 3.

[15] *Leviathan*, XIV, p. 191.

This process is significant because it shows us the first way in which Hobbes does put in place duties toward right holders. So, certain rights held by individuals will gain some degree of protection. We all agree to take on duties not to hinder others from their exercise of, for example, their rights over their own bodies. In this case the duties are held by individuals toward other individuals. It also points us toward another way the rights will be protected once a sovereign is in place. The sovereign must translate the laws of nature into civil laws and see that they are enforced. As it is the second law of nature that sets up these new duties toward right holders, they will in time become enforceable civil laws. In this way they will receive (indirect) protection from the sovereign.

…the Lawes of Nature, … in the condition of mere Nature … are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before; as being the commands of the common-wealth; and therefore also Civill Lawes: For it is the Soveraign Power that obliges men to obey them.[16]

We must be careful to emphasize the indirect nature of the sovereign duties as Hobbes famously tells us that the sovereign is outside the contract made between individuals and owes no direct duties to subjects. This has often been taken to be proof that subjects cannot hold substantive political rights against the sovereign, because the sovereign holds no direct duties to the subjects, not even to protect their rights. My argument is that while the sovereign does not hold direct duties to protect subjects' rights, he or they do hold *indirect* duties of protection, such as those described previously. Such duties are held as part of the office of sovereign and may be characterized as being duties to the office they hold or duties held as part of the requirements of that office, rather than directly to subjects. The sovereign also has a general duty to protect subjects, which Hobbes sets out at the start of chapter XXX.

The Office of the Sovaraign, (be it a Monarch, or an Assembly,) consisteth in the end, for which he was trusted with the Sovaraign Power, namely the procuration of *the safety of the people;* to which he is obliged by the Law of Nature, …

And he continues in an important remark pertaining to the extent and the breadth of the subjects' aggregate right to self-preservation,[17]

[16] Ibid., XXVI, p. 314.

[17] For a full discussion of the right to self-preservation (which is carried into the commonwealth and held even against the sovereign) and the sovereign's duties to protect that right see Curran, E., "Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-preservation, Duties of Sovereignty and the Limitations of Hohfeld," *Law and Philosophy* 25 (2006): 243–65. See also Curran 2007, chapter 4.

But by Safety here, is not meant a bare Preservation, but also all other Contentments of life, which every man by lawful Industry, without danger, or hurt to the Commonwealth, shall acquire to himselfe.[18]

It has not been my intention here to argue in detail for my analysis of Hobbes's theory of rights, but just to state briefly some of its central elements so that I can demonstrate its relevance to current rights theory. It is important, in that context, to demonstrate Hobbes's way of grounding the notion of a right in that of a liberty and of providing for the protection of some rights, both by the duties of subjects toward each other, by the civil law, enforced by the sovereign and by the (indirect) duties of the sovereign.

To summarize then, the political argument of *Leviathan* starts with the right of nature and the claim that individuals in the state of nature have "a right to every thing even to one anothers' body."[19] And the argument proceeds with a discussion of which rights must be given up and which may be retained before a sovereign can be instituted and a peaceful, commodious life attained. Those rights that endanger others must be given up. These are what I call *invasive rights*; and the right to one another's bodies, included in the aggregate right of nature, would be the exemplar of an invasive right. Some of those rights that are required for individuals, if one is to live a commodious life, however, must be retained; they are inalienable ("not all Rights are alienable"[20]).

As well as the aggregate right to self-preservation mentioned previously, in chapter XXI of *Leviathan* Hobbes gives us a long and surprising list of those rights (liberties) that we retain and that he describes as the "true Liberty of a Subject" characterized as those things that "though commanded by the Soveraign, he may neverthelesse, without Injustice, refuse to do."[21] These rights include the rights to "buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves see fit; and the like"[22] and also, "every subject has liberty in all things, the right whereof cannot by Covenant be transferred," which includes the right to "defend ones own body," the right not to kill, wound, or maim himself; to resist those who assault him; not to "abstain from the use of food, ayre, medicine, or any other thing without which he cannot live;"[23] to

[18] *Leviathan*, XXX, p. 376.

[19] Ibid., XIV, p. 190.

[20] Ibid., squib, XIV, p. 192 and in the text he explains, "there be some Rights, which no man can be understood by any words, or other signes, to have transferred…. the motive, and end for which this renouncing, and transferring of Right is introduced, is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it. And therefore if a man by words, or other signes, seem to despoyle himself of the End,…he is not to be understood as if he meant it, or that it was his will;"

[21] Ibid., XXI, p. 268.

[22] Ibid., p. 264.

[23] Ibid., p. 269.

not give evidence against himself, not to kill himself or any other man, ... and even "upon the command of the sovereign," not to execute any dangerous or dishonorable office (unless it will harm the commonwealth).[24]

Given the prominence, centrality, and extent of the rights of the individual subject in *Leviathan*, it is perhaps surprising that Hobbes is not generally seen as being one of the great early rights theorists along with Grotius and Locke. Yet, not only is he not regarded as a great rights theorist, but he is also not usually seen as holding a theory of substantive rights at all.

If there is a question, then, concerning why Hobbes's theory of rights is not usually viewed as being of any great importance in the history of rights theories, then the short answer has of course been that Hobbes's absolutism is thought to prevent any genuine theory of rights from getting off the ground. Whatever rights individuals may start off with, the argument goes, once the sovereign is in place, and keeping in mind that the sovereign, according to Hobbes, owes no direct duties to the subject, then the subjects' rights surely cannot be maintained.

That is the short answer. The longer answer is to be found in the ways that Hobbes's theory of rights has been analyzed. In this chapter, I rehearse arguments against two interpretations of Hobbes's theory of rights. The first is that it is a theory of natural rights, and a very weak theory of natural rights at that. The second, using Hohfeld's definitional, jurisprudential analysis, is that it consists only of liberty rights or privileges. In other words, the rights Hobbes describes for individuals are all mere freedoms with no correlative duties on the part of others that could protect them. Once I have made the case that Hobbes's theory of rights is not a theory of natural rights and that Hobbesian rights are not, on the Hohfeldian analysis, all Hohfeldian liberties, I will then show how Hobbes's theory enables us to look afresh at current rights theory and how we can use his theory to contribute to ongoing discussions of some of the problems faced by those theories.

HOBBESIAN RIGHTS ARE NOT NATURAL RIGHTS

The reading of Hobbes that sees his theory of rights as a theory of *natural rights* is closely related to a reading of his political theory as one of natural law. Theories of natural law and natural rights were of course intellectually dominant at the time Hobbes was writing and he would have been steeped in the

[24] Some of these liberties of the subject are phrased in a conditional way and there is room for debate about how far Hobbes intends them as rights in a way we would understand, given for example, his statement concerning the right not to execute a dangerous or dishonourable office. He puts in the proviso "when ... our refusall to obey, frustrates the End for which the Sovaraignty was ordained; then there is no Liberty to refuse: otherwise there is" (Ibid.). Nevertheless, the list of rights is extensive and is difficult to explain away even for those commentators who are convinced that Hobbes does not hold a substantive theory of rights.

natural law tradition. As Perez Zagorin puts it in his fascinating (posthumously published) book, *Hobbes and the Law of Nature*[25]:

> Natural law was a doctrine he could hardly have avoided or ignored, because it occupied such a dominant position in the classical and Christian philosophical tradition of reflection on morality and law and their transcendental or cosmic grounding in nature, the order of the universe, and the reason and will of God.[26]

This comment draws our attention to something that is of great relevance in my view, that for Hobbes, theories of natural law were as much a part of the intellectual landscape as theories of empirical science are for us. The notions of nature and the order of the universe were inextricably tied to the premises of natural law theory. In other words, the idea that there is such a thing as "the order of the universe" was used as a starting point for exploration of morality and for law, just as easily and naturally as such an idea as "the order of the universe" is for us a starting point for the exploration of the laws of physics and the physical origins of the (physical) universe. Similarly, the notion of the reason and will of God was, for Hobbes and his contemporaries, quite naturally attached to the exploration of morality and law and to the notion of the order of the universe itself, as it was utterly uncontroversial to see God as being the originator of everything; the unmoved mover. If I seem to be stating the obvious and stating it somewhat simplistically, the reason is that it is necessary to appreciate the depth of belief in these assumptions, in order to see just how original and revolutionary Hobbes's thought is. His questioning of these assumptions is so ahead of its time that we can easily fail to see how extraordinary his thinking is on these matters.

This point is illustrated by looking at Locke's theory of natural rights. Published just under forty years after *Leviathan*, Locke's *Second Treatise of Government* was, and still is, seen as having put the theory of natural rights, as part of the theory of government, right at the forefront of emerging liberal political philosophy. Yet if we look at his theory of natural rights, it is clear that it has as its basis a thoroughly traditional theory of natural law. His description of the state of nature demonstrates this.

> ...though this be a *state of liberty*, *yet it is not a state of license:* ...The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure.[27]

[25] Zagorin, P., *Hobbes and the Law of Nature* (Princeton, NJ: Princeton University Press, 2009).
[26] Ibid., p. 12.
[27] Locke, J., *Second Treatise of Government* (1690), ed. C. B. Macpherson (Indianapolis: Hackett 1980), p. 9.

Locke is clear in his presentation of the natural law premises of his theory of natural rights and the importance of the theological premises is evident. It is perhaps surprising, given their evidence, that more has not been made of this, and yet the political theory and the theory of natural rights have very often been discussed without reference to their traditional natural law premises. The sincerity of Locke's own Christian beliefs, while receiving some scholarly attention, has been largely ignored, though Jeremy Waldron has reopened the discussion recently.[28]

Locke provides a striking contrast with Hobbes, both in terms of his theory of rights and his own clearly evident Christian beliefs. Hobbes's theory of rights is a far more modern and secular theory, and the sincerity of his Christian beliefs was doubted and questioned both in his own time and ever since. His personal beliefs are shrouded in myth and mystery and the subject of considerable debate, but what we can say with some certainty is that his theory of rights does not rely on the premises of traditional natural law theory, or at least that is what I shall argue, briefly, in the text that follows.

The relationship between Hobbes's political theory and theories of natural law and natural rights has received some attention from Hobbes scholars recently and some have argued that Hobbes is closer to this tradition than has sometimes been assumed.[29] These writers have tended to focus on the question of whether Hobbes's theory is one of natural law rather than directly addressing the question of natural rights. There is also an earlier precedent in the work of Howard Warrender,[30] who argues that Hobbes's moral theory can be characterized as one of natural law, but also argues that there is no substantive theory of natural rights in the theory. Richard Tuck, on the other hand, has argued that Hobbes's theory of rights owes much to that of Hugo Grotius's theory of natural law and natural rights and that it follows a particular strain of that theory that he refers to as "conservative rights theory."[31] The view that Hobbes's theory is much influenced by Grotius's theory of natural law and natural rights has received some criticism.[32] Interestingly, despite these writers

[28] *God, Locke and Equality: Christian Foundations of Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).

[29] See, for example, Bobbio, N., *Thomas Hobbes and the Natural Law Tradition*, transl. D. Gobetti (Chicago: Chicago University Press, 1993); Murphy, M., "Deviant Uses of 'Obligation' in Hobbes's *Leviathan*," *History of Philosophy Quarterly* 11 (1994): 3; Lloyd, S. A "Hobbes's Self-Effacing Natural Law Theory," in *Pacific Philosophical Quarterly* 82.3–4 (2001): 285–308; and *Morality in the Philosophy of Thomas Hobbes* (Cambridge: Cambridge University Press, 2009); and Zagorin, P., as in footnote 25.

[30] Warrender, H., *The Political Philosophy of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press, 1957).

[31] Tuck, R., *Natural Rights Theories, Their Origin and Development* (Cambridge: Cambridge University Press, 1979); *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993).

[32] See Perez Zagorin, "Hobbes without Grotius," *History of Political Thought* XXI. 1 (Spring 2000) 16–40; Martin Harvey, "Grotius and Hobbes," *British Journal for the History of Philosophy* 14.1 (2006) 27–50.

arguing, in various ways, that Hobbes holds some form of natural law theory, none of them argues that he has a substantive theory of natural rights. Even Tuck, who argues that Hobbes's theory of rights is strong, means in the sense of being authoritarian, rather than in the sense of providing substantive rights for subjects.

Elsewhere, I have argued that Hobbes does not hold a "conservative" natural rights theory, in Tuck's terminology, and that his theory has little (of importance) in common with Grotius's theory.[33] I do not discuss, in any detail, these debates within Hobbes scholarship and so will not argue against these particular positions directly. Instead, I argue against what might be termed the generic position: that Hobbes can be described as a natural law theorist.

I should perhaps mention that there are arguments that it is mistaken to see theories of natural rights as having emerged from theories of natural law, or to be "derived from" theories of natural law,[34] and specifically there are also arguments that Hobbes derives natural law from natural rights rather than the other way around.[35] I do not address those arguments here; instead I briefly summarize an argument I have made elsewhere, that Hobbes does *not* hold a theory of *natural rights*, in the sense that theories of natural rights have been taken to depend for their philosophical justification on traditional theories of natural law.[36]

My argument relies on Hobbes's relationship to theories of natural law in terms of the premises of natural law theories. If Hobbes successfully avoids a commitment to those premises or theses that have been seen as central to traditional theories of natural law (and by extension to theories of natural rights), then I argue he has successfully turned away from natural law theory in providing a basis for his theory of rights.

What premises do the many variations of natural law theory have in common? Several are mentioned by Cicero in the following frequently quoted passage. One is the notion of an independently existing, universal law that can be known by all rational beings and that applies to all people at all times. Another is that this law is known by reason.

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions.... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entireley. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one

[33] Curran, E., 2007, chapter 5.
[34] d'Entrèves, 1951.
[35] Straus, 1952; Tuck, 1979.
[36] Curran, E., 2007, chapter 5.

master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.[37]

We can turn to Aquinas for an illustration of the theological premise so central to the Christian tradition of natural law that Hobbes was immersed in.

… it is clear that the whole community of the universe is governed by the divine reason. This rational guidance of created things on the part of God … we can call the Eternal law.

[Now] since all things which are subject to divine Providence are measured and regulated by the Eternal law … it is clear that all things participate to some degree in the Eternal law, in so far as they derive from it certain inclinations to those actions and aims which are proper to them.

But, of all others, rational creatures are subject to divine Providence in a very special way; being themselves made participators in Providence itself, in that they control their own actions and the actions of others. So they have a certain share in the divine reason itself, deriving therefrom a natural inclination to such actions and ends as are fitting. This participation in the Eternal law by rational creatures is called the Natural law.[38]

The theological premise retained its importance, despite the fact that 400 years later, Hugo Grotius is famous for having hypothetically taken the theological premise out of the theory, saying, after putting forward his theory of natural law: "[a]nd what we have said would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs."[39]

These few quotations serve to remind us of the theoretical framework upon which natural law theory is constructed. Zagorin again makes the point:

The idea of natural law … (which belongs to a pre-scientific outlook based on a belief in final causes, one that assumes a teleologically directed cosmic order), continued to flourish in the 17th and 18th centuries, … [and] helped … in the same century that witnessed the eventual victory of Copernicanism, [and] the growth of empiricism and experimentalism, … to preserve meaning in the world by positing the existence of universal, immutable moral principles that derived from nature and the will and reason of God and existed as law on a rational foundation as part of human knowledge.[40]

It is Zagorin's view that although Hobbes was to "subvert and transform" the concept of natural law, he did nevertheless retain it. My view is rather that he subverts it to such an extent that he actually moves away from it and does not use any of the common premises of natural law to provide the basis for his theory of rights.

[37] Cicero, *De republica*, III, xxii, p. 33, quoted in d'Entrèves 1951, 20, 21.
[38] Aquinas, *Summa theologica*, Ia 2ae, quae. 91, art. 1 and 2, quoted in d'Entrèves 1951, p. 39.
[39] Grotius, H., *De jure belli ac pacis*, 1853, Prolegomena 11., p. xlvi.
[40] Zagorin, 2009, p. 11.

The common premises to which I refer may be characterized as the theological, metaphysical/metaethical, and epistemological premises. The medieval Christian philosophers understood natural law as coming from God as creator of the universe and of all laws within it. Natural law is God's law, which gives it its moral authority as well as its origin. The metaphysical/metaethical premise places natural law outside human beings. Natural law is said to exist in the fabric of the universe or in the commands of a superhuman legislator or in ideals of justice and morality or in the "essences" that give rise to moral qualities. Whichever of these the theory in question posits, it can then be argued that there is consequently an *objective* basis for the law of nature and the law will be binding upon all persons at all times. The epistemological premise posits knowledge of the natural law as universal, known to us all by reason, which is shared by all rational beings. Reason is often analyzed as God given and therefore created to fulfill God's purpose. This makes the "fit" between reason and natural law a perfect one. The role assigned to reason by natural law theory is a powerful one befitting a strongly rationalist theory. The "natural light" of "right reason" is what gives us knowledge of natural law.

HOBBES'S REJECTION OF THE PREMISES OF TRADITIONAL NATURAL LAW THEORY

First, regarding the theological premise, despite the thesis of the Taylor/Warrender tradition within Hobbes scholarship, that is, that Hobbes's moral theory relies on God as the author of the laws of nature, there is little evidence, in my view, to support the argument that the theory relies on God. And even if it is granted that Hobbes might have believed that the laws of nature were the commands of God, or that it is only as the commands of God that they have the status of *laws*, in the text of *Leviathan*, this is put forward only hypothetically, in the last paragraph of chapter XV[41] and alongside the primary, non-theological argument that the laws of nature are precepts of reason, which we know will help us to ensure our preservation. The final paragraph of chapter XV has caused and continues to cause controversy and is greatly puzzling in its implications. If Hobbes means that in fact they are not the commands of God then he seems to be saying they are not truly laws and yet he seems to keep treating them as laws, or at least as rules with moral standing. If he does mean that they are the commands of God then he has a theological premise for the laws of nature, which seems to contradict many other statements that imply they are simply rules calculated to better our chances of self-preservation and

[41] "These dictates of Reason, men use 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; wheras Law, properly is the word of him, that by right command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes" (*Leviathan*, XV, pp. 216/217).

a peaceful coexistence. This takes us into the territory of the continuing debate about the nature of Hobbes's moral theory. All that is required here is the simple point that in Hobbes's theory there is ample scope for arguing against the presence of a theological premise. His discussion of rights does not involve any mention of God and is clearly built solely on premises about the physical and psychological need for self-preservation and the lack of impediments (freedom/liberty) to act or refrain from acting. We can contrast Hobbes's theory with Locke's again and say, with apologies to Locke, that according to Hobbes, the state of nature is a state of liberty *and a state of license*.

Second, on the metaphysical/metaethical premise, the position seems relatively straightforward. Hobbes's clearly stated materialism and nominalism do not allow him to countenance the existence of any other sorts of entities, whether they are essences, ideals, objectively existing values, or anything else that is ontologically extravagant.

Third, the question of the epistemological premise is a little more complicated. A useful remark from Hobbes to note here is the following from the *Elements of Law*,

> In the State of Nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, … it was necessary that there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, etc.… This common measure some say, is right reason: with whom I should consent, if there were any such thing to be found or known in *rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man or men, must supply the place thereof; and that man or men, is he or they, that have the sovereign power.[42]

Hobbes's rejection of the notion of right reason in this passage is clear, which is not to say that there are no rationalist elements to Hobbes's thinking or to deny that the laws of nature are precepts or rules "found out by Reason." But his computational definition of reason in *Leviathan* famously states that it "is nothing but *Reckoning* (that is, Adding and Subtracting) of the Consequences of generall names agreed upon, for the *marking* and *signifying* of our thoughts."[43] He points out that this process is always prone to error and even where the agreement of many is achieved this is no guarantee of certainty "no more that an account is therefore well cast up, because a great many men have unanimously approved it."[44] So, there is no certainty to be achieved by the mere application of reason and no special power or privileged access to knowledge provided by it. It is worth noting that some of

[42] Hobbes, T., "The Elements of Law," in ed. J. C. A. Gaskin, *Human Nature and De corpore* (Oxford: Oxford University Press, 1994), II.10.8.

[43] *Leviathan*, V, p. 111.

[44] Ibid.

his claims for his own work would fall foul of this definition of the limits of reason[45] and so we can accuse Hobbes of some inconsistency on the subject of reason, though I am still justified, I believe, in claiming that Hobbes rejects the classical natural law notion of "right reason," usually seen as sharing in God's reason and thereby providing privileged access to knowledge of the natural law, for each rational being.

The run through the premises of natural law has indeed been brief and rather crude, yet even this exercise is enough to cast serious doubt on the contention that Hobbes's theory of rights can be accurately characterized as a theory of natural rights in the tradition of natural rights theories, connected to theories of natural law. Hobbes's theory, we can say, is no straightforward natural law theory. The premises that standard natural law theories rely on cannot easily be attributed to Hobbes. And although there are strong arguments about the lack of necessity for the theological premise, not least from Grotius, we cannot do without all the premises. A natural law theory without a theological premise, which also lacked the metaphysical and epistemological premises, would surely be no natural law theory at all.[46]

Hobbes certainly shares some of the terminology of natural law theorists, but he does not share with natural law/natural rights theories a notion of laws that are to be found outside ourselves, either in the fabric of the universe or as the commands of a superhuman legislator and known to us innately by the "light of reason." Hobbes's materialism keeps him from engaging in the sort of metaphysics that is required for this kind of natural law theory. His spare, mechanical descriptions of the nature of individuals contrasts so strikingly with the language and claims of natural law theory and his positing of a state of nature that is genuinely, anarchically free (the right of nature) sets up the only premises he requires for his theory of rights. These are that human beings can be fully unrestrained, and when they are, they are driven by fear of death and a desire to preserve themselves and to have a good life (and sometimes also to attain reputation and glory) and will start to restrain themselves only by their own realization that such anarchy is not the best way to preservation, peace, and a commodious life. The theory of rights builds on these assumptions to show how the full set of unrestrained liberties of the state of nature are pared down to groups of liberties held in a commonwealth, which are justified and some of which are protected in various ways.

I hope I have provided at least the bare bones of an argument that Hobbes's theory of rights should not be categorized as one of natural rights, in the traditional sense. The next part of my argument concerns a more recent way of characterizing Hobbesian rights and that has become the current orthodoxy in discussions of rights in the theory.

[45] My thanks to a participant at the EUI conference for reminding me of this.

[46] I should make clear that I am only referring to traditional theories of natural law and not to any modern versions of natural law, such as that of John Finnis.

HOBBESIAN RIGHTS ARE NOT ALL HOHFELDIAN LIBERTY RIGHTS

The jurisprudential analysis of rights by Wesley Hohfeld at the beginning of the 20th century has become widely used in moral and political philosophy as well as in jurisprudence. Within current Hobbes scholarship a Hohfeldian analysis of rights is usually now assumed. Following the Hohfeldian analysis of (legal) rights into the four categories – claim rights, liberty rights (or privileges), powers, and immunities – the rights held by Hobbesian individuals are usually taken to be only liberty rights.

For my purposes here, I need only discuss claim rights and liberty rights. According to the Hohfeldian analysis, all uses of the term "right" in the legal literature can be categorized using one of the four categories of right that he picks out from the legal literature. Each category or incident of a right also has a legal correlative, and a legal opposite, as they each define a legal relationship between two or more persons.

Claim – correlative – duty
Liberty – correlative – no-right
Claim – opposite – no-right
Liberty – opposite – duty

It is the claim right that has been picked out by political and moral philosophers, and even by Hohfeld himself, as being the one category of right that most accurately captures what we mean by a right in a moral/political context. My right to free speech, for example, correlates with the duties of others (and the state) to allow me to speak freely (with the usual sorts of provisos about it not clashing with other more important duties/rights).

Liberty rights, on the other hand, have been seen by moral and political philosophers as not really being rights in any important sense as they lack the all-important correlative duties that can provide for their protection. In what sense am I free to speak my mind if all others have an equal freedom to do so and none have any duties to allow me to speak or protect my right to speak? I may be free to speak in a sense but so is everyone else, and if they do not like what I am saying, they can shout me down or silence me in some other way.

The rights Hobbes describes do at first seem to conform to the definition of liberty rights. The rights we enjoy in the state of nature are indeed "bare freedoms" and are not protected by any correlative duties on the part of others. We are all equally free to do or forebear from doing anything and we have no duty not to do anything that may help us to survive. As Hobbes says,

> THE RIGHT OF NATURE, … is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his owne Life; and consequently, of doing anything, which in his own Judgement and Reason, hee shall conceive to be the aptest means thereto.[47]

[47] *Leviathan*, XIV, p. 189.

As mentioned previously, Hobbes goes on to say that in the state of nature "every man has a right to every thing; even to one anothers body."[48] It is easy to see how Hobbesian rights have come to be seen as liberty rights. The right of nature is indeed, on a Hohfeldian analysis, a set of liberty rights. But of course Hobbes doesn't stop there. He goes on to set out the way in which some rights do come to be protected by the duties of others. This process has been explained away in various ways by commentators, who argue that the apparent protections Hobbes puts in place are meaningless because of his absolutism, because of his subjectivist moral theory (which cannot allow an objectivist theory necessary for moral rights), and so on. I have argued, against such commentators, that Hobbes does describe a way in which some rights come to be protected and I set out very briefly how he does this in one case.

In the preceding section on individual rights in Hobbes's theory, I referred to Hobbes's device of a process of transferring and renouncing those rights that contribute to our insecurity. This is done under the second law of nature.[49] Hobbes describes how we transfer and renounce what I call "invasive rights" and how this leads to those rights becoming protected by duties that we then take on to not violate those rights that have been transferred to others. For example, when I transfer my right to your body over to you, I then take on a duty not to interfere with your right to your body (which you already had under the right of nature) and you do the same in relation to me. As quoted previously, Hobbes says, "To lay d*owne* a mans *Right* to any thing, is to *devest* himselfe of the *Liberty*, of hindring another of the benefit of his own Right to the same." He goes on, "when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it."[50]

We can see from this how Hobbes does allow for some rights, between subjects, to be protected by duties and this forms part of my argument that not all Hobbesian rights are (Hohfeldian) liberty rights. The rights that result from this process of transferring and renouncing invasive rights, under the second law of nature, are what Hohfeld would call claim rights because they now correlate with the duties of others not to interfere with them. It is clear from the preceding quotations that Hobbes does describe some rights as having correlative duties and Hobbes scholars have had to find ways of explaining away these substantive rights. My straightforward reading of the text demonstrates that Hobbes does indeed provide some substantive rights for subjects, protected by the duties of other subjects and that will come to be

[48] Ibid., p. 190.

[49] As earlier, that "a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, 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 himself" (*Leviathan*, XIV, p. 190).

[50] *Leviathan*, XIV, p. 191.

indirectly protected by the sovereign when he makes the second law of nature part of the civil law and enforces it. Then those rights will be protected by the duties of subjects and the duties of the sovereign to enforce the laws that cover them. In this way there will be, for example, a law that forbids assault on another's body.

I hope this brief summary of my argument is enough to at least establish some doubt that all Hobbesian rights are liberty rights. This supports my second argument, that the Hohfeldian analysis of Hobbesian rights, so prevalent in current Hobbes scholarship, mistakenly dismisses Hobbes's theory of rights as of little significance, on the assumption that all Hobbesian rights are (Hohfeldian) liberty rights.

WHAT DOES HOBBES'S THEORY OF RIGHTS HAVE TO OFFER TO RIGHTS THEORISTS IN THE 21ST CENTURY?

If I am correct in claiming that in his theory of rights Hobbes does not appeal to theories of natural rights, based on traditional theories of natural law to provide a philosophical basis for the existence of rights and if I am also correct in claiming that Hobbesian rights cannot all be captured by the Hohfeldian analysis of all Hobbesian rights as liberty rights, then where does this take me, in trying to understand Hobbes's particular contribution to rights theory? And, more importantly here, what may Hobbes's theory of rights contribute to our efforts to theorize rights in the 21st century?

To answer this question it is necessary to return to the discussion at the beginning of this chapter and remind ourselves of the way in which Hobbes defines a right and then builds his elegant theory from that definition.

> …they that used to speak of this subject, use to confound *Jus* and *Lex*, *Right* and *Law*, yet they ought to be distinguished; because *RIGHT*, consisteth in liberty to do or to forebeare, Whereas LAW, determineth, and bindeth to one of them: so that Law and Right, differ as much as Obligation, and Liberty; which in one and the same matter are inconsistent.[51]

The notion of liberty is used to ground that of a right. All rights are liberties for Hobbes but there has been a longstanding controversy concerning his definition of liberty, which I cannot go into in detail here. I will just state that I follow Michael Goldsmith[52] and others in taking his use of the term liberty to apply to freedom from laws and obligations as well as from the mere physical impediments implied by the "absence of externall Impediments" of the infamously restrictive definition he gives us in *Leviathan*.[53] In other words, I argue that we can take Hobbes to be using the term liberty in a broader, more familiar

[51] Ibid., XIV, p. 189.
[52] Goldsmith, M., "Hobbes on Liberty," *Hobbes Studies* 23 (1989): 23–39.
[53] Ibid.

way than is often taken to be the case.[54] This is supported by the statement in chapter XXI of *Leviathan*, where Hobbes expands the notion of liberty to include freedom from civil bonds as well as from physical impediments.

> But as men, for the atteyning of peace and the conservation of themselves thereby, have made an Artifical Man, which we call a Common-wealth; so also have they made Artifical Chains, called Civill Lawes, which they themselves, by mutuall covenants, have fastned at one end, to the lips of that Man, or Assembly, to whom they have given the Soveraigne Power; and at the other end to their own Ears.[55]

This interpretation is also supported by remarks such as, "For he is free, that can be free when he will,"[56] and by referring to subjects' need to consider what "liberty we deny ourselves, …"[57]

So, all rights are liberties and liberties are freedoms from civil bonds as well as from physical ones. But what the Hohfeldian analysis has done, at least in the way in which it has been taken up and used by Hobbes scholars, is to divide the notion of a claim from that of a liberty. When philosophers interpret Hobbes's theory of rights using Hohfeld's analysis they conclude that all Hobbesian rights are liberty rights and therefore are rights without any protections, or to put it another way, they are not genuine, substantive political rights at all. Although there is no formal hierarchy among the four categories of right that Hohfeld describes, even Hohfeld himself says that it is only the claim right that is a right "properly so called."[58] Political philosophers who use Hohfeld's analysis have usually followed him in this by taking the claim right as the exemplar of a genuine, political right.

I argue, contrary to this, that Hobbes *does* account for the protection of some rights by imposing duties on others toward rights holders, but that he does this without abandoning his core notion of a liberty as the ground of a right. Both the Hohfeldian analysis, with its assumption of the claim right as the only "right properly so called," and an analysis within moral philosophy (and adopted by Hobbes scholars such as Howard Warrender, in his discussion of Hobbesian rights[59]) that states that a right is no more than the other side of a duty, have bolstered a view of rights as fundamentally claims or entitlements. While I do not wish to argue against the importance of the notion of duties to uphold or protect the rights of individuals, I do want to argue that the Hohfeldian analysis has contributed to the separation of the notion of a liberty from that of a claim and to the denigration of the notion of liberty, within

[54] For a full discussion of this see Curran, E., "Blinded by the Light of Hohfeld: Hobbes's Notion of Liberty," *Jurisprudence: An International Journal of Legal and Poltical Thought* 1 (2010): 85–104.

[55] *Leviathan*, XXI, p. 263.

[56] Ibid., XXVI, p. 313.

[57] Ibid., XXI, p. 268.

[58] Hohfeld, W. (New Haven: Yale University Press, 1919), p. 39.

[59] Warrender, H., 1957.

rights theory. As long as liberties are seen as nothing more than Hohfeldian liberty rights, that is, as bare freedoms with no protections, they will not be seen as rights in any significant sense. All the theoretical "work" is then left to the notion of a claim.

In Hobbes's theory, on the other hand, we are shown that liberties may be unprotected, as in the state of nature, but that they can also be protected, as they come to be under the second law of nature, by the duties we take on when we give up our invasive rights. And he also shows that there is another, indirect way in which they can come to be protected too, by the duties of the office of sovereign, to protect the subjects. This suggests that we should be careful not to become too wedded to a Hohfeldian analysis that states that a claim right *necessarily or by definition* correlates with the duties that protect it and that a claim right cannot be at the same time a liberty.

MODERN RIGHTS THEORIES – THE INTEREST AND WILL THEORIES

In the search for a modern philosophical justification for rights that avoids recourse to the premises of traditional natural law theory, two theories, both from within the jurisprudence literature, have dominated discussions. These are the "will" or "choice" theory, most famously proposed by H. L. A. Hart, and the "interest" or "benefit" theory, originating with Bentham and supported by Mill, but also adopted and adapted by towering figures in recent and current jurisprudence, such as Joseph Raz and Neil MacCormick.

I here give a brief sketch of these two theories. The will theory takes as its starting point the idea that the defining characteristic of a right is that when I have a right to *x* in relation to *y*, it is my choice whether or not to hold *y* to delivering her duty, that is, her side of the right. So, for example, if I have a right to exclude *y* from my garden, it is up to me whether or not to demand from *y* that she stay out, thereby performing her duty, or to release her from that duty and allow her into the garden. So, I control the right. Having the right gives me the choice and the control or power over the duty that is correlative to the right. To put it another way, the right is created when enforcement of a duty is given over to the particular individual to whom the duty is owed. Nigel Simmonds puts the point in the following way: "In some cases, the enforcement of a duty is made conditional on an exercise of will by someone other than the person who has the duty. In such cases, the party whose will is made decisive is spoken of as having a right."[60] He summarizes the idea behind will theory in the following way: "The will theory considers the essence of a right to be a power of waiver over someone else's duty."[61] So, a promisee, for example, has a right because she has the power to waive the promiser's duty to keep the

[60] Simmonds, N. E., *Central Issues in Jurisprudence: Justice, Law and Rights* (London: Sweet and Maxwell, 1986), p. 136.

[61] Ibid., p. 137.

promise. Hart illustrates the idea by making a distinction between the criminal law and the civil law in the way each treats individuals.

> The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.[62]

And Hart continues by pointing out the contrast with a person protected only by the criminal law who has no such power to release anyone from their duties. One thing to note here is just how much the theory of rights is being thought through in terms of *legal rights*. In other words, to a great extent this is theorizing about the jurisprudence of rights rather than about political or moral rights. I return to this point below.

The interest or benefit theory, on the other hand, says that when I have a right to exclude others from my garden then I have an interest that should be protected, in being able to exclude others from my garden. Another way of putting this is that when I have a right to x, then there is some benefit that will accrue to me when that right is exercised or granted. So, with this example, there is a benefit to me when all others have a duty to stay out of my garden and I am therefore protected in my exercise of my exclusive right to occupy my garden. In fact, we could name several benefits that accrue to me; privacy, control over the garden, solitude, and so on. Joseph Raz says that the right is *based on* the interest: "A right is based on the interest which figures essentially in the justification of the statement that the right exists."[63]

So, it is the fact that the right is based on an interest or interests for the right holder that provides the philosophical justification for the claim that the right exists. For Raz, the right is also inextricably linked to a duty or duties: "The proposed definition of rights identified the interest on which the right is based as the reason for holding that some persons have certain duties."[64] And he says further "that a right exists where the interests of the right-holders are sufficient to hold another to be obligated…."[65] So, according to the interest theory, the rights we hold could be said to be interests of ours that give reasons or provide grounds for saying that other people owe us duties to ensure those interests are protected. This echoes the utilitarian forerunner of the interest theory, and

[62] Hart, H. L. A., *The Concept of Law* (Oxford: Oxford University Press, 1982), pp. 183/184.
[63] Raz, J., *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 169.
[64] Ibid., p. 181.
[65] Ibid., p. 182.

what John Stuart Mill seems to be saying when he declares that "to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of."[66] Though of course for Mill the philosophical justification is not the interests of the individual as such but rather "general utility."

Both theories have been attacked in various ways. Perhaps the most damaging general criticism that has been applied to each theory is that they are open to numerous objections in the form of counterexamples. In other words, they can each be shown to exclude as rights many examples of rights that are generally taken to exist. So, for example, in MacCormick's famous case, the will theory fails to designate as rights any rights held by children, because we do not think that children could or should have the power or control over the correlated duties.[67] This criticism also extends to any examples of rights held by those without competence or capacity to hold such authority or power over the duties of others. And the will theory also fails to cover those rights we think of as inalienable, where the correlative duties cannot be waived; the right to life or the right to not be enslaved, for example.[68] These are rights that we deem so crucial to our well-being and safety that we exclude them from those we may give up. This recognizes the need to protect such rights from decisions we may make under duress or due to a failure for any reason to be able to act to protect ourselves and also to protect us from serious harm that we may, for whatever reason, consent to.

The interest theory, on the other hand, does allow for the rights of children and for inalienable rights, as these can clearly be seen to be of benefit to the right holders or to represent their interests. The interest theory also gives rise to counterexamples, however. Most obviously, we can also think of interests that we do not consider to amount to rights. For example, the interests of the salesman in selling his products do not amount to rights to sell the products. Third-party beneficiaries are also often used as examples. X's interest in her spouse inheriting his father's estate does not amount to a right held by her, to inherit it. There are also rights we hold that do not seem to provide any benefit. My rights as executor of my friend's will (in which I am not a beneficiary) may not reflect any interests in doing so, or provide any benefit to me. On the contrary there is, rather, a burden on me to do the necessary paperwork and so forth.

There are also criticisms of both theories for the way they make rights so attached to duties. This is the idea that there is no independent concept of a right; all rights are just the "other side" of duties. Hart accuses the interest theory of failure on this count in what he terms the "reproach of redundancy."[69]

[66] Mill, J. S., "Utilitarianism," in ed. Alan Ryan, *John Stuart Mill and Jeremy Bentham*: *Utilitarianism and Other Essays* (London: Penguin Books, 1987), p. 327.

[67] MacCormick, D. N., *Legal Rights and Social Democracy* (Oxford: Clarendon Press, 1982).

[68] MacCormick, D. N., "Rights in Legislation," in eds. P. M. S. Hacker and J. Raz, *Law*, *Morality and Society* (Oxford: Clarendon Press, 1977).

[69] Ross, H., "Hohfeld and the Analysis of Rights," in eds. J. Penner, D. Schiff, and R. Nobles, *Jurisprudence and Legal Theory* (London: Reed Elsevier, 2002), p. 639.

In Hart's view his own choice theory escapes this criticism by virtue of the extra ingredient of choice or control that it gives to the right holder over and above being the mere passive recipient of the duty. But Hart's theory can also be criticized for emphasizing a core connection between a right and a duty.

The argument between will theorists and interest theorists carries on and complex defenses of each theory are made. Yet, it seems we must admit that both are flawed at least in terms of the counterexamples that can so readily be found within the legal literature. I argue that an awareness of Hobbes's theory of rights allows us to view the debate from another angle and perhaps to contribute to the critique of both theories. I would like to make four suggestions of areas for discussion and arguments that might be developed, using Hobbes's theory of rights.

First, Hobbes's use of the notion of liberty as grounding that of a right enables us to take a fresh look at liberty as an alternative to either interests/benefits or will/choice as the foundational concepts for rights. Liberty has of course figured more prominently in rights theories in the past, but has been less to the fore as jurisprudential theories have come to be dominant and particularly since Hohfeld's notion of a privilege or liberty right has encouraged the view that liberties as such cannot be "rights properly so called" because they are by definition unprotected. (There are exceptions to this general trend and Rawls's reworking of the first principle of justice in his *Political Liberalism* would be a good example from political theory of rights being defined as liberties.[70])

Hobbes shows that we can construct a theory of rights in such a way that liberties can be either protected or unprotected. There is nothing about being a liberty or the notion of liberty itself, that means there cannot be duties held in relation to it unless we, like Hohfeld, choose to stipulate in our definition of liberty that it is a "mere freedom" without correlative duties. There are clearly examples of Hohfeldian liberty rights in the legal literature but when we are talking about political/moral rights we can be more creative and flexible with our understanding of the notion of liberty.

Second, Hobbes shows us a way to separate rights from duties. This is a problem for interest theories, will theories, and the Hohfeldian analysis; indeed it has been a persistent problem for theorizing rights and demonstrating their existence as conceptually separable from duties. Looking at Hobbes's theory we can see a system of analyzing rights whereby some rights (liberties) do not have any correlative duties but are still defined as rights. Also, and importantly, he shows that rights can be protected by indirect duties as well as by directly correlated duties.

[70] "Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all." Rawls, J., *Political Liberalism* (New York: Columbia University Press, 1993, 1996), p. 291.

Third, Hobbes gives us an alternative to the notion of a claim that has become so dominant with the influence of the Hohfeldian analysis. The notion of a claim has a similar problem to that of an interest in that, on their own, they seem to lack the necessary moral/political value, that our intuitions tell us attach so strongly to rights.

Fourth, and following on, arguably, liberty could provide the required moral/political value that is lacking in the notions of both interests and claims. It certainly has a rich history of doing so. The notions of will and choice escape the criticism that they lack value but that is only because they themselves attach to the value of liberty.

Clearly, much more work would need to be done to flesh out any of these areas for discussion and to inform any arguments that might be developed as a result. What Hobbes's theory does, though, is to provide another way of analyzing rights that can be used to contribute to such discussion.

If I can summarize what I think Hobbes's theory of rights has to offer us in this century, it would be that it enables and encourages us to look again at the notion of *liberty*, to ground and justify that of a (moral/political) right. It also gives us reason to pull away from a strictly Hohfeldian analysis of rights, at least when we are talking about moral and political rights rather than legal rights. It provides a way to criticize the notion of a claim or entitlement and to ask whether that is the best way of capturing what is important about the notion of a moral/political right. And, by offering an alternative to the correlativity thesis of the Hohfeldian claim right, it may help to answer the "reproach of redundancy."

In the maelstrom of philosophical disputes that make up modern rights theory, Hobbes's simple yet undeniably modern approach to rights merits close examination. By making liberty the central, grounding concept for a right, he is able to discuss the extensive freedoms we desire, those we are justified in holding on to and those we are obligated to protect in various ways, in civil society.

4

Hobbesian Legal Reasoning and the Problem of Wicked Laws

Claire Finkelstein

THE JURISPRUDENTIAL DEBATE

No jurisprudential question is more important, and at the same time more difficult, than whether a morally repugnant law is still a law. Indeed, one might even say that this question has come to define postwar jurisprudence: it raises the debate between the traditional view that the concept of law is limited by that of moral obligation and the more modern view that law is defined in terms of the authority of political sovereigns over their subjects.

The latter view is the positivistic picture of law that contemporary jurisprudence inherits from John Austin, and later from H. L. A. Hart. Positivists suggest that the concept of law is largely a formal one: any sovereign pronouncement with the right sort of structure and pedigree is a candidate for law. In a command theory like Austin's the point is easiest to see. Although there may be formal restrictions on the sorts of prescriptions that can be commanded and the sorts of commands that can be coerced, there is nothing to limit what can count as law based on the content of the command.[1] At least as a first approximation, the same is true for Hart. Although Hart establishes various formal conditions on the sorts of prescriptions that can count as law, in theory any rule with the right generality of structure and the right sort of relation to the relevant social practice is a candidate for law.[2] We might, indeed, regard the idea that there are no content-based restrictions on the nature of law as one way of formulating the core of legal positivism.[3]

[1] See John Austin, *The Province of Jurisprudence Determined*, ed. Wilfred Rumble (1832; new edition, Cambridge: Cambridge University Press, 1995).

[2] Although Hart famously modifies this view in chapter IX of *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), pp. 185–212, where he tentatively suggests that legal rules must have a certain minimum moral content, these remarks have been thought to stand apart from the account he offers in the preceding chapters, and it is not clear it can be reconciled with that account.

[3] Inclusive and exclusive positivists characterize this feature of positivism differently. Exclusive legal positivists take this restriction to be a *necessary* feature of the law. For example, Joseph

An important implication of this feature of positivism is that positivist theories have no basis for denying the status of law to wicked rules or wicked legal systems. Anti-Semitic legislation of the Third Reich, laws establishing racial segregation in the Southern United States or requiring East German border guards to shoot those seeking to escape to the West, in the eyes of the positivist, are as deserving of the title "law" as any others. Natural law theorists have accordingly been quick to accuse positivists of depriving jurisprudence of its most potent hedge against injustice. Worse, positivists in their eyes place law at the service of such injustice, as a legitimating force. But if, on the contrary, the identification of law depends on its satisfaction of a certain minimum moral content, officials in regimes like the Third Reich could not cloak their genocidal objectives in the mantle of legal legitimacy. One well-known German natural law theorist, Gustav Radbruch, even laid causal responsibility for the rise of Nazi law at the positivists' door, suggesting that the advent of positivism among German-language legal scholars before the war (such as Hans Kelsen) had facilitated the acceptance of Nazi law, and that this had encouraged the view of Nazi law as worthy of allegiance.[4]

Although this is a potent criticism of positivism, most positivists have made a virtue of necessity. Far from thinking of the separation of law from morality as enhancing the legitimacy of immoral regimes, positivists claim it enables legal actors to distinguish better their legal from their moral obligations. Hart famously made the point with regard to the decision to prosecute the German informers who betrayed violators of Nazi law:

> A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them. It may be conceded that the German informers, who for selfish ends procured the punishment of others under monstrous laws, did what morality forbad; yet morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbad. This is the principle of *nulla poena sine lege*. If inroads have to be made on this principle in order to avert something held to be a

Raz, an exclusive positivist, argues that individuals subject to law's authority "benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle" (*Ethics in the Public Domain*. Oxford: Oxford University Press, 1994, p. 219). Inclusive positivists, on the other hand, argue that content-based restrictions are possible but *not necessary*. Hart, for example, argued in the Postscript to *The Concept of Law* that a legal system's "rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values …" (*Concept of Law*, p. 250). See generally Brian H. Bix, "Legal Positivism," in eds. Martin P. Golding and William A. Edmundson, *The Blackwell Guide to Philosophy of Law and Legal Theory* (Malden, MA: Blackwell, 2005), pp. 29–49.

[4] See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593; see also L. L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.

greater evil than its sacrifice, it is vital that the issues at stake be clearly identified … *At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made.*[5]

According to Hart, if we are determined to prosecute the German informers and their ilk, we must at least be clear that we do not do so in accordance with law, which does not countenance retroactive prosecution, but according to the moral imperatives of the situation. Such proceedings might more aptly be thought of as courts of moral confrontation than legal trials, and the resulting "punishment" closer to acts of moral vindication than to legally prescribed sanctions. Although these "prosecutions" may sometimes seem *morally* compelled, we should not pretend they are *legally* compelled or even legally *sanctioned*. Unless the moral reasons to ignore the law outweigh the reasons to stay within its confines, prosecutions of this sort should be strongly disfavored on a positivist approach.

The standoff between the natural lawyer and the positivist on the question of the status of wicked laws, and the correlated question of the legitimacy of prosecuting individuals who act under such laws, is as timely a question today as it was when Hart and Radbruch sparred over the trials of the German informers.[6] In our own time, the problem has reappeared in the debate over whether former officials of the Bush Administration should be prosecuted for violating international (and domestic) laws governing the treatment of suspected terrorists by authorizing their torture.[7] It has also come to the fore in the Obama Administration's use of targeted killing and its willingness to target Americans without affording them due process of law. If we take a positivistic approach, it is substantially more difficult to argue that such policies fail to conform to the rule of law. Justice Department officials have offered narrow interpretations of the laws restricting the use of enhanced interrogation techniques, and in this way provided a basis for exonerating agents who would at other times have been prosecuted under such laws. Since these high officials were duly authorized by secondary rules of the system to offer such interpretations and individual state agents were merely implementing official pronouncements, the case for prosecuting individuals for acting according to legal authorization is a difficult one to make. And the D.C. Circuit has held that questions involving targeted killings are "political questions," and that as such they are beyond the reach of the Fifth Amendment's Due Process

[5] Hart, *Concept of Law*, 211–12 (emphasis added).

[6] Lon Fuller describes the debate between Hart and Radbruch in "Positivism and Fidelity to Law" (p. 630).

[7] See my "Vindicating the Rule of Law: Prosecuting Free Riders on Human Rights," in eds. Austin Sarat and Nasser Hussain, *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* (New York: New York University Press, 2010).

Clause.[8] Matters are potentially otherwise from the standpoint of the natural law theorist: if the legal opinions of Justice Department officials or of the D.C. Circuit distort international and domestic sources of law, rendering them immoral, we have reason to deny domestic orders that authorized such torture the status of law, and to prosecute both the officials who issued such authorizations and those who acted under their imprimatur.

In this essay I suggest that an examination of the legal philosophy of Thomas Hobbes may shed light on this well-worn but important debate between positivists and natural law theorists. In particular, I shall argue that Hobbes's approach to law presents a middle road between the two standard theories: it incorporates content-based restrictions on the notion of law without embracing tendentious natural law commitments. If this is correct, then although Hobbesian jurisprudence contains a number of elements of both positivist and natural law theory, it should ultimately be understood as constituting a third alternative to the traditional array of jurisprudential approaches to the nature of law. I shall suggest that legal contractarians in fact benefit from the central advantages of the naturalistic approach on this question: they are able to deny evil regimes the status of law, on the one hand, but do so on the basis of rationalistic, rather than moralistic, assumptions. For this reason, the problem of wicked laws and legal regimes that has vexed legal theorists of both natural and positivistic orientation is better resolved in a contractarian theory of the sort Hobbes proposes than in either of the traditional alternatives.

Before we can properly assess Hobbes's contribution to the problem of wicked laws, we will need a clearer understanding of his legal framework more generally. In this essay, I first consider Hobbes's formal account of civil law in *Leviathan*, both with regard to its definition of law as "command" and its apparently conflicting suggestion that civil law and natural law are "of equal extent." Next, I consider Hobbes's view of the two most crucial aspects of adjudication, namely the role of common law reasoning and the proper approach to statutory interpretation. The latter will provide our entry into the topic of wicked laws, since Hobbes addresses this problem most clearly when he discusses legal interpretation and, in particular, the question of how to interpret commands that diverge from the laws of nature. As we shall see, the great difficulty for Hobbesian legal theory is to reconcile the role of content-based restrictions with the more formal contract-based approach to the nature of law that forms the foundation of Hobbes's political philosophy. The problem of wicked laws brings this problem to the fore. In addition to its contemporary relevance, then, it also serves as a vehicle for addressing an apparent tension in Hobbes's legal theory.

[8] *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 – Dist. Court, Dist. of Columbia 2010.

CIVIL LAW, NATURAL LAW, AND THEIR "EQUAL EXTENT"

Traditionally, commentators have regarded Hobbes as the grandfather of modern legal positivism and Hobbesian jurisprudence as an anachronistic combination of Austinian command theory and Holmesian legal psychology. The link between command theories and Holmesian realism is not an unreasonable one to make: Austin's view of law as a command backed by a threat dovetails nicely with Holmes's picture of the legal subject as "the bad man," who "cares only for the material consequences which ... knowledge [of the law] enables him to predict."[9] For the bad man, law's authority resides entirely in the possibility of external sanction, rather than in an inner sense of duty. As Hart would later put the point, the man who regards law and legal duty from a wholly external perspective looks at law as a basis for predicting what others will do – "as a *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come."[10] But the person who takes this external stance toward the law will miss the central feature of law as a social practice, namely its "internal aspect." Such a person

> will miss out [on] a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation.[11]

Attributing an "external" view of law to Hobbes is not entirely without justification: Hobbes's depiction of natural man as a pure instrumental reasoner, concerned primarily to secure his own survival, provides a convenient hook on which to hang the Holmesian view of the legal subject. For the Holmesian interpretation of Hobbesian man, the Austinian version of the command theory is the most appropriate corresponding legal theory. But we should examine the attribution of such views to Hobbes with care. Is it in fact correct that the only sense of legal duty Hobbesian man has is one inspired by the sanction he may fear? And does Hobbes really hold a command theory of law that could lend itself to this account of legal obligation? Let us start by considering the latter question, as Hobbes's formal definition of civil law in *Leviathan* seems, at first blush, to provide the strongest support for the image of Hobbesian jurisprudence described above.

Most famously, Hobbes says that "law in general is not counsel, but command,"[12] and the command of one who himself "is not subject to the civil

[9] Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457, 459.

[10] Hart, *Concept of Law*, p. 90.

[11] Ibid.

[12] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (1651; new edition, Indianapolis: Hackett, 1994), XXVI.2 (References to Leviathan are given by chapter number, followed by paragraph number).

laws."[13] At another point he says that "all laws, written and unwritten, have their authority and force from the will of the commonwealth, that is to say, from the will of the representative…."[14] And further, that "before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant…."[15] Thus the civil law depends chiefly on the existence of a sovereign empowered to inflict greater harm for breach of covenant than those seeking to advantage themselves would gain from defecting. And Hobbes's sovereign is certainly thus empowered, since "nothing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice, or injury…."[16] This reading of Hobbes's formal definition of law, in combination with his apparent commitment to psychological egoism,[17] will surely make the caricatured portrait of Hobbes's legal philosophy sketched above seem basically correct: we have a command theory of law, a sovereign who is above and hence exempt from the law, the "bad man" motivations of the subjects toward whom law is directed, and the articulation of legal duty in terms of sanctions for legal violations.

Nevertheless, it is not difficult to begin to chip away at the association of Hobbes with Austinian positivists and Holmesian pragmatists when we delve deeper into Hobbes's remarks on law. The first sign that matters are more complex appears in an aspect of Hobbes's definition of law we have not yet considered. As David Gauthier has pointed out, Hobbes writes that law is not merely command, but the command of a sovereign issued to one "formerly obliged to obey him."[18] The obligation to obey the law for Hobbes thus *precedes* the command through which the law is expressed. With these few words we have an immediate basis for distinguishing Hobbes's account from Austin's, for if the obligation to obey the command precedes the command, the duty to obey cannot lie in the sovereign's ability to compel compliance with a threat of –sanction. The commands of the sovereign are law, Hobbes thinks, not because the sovereign who issues them has the power to compel compliance, but rather because the subjects who receive these commands have a prior obligation to obey him, an obligation that stems from the contractual commitment they have previously assumed.[19] This suggests, by contrast with the Austinian account,

[13] Ibid., XXVI.6.
[14] Ibid., XXVI.10.
[15] Ibid., XV.3.
[16] Ibid., XXI.7.
[17] There is a lively debate in the secondary literature about whether Hobbes is in fact committed to psychological egoism. It seems to me fair to say that he is, but that psychological egoism may not be the insult commentators seem to believe it to be.
[18] Ibid., XXVI.2.
[19] See David Gauthier, "Thomas Hobbes and the Contractarian Theory of Law," *Canadian Journal of Philosophy*, Suppl. 16 (1990), reprinted in Claire Finkelstein, *Hobbes on Law* (2005), p. 63.

that the ultimate source of the law's authority is *the agreement the subjects make with one another to obey the law*, rather than the coercive power the sovereign has to insist on compliance with it. This contractarian underpinning to Hobbes's definition of law thus provides one reason for seeing his approach as only superficially positivistic.

A second reason for questioning the construction of Hobbes as a positivist is the intrinsic relation between positive and natural law that Hobbes repeatedly asserts, one that would appear to be quite separate from the connection between positive law and contractarian agreement noted earlier. The best place to begin our investigation into Hobbes's position on this question is with the odd statement in chapter XXVI of *Leviathan* that "[t]he law of nature and the civil law contain each other, and are of equal extent."[20] Hobbes goes on to explain that the laws of nature, which are justice, gratitude, and other moral virtues, are mere "qualities that dispose men to peace and obedience."[21] They become laws once a commonwealth is formed. He writes:

> That which I have written in this treatise concerning the moral virtues, and of their necessity for the procuring and maintaining peace, though it be evident truth, is not therefore presently law but because in all commonwealths in the world it is part of the civil law. For though it be naturally reasonable, yet it is by the sovereign power that it is law.[22]

In other words, the requirements of virtue are part of the natural law, but they become part of the civil law only once the sovereign legislates them. Once part of the civil law, they help to sustain adherence to the natural law, by supporting the commitment to the civil state and the avoidance of war. Hobbes thus suggests that the laws of nature supply the content for the commands of the sovereign, and hence for the civil laws. The sovereign acts as translator for the laws of nature: he interprets them and gives them definite positive form.

This second aspect of Hobbes's legal theory will be our primary focus. For those interested primarily in the contractarian aspect of Hobbes's political philosophy, the first feature of his legal theory will seem the most significant. But this second feature – the connection of positive law to natural law – will seem troubling, not only because it makes Hobbes look like a natural law philosopher, but also because it seems to stand in sharp contrast with the contractarian underpinnings of his account. We must therefore consider Hobbes's suggestion on this point in considerable detail, as it will turn out that finding a way to reconcile these two opposing strands of Hobbes's legal theory will hold the key to understanding the uniqueness of his account. In addition, understanding how Hobbes combines these different aspects of his account will shed light on how he can reject the positivist position on wicked legal systems.

[20] *Leviathan*, XXVI.8.
[21] Ibid., XXVI.8.
[22] Ibid., XXVI.22.

An initial objection to Hobbes's use of natural law in this context would occur to anyone familiar with more traditional forms of natural law theory, and will raise doubts about the very intelligibility of Hobbes's suggestion. The objection would be that it is one thing to say that the sovereign takes the content of the positive laws from the natural law, but quite another to declare the two bodies of law *equal in extent*. What could Hobbes have meant by such a statement? Among other difficulties, the suggestion makes the concept of natural law virtually unrecognizable from a historical perspective, for it constitutes a drastic reduction in the scope of natural law as compared with the view on this question of Hobbes's Thomistic forbearers. When Aquinas spoke of natural law, for example, he meant the participation on the part of a rational creature in God's eternal law.[23] That is, the natural law encompasses all of the principles of the eternal law that apply to rational creatures – a domain of vast extent. When Hobbes speaks of "natural law," by contrast, he is not referring to the expansive category of all the regularities of nature as conceived by human reason. Instead, he literally means to refer to the nineteen rules or rational recommendations he sets out in chapters XIV and XV of *Leviathan*. In the move from Aquinas to Hobbes, then, the domain of natural law has shrunken significantly, and this makes it particularly unclear why Hobbes thinks it possible to derive the content of positive law entirely from the natural law. To make sense of Hobbes's claim, then, we must at least briefly digress and take a closer look at the laws of nature.

One feature of the first three laws of nature is that they are quite general, and if all the laws were equally general, we could make sense of Hobbes's statement of equivalence between the natural and the civil laws reasonably well. The laws of nature could be the general principles that establish man's best hope for survival and flourishing; the civil laws would translate these general principles into specific rules of conduct. The relationship between laws of nature and specific civil laws would then look something like that between constitutional and statutory provisions: the former are not useful for guiding actual conduct, but they are useful insofar as they establish the parameters within which rules of conduct will function.[24]

Unfortunately, however, this suggestion will not work with most of the laws of nature beyond the first three because the remaining laws are highly specific. For example, the fourteenth law of nature says that "those things which cannot be enjoyed in common, nor divided, ought to be adjudged to the first possessor; and in some cases to the firstborn, as acquired by lot."[25] Or consider the fifteenth law of nature, "that all men that mediate peace be allowed safe

[23] Thomas Aquinas, *Summa theologiae*, pt. IaIIae, q. 91, art. 2.

[24] A similar idea is found in John Rawls's claim that the basic structure of society is the first subject of principles of justice. See "*The Basic Structure as Subject*," in *Political Liberalism* (New York: Columbia University Press, 1996), pp. 257–88.

[25] *Leviathan*, XV.28.

conduct."[26] The sixteenth involves the obligation and/or right to submit one's disputes to an arbitrator, and the nineteenth that a judge must credit the testimony of witnesses.[27] These recommendations are too specific to play the role of metaprinciples intended for the guidance of other rules or principles, in the way that constitutional principles typically do. We therefore need some other story about the laws of nature and their relation to the civil laws.

Arguably what is distinctive of the laws of nature is not their generality but the fundamental role they play in furthering the function of ordinary law. That is, the laws of nature are distinguishable from ordinary legislation in that they establish the preconditions for the existence of legitimate civil laws. It is clearest how this might be so in the case of the first three, or "primary," laws: once men are exhorted to seek peace, they are told to do this by laying down a portion of their rights. Having satisfied this condition, they are further instructed to accomplish these aims by entering into a contract with their fellow men and adhering to it.[28] The first three laws are thus temporally ordered recommendations of reason that can guide human beings out of the state of nature and into civil society. The later laws of nature, meant to apply once the first three laws have been met, should be seen as further refinements of the conditions necessary for the maintenance of a civil state of peace. They are not, however, different in aim and purpose from the primary laws: whether general or specific, the laws of nature speak to the necessary conditions for the establishment and maintenance of peace, and ensure procedures for resolving disputes among men that significantly enhance the chances of avoiding recourse to war.

The sense in which it is plausible to think of the civil law and the natural law as "of equal extent," then, requires some elaboration, but it may not in the end be quite as mysterious as it at first glance appeared. Adherence to the natural law is the precondition for the existence of *good* civil laws, that is, civil laws that suit their function. Since the ability to protect and further human welfare through legislation is one of the central legitimating functions of the sovereign, the very authority of the sovereign depends in part on the satisfaction of this condition. On the other side, civil laws have as their aim the reinforcement of the laws of nature, meaning that the civil laws help to ensure that laws of nature are satisfied. This creates a kind of feedback between the natural law and the civil law – one might say a relationship of mutual reinforcement.

[26] Ibid., XV.29.

[27] Ibid., XV.30, 33.

[28] The first law – that man must seek peace, "in sofar as he has hope of obtaining it," and otherwise to "seek and use all helps and advantages of war" – establishes the conditional rationality of leaving the state of nature in favor of civil society. The second law – that men should lay down their rights to all things, "and be contented with so much liberty against other men as he would allow other men against himself" – establishes the method by which peace is to be obtained. With ever-increasing specificity, the third law of nature – that men must keep their covenants – presupposes the satisfaction of the first two.

To see in greater detail what this relationship of mutual reinforcement might look like, consider that between the third law of nature and the civil laws regarding the enforcement of ordinary contracts. The third law helps to establish the possibility of sovereign rule, by instructing men to abide by the original covenant through which the sovereign is instituted. Ordinary contracts are then enforced through commands of the sovereign that become law, which in turn helps to reinforce the contract for the institution of the sovereign. It is not hard to project in this context what Hobbes might mean when he says that the natural law and the civil law are of "equal extent." He emphatically does *not* mean that they are identical bodies of law, as one might have initially thought. Rather, he means that the principles of reason on the basis of which the natural practice and their corresponding social institutions are established are the same, and further that the natural and civil practices are therefore mutually supportive.

Another example would be the natural and civil practices regarding self-defense. As we see in chapter V, Hobbes is clear that the retained natural right of self-defense provides the basis for the panoply of defensive rights citizens bring with them into civil society. The retained natural right to self-defense indirectly obligates the sovereign to extend a *civil* right of self-defense to his citizens, and to refrain from punishing citizens who exercise this right.[29] But the sovereign is always free to extend more expansive rights of self-defense to citizens than those they retain by nature, as long as those expanded rights do not threaten the abandonment of right the original covenant requires. In this example, we see once again that the natural and civil laws need not display a one-to-one correspondence for us to make sense of Hobbes's assertion about the relationship between the two. Instead, the suggestion that the natural and civil rights are of "equal extent" means that they stem from the same principles of natural reason and are mutually reinforcing. Natural laws, we might say, are *candidates* for adoption as civil laws, and civil laws either provide a specification of a natural principle or a rule that reinforces a principle of natural law.

It might be objected that the examples of contract and self-defense make the suggestion of mutual reinforcement too easy to prove, as both contract and self-defense are fundamental concepts in Hobbes's *natural* philosophy, in addition to figuring importantly in his discussion of civil society. Let us briefly consider a more difficult case for testing our interpretation of Hobbes's claim, namely the civil institution of private property, for which there is no natural equivalent. The sovereign establishes laws for the protection of private ownership, but in Hobbes's account, unlike in Locke's, there is no ownership in nature. How could the civil law of property and the natural law be said to

[29] See Claire Finkelstein, "A Puzzle on Hobbes on Self-Defense," *Pacific Philosophical Quarterly* 82 (2001): 332; see also Claire Finkelstein, "On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens," *University of Pennsylvania Law Review* 147 (1999): 1361.

be "of equal extent" in this case, given that there is no natural equivalent of any sort?

As we saw with the previous two examples, civil entitlements can exceed natural entitlements as long as the expansion of civil rights is consistent with the principles that provide protection against descent into war. Private property, as a social institution, is strongly supported by such principles, as ownership is one of the central institutions in civil society that enhances survival and quality of life, and minimizes the need to protect the fruits of one's labors with battle. Thus the very same principles that endorse the abandonment of offensive rights and the institution of sovereignty also endorse the establishment of private property. In this sense, the rules establishing and protecting rights of private property can be seen as mere elaborations of natural principles of right. They both flow from, and in turn reinforce, the recommendations of natural reason Hobbes articulates through his laws of nature. In this sense, the natural laws and civil laws can still be thought "of equal extent." While the civil law of property does not have a corresponding right of precisely the same size and shape in nature, the natural entitlements that support the civil institution of property form, in the aggregate, a reasonable natural equivalent for the civil institution.

With this understanding of the relation of natural to civil law on board, we are in a better position to understand specific Hobbesian positions on questions in legal theory, and ultimately to consider in what way Hobbes is willing to embrace content-based restrictions on civil law and how such restrictions fit in with the rest of his political and legal philosophy. We begin our more specific exploration of the role of natural principles in Hobbes's legal philosophy by considering his views on two essential jurisprudential topics: precedent and legal interpretation.

PRECEDENT AND THE COMMON LAW

Hobbes's affection for natural law appears nowhere more clearly than in a short work Hobbes wrote in 1666 called *A Dialogue Between a Philosopher and a Student of the Common Laws of England*.[30] The *Dialogue* is a charming debate between a philosopher and a lawyer, or, as Hobbes calls him, "a student of the common laws of England." The philosopher gives voice to Hobbes's own thoughts, while the lawyer is a thinly disguised version of the preeminent jurist of Hobbes's day, Sir Edward Coke. Somewhat surprisingly, the philosopher aligns himself with the scholastic position on civil law, in opposition to the then prevailing position of the English legal profession. Among other things, it is a furious attack on the English Common Law of Hobbes's day.

[30] Thomas Hobbes, ed. Joseph Cropsey, *A Dialogue between a Philosopher and a Student of the Common Laws of England* (Chicago: University of Chicago Press, 1971).

In the first chapter of the *Dialogue*, the philosopher calls into question the lawyer's idea that legal decision making is "an artificial perfection of Reason, gotten by long Study, Observation and Experience, and not of every Mans natural Reason."[31] Coke, like all English jurists, had staunchly defended the use of precedent in legal reasoning. Against precedent, which Hobbes refers to in the *Dialogue* as "custom," Hobbes has the philosopher say:

> As to the authority that you ascribe to custom, I deny that any custom of its own nature can amount to the authority of a law. For if the custom be unreasonable, you must, with all other lawyers confess that is not law, but ought to be abolished; and if the custom be reasonable it is not the custom but the equity that makes the law.[32]

In short, the philosopher argues that if the precedent case was wrongly decided, following it in the current case would only perpetuate error. And if the precedent case was rightly decided, it ought to be possible to arrive at the same solution on the basis of first principles, making the prior case otiose. The philosopher therefore argues that precedent is either misleading or redundant, and that there can be no justification for adhering to it.

There is an important point lurking behind this simple argument. In this passage, the philosopher is suggesting that considerations of justice, welfare, and fairness are more authoritative than mere consistency with prior cases. The point seems to be that consistency cannot by itself be counted a virtue in this context, since a judge's sole aim should be to do justice in the particular case at hand. One can understand Hobbes's thought here. Why after all, should the fact that a case is decided the same way as an earlier, similar case be a basis for thinking it correctly decided? Would a case following in the footsteps of *Plessy v. Ferguson*[33] – the infamous decision upholding segregation on public conveyances – be a better decision for adhering to *Plessy* than for rejecting it? No, one may say, because *Plessy* was so indefensible from a moral standpoint that the value of following precedent cannot outweigh the value gained by rejecting *Plessy*. It is all a matter of balancing. But here is where Hobbes's point makes itself felt: Would a decision that followed *Plessy* be better in *any* respect, merely by virtue of the fact that it conformed to, rather than rejected, that earlier decision? Would consistency even be a point in its favor? Certainly there may be contexts in which consistency is a virtue. But is adjudication of disputes involving individual rights and responsibilities one of them?

Similar to the somewhat dull-witted debating partners with whom Socrates converses, the lawyer in Hobbes's debate might have wished for a better hearing, such as the defense of consistency presented by Ronald Dworkin in *Law's Empire*. In addition to fairness and justice, he argues, adjudication reflects a moral virtue that is of unique relevance to legal systems, and this is the virtue

[31] *Dialogue*, p. 55.
[32] Ibid., pp. 62–3.
[33] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

of *integrity*.[34] Integrity is a near cousin of consistency. It does not defend mechanical adherence to precedent or treating like cases alike as a virtue in and of itself. Such empty formalism is worth little from a moral point of view: like a policy that would seek to split the difference on abortion by allowing only women who were born in even years to have abortions, and to forbid it to women born in odd years, policies that would make a virtue of mere adherence to a rule would miss the inherent value of consistency in the law.[35] Instead, the virtue of integrity earns its rightful position in our legal system by its promotion of what Dworkin calls "principled consistency," meaning drawing consistent distinctions according to morally relevant features of classes of persons or cases. Thus the year of a woman's birth is not in general a morally relevant feature, and thus assigning the right to an abortion based on characteristics of this sort would not defend integrity. But the source of a woman's pregnancy or the gestational age of the fetus when an abortion is sought might be such a feature. Integrity, then, is a morally defensible quality of a legal system because it seeks to treat like cases alike, according to morally salient features of such cases.

Still, one can imagine the philosopher's response to this rather more sophisticated defense of the common law tradition. To the extent we value "principled consistency" in adjudication, it is not the fact that one case is being decided in the same way as another case, according to some set of morally relevant principles. What is valuable is not the similarity in treatment of the cases in and of itself, but the correctness of the principles being followed, along with the accuracy of their implementation in particular cases. Having decided a case correctly under the applicable set of moral principles, we are pleased to note in the next case that we once again find those same moral principles of relevance, and that our intuitions of justice are consistently displayed, thus supplying evidence of their veracity. But once again, it is the correctness of the decision that is relevant, not the adherence to precedent. The proof of this point lies again in the imagined situation of having to adhere to a wrongly decided case on false moral principles, such as the principle of "separate but equal." Dworkin, indeed, founders on this very example, suggesting that one of the reasons *Brown v. Board of Education*[36] was admirable was the fact that it was able to interpret the equality requirements of the Fourteenth Amendment in a way that allowed them to evolve, on the one hand, and yet remain consistent with the principle in *Plessy*, on the other. The relevant principle, on Dworkin's reading, is equality rather than segregation.

But once again we should ask Hobbes's question: Is *Brown* to be thought a better case because it managed to reject the substance of *Plessy* according to a rationale that renders the two cases roughly consistent with one another?

[34] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 176–224.

[35] Ibid., p. 185.

[36] U.S. 483 (1954).

Or would it not have been better for *Brown* simply to declare its rejection of *Plessy*; rather than reaching for an interpretation of that case that makes it more consistent with contemporary moral principles than perhaps it was? Or, to put the point another way: If the interpretive stance requires us to force *Plessy* and *Brown* into a common principled framework, do we not do damage to the principles of justice and fairness that the ideal of equality also seeks to defend? And is such damage really justified by the questionable goal of showing the law to possess integrity over time, in addition to justice and fairness? If one were to give up on the idea of integrity, it would be clear that the *Brown* court ought to have been more concerned about justice than consistency in its approach to *Plessy*. That, arguably, is both a better and more honest basis for reaching hard, moral decisions in the face of immoral precedent.

Had the debate been allowed to continue, however, the lawyer might yet have had a rejoinder to the philosopher. The philosopher is assuming that it is possible to determine what counts as a good or a bad decision, a just or an unjust outcome, independently of knowledge of how the precedent case was decided. But the common law lawyers with whom Hobbes was arguing might maintain that this is not so: there *is* no measure of the correctness of a decision that is entirely independent of its fidelity to sources of law, among which prior decisions figure prominently. Imagine someone tried to make the same argument about following statutes. He might say: "Statutes are either misleading or otiose, for if the statute is bad and dictates undesirable results, we have reason not to follow it, and if the statute is good, we could have reached the same conclusion on the basis of first principles alone. Either way, we ought not to follow statutes."

For statutes this is manifestly a bad argument. Why should we be more inclined to accept it where common law reasoning is concerned? Notwithstanding the proximity of this argument to Hobbes's own argument, Hobbes would appear to have a clear basis for distinguishing statutes from precedential reasoning. Statutes, he would say, are sources of law in a way that prior decisions are not, or at least ought not to be. Statutes are authoritative pronouncements that create law where none was before; they are not themselves interpretations of other sources of law.[37] The content of these pronouncements, therefore, cannot be discerned directly from first principles. Prior cases, by contrast, are not sources of law in the same way, in that they are themselves interpretations of other sources of law. There is thus greater reason to follow statutes than to follow prior decisions. This raises the following question, however: if prior decisions are not properly speaking sources of law, in Hobbes's view, what sources of law *should* a judge rely on in situations in which no statute applies? We return to Hobbes's own discussion to answer this question.

[37] As we shall soon see, this is only an approximate statement of Hobbes's views on this question, since he does think that statutes bear something like an interpretive relation to natural law.

In the *Dialogue*, Hobbes contrasts the "artificial reason" of the common law with "natural reason," namely reasoning from first principles. Precedential reasoning is "artificial," because it takes as its premises conventional facts drawn from legal practice. Reasoning from precedent is thus in Hobbes's view fundamentally positivistic. Natural reason, by contrast, relies on universal truths of human existence – truths that are accessible to all human beings in virtue of their possession of the faculty of reason. Of course the question remains how a judge should discover these abiding truths of reason. Moreover, Hobbes's thought here is particularly mysterious, given that he emphatically rejects the existence of moral constraints on individual conflict in nature. If natural principles *were* available to judges to decide cases, why would these same principles not impose obligations on private individuals in a state of nature? Or, to put matters the other way around, if the state of nature is a condition of unmitigated license, how could there be natural principles available for the guidance of adjudicators in legal cases? Hobbes's moral and jurisprudential theories appear to be badly out of sync with one another. Is there a way to reconcile the two?

In the *Dialogue*, we receive only the faintest description of the natural principles Hobbes has in mind. The abiding theme is the equation of reason, or "right reason," with "equity," which he explains as "a certain perfect reason, that interpreteth and amendeth the law written, itself being unwritten, and consisting in nothing else but right Reason."[38] He contrasts the use of natural principles of equity to judge between man and man with a judge's function when he is merely interpreting statutes, at which point his primary task is to discern the intent of the legislator. But what exactly is equity? In addition to treating equity as a principle of natural reason, Hobbes also says that equity is a law of nature. Natural reasoning is thus reasoning that is guided by, or is consistent with, the laws of nature as Hobbes conceives them. But unlike other laws of nature, equity, which is the Eleventh law of nature, particularly addresses sovereigns and judges. Hobbes writes:

> [I]f 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. For without that, the controversies of men cannot be determined but by war. He, therefore, that is partial in judgment doth what in him lies to deter men from the use of judges and arbitrators; and consequently (against the fundamental law of nature), is the cause of the war. The observance of this law (from the equal distribution to each man of that which in reason belongeth to him) is called Equity, and (as I have said before) distributive justice.[39]

"Equity" thus has two somewhat different, though related, meanings in Hobbes's theory. First, it is a *characteristic of human beings* that describes their style of settling disputes between other men. An equitable judge is someone

[38] *Dialogue*, p. 54.
[39] *Leviathan*, XV.23–24.

who is able to settle disputes between others fairly, which for Hobbes means in a way that is consistent with other natural principles. When other sources of law are absent (such as statutes), Hobbes sees the ability to do equity as the most crucial function of the adjudicator, and correspondingly *being equitable* as the most important natural principle for a judge to follow. Second, equity is a specific law of nature – a particular natural principle that acts as a source of law for adjudicators. It is binding on judges in the way that all the laws of nature are, namely "in foro interno." As Hobbes explains,

> [W]hatsoever laws bind *in foro interno* may be broken, not only by a fact contrary to the law, but also by the fact according to it, in case a man think it contrary. For though his action in this case be according to the law, yet his purpose was against the law, which, where the obligation is *in foro interno*, is a breach.[40]

In other words, judges are bound by conscience to follow the laws of nature, in deed as well as in spirit, and thus the mandate that a judge decide equitably among litigants is a duty of any adjudicator.[41]

In light of the special equitable obligation Hobbes attributes to adjudicators, certain remarks he makes, which seem otherwise mysterious, come easily into focus. In the *Dialogue*, for example, Hobbes makes the surprising suggestion that bishops are better suited to be judges than lawyers, because they are most likely to be skilled in equitable reasoning: "The Bishops commonly are the most able and rational Men, and obliged by their profession to Study Equity, because it is the law of God, and are therefore capable of being Judges in a Court of Equity."[42] And when the lawyer in the *Dialogue* challenges the philosopher by saying that bishops are not familiar with the workings of statutes, Hobbes has the philosopher say that judges do not particularly require knowledge of statutes, as the lawyers for the parties can inform the bishops of whatever they need to know![43] These comments fit reasonably well with Hobbes's views on the laws of nature and the role they play in imposing content-based restrictions on sovereigns. Like all of the other laws of nature, equity and equitable reasoning contribute importantly to the impartial settlement of disputes in Hobbes's view, and thus allow subjects to avoid resort to the methods of war. Equity now makes a third appearance in Hobbes's legal philosophy, namely in Hobbes's account of statutory interpretation. It is to that topic that we now turn.

[40] Ibid., XV.36, 37.

[41] By endorsing equitable over common law reasoning, Hobbes is also declaring his allegiance to the Chancery over the King's Bench in the historic battle between the two. Courts of equity were characterized by a more flexible, more individualized approach to justice.

[42] *Dialogue*, p. 99.

[43] Could it have been a mere historical accident that induced Hobbes to endorse equitable as against precedential reasoning, given that siding with the Chancery courts was more consistent with Hobbes's monarchist sympathies? There is enough of a basis for attributing to Hobbes a preference for equitable over formalistic forms of reasoning, however, that we need not dismiss Hobbes's fondness for the Chancery as a mere historical accident.

LEGAL INTERPRETATION

In *Leviathan*, Hobbes addresses the topic of interpretation of the laws, whether natural or civil, as a unified matter, much in the way Aquinas would have done:

> All laws, written and unwritten, have need of interpretation. The unwritten law of nature, though it be easy to such, as without partiality and passion, make use of their natural reason, and therefore leaves the violators thereof without excuse; yet considering there be very few, perhaps none, that in some cases are not blinded by self love or some other passion, it is now become of all laws the most obscure; and has consequently the greatest need of able interpreters. The written laws, if they be short, are easily misinterpreted from the divers significations of many words: insomuch as no written law, delivered in few, or many words, can be well understood without a perfect understanding of the final causes, for which the law was made; the knowledge of which final causes is in the legislator.[44]

While both natural and civil laws require interpretation, the form of that interpretation will differ significantly in the two cases. The natural law is accessible to interpretation through natural reason. And since every human being is in possession of natural reason of his own, the natural law is available to every rational agent without intermediary. Nevertheless, as Hobbes explains, distortions of natural reason occur because of passions, and human beings are therefore in need of guidance as to the proper identification and interpretation of principles of natural law. We have already seen that this is one of the reasons the judge must be endowed with excellent powers of equitable reasoning. But in principle, if human beings were perfect in the use of their natural reasoning, there would be no need for assistance in the interpretation of the natural laws.

Matters are significantly different where a legal question calls for the interpretation of a statute, for the central question there of importance is what the will of the legislator was when he issued the law. Since the sovereign is the legislator of the civil laws, it is the sovereign's intentions in creating the law that any interpreter of the law must strive to discover. And this is something it is difficult for ordinary persons to discern, given, as Hobbes says, that they may be unaware of the "final causes" for which the law was written. It is here that equity makes its third appearance.

In the *Dialogue*, Hobbes says that "Equity is a certain perfect Reason that interpreteth and amendeth the Law written, itself being unwritten, and consisting in nothing else but right Reason."[45] That is, equity is relevant not just for adjudication, but for the interpretation of the civil law as well. But this may seem puzzling. If the interpretation of the civil law is no more than a study

[44] *Leviathan*, XXVI.21.
[45] *Dialogue*, p. 54.

in sovereign intention, why would equitable principles be useful as an aid to interpretation? What role, if any, do principles of natural reason play in the interpretation of written civil laws? Does Hobbes think that equity can help us to discover the lawmaker's intentions? And if he does, why did he distinguish so sharply between equitable reasoning on the part of a judge in the absence of a statute and the use of equity to interpret the meaning of a statute?

It is on this topic that Hobbes most manifests his indebtedness to Aquinas and scholastic philosophy generally. Like Aquinas, Hobbes makes the assumption that correctly written laws will further the best interests of the subjects – that when the sovereign legislates, it is not his own welfare he is seeking to protect and advance, but the welfare of the community with whose care he has been entrusted.[46] If the sovereign legislates with the interests of his subjects in mind, he legislates according to principles of natural reason. Accordingly, outside interpreters trying to discern his will could do no better than to make use of equitable principles to interpret his intentions: when in doubt as to the meaning of the words of a statute, we should turn to principles of equity to clarify ambiguities or fill in the gaps in language.

Implicit in this approach to interpretation is a commitment to a certain view of interpretation that many contemporary legal philosophers, as well as literary critics, would want to reject. Hobbes takes authorial intent as supplying the "meaning" of a text, and the question then becomes how best to discern that intention. Other approaches to interpretation would regard authorial intent as only one ingredient in determining the meaning of a text, and in some cases it would be regarded as altogether irrelevant. Hobbes's view of interpretation may therefore appear naïve.

Yet we ought not ascribe to Hobbes a thoroughly premodern commitment to textual meaning as authorial intent, given his simultaneous commitment to equitable reasoning as a way of discerning that intent. That is, while he does subscribe to the significance of the author's purpose in writing the relevant text, he also contextualizes that purpose in a larger interpretive framework in which principles of equity play a role. A contemporary version of this type of view can be found once again in the writings of Ronald Dworkin. Like Hobbes, Dworkin maintains that moral principles (Hobbes would say principles of natural reason) should be used to interpret the written law. Dworkin famously analogizes statutory interpretation to literary criticism. Great works of literature are interpreted in light of an aesthetic theory about what makes a work of literature great. If consistency of character development and complexity of plot enhance a novel's worth, for example, then a literary critic should attempt to maximize the value of a piece of fiction by interpreting it in light of such values. She will seek, in other words, to make the novel the best work of literature it can be, consistent with the constraints the text itself imposes.[47] Similarly,

[46] Admittedly, Hobbes is somewhat inconsistent on this point.

[47] Dworkin, *Law's Empire*, pp. 55–75.

Dworkin maintains, a judge should strive to make a *source of law* the best *it* can be, by interpreting it in light of a corresponding political philosophy that enhances its worth. If maximizing equality and fairness makes a statute a better source of law, a judge should interpret a statute in light of principles of equality and fairness, provided that his interpretation "fits" with the text of statute itself. Dworkin writes:

> According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.…
>
> Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality.[48]

Unlike Hobbes, Dworkin's interpretive method applies equally to statutory as to case-based sources of law. For Dworkin does not subscribe to Hobbes's distrust of common law reasoning and his rejection of the practice of following precedent. But if we limit the comparison to the exercise of statutory interpretation, we would find the two accounts deeply similar.

Consider Dworkin's famous example of the New York case *Riggs v. Palmer*,[49] in which a young man murdered his wealthy grandfather to accelerate his inheritance under the latter's will. Strictly construed, the New York Statute of Wills did not forbid a murderer from inheriting under a will under these conditions, despite the beneficiary's evident culpability under state criminal laws. (The New York legislature subsequently revised the statute.) While a literal interpretation of the statute would have given the defendant his inheritance, the court was not satisfied with this reading of the statute. Instead, the New York Court of Appeals reached for a generic moral principle, unsupported by legal precedent or other textual source of law, in order to interpret the statute as barring the inheritance in this case. Applying the slogan that "no man shall profit from his own wrong," the court suggested that properly interpreted the Statute of Wills was never intended to allow murderers to inherit under the wills of their victims. According to the Court of Appeals, the true intent of the legislature in drafting the statute of wills does not emerge unless interpreted against the background of this moral principle – as though the principle itself lurked in the interstices of the written statute. The Court wrote:

> Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view… [M]any cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the

[48] Ibid., pp. 225, 255–6.
[49] *Riggs v. Palmer*, 22 N.E. 188 (1889).

statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction….[A]ll laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.[50]

The reasoning of the judges in this case, of which Dworkin is so enamored, would have been music to Hobbes's ears as well: the court regarded the true meaning of the statute as depending on the intent of the legislature and the intent of the legislature as discoverable through the application of equitable principles. Both Dworkin and Hobbes thus see moral principles as a way of discovering the "intentions of the law-maker[]," against the background of the assumption that lawmakers strive to create the most worthwhile statutes possible.

When we probe this natural law approach to interpretation a bit more deeply, however, matters become quite complex. For it is possible for every man to err in the use of his reason, and surely the lawmaker is no exception. The threat always looms that the sovereign might create a law that is inconsistent with the law of reason. In this case, we cannot trust principles of equity to reveal the sovereign's intentions. Indeed, if the sovereign has inequitable or malicious intentions, then interpreting the statute through the lens of moral principles would only serve to distort the "meaning" of the statute, at least to the extent that authorial intentions help to define that meaning. In worrying about this problem, Hobbes runs headlong into the issue of wicked legal systems. Should we interpret an evil command on the part of a sovereign in light of principles of equity, as Hobbes generally suggests we do? Such a method in the usual case both helps to discern the lawmaker's intent, and makes the statute the best law it can be. In the case of the sovereign with wicked intentions, however, to interpret his law in the light of equity would only distance the meaning of the statute from what was originally intended. The positivist position on interpretation would presumably sacrifice equity to fidelity to legislative purpose. The natural law position, however, is less clear, and Hobbes's account suffers from the same ambiguity.

Aquinas, for example, does not even consider the possibility that the legislator who has "care of the community" would legislate against the interests of the whole. The supposition that he might would appear to present an insuperable dilemma for his account. Dworkin is often charged with being ambiguous on the question of immoral law. He is, for example, surprisingly noncommittal about whether Nazi law should be considered law. After seeming to argue the matter first one way and then another, he concludes:

[50] Ibid., p. 189.

We need not deny that the Nazi system was an example of law, no matter which interpretation we favor of our own law, because there is an available sense in which it plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using "law" in that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion. His judgment is now a special kind of political judgment for which his language, if the context makes this clear, is entirely appropriate. We do not understand him fully, of course, unless we know which conception of flourishing legal systems he favors. But we catch his drift; we know the direction in which he will argue if he continues.[51]

The problem for a Dworkinian is familiar from the dilemma in which we found Hobbes moments ago: if making Nazi law into "the best law that it can be," as judged from the standpoint of Nazi principles, would make them more, rather than less, immoral, Dworkin's theory seems to suggest they should be interpreted that way, and hence that there is no bar to seeing Nazi law as law. Because political morality is itself non-absolute on Dworkin's scheme, the assessment of Nazi law does not benefit from that extralegal standpoint that natural law normally provides. Hobbes, by contrast, might fairly be thought of as siding with Aquinas in seeing the content of the relevant moral and political principles as *fixed* by natural law, and so would have the resources to deny Nazi law the status of law.

The problem of the status of immoral laws has thus never been satisfactorily answered by natural law theorists. While it has seemed a benefit to be able to say of Nazi law, "It's not really law, so there was no obligation to obey it," there has always been a sense in which this answer was unconvincing. Why not law if the rules promulgated by Nazi officials conformed to and furthered the ideals of the Third Reich? In what place are we standing when we attempt to deny the status of Nazi laws in the general category of law? From whatever vantage point we might attempt to make such claims, would we not have to say the same of immoral laws within an otherwise legitimate state – such as laws of segregation in the United States? What of laws allowing capital punishment of a committed abolitionist? And is it worse to say of Nazi law, "It is law but *immoral* law, and so we have reason not to follow it," than to deny its status as law altogether? What, then, can Hobbes say of such examples, and does his answer merely suffer from the same Janus-faced mix of positivistic and natural law elements that his jurisprudence seems to display? Or can he offer a more systematic answer to the problem of sovereign error, one that may prove more satisfying than that supplied by either positivists like Hart or neo-natural law theorists like Dworkin?

[51] Dworkin, *Law's Empire*, pp. 103–4.

HOBBESIAN LEGAL THEORY AND THE PROBLEM OF WICKED LAWS

Addressing the problem of wicked laws from a Hobbesian perspective will require us to bring together two disparate strains in our understanding of Hobbes's legal philosophy thus far: the role of authority, as expressed in sovereign commands, on the one hand, and the content-based restrictions on the use of that authority as grounded in right reason, or natural law. The question is as follows: If law is command, how can it also be right reason, or equity? Would we not expect the sovereign's exercise of authority, through the issuance of commands, to collide with the demands of equity on a regular basis? To put the point most starkly, the emphasis on natural reason suggests that civil pronouncements can be disqualified from counting as true civil law if their content cannot be defended as fair and equitable. But the Hobbes of *Leviathan* repeatedly asserts that "nothing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice, or injury …,"[52] making it sound as though the sovereign's commands are authoritative, regardless of their content. As we have seen, remarks of the latter sort not only fit well with a command theory of law, and with a positivistic approach to law more generally. They also fit with a contractarian approach to political legitimacy, since, as Hobbes goes on to remind us in the same passage, the subjects are themselves author of everything the sovereign does. Thus it looks as though a contractarian political philosophy of the sort to which Hobbes subscribes would most seamlessly connect with a positivistic legal theory, according to which the contract explains the source of the sovereign's authority but the content is established by fiat. But Hobbes's views on equity and natural reason pull sharply in the other direction. Can these different strains of Hobbes's legal philosophy be reconciled? And what would such reconciliation imply about the problem of wicked laws and whether Hobbes should be thought a positivist or a natural law theorist in the final analysis?

Elsewhere, I discuss a parallel problem in Hobbes, namely the tension between the sovereign's power to punish and the subject's right of self-defense.[53] Since the sovereign's power is absolute, it must be that his power to punish is similarly absolute. But if citizens retain a right to self-defense, which is apparently also absolute, might they not retain it in the face of a sovereign who is seeking to exercise his right to punish? Can the sovereign's right to punish coexist with a citizen's right to self-defense? One might suppose from this analysis that it cannot. But a possible reconciliation of these rights permits coexistence: although a sovereign retains the power to punish those who choose to exercise their rights to self-defense, a sovereign who did so would violate his duties *in foro interno* to abide by the natural law. Similarly, a sovereign who

[52] *Leviathan*, XXI.7.

[53] See my "A Puzzle on Hobbes on Self-Defense," and "On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens."

issues commands that violate the laws of nature violates his duty *in foro interno* to legislate in a way that recognizes the equal extent of the civil and the natural law. But the problem remains: given that citizens have committed themselves to adhere to the sovereign's every command, are his pronouncements not authoritative even when immoral? So although Hobbes may have a substantive basis for rejecting the legitimacy of civil laws that violate the laws of nature, does he have any basis for rejecting their authority over private citizens?

The tension we are exploring might be put more sharply in terms of the role played by the notion of private judgment in Hobbes's general political philosophy. For it is not merely the fact that the sovereign's power is unrestrained by nature (given that he lays down none of his own natural rights when others lay down theirs), but the further fact that the subjects have committed to one another to forsake their own private judgment and to take the sovereign's reason for their own. The basis for their commitment to obey the sovereign's commands, then, is not mere submission, but the recognition that the aims dictated to them by their own reason require them to adhere to the sovereign's judgments over their own.[54] The substitution of public for private judgment is of course crucial for Hobbes: if each man were to serve as his own interpreter of the laws of nature, there could be no civil law. So the problem of wicked law presents the following dilemma: if a judge or private citizen were to question the legitimacy of the sovereign's commands, it would have to be by direct appeal to their own right reason. Such direct appeal, indeed, is offered by the philosopher in the *Dialogue*, after all, as a basis for rejecting precedential reasoning. But how is it possible for individuals to evaluate sovereign dictates in the light of such private reason, if their most significant contractual commitment to their fellows required the abandonment of this very reason? Worse, how is it even possible for judges or private citizens to *interpret* any sovereign command on their own, given that equitable reasoning is the most essential tool of interpretation? Since all positive law stands in need of interpretation through the use of principles of equity, and since judges must even sometimes render decisions in the absence of such laws by direct appeal to equity, it seems quite impossible for private citizens, or even the relevant officials, to arrive at their own judgments under the law. Equitable reasoning, in short, is the opposite of authoritative reasoning: it takes conscience, not commands, as its guide, and not the conscience of another, but one's own, internal conscience, drawn directly from principles of reason.

[54] There is thus an echo of Hobbes in Joseph Raz's account of the normal way to establish the legitimacy of an authority and to establish that citizens should acknowledge the authority as legitimate: "the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him…if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly" (*The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 53.

At the risk of repetition, let me put the point yet a final way. If the status of the sovereign's reason as right reason is established by the agreement of his subjects alone, it is not by virtue of the *content* of his judgment that we can defend the authority of his pronouncements. And this means that the status of the sovereign's commands as law cannot be established by their conformity to the laws of nature. From the standpoint of the laws of nature, it is possible for the sovereign to err, namely to issue commands that contravene the laws of nature. But if subjects have agreed to treat the sovereign's reason as right reason, are they not bound by that agreement even in the face of sovereign error? And does that not suggest that they are bound by nature to violate laws of nature, where they have been in effect commanded to do so? Moreover, what is the difference in such a case between the sovereign's reason and the "artificial reason" of the laws that Hobbes so decries in the *Dialogue*? If it is the commands of the sovereign that are to be taken for law, is law not artificial reason after all? Hobbes's difficulty is that if he sides with the sovereign's reason over the laws of nature, he has surely undermined the basis for treating the sovereign's reason as right reason, and hence for obeying the sovereign's will in the place of each man's own judgment of what the laws of nature require. On the other hand, if he sides with the laws of nature, as determined by each man's judgment of what that law requires, he has undermined the authority he defends as necessary to avoid the devastating return to the state of nature that civilized man so fears.

The first way would be the positivist's solution: errant legal standards still retain the authority over the reasoning of private citizens that it was the original point of the grant of such authority to provide. The second way is the natural law theorist's: when sovereigns err, the voice of private judgment must take over. Each individual, insofar as he is rational, has access to his own right reason, and hence the deliverances of the reason he has been prepared to grant as authoritative must be checked against the dictates of each man's own moral compass. The ultimate responsibility for adherence to equity and the laws of nature would lie, on this view, with each individual *in foro interno*. And this might lead us to see the renunciation of right as ultimately made, not to another human being, in the figure of authority, but to each man's own right reason, and hence to the sovereign insofar as his use of such reason conforms to what nature demands.

Ultimately, the tension in Hobbes's account of law I have been describing is one built into the very structure of reason itself: it is reason that leads human beings to authorize a sovereign to act on his own behalf – a faculty with which all are endowed by nature in roughly equal measure. It is this same reason that directs human beings to retain autonomy in the domain of private reason, and to check and assess the dictates of their representative against the dictates of their own needs and wants. Since it is possible for a sovereign to err in the exercise of his powers, the conflict between a subject's duty to obey and his right to rebel is a conflict in the recommendations that each man's private

reason would issue to himself. The problem of the authority of wicked laws, then, reveals a difficulty at the very heart of the Hobbesian political philosophy. For an error in sovereign reason creates a kind of logical absurdity for Hobbes: if citizens choose to side with their duty to the sovereign, they surely cannot be faulted for not pursuing their own preservation and ignoring the dictates of private judgment. And if they side with private judgment and reject the sovereign's will in such a case, they are also immune to criticism from the standpoint of natural principles. In cases of serious sovereign error, then, reason endorses every path, to the detriment of its own consistency.

Let us return to this same threat of inconsistency in the example of the clash between the sovereign's unlimited right to punish, on the one hand, and the subject's unlimited right of self-defense, on the other. The subject's right to self-defense is so strong that it operates even against the justified executioner, who comes to inflict a punishment that the subject has fairly earned. On the other hand, the sovereign's right to punish is so strong that it operates even against a subject defending his life to entitle the executioner to put the struggling subject to death, even, contrary to what we just assumed, if the subject's punishment is in fact *not* deserved. The ability of sovereign and subject conflicting rights to coexist in the manner Hobbes supposed depends on the non-correlative nature of rights in Hobbes's account. The fact that A has a right to put B to death does not impose a duty on B not to interfere with A's right to put him to death. The "inconsistency" in this context might be said to stem from a rejection of the idea of a global perspective from which conflicts of rights are to be assessed and reconciled.

The same can be said of sovereign power in the face of errors in a more general vein. The sovereign has nearly unlimited powers vis-à-vis his subjects: he can order them to do virtually anything or refrain from doing anything without injustice. But he does have what we might gingerly call a "duty" to abide by the laws of nature – this is not a duty he owes *to* anyone in particular, but a duty he owes to himself, and to God, by virtue of his own internal reason. And so it seems to follow that the sovereign both may, and may not, legislate contrary to the interests and well-being of his subjects. And to the degree that this conflict in the sovereign's own authority remains unresolved in Hobbes, it is due to the fact once again that there appears to be no general or abstract perspective from which to judge the conflict of duties to which the sovereign may fall prey. Similarly, when the subject finds himself obligated to obey a sovereign command, by dint of his voluntarily assumed contractual obligations to his fellows, and obliged to reject such commands, by dint of his duty *in foro interno* to abide by his own requirements for survival, there appears to be no general perspective outside the subject's own person to which one can turn for guidance.

The resolution to this crisis in Hobbesian jurisprudence ultimately lies in the supremacy of private reason. After all, the entire Hobbesian edifice is meant to act in the service of such reason, and hence private judgment is likely ultimately to win out in conflicts with self-imposed obligations that are derived

from that reason, if enough pressure is put on the central aims private reason serves. While faithful adherents to the contract must defer to sovereign reason, even in the face of error, on most occasions there comes a point at which each person must revert to his own private judgment. Since the sovereign's authority stems from, and is meant to serve the private ends of each rational agent, there is little doubt that it is private reason that is the ultimate authority for human agents.

The answer to the question of whether subjects should follow private judgment in the place of sovereign authority thus collapses into the question of when rational agents should follow previous commitments and plans dictated by their own reason, and when they should abandon those commitments in favor of more immediate considerations of private welfare. We must leave resolving that larger problem in the theory of rational choice for another day. But the political implications of the supremacy of private reason are relatively clear, and we can trace them here: as Hobbes unequivocally articulates, the duties of subjects to sovereigns who are no longer able to protect their interests come to an end. And while Hobbes does not say so, it is as an inevitable concomitant of the right of revolution that Hobbes is willing to recognize that the private reason of every person remains the touchstone of his own well-being. For the judgment of the sovereign's ultimate success cannot be one that is relegated to sovereign judgment itself: it must remain anchored in the acts of individual judgment that Hobbesian agents are often misunderstood as having foresworn.

The solution to the problem of wicked laws follows easily and seamlessly from this conclusion: rational agents do not forfeit the right to judge the conformity of the sovereign's commands to the dictates of nature. And if forced to choose between adherence to a command that violates those dictates – for example, if expected to implement a command that violates the commitments each contractor has made to his fellow agents – the choice is not a hard one for a Hobbesian agent: fidelity to the principles of right reason must hold sway. This conclusion, however, must be interpreted wholesale, not retail. Since it is not in the interest of any adherent to the social contract that every man rethink the sovereign's commands on each occasion, holding every law up to the light of natural reason and deciding whether it is worthy to be followed, it is also not incumbent on individuals to do so in the individual case. It is only, then, when departures from the natural law become so great that the rational agent can come to see the purpose of his original abandonment of right as thwarted, that he must evaluate the sovereign's commands by his own lights. If he finds them systematically lacking, he must reject their authority over him and over his fellow man. But if his own reason, taking into account the reasons of self-interest that weigh in favor of adherence to authority generally, come out in favor of conformity, he must reject his personal objections and abide by the terms of the law. In this respect, Hobbes's answer to the problem of wicked laws sides neither entirely with authority nor entirely with moral reassessment. His has

the advantage of maximizing the protection of stability, at the same time that it requires individual conscience to be the ultimate guide to a legal system's validity.

The interpretation of Hobbes I have offered may seem anachronistic, for the idea that private reason is the ultimate source of authority for every individual is a profoundly modern one. It may seem to erroneously read the modern commitment to individual freedom back into the political philosophy of a thinker whose primary purpose was the rejection of individual freedom and the vindication of centralized authority. But the balance between private reason and public authority need not be the same for Hobbes as it would be for more modern thinkers in order for us to recognize Hobbes as the source of the modern conception of private reason. Hobbes's reflection on this topic is indeed arguably the kernel from which later grew the most significant advances in moral philosophy in the history of that subject, namely the Kantian idea of self-legislation.

No doubt Kant scholars will be aghast at the suggestion that as interior an ethical system as Kant's could bear any affinity with the exterior and authoritarian political philosophy Hobbes appears to be advancing. Yet the parallels are unmistakable once one grasps the proper role of private reason in Hobbes. Hobbesian subjects legislate for themselves through the person of the sovereign. So the source of their obligation to obey the law is ultimately that these laws spring from their own wills. Kantian subjects legislate for themselves in a moral arena without intermediary. Yet for both philosophers it is human reason that allows man to be a source of law for himself – whether it is civil or moral law that is at issue. Hobbes arguably can also be credited with anticipating the central idea of democratic theory, namely that the foundation of a legitimate legal system is the consent of those who must submit to its rule.

5

Hobbesian Equality

Kinch Hoekstra

> Even at the front, where, one might have thought, death made equals of us all, my power soon convinced me that I was a superior human being.
>
> *
>
> Pride grows in the human heart like lard on a pig.
>
> – Solzhenitsyn, *The Gulag Archipelago*[1]

While many of Hobbes's tenets are unattractive to a modern audience, a signal exception is his renowned doctrine that "all men are equall." This claim looks more appealing, holding out the promise that it will allow us to congratulate Hobbes for thinking in a way that is more like our own. When we are taught that in taking this position Hobbes broke with the traditional doctrine of natural inequality accepted by his predecessors and contemporaries, he begins to look like a founding father of values we hold dear.

This impression of Hobbes as pioneer of a modern commitment to equality often begins from ignorance of how commonplace the claim of natural human equality was by Hobbes's day. Moreover, it is unclear why we should be drawn to Hobbes's own particular position, as the theory of equality for which he is renowned is that human beings are naturally equal in their physical and mental powers, and especially that they are equal because of their natural ability to kill

I am indebted to so many for their thoughtful questions and criticisms that I will limit myself to thanking those who convinced me to alter my previous attempts to make sense of this topic: Eric Beerbohm, Josh Cohen, Katharine Dion, Paul Gowder, Jeffrey Green, Joe Heath, Nancy Hirschmann, George Kateb, Timothy Kaufman-Osborn, Niko Kolodny, Melissa Lane, Russ Leo, Jacob Levy, Eric Nelson, Takuya Okada, Johan Olsthoorn, Arthur Ripstein, Kari Saastamoinen, Sam Scheffler, Sally Scholz, Quentin Skinner, Susanne Sreedhar, Peter Stone, Don Tontiplaphol, Richard Tuck, and Jeff Weintraub.

[1] Aleksandr Solzhenitsyn, *The Gulag Archipelago, 1918–1956* (vol. 1), tr. Thomas P. Whitney (New York: Harper Collins, 2007), p. 163. Reproduced by permission of Harper Collins Publishers.

one another. This equality of ability is hardly what motivates recent proponents of equality. Interpreters generally agree, after all, that Hobbes argues that natural human equality is the *problem*, which is to be overcome by instituting inequality. As the argument is summed up in the margins of chapter XIII of *Leviathan*: "*Men by nature Equall*"; "*From Equality Proceeds Diffidence*"; "*From Diffidence Warre*." By contrast, it is the creation of an unequal power to overawe all others that allows for peace, security, and flourishing. To find a worthwhile case for equality in Hobbes would thus seem to require consideration of elements in addition to what he says about our physical and mental capacities, and a way to square such a case with his advocacy of inequality.

I maintain that close scrutiny of Hobbes's argumentative strategies reveals a view of equality that is worth considering today.[2] In the first section, I consider Hobbes's famous claims about the equality of human power, and in the second, his arguments for an effective equality that holds regardless of admitted inequalities. These arguments play an important role, but that role has generally been misidentified. For the fulcrum of the Hobbesian case for equality is not human beings' physical or ontological equality, but their unwillingness to suffer unequal treatment in peace. The third section focuses on Hobbes's own insistence on a kind of basic human equality, frequently underemphasized because it is not about equal physical or mental capacities but about equal natural liberty and equal natural right. This position is more akin to recent views about equality, and sets up (but still does not constitute) the core of Hobbes's theory. A brief historical survey will reveal that his claims for natural equality and liberty are not as innovative as they are often claimed to be, and will suggest how seriously he takes the more radical motivation for such claims that is primarily associated in Hobbes's day with the Levellers. This brings us in the final section to the crux of the Hobbesian preoccupation with equality, the natural law requirement that we acknowledge others as our equals. Without this acknowledgment or attribution of equality, we will not have peace. It is less a matter that we are equals because we can destroy one another if we are so inclined, and more that we must acknowledge one another as equals because we will otherwise be inclined to destroy one another.

EQUALITY OF POWER OR ABILITY

What is Hobbes saying or doing when he states that "all men are equall"?[3] The equality that Hobbes affirms is generally understood to be a natural equality

[2] For reasons of space, I do not discuss what Hobbes says about gender or racial equality or such aspects of his normative theory as the requirement that justice be meted out equally within the commonwealth.

[3] *Leviathan*, XV.21, p. 76. Cf. *The Elements of Law*, *Natural and Politic* I.14.13, I.14.14; *De Cive* I.11, I.15; and *Leviathan*, XIV.18, p. 68. Note that both of these flat statements of equality from *Leviathan* are dropped in the Latin version (in the redaction of XV.21, Hobbes makes clear

of ability, capacity, or power.[4] At the very beginning of his exposition of the natural condition, Hobbes says that the nature of man consists in "the powers natural of his body and mind," viz., "Strength of body, Experience, Reason, and Passion," and that these provide the starting point for the doctrine to follow.[5] Despite sometimes asserting "the equality of strength and other natural faculties of men,"[6] Hobbes provides overwhelming evidence that he regards humans as naturally *un*equal in each of these four respects. I do not focus here on Hobbes's well-known claims of equality, but on a very brief account of complications that are in each case endemic in his works. Clearly, however, a crucial interpretive question to keep in mind is why Hobbes makes straightforward claims of natural equality despite the qualifications of, exceptions to, and denials of such equality that become manifest upon further inspection of his writings.

Strength

Hobbes acknowledges that some people can have naturally superior bodily powers, and that others can recognize such "odds or excess of power."[7] He says that "men differ much in constitution of body," and that this great difference leads to different appetites, different passions, and different wits.[8] These differences will not amount to incidental variations among equals,

that his point is to undercut the doctrine of a natural hierarchy or social ranking). Unless otherwise specified, references are to the following editions: *The Elements of Law*, ed. Ferdinand Tönnies (London: Frank Cass, 1969) (to part, chapter, and section number); *De Cive: The Latin version*, ed. Howard Warrender (Oxford: Clarendon Press, 1983) (to chapter and section); *Critique du* De mundo *de Thomas White*, ed. Jean Jacquot and Harold Whitmore Jones (Paris: Vrin-CNRS, 1973) (chapter and section); *Leviathan* (London, 1651) (to chapter and paragraph, followed by page number of the "Head" edition, given in most modern editions); *De Homine* (London, 1658) (chapter and section); and *Behemoth*, ed. Paul Seaward (Oxford: Clarendon Press, 2010). I do not focus here on the question of how Hobbes's treatment of equality developed from work to work.

[4] Stimulating treatments of Hobbes on equality and related subjects include Joel Kidder, "Acknowledgements of Equals: Hobbes's Ninth Law of Nature," *Philosophical Quarterly* 33 (1983): 131; 133–46; Gayne Nerney, "The Hobbesian Argument for Human Equality," *Southern Journal of Philosophy* 24.4 (1986): 561–76; Bernard Baumrin, "Hobbes's Egalitarianism," in *Thomas Hobbes. De la métaphysique a la politique*, ed. Martin Bertman and Michel Malherbe (Paris: Vrin, 1989), pp. 119–27; Gary B. Herbert, *Thomas Hobbes: The Unity of Scientific and Moral Wisdom* (Vancouver: University of British Columbia Press, 1989), chapter 5; Gabriella Slomp, *Thomas Hobbes and the Political Philosophy of Glory* (London: Palgrave Macmillan, 2000), chapter 2; and Julie E. Cooper, "Vainglory, Modesty, and Political Agency in the Political Theory of Thomas Hobbes," *Review of Politics* 72 (2010): 241–69.

[5] *The Elements of Law*, I.14.1; *De Cive*, I.1.

[6] *The Elements of Law*, I.14.14.

[7] Ibid., I.8.4–5.

[8] Ibid., I.10.2; cf. *De Homine*, XIII.2. See also *The Elements of Law*, I.7.3, where Hobbes says that every man differs from each other in constitution, and therefore each differs from all others in distinguishing good and evil.

for differences in power, wit, and passions will lead to unequal chances and outcomes in natural conflict situations. Hobbes makes clear that there can be "inequality of Power" even "in the condition of meer Nature," though this inequality will often not be obvious until the conclusion of battle.[9] Indeed, "*Naturall Power*" for Hobbes is simply "the *eminence* of the Faculties of Body, or Mind," such as "an *extraordinary* Strength, Forme, Prudence," or the like.[10] Even in the central chapters on the state of nature, as he apparently constructs his case for natural equality, Hobbes repeatedly indicates that bodily strength is naturally unequal.[11]

Experience

The inequality of experience is naturally pervasive, especially because experience (like bodily strength) varies with age. The more experience one has had, the more prudent one is;[12] this is why "old men are more prudent, that is, conjecture better, *caeteris paribus*, than young."[13] And one may be more prudent than another of the same age if a quick wit effectively speeds one's experience: "men of quick imagination, *caeteris paribus*, are more prudent than those whose imaginations are slow: for they observe more in less time."[14] Moreover, among men of the same age the qualitative inequality of experience is even greater than the quantitative inequality; that is, there is still more variation in kind of experience than in amount.[15] Natural variations in experience ramify in sundry ways: the desires of people of different ages are different, diversity of experience gives rise to diversity of dispositions, and inexperienced people judge good and evil differently from experienced and thus incur long-term damage.[16] Again, this is relevant inequality rather than negligible diversity among

[9] *Leviathan*, XIV.31, p. 70; cf. *De Cive*, IX.3 and *Leviathan*, XX.4, p. 102.

[10] Ibid., X.2, p. 41, latter emphases added; cf. *The Elements of Law*, I.8.4 and *Critique du* De mundo, XXXVIII.7.

[11] *The Elements of Law*, I.14.2–5, 10, 13; *De Cive*, I.3, 6, 13, 14; *Leviathan*, XIII.1, p. 60.

[12] *Leviathan*, III.7, p. 10; V.21, p. 22; VIII.11, p. 34. Hobbes "derives Prudence from Experience, and Experience from Age" (*Mr Hobbes Considered*, p. 61 = Molesworth, ed., *English Works* 4, p. 440). Thus, "in the judgment of nature the furthest along in years (… usually …) is the more prudent" (*De Cive*, IX.17). In *Leviathan*, Hobbes says that prudence depends on much experience and memory of similarity and consequences, that it is an unusual wit (VIII.11, p. 34), and that equal experience comes from equal time *plus* equal application (XIII.2, pp. 60–1).

[13] *The Elements of Law*, I.4.10; cf. I.4.6–9. Ultimate sources of Hobbes's view that prudence is proportional to time may be Job 12:12 ("In antiquis est sapientia, & in multo tempore prudentia") or Aristotle, *Nicomachean Ethics* 1142a11–16. *Behemoth*, p. 107 suggests that one judges good and evil best at a certain age – not too young, but also, it seems, not too old. It also suggests the importance of *relevant* experience.

[14] Ibid., I.4.10; cf. *Critique du* De mundo, XXXVIII.9, *Leviathan*, X.2, p. 41.

[15] *Leviathan*, VIII.11, p. 34.

[16] *De Homine*, XI.3 (differing desires), XIII.4 (differing dispositions), XI.5 (differing judgment: cf. *Horae Subseciuae. Observations and Discovrses* (London, 1620), p. 313).

equals.[17] Although he maintains that people vary even more in judgment and fancy than in experience (and in kinds of experience than in quantity of experience), Hobbes claims that greater experience is a more decisive advantage than a superiority of natural wit.[18]

Reason

Any judgment of whether the inequalities of experience are greater or less than the inequalities of natural reason will be complicated by Hobbes's tendency, especially in his earlier works,[19] to see reason as dependent on experience; but the comparison in any case must take place within the context of his view that both kinds of natural inequality are common. Hobbes is troubled that few can follow artificial reason, but he also insists that natural reason is highly variable (and also varies with age). Intellectual ability reflects to a great extent the cognitive potential with which one is born, and Hobbes even asserts that foolishness is the fault of nature only.[20] Even in *The Elements of Law*, a work in which he is optimistic about the capacity of most everyone to apprehend the unadorned truths of reason,[21] Hobbes devotes a chapter to "the Difference between Men in their Discerning Faculty and the Cause," in which he explores the greater or lesser endowments of judgment, wit, fancy, dullness, gravity, and so forth, and traces some of these inequalities back to natural physiological differences and naturally dissimilar passions.[22] These differences will amount to

[17] At the same time, Hobbes makes clear that superiority of prudence does not itself justify authority over others, for "a plain husband-man is more Prudent in affaires of his own house, then a Privy Counseller [Latin edition: philosopher] in the affaires of another man" (*Leviathan*, VIII.11, p. 34).

[18] *Leviathan*, VIII.11, p. 34 (judgment and fancy differ more, and kind of experience more than quantity), III.8, p. 10 (advantage of experience greater than that of wit). Note that judgment and fancy also vary with age: *De Homine*, XIII.2; cf. *Horae Subseciuae*, p. 294. Greater experience can lead not only to a greater ability to cause another's death or avert one's own, but also to a greater ability to save another's life: Aubrey reports that Hobbes "was wont to say that he had rather have the advice, or take physique from an experienced old woman, that had been at many sick people's bed-sides, then from the learnedst but unexperienced physitian" (John Aubrey, '*Brief Lives*,' *chiefly of Contemporaries*, ed. Andrew Clark, vol. 1. Oxford: Clarendon Press, 1898, p. 350).

[19] Cf., for example, *The Elements of Law*, I.1.2, I.5.12, I.6.1, I.9.18, I.13.2–3; *De Cive*, Preface, XII.12, XVII.12. Cf. also *Leviathan* Intro, p. 2; *Concerning Body*, I.8 and II.1; *De Homine*, XI.10; and *The Questions Concerning Liberty, Necessity, and Chance* (London, 1656), p. 308.

[20] *De Homine*, XI.8.

[21] Cf. Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996), pp. 257–326; and for some discussion of this point, my review in *Filosofia Politica* 11 (1997): 11.1 (1997), pp. 139–43.

[22] *The Elements of Law*, I.10; cf. *Leviathan*, VIII. Clarence DeWitt Thorpe, in *The Aesthetic Theory of Thomas Hobbes* (New York: Russell & Russell, 1964 [1940]), pp. 176–81, shows that these chapters, together with *Leviathan*, III, are the direct source of much of Walter Charleton's discourse about mental variability, *Concerning the Different Wits of Men* (London, 1669). See also *De Homine*, XIII.2.

inequalities in power or capacity, for one's wit, judgment, prudence, and so on will affect one's chances of success or failure in situations of natural conflict.

Passion

Difference of wit is caused by difference of passions.[23] Differing degrees of knowledge correspond in particular to differing degrees of curiosity, which is one of the appetites or passions.[24] This is one example of a passion that will influence one's chances for success in the state of nature depending on whether one is more or less prone to it; similarly, rates of success will vary according to whether one is timid or courageous, hopeful or despairing, and so on. Whereas some passions will dispose people to conflict, others incline those who are moved by them to peace.[25] As Hobbes details, passions vary greatly between persons.[26] It is because of the difference in kinds and degrees of passion that "scarce two men agree [ ] what is to be called good, and what evil; what liberality, what prodigality; what valour, what temerity."[27] Considering "the great difference there is in men, from the diversity of their passions" leads Hobbes to conclude that "from hence shall proceed a general diffidence in mankind, and mutual fear one of another."[28] The dissimilarity of passions, and the resultant divergence in judgment, is a cause of the conflict that characterizes the Hobbesian natural condition.[29] And this affective diversity also gives rise to the critical fact that some are sociable, while others are not: "there is in mens aptnesse to Society, a diversity of Nature," he argues in chapter XV of *Leviathan*, such that one who is marked by "asperity of Nature" and "the stubbornness of his Passions" must be prevented from entering society or expelled therefrom.[30] Some are motivated by their passions toward peace and security while others are moved to violence or simply rendered unfit for human society.

Hobbes regards humans as naturally unequal in every aspect of human nature that he specifies – strength of body, experience, reason, and passion. Moreover, certain *kinds* of people tend to be superior in specific ways. Although we are far from Aristotelian hierarchy, inequalities will align such that identifiable sorts of

[23] *Leviathan*, VIII.14, p. 35.

[24] *The Elements of Law*, I.9.18; cf. *Leviathan*, VIII.2–3, pp. 32–3, where Hobbes more generally states that "Naturall Wit" varies from dullness and stupidity to a quick and steady imagination: "And this difference of quicknesse, is caused by the difference of mens passions; that love and dislike, some one thing, some another." This natural wit, says Hobbes, "is valued for eminence; and consisteth in comparison" (*Leviathan*, VIII.1, p. 32).

[25] *Leviathan*, XIII.14, p. 63.

[26] Cf. *The Elements of Law*, I.9; *Leviathan*, VI; and *De Homine*, XII.

[27] *The Elements of Law*, I.5.14.

[28] *The Elements of Law*, I.14.3; cf. *De Cive*, I.4.

[29] *Leviathan*, XV.40, pp. 79–80.

[30] Ibid., XV.17, p. 76. Hobbes here affirms that people are naturally sociable – but not all people.

people will naturally be able to outdo others on average: according to Hobbes, the mature will be stronger than the immature, men are more likely to subdue women than women men, and the old will be more prudent than the young.[31]

EFFECTIVE EQUALITY

Hobbes's cleverest critical correspondent, the young François Peleau, objects to Hobbes's claim that all are equal in the state of nature, given that this could be so only by virtue of their equality in the faculties of human nature, yet they are not equal in strength, experience, reason, or passion.[32] We have seen that Peleau could have cited Hobbes's own works for testimony of such inequalities. Hobbes provides a few arguments that may have helped Peleau to understand how he hopes to persuade people to admit natural equality in the face of his point-by-point denial that individuals are equal in any of their natural capacities.

Hobbes apparently comes to think that his earlier arguments of this kind require reinforcement, for he adds new arguments in *Leviathan*. The first of these is that "though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable.…"[33] This is somewhat ambiguous, and admits manifest inequalities of both body and mind, but has been read as an argument for a rough overall equality, in sum or on average.[34] One person may be somewhat superior in one way, but this will tend to be balanced by his or her inferiority in another way; considering all of a person's capacities together yields the conclusion that all people are approximately equal. As John Eachard satirically presents the point: "*men by Nature are all equal*. i.e. though *Roger* may chance to have huge *Leggs*, yet *Dick* may have the quicker *eye*: and though *Tumbler* may have a very large *fist*, and a great *gripe*, yet *Towser* may be in better breath, and have longer nailes."[35] Without further assumptions, however, it is just as likely that someone who is superior

[31] For the idea of gender inequality in this sense, see *The Elements of Law*, II.4.2, II.4.7, II.4.14; *De Cive*, IX.3, IX.6, IX.16; *Leviathan*, XIX.22, p. 101 and XX.4, p. 102. For a balanced consideration of the question, see Gabriella Slomp, "Hobbes and the Equality of Women," *Political Studies* 42 (1994): 441–52.

[32] Letter to Hobbes of 18/28 August 1656, in *The Correspondence of Thomas Hobbes*, ed. Noel Malcolm (Oxford: Clarendon Press, 1994), 1, p. 304. See note 61, below.

[33] *Leviathan*, XIII.1, p. 60. The passage continues: "… as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he." The upshot is not a claim of average equality of power, but about the natural human capacity to claim (warranted or unwarranted) benefits, regardless of the claims of others. That is, inequality is not sufficient to cause others to recognize one's claim to something as authoritative or exclusive. See the below consideration of "equality of hope."

[34] And perhaps he has in mind an average over time, given that he says "sometimes." Alternatively, Hobbes may be awkwardly presenting the argument, discussed later, that the individual differences are inconsiderable.

[35] *Mr Hobbs's State of Nature Considered* (London, 1672), p. 132.

by virtue of a beneficial trait will *also* be better endowed with another such trait as it is that he or she will be inferior in that regard.[36] And even if a given superiority or advantage is accompanied by an inferiority or disadvantage, there is little reason to think that the offset will be approximately equivalent. If a state-of-nature scenario includes any people with concatenations of superior traits or concatenations of inferior traits, success rates in conflict situations (or in attempts to avoid conflicts or otherwise maximize anticipated outcome) will no longer be equal, and there may be a strong motivation for the superior to conquer the inferior, and for the inferior to band together or submit to the superior. What is more, Hobbes suggests that such concatenations are possible.[37] Note that while to be motivated in this way by inequality would require an ability to recognize comparative advantage, the success rate in conflict situations will differ even if there is no such recognition.

Another argument unique to *Leviathan* is meant to encourage belief in intellectual equality in particular. In a revealing oxymoron, Hobbes says that with regard to the faculties of mind there is "yet a greater equality amongst men, than that of strength."[38] From the observation that men "will hardly believe [non concedet] there be many so wise [prudentiorem] as themselves," Hobbes concludes that they are thus equal in wisdom: "For there is not ordinarily a greater signe of the equall distribution of any thing, than that every man is contented with his share."[39] Significantly, Hobbes expressly excepts

[36] James Tyrrell makes a similar point, initially in response to the argument that weaker and stronger individuals will balance out in alliances: "may not this wiser and stronger man as well also combine with others as wise and strong as himself, and then will not the unequality be much greater than it was before? And as for cunning, or surprize, it signifies as little, since the stronger man may be as cunning as the other, and may have also as good luck in surprising him at unawares" (*A Brief Disquisition of the Law of Nature*, London, 1692, p. 269).

[37] In the first four paragraphs of "A Review, and Conclusion" of *Leviathan*, for example, Hobbes criticizes without naming Juan Huarte's famous pyschological treatise, particularly a number of Huarte's variations on the idea that a range of capacities and faculties are contrary to one another and so cannot be combined in the same person. For passages that Hobbes apparently targets when he lays out his case that diverse excellences can be found in one person, see *Examen de Ingenios. The Examination of mens Wits*, tr. Richard Carew from the Italian tr. of Camillo Camilli (London, 1594): for example, sig. Aii^{v}–Aiii^{r} and pp. 63ff., 87–8, 103, 113, 124–5, 200–2, 207, and 209. For Huarte's own suggestion (which Hobbes follows) that these putative contraries *can* after all be found in a single person, see sig. Aiiii$^{r\text{-}v}$, pp. 172–3, and chapter XIV (esp. pp. 262–3).

[38] *Leviathan*, XIII.2, p. 60. Hobbes elsewhere accepts that some unequals are more unequal than others, but rejects the language of "greater equality" (*De Corpore*, XI.4, 12.8).

[39] Ibid., XIII.2, p. 61. Cf. the first lines of Descartes, *Discourse on the Method*. Although Hobbes says this is only "ordinarily" a "signe" of this equality, and he may be making little more than an offhand joke here, I proceed on the assumption that it is worth considering how it fares as an argument. One of the twists of the joke is that to get it the reader will typically have adopted a position of superiority like the one being mocked (chuckling in the belief that he or she has knowledge that others do not have – specifically, that their belief in their own wisdom is mistaken).

wit, eloquence, learning, and science from this argument, as he recognizes that someone may be vastly superior to others in such abilities or pursuits. Even when restricted to wisdom or prudence this borrowed argument is tenuous.[40] Hobbes insists in this paragraph that "almost all men" have a thoroughly distorted perception of their own wisdom, so we should be wary of a conclusion based on this perception. More importantly, universal contentment is not a reliable indicator of the equality of possessions, and a still poorer indicator of the equality of natural abilities, faculties, or other endowments. The vanity Hobbes regards as rife would not entail contentment or equality, nor would universal self-contentment entail equality. That many people consider themselves "unusually attractive" does not entail that they are happy with their looks, much less that they are all equally good looking. In any case, this argument for a certain restricted intellectual equality is founded on an entrenched and pervasive opinion of superiority – a belief in inequality that will foster discord that the putative (and generally denied) fact of this kind of equality will do little to assuage.

"From this equality of ability," Hobbes next argues, "ariseth equality of hope in the attaining of our Ends."[41] Equal aspirations or expectations hardly require equal abilities (though sufficiently marked inequalities of ability may well inhibit them), and equal abilities do not necessarily bring about equal aspirations or expectations. But Hobbes here jumps awkwardly in order to move to a central concern: people insist on striving for what they want even if they are not seen by others to be (and even if they are not in fact) as worthy or as likely to achieve it as others who also want it. The equal presumption does the real work here, rather than its claimed basis in equal ability. The result will not be equal outcomes, for the stronger will emerge in the ensuing battle.[42] But the roughly equal presumption ensures that conflict in the first place. And Hobbes is also concerned with the effect of such striving, for those who would otherwise be contented with equal shares will be provoked by those who claim more "through vanity, or comparison, or appetite."[43] There is no natural inequality of status, and there is often no reliable way to determine inequality of power other than by conflict; and claimed superiority will not preclude that conflict, but inflame it. Although Hobbes in this instance claims a foundation in equality of ability, we have here moved far from conflicts between equals in power into territory to be explored later, in which the conflicts in question are

[40] Ibid., XIII.2, p. 61. This and the next argument for natural equality lead Giuseppe Sorgi to conclude that Hobbes here offers outright sophisms ("veri e propri sofismi"), and conspicuously weak reasoning ("debolezza ragionativa") (*Quale Hobbes? Dalla paura alla rappresentanza*. Milan: Franco Angeli, 1996, pp. 100–1). Criticism of this kind should prompt the further enquiry of whether Hobbes's aim in offering such arguments has been adequately identified.

[41] *Leviathan*, XIII.3, p. 61.

[42] See, for example, *The Elements of Law*, I.14. 4–5.

[43] Ibid., I.14. 5.

caused by people pushing forward as if they were equals (regardless of the fact of the matter), together with the prideful they provoke and by whom they are provoked.

Let us consider the most compelling argument for the natural equality of power, which is presented most thoroughly in *The Elements of Law*:

> … if we consider how little odds there is of strength or knowledge between men of mature age, and with how great facility he that is the weaker in strength or wit, or in both, may utterly destroy the power of the stronger, since there needeth but little force to the taking away of a man's life; we may conclude that men considered in mere nature, ought to admit amongst themselves equality.[44]

Natural equality should be acknowledged because (1) such superiority as one may have is not irresistible, and (2) those who are stronger are still vulnerable to those who are weaker. Further, as Hobbes explains in proximate passages, (3) if one does have a natural advantage sufficient for victory, one cannot be sure of this beforehand.[45]

Hobbes develops the second point in an argument that he presents most clearly in *De Cive*:

> For if we look at mature human beings, and consider how fragile the structure of the human body is (which being struck down all of its force, strength, and Wisdom falls too), and how easy it is for the weakest to kill someone stronger, there is no one who, trusting to his own powers, can consider himself made by nature superior to others. They are equals who can do equal things against one another; and they who can do the greatest things, namely to kill [one another], can do equal things.[46]

Any other supposed superiorities or inferiorities are insignificant, outbalanced by every person's high degree of vulnerability to destruction.

Note that Hobbes does not claim in this argument that each has an *equal* capacity to kill any other. Instead, if he is deriving equality he is doing so from the capacity, however unequal, that each person has to kill each other. But unequal capacities for killing one another can give rise to different chances for survival in the natural condition, which undermines Hobbes's conclusion of natural equality. Suppose that Alpha has a 6 in 10 chance of killing Gamma in combat in the natural condition, and Gamma only a 4 in 10 chance of killing Alpha.[47] If they have some awareness of their

[44] *The Elements of Law*, I.14.2. In line with common seventeenth-century usage, Hobbes sometimes employs "odds" to mean superiority or advantage, or simply difference or inequality, rather than to suggest chances or ratios. Note that the conclusion is not that we are equal, but that we ought to admit equality among ourselves.

[45] Hobbes specifies that one has "no assurance of odds" (*Elements*, I.14.5), and that "pre-eminence" cannot be determined without battle (*Elements*, I.14.4).

[46] *De Cive*, I.3.

[47] I choose odds that are fairly close, rather than building in sharper results with 1 in 10 vs. 9 in 10, say, or 1 in 100 vs. 99 in 100, to respect what Hobbes may wish to indicate with his remark about "how little odds there is of strength or knowledge" (*The Elements of Law*, I.14.2), or his

situation,[48] then their calculations of what to do in various circumstances could also lead to different actions (Alpha advancing to take possession of something, for example, and Gamma retreating). Even without awareness of their inequality, the probability of conflict in the state of nature will mean that their natural inequality with respect to killing and avoiding being killed will translate into importantly unequal results.[49]

To this objection that patterns of dominance will develop in the state of nature, someone might reply that encounters in the Hobbesian natural condition are likely to be single-shot rather than iterated interactions, given the imperative of self-preservation and the likelihood that an encounter will be a matter of life and death. If we have not engaged with one another before, then our relative power will be more opaque. But Hobbes *does* suggest that interactions in the natural condition are iterated, allowing for reputations to develop and for one person's treatment of another to vary over time, according to the reaction to previous actions.[50] And patterns of dominance may develop less directly: I might witness your abilities, say. Even aside from one's reaction to another's previous actions or reputation, the chances that one will survive conflict situations, or emerge dominant or dominated, will be importantly different for those who are unequal in these ways.

In reply, one could emphasize Hobbes's belief that death is "the greatest of natural evils," and that it is therefore reasonable "if one makes every effort to defend his body and limbs from death and sufferings, and preserve them."[51] Recall that Hobbes says that when the body is ruined, "all of its force, strength, and Wisdom falls too," and the totality of this loss is what makes it relevant that the weakest may readily kill the strongest.[52] When he concludes that "they who can do the greatest things, namely to kill [one another], can do equal things," his idea may be this. Suppose that the disvalue of death for each person is infinite. All are vulnerable to death at the hands of another, even if there is a considerable difference in the likelihood of death for each of the parties in a violent encounter. Even if Alpha has only a 1 in 10 chance of dying in

emphasis on how easy it is for even the weakest to kill someone stronger (*De Cive*, I.3). But as I discuss later, Hobbes is clear that such similarity only holds among men of similar age, and so forth; he recognizes that without these stipulated restrictions (which are not natural restrictions) the chances of death will often be extremely uneven.

[48] As Hobbes suggests, for example, in *The Elements of Law*, I.8.5.

[49] Tyrrell (*A Brief Disquisition of the Law of Nature*, pp. 269–70) objects to the idea that "those are equal that are able to do the like things to each other": "For there is scarce any Beast, nay Insect, so weak, but may sometime or other destroy a man by force, or surprize; and we read of a Pope [Adrian IV, the English pope] who was choaked by swallowing of a Fly in his Drink, which if it could be supposed to be done by the Fly on purpose, would make the Fly and the Pope to be equal by Nature."

[50] See, for example, *Leviathan*, XV.5, p. 73.

[51] *De Cive*, I.7. Cf. *The Elements of Law*, I.14.6; *Leviathan*, XIII.9, p. 62.

[52] Ibid., I.3.

a conflict with Gamma, and Gamma has a 9 in 10 chance (setting aside for now the outcomes where neither dies or both die), both face an unacceptable risk profile. Because Alpha's risk is ≈.1 multiplied by negative infinity, and Gamma's risk is ≈.9 multiplied by negative infinity, they both face a negatively infinite risk, and in that sense are equal (or equal for the purposes of practical choice). And this single-shot calculation is *strengthened* if we insist on iteration or extend the consideration of risk over time: even if the rest of the population is roughly Gamma-like, Alpha's chance of meeting a violent death will approach certainty long before the endpoint of the lifespan he could reasonably expect in a situation of peace. With one pairwise life-and-death conflict a day, the odds are that Alpha will be dead in less than a week.[53]

One might still object to this interpretation of Hobbes's argument. One apparent problem with the argument that any two people are equal in any situation in which they can kill each other is that it would establish too much: in particular, it would work to establish equality in the commonwealth. For even the sovereign is at risk of being killed by treachery, force, or alliance: the king's footman may poison him, his chambermaid may stab him in his sleep, or together they may overpower him. If Hobbes holds the view that death is negatively infinite, he would apparently arrive at the conclusion that each servant, despite facing overwhelming odds, is thereby equal to the sovereign in the commonwealth (though he commands battalions and is not bound by the same obligations). Hobbes would presumably bite the bullet, accepting that the sovereign is equal – naturally equal – to his servants and subjects. He is made sovereign, and thus made superior, by artifice. As we explore in the next section, Hobbes insists on the natural liberty that accompanies natural equality. Thus there are no relevantly different natural obligations.

Another difficulty is that we do not calculate risk this way, and nor did Hobbes think we do; if we did, then even within commonwealth we would seldom venture out of our houses, given the greater chance of death. Hobbes recognizes that what matters to people is not mere living, but living well – what he calls "commodious living." Expositions of Hobbes sometimes rely on the idea that the exclusive or always overriding motivation of Hobbesian humans is survival. They strive not for mere existence, however, but for a comfortable existence; for pleasure as well as preservation. There can be no doubt that many people will cross a busy road if they know that the fruit at the stand on the other side is sweeter. Explaining what makes people risk their own lives when they "endeavour to destroy or subdue one another" in the natural condition, Hobbes says that their end is "principally their own conservation, and sometimes their delectation only"[54]; that is, natural human beings do not always put an infinitely negative value on their own death. Not least, he insists

[53] Cf. *De Cive*, I.13 on how a victor is constantly threatened with new danger.

[54] *Leviathan*, XIII.3, p. 61.

that people sometimes prefer death to other outcomes, including dishonor. Hobbesian humans are motivated by self-preservation, but also by interests, pleasures, passions, and pride.

The arguments we have been considering do not seem to show that the state of nature is a condition in which each member is in perpetual conflict with others who are equal in the relevant respects. The reasoning is not sufficient to show that inequalities of body and mind will not lead to markedly different success rates in the state of nature, so that one who has a natural superiority of power and a commitment to exploit it will not tend increasingly to reduce his or her vulnerability. Hobbes describes the natural condition as a situation "wherein men live without other security, than what their own strength, and their own invention shall furnish them withall."[55] If natural strength and wit vary, so too will individual levels of security and success in the state of nature. And such inequalities may multiply: "For the nature of Power, is…like to Fame, increasing as it proceeds; or like the motion of heavy bodies, which the further they go make still the more hast."[56] Hobbes supports the idea of a reinforcing circle of power: "Reputation of power, is Power," for example, "because it draweth with it the adhaerence of those that need protection"; this "assistance, and service of many" provides further power and in turn creates greater reputation of power.[57]

Hobbes himself makes clear that the foregoing arguments for equality are applicable only in highly limited circumstances. They are valid only for men of a certain age.[58] A robust adult is physically and mentally vastly superior to a newborn, and the adult's ability to destroy the child is tremendously greater.[59] Nor does Hobbes consistently suggest that the difference between two given individuals' intellectual power must be negligible. For example – despite his

[55] Ibid., XIII.9, p. 62.

[56] Ibid., X.2, p. 41.

[57] Ibid., X.5, p. 41; X.7, p. 41. Cf. *De Cive*, XV.13 and *Critique du* De mundo, XXXVIII.7. The equality that Hobbes ascribes to people in the state of nature is a rough equality of vulnerability. But this does not disappear or diminish upon exit from the state of nature. In Hobbesian civil society there is, if anything, a further advance toward equality of vulnerability. Everyone is vulnerable to one another to a similarly low degree, and vulnerable to the sovereign to a similarly high degree, any natural advantages of strength or acumen being eclipsed by the sovereign. Cf. *Leviathan*, XXX.16, p. 180: "The Inequality of Subjects … has no more place in the presence of the Soveraign…then the Inequality between Kings, and their Subjects, in the presence of the King of Kings"; and cf. *Leviathan*, XVIII.19, p. 93: "So are the Subjects, [equal] in the presence of the Soveraign.…in his presence, they shine no more than the Starres in presence of the Sun."

[58] As is usually the case, when Hobbes refers to "men" in these contexts he probably means "people" rather than "males"; but given indications of his belief in relevant gender inequalities (see note 31), we cannot simply assume this.

[59] Obvious as they are, such observations may sit uneasily with the idea that there can be neither authority nor obligation in the natural condition, for Hobbes argues that in the state of nature, an irresistible power confers the right to rule and command those who are unable to resist (*The Elements of Law*, I.14.13, *De Cive*, I.14).

jabs at Aristotle for postulating the natural superiority of the wise such as himself – Hobbes exempts those with scientific ability from his argument for natural equality.[60] Too much limitation, however, reduces the point to the truism that those who have substantially equal natures (being of the same age, education, etc.) are naturally substantially equal.[61]

Perhaps the most important restriction of these arguments is that they apply only to individuals: they regard the isolated agent, "trusting to his own strength." There is considerable evidence in Hobbes's texts, however, that the state of nature is a scenario of groups, and groups cannot be expected to be constrained to equality even in the limited way that individuals sometimes are.[62] Hobbes could not have believed that commonwealths in the international state of nature are necessarily roughly equal, for example, or that any commonwealth can easily destroy any other.[63] Furthermore, an equality of groups does not entail that the individuals are equal – and if the capacity for group formation is *necessary* to explain equality, as he suggests in *Leviathan*, that implies that the individuals are *not* equal.[64] This is a further sign that Hobbes's argument about the equality of individuals sits uneasily within his exposition of the composition of the natural condition.

[60] *Leviathan*, XIII.2, p. 60. In *Leviathan*, XIII.9, p. 62, Hobbes includes "Arts" in his extensive list of things excluded from the state of nature, and in XIII.2 considers science one of the arts; so it may seem that there can be no science in the state of nature. However, if this state is conceived of as possibly postpolitical or international, it seems evident that people or populations who have made progress in science or true philosophy may be found therein. Presumably Hobbes would have considered himself to be a person of scientific ability within a state of nature had he not fled the civil war.

[61] Peleau objects that the existence of the ill, insane, foolish, small, and extremely timid invalidates the suggestion that all men are equal on the basis of being able to do equal things against one another or of being able to kill one another (letter to Hobbes of 18/28 August 1656, in *Correspondence*, I, p. 304). François du Verdus reports that Hobbes carefully addressed each of Peleau's points in a "response galante" (letter to Hobbes of 20/30 October 1656, *Correspondence*, I, p. 323). Peleau begins his reply by disavowing his errors ("Je desauoüe mes Erreurs"), and then corrects himself to say that he instead declares that Hobbes has clarified all of his doubts ("où plus-tost Je déclare, que vous auéz éclaircy tous mes doutes"). He thanks Hobbes for the frankness ("la franchise") of his explanation, saying that thenceforth he must call Hobbes his teacher ("mon Maistre") because he has received a lesson from Hobbes which the public had no part of ("puisque iay receu de vous vne Leçon, ou le Public n'a nulle part auec moy") (letter of 19/29 October 1656, *Correspondence*, I, p. 316).

[62] There are many indications that there are groups in the natural condition: in chapter XIII of *Leviathan*, for example, see paragraphs 1, 3, 4, 7, 11, and 12.

[63] Cf., for example, *Behemoth*, p. 149.

[64] Hobbes bases an argument for equality on the ability of those who are weaker to group together to make units of greater power in *Leviathan*, XIII.1, p. 60. William Lucy complains: "what hee talkes of confederacy by that accompt he may bring a Fly in competition, for a Fly with company enough can effect any thing" ("William Pike," *Observations, Censvres and Confutations of Divers Errors in the 12, 13, and 14 Chap. of Mr. Hobs His Leviathan* (London, 1657, p. 79).

Whether the inhabitants of the natural condition primarily pursue their own preservation or also place significant weight on such matters as convenience, whether they are more or less likely to survive a given violent encounter, the crucial thing for Hobbes's argument seems to be this: their predictable inability to survive a string of violent encounters means that they will rationally prefer the situation of commonwealth, if it may be had. This does not support the conclusion that all are equal, however, but the very different conclusion that all share (or should share) a particular preference. What drives the justificatory argument of Hobbes's political philosophy is not equality, but that convergence on the preference for commonwealth (which does not depend on ontological equality). The underlying ontology is minimal, though it does not drop out completely: Hobbes's argument does depend on the absence of natural inequalities that are overwhelming, widespread, and manifest. The need to agree with relevant others in order to create or maintain commonwealth only gets going if all are vulnerable (though they need not be equally vulnerable) to death at the hands of others, and this requires that there not be extreme inequality. But that is the extent of the role of the metaphysics of "equality."[65] Hobbes's argument here requires only the shared preference ordering, which is based on the commom vulnerability of human beings. Why, then, does he attribute natural equality to them? We will consider distinct reasons in the following sections.

EQUALITY OF FREEDOM AND RIGHT

Although renowned for his views about equality based on human capacities, Hobbes's most definite assertions of equality are instead claims of the natural equality of liberty or right. As he says in *Leviathan*: "all men equally, are by Nature Free."[66] Hobbes does not seem to be talking here about freedom as "the absence of externall Impediments," as he famously defines liberty elsewhere in *Leviathan*,[67] for the extent to which there are external obstacles to one's motion in the natural condition will evidently be contingent and variable. Someone living in an area criss-crossed by mountains and streams may meet with more obstacles to motion than one who lives elsewhere, and so is correspondingly less free in that sense; so such freedom would not be equal in the natural condition.

The conception of the natural condition as a condition of liberty may be found in Hobbes's earlier works. In chapter XIV of *The Elements of Law*, the first heading of which states simply "Men by nature equal," Hobbes says that "the estate of men in this natural liberty is the estate of war"; it is "the

[65] Not least, the "equality" that amounts to a lack of excessive inequality does not directly serve to justify the need to acknowledge equality, and it is hard to see how it gives rise to the "equality of hope in the attaining of our Ends" that Hobbes refers to in *Leviathan*, XIII.3, p. 61.

[66] *Leviathan*, XXI.10, p. 111.

[67] Ibid., XIV.2, p. 64.

estate of liberty and right of all to all."[68] In *De Cive*, Hobbes provides a clue to understanding this when he says that each will strive to harm each other in the state of nature due to "the necessity of defending his property and liberty against the other."[69] Liberty here is apparently a condition of self-determination or not being subject to another. At first glance, at least, it looks straightforward that everyone in the state of nature has equal natural liberty in this sense, for none are subjects and "liberty is the state of him that is not subject."[70] This is the counterpart of the equal subjection that is to be found once commonwealth is in place. "Freedom cannot stand together with subjection": just as subjects are without liberty insofar as they are subjects, so those in the state of natural liberty are without subjection.[71]

Natural liberty can be identified in this context not with the absence of external impediment, but with the bearing of natural right. It is "a *right of nature*," Hobbes assures us, "that every man may preserve his own life and limbs, with all the power he hath"; and to have such a right is the same as to have a "blameless liberty."[72] In *Leviathan*, Hobbes defines the right of nature as "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature."[73] Immediately thereafter he defines liberty, "according to the proper signification of the word," as "the absence of externall Impediments."[74] If the natural condition is not one of unhindered motion, it is worth asking whether Hobbes is using "liberty" in the first paragraph of chapter XIV differently from his strict definition of it in the second; and we only have to look to the third paragraph for the answer that he is content to use "liberty" in an extended sense. "RIGHT, consisteth in liberty to do, or forbeare," he says there: "so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter

[68] *The Elements of Law*, I.14.11, I.14.12.

[69] *De Cive*, I.4. See also *Leviathan*, XIII.3, p. 61.

[70] *The Elements of Law*, II.4.9.

[71] Ibid., II.8.3. There are three complications here. First, there is a kind of liberty within commonwealth, namely the liberty of the subject. Hobbes argues in *Elements*, II.4.9 that this sense of liberty is therefore idiosyncratic, meaning as it does only a kind of hope of better treatment. Second, Hobbes sometimes says that those who are physically bound are not subject, as they remain in the natural condition with regard to their master; this would mean that such slaves are unfree despite their lack of subjection. We may understand them to be corporally unfree and yet free from obligation (for it is licit for them to escape, kill their master, and so on). Third, it is unclear whether Hobbes on balance denies any possibility of subjection in the state of nature. To take just one example, he refers in *Elements*, II.1.16 to absolute subjection in the state of nature. The complexities of Hobbes's understanding of liberty are at least as great as those attending his understanding of equality, so I cannot hope to do them justice here. The best treatment is now Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008).

[72] *The Elements of Law*, I.14.6; cf. *De Cive*, I.7.

[73] *Leviathan*, XIV.1, p. 64.

[74] Ibid., XIV.2, p. 64. Cf. *Leviathan*, XXI.1, p. 107.

are inconsistent."[75] Liberty as the absence of obligation parallels the idea of liberty as the absence of external impediment, for it is an absence of a kind of impediment to what one may do. Hobbes does not regard liberty in the sense of freedom from obligation as an abuse of the word, and often relies on the idea, even when explaining that it is improper to apply the terms "free" or "liberty" to anything but bodies subject to motion: "And when we say a Guift is Free, there is not meant any Liberty of the Guift, but of the Giver, that was not bound by any law, or Covenant to give it. So when we *speak freely*, it is not the liberty of voice…but of the man, whom no law hath obliged to speak otherwise than he did."[76] And when he moves from the "proper" sense of liberty as the absence of corporal bonds to the sense of liberty as the absence of "Artificial Bonds, or Covenants," Hobbes's willingness to use liberty as the absence of obligations is plain.[77] A condition of equal liberty in this sense means that all are without obligation, and so too without law.[78]

Hobbes equates natural liberty with natural right[79] and maintains that human beings are naturally equally free, so it is no surprise that he goes on to assert their naturally equal right. "For by nature men have equal right"; thus, if there is unequal right, "this inequality must proceed from the power of the commonwealth."[80] Hobbes argues that we may do by right that which is not contrary to right reason; that it is not contrary to right reason to aim for our self-preservation since we do so by a necessity of nature; and therefore that we aim to preserve ourselves by right.[81] Each may judge for himself what may conduce to his preservation,[82] and there is no object or action that one may not judge will aid that preservation, so the right of self-preservation entails the right to everything.[83] "Every man by nature hath right to all things, that is to

[75] Ibid., XIV.3, p. 64.

[76] Ibid., XXI.2, p. 108; cf. XXI.5–6, pp. 108–9. Cf. also, for example, *The Elements of Law*, I.15.9: "where liberty ceaseth, there beginneth obligation."

[77] *Leviathan*, XXI.5, p. 108.

[78] I am here bracketing the obligations of natural law, to which we are subject even in the state of nature. Because everyone in the natural condition is subject to the laws of nature, we can say that they are all equally free from obligation, though this is still to set aside the fact that the obligations will *affect* some and not others. For example, everyone in the natural condition has a natural law obligation to allow safe conduct to mediators of peace, but only some people will be in the position of having to act in accordance with this requirement.

[79] In addition to the passages referred to in the preceding paragraphs, see *De Cive*, I.7. The assimilation of natural liberty and natural right underlines the point that in this context Hobbes is not referring to liberty as the absence of external impediments, for to have a natural right to something does not mean that there are no external obstacles to it. Everyone naturally has the right to everything, so one's enjoyment of a thing to which one has a natural right may well be impeded by another who has a right to it.

[80] *The Elements of Law*, II.1.19.

[81] *De Cive*, I.7.

[82] Or to his benefit or advantage, as he sometimes argues (especially in the Latin *Leviathan*).

[83] See *The Elements of Law*, I.14.6–10 and *De Cive*, I.8–10; cf. *Leviathan*, XIV.1, p. 64.

say, to do whatsoever he listeth to whom he listeth, to possess, use, and enjoy all things he will and can."[84] Everyone has a natural right to everything, therefore by nature all have equal right.

It might be thought, though, that Hobbes *derives* equal natural right from equal natural capacity, for such a derivation of right from power has been thought to be central to the Hobbesian theory. Hobbes does argue that "this right of protecting ourselves by our own discretion and force, proceedeth from danger, and that danger from the equality between men's forces."[85] This does not mean, however, that our right is somehow the same as our force, or that it derives directly from it. The right is an assumption in this argument: we have a right to protect ourselves according to our own judgment and power so long as we do not enjoy the security that would obviate such self-protection; there is enough equality of people's forces to ensure that we do not have that security; therefore we retain the right of self-protection.

So we can find a premise of equal natural right and liberty in Hobbes. It is not yet clear, however, why we would turn to Hobbes if we are looking for a satisfactory or stimulating theory of equality. One motivation, enabled by understanding the history of political thought as a tiny enclave of one or two dozen canonized souls, has been an assumption that Hobbes's premise of natural equality was revolutionary.[86] So it is commonly maintained that Hobbes dramatically rejected the traditional view of natural human inequality that ran from Aristotle through to his early modern contemporaries.[87] But natural human equality was widely avowed within most important traditions

[84] *The Elements of Law*, I.14.10. Hobbes here suggests that everyone may do whatever "he will and can": it is not always clear whether he thinks that someone has a right to do that which he cannot do because of his lack of inclination or ability, or whether the right to do everything is limited to a right to do what he both wants to do and can do.

[85] Ibid., I.14.13.

[86] "Because all men are equal…the difference between the wise minority and the unwise majority loses the fundamental importance it had for traditional political philosophy.…when the equality of all men is exalted to a principle, a new philosophy becomes possible" (Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis*, tr. Elsa M. Sinclair. Chicago: The University of Chicago Press, 1963 [1936], pp. 101–2).

[87] Such views are common in specialist studies as well as general surveys. So Baumrin, extrapolating from the separation of people into classes in Plato's *Republic* and the claim for natural mastery and slavery in Aristotle's *Politics*, says that "these two traditions survived through nearly two thousand years." Hobbes's egalitarianism, by contrast, "stands squarely against both the Platonic (Augustinian) and Aristotelian (Scholastic) traditions that buttressed not only the divine right of kings, but the theoretical underpinnings of feudal and ecclesiastic caste theories." Baumrin concludes that "modern moral and political theory begins with Hobbes, and that beginning springs from his theory of equality" ("Hobbes's Egalitarianism," pp. 119, 121, 119). Martin A. Bertman concludes his "Equality in Hobbes, with Reference to Aristotle" (*The Review of Politics* 38.4 (1976): 534–44) similarly: with his doctrine of equality, Hobbes "reversed the pivotal concept of classical political thought" (p. 544). See also, for example, Victor Goldschmidt, "Les renversements du concept d'égalité, des anciens aux modernes," in *Écrits*, vol. 1 (Paris: Vrin, 1984), pp. 249–71.

of political thought before Hobbes; though prominent and influential, it is Aristotle's doctrine of natural inequality that is more exceptional. A glance at the relevant intellectual history should be enough to establish the falsity of the widespread view that Hobbes's assertion of the natural equality of human beings was itself a great innovation. Yet this historical backdrop will also help us to understand the nature of Hobbes's own concern.

The idea of the equality of natural right or natural liberty usually stems from natural law theory, a theory with deep roots and spreading branches. Some of the Greek sophists who privilege *phusis* over *nomos* seem to endorse natural equality, and Aristotle's argument for inequality was itself cast as a rejoinder to those who had asserted natural human equality.[88] A commitment to such equality becomes prominent in Stoicism (in the writings of Cicero, Seneca, and others) and the New Testament (all souls being capable of salvation, memorably expressed in Paul's idea that in Christ "there can be neither Jew nor Greek…neither bond nor free…no male and female").[89] Around the same time, Philo of Alexandria held that no one is a slave by nature, and expressed his admiration for those who live according to the belief that there is a natural law of human equality.[90] By the early third century, the principle had been laid down in a form which would be embedded in Roman law, the legal framework that informed all subsequent European political thought. The most forceful articulation is that by Ulpian, who says both that "by the law of nature, all were born free" and that "according to natural law, all people are equal."[91]

The Fathers of the Church wrote in a similar vein. Lactantius maintains that "the force of justice consists in equality, since all are born in an equal condition"; Basil of Caesarea holds that no one is a slave by nature, and that all are of equal rank; Gregory of Nyssa argues that all human beings are naturally equal,

[88] *Politics*, 1.2 (1253b20–3 and 1255a3–12). Antiphon is one prominent figure who had asserted the fundamental natural similarity of all (DK 87 B44b). Jonathan Barnes supposes that Antiphon argued that "by nature all men are equal; hence all men deserve equal treatment"; but this may be in order to set up his ridicule of an "evidently false premiss" that "by an evidently invalid inference" yields an "absurdity" (*The Presocratic Philosophers*. Abingdon: Routledge, 1982, p. 513 re. p. 511). Circumspection in light of new evidence animates Gerard J. Pendrick's discussion in *Antiphon the Sophist*: *The fragments* (Cambridge: Cambridge University Press, 2002, pp. 351–65, re. pp. 180–2). Alcidamas (successor of Gorgias) says that god let all go free and nature made no one a slave (scholion on Aristotle's *Rhetoric* 1373b18 in *Commentaria in Aristotelem graeca* 21.2, ed. Hugo Rabe (Berlin, 1896, p. 74), a position also found in the comic writer Philemon (fr. 39 Meineke)). Although they are no longer easy to identify, Aristotle indicates here that "many" of his predecessors shared a view of natural equality.

[89] Galatians 3.28; cf., for example, Colossians 3.11. For context, see Jennifer A. Glancy, *Slavery in Early Christianity* (Oxford: Oxford University Press, 2002).

[90] Philo, *De specialibus legibus*, 2.69 and *Quod omnis probus liber sit*, 79 (cf. *De vita contemplativa*, 70).

[91] Digest 1.1.4 ("cum jure naturali omnes liberi nascerentur"), Digest 50.17.32 ("quod ad jus naturale attinet, omnes homines aequales sunt"); cf. 1.5.4 (Florentinus) and 12.6.64 (Tryphoninus). Cf. also Ulpian in Institutes, 1.2.2: "Jure enim naturali ab initio omnes homines liberi nascebantur."

and that to set oneself above another is pride and arrogance; Ambrose states that "Nature…creates us all equals."[92] Like the Stoics, Augustine holds that in the original condition of humanity there was no coercive authority. Cautioning in his work *Of Christian Doctrine* against the arrogant presumption that one deserves a place of authority over others, Augustine maintains that human beings are naturally equal.[93] In an influential passage of the *City of God*, he spells out the idea that by nature all are free and the corollary that there was originally no dominion of human beings by other human beings.[94] "All the Fathers maintain," one scholar concludes, "that in their original nature men were free and equal."[95]

One of the most important of these for the later reception of the doctrine of natural equality is the sixth-century pope Gregory the Great. Like Augustine, he argues that the original condition of humankind was a "condition of equality" in which there was no legitimate rule over other human beings. In terms that will echo for centuries, Gregory maintains that we are all equal by nature.[96] The doctrine of natural human equality is a keystone of Gregory's political theology, in which the greatest evil is pride, the beginning of all other sins.[97] A few hundred years later, the doctrine of natural equality and liberty is still firmly in place, and many of the most important writers of the day rely on Gregory as an authority.[98] Reformers, too, will cite the authority of Gregory on this point, starting with Luther in 1520.[99]

If we jump forward to the late 16th and early 17th century, the picture is remarkably similar on this front.[100] Even many of Aristotle's later followers

[92] Lactantius, *Divine Institutes*, 3.21; Basil, *On the Holy Spirit*, 20; Gregory of Nyssa, *Homilies on Ecclesiastes*, 4 (on Eccl. 2.7); Ambrose, *The Story of Naboth*, 2. Lactantius and Ambrose quotations from Oliver O'Donovan and Joan Lockwood O'Donovan, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought, 100–1625* (Grand Rapids, MI: William B. Eerdmans, 1991), pp. 48, 76. See also Lactantius, *Divine Institutes*, 5.14.15–5.15.3, especially where he argues that all are free by equal right, and that equality is the foundation of equity and justice; and Jerome's *Tractatus* on Psalm 81 ("Aequaliter omnes nascimur, et imperatores, et pauperes: aequaliter et morimur. Aequalis enim conditio est").

[93] *De doctrina Christiana*, 1.23.

[94] *De civitate Dei*, 19.15.

[95] A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, vol. 1 (Edinburgh: William Blackwood and Sons, 1903), p. 114.

[96] *Moralia in Iob*, 21.15: "Omnes namque homines natura aequales sumus…omnes homines natura aequales genuit." In this influential section, Gregory is commenting on Job 31:15, "Nunquid non in utero fecit me, qui et illum operatus est" (1611 King James Version: "Did not he that made me in the womb make him [i.e., my servant]?"). See also Gregory's *Regula pastoralis*, 2.6 and 3.5, and Ambrose, *De Noe et arca*, 26 (94).

[97] David Hipshon, "Gregory the Great's 'Political Thought'," *Journal of Ecclesiastical History* 53.3 (2002): 447 (cf. 449–52).

[98] See the summary in Carlyle, *A History of Mediaeval Political Theory*, vol. 1, 199–204.

[99] See *An den Christlichen Adel deutscher Nation von des Christlichen standes besserung*, in *D. Martin Luthers Werke: kritische Gesamtausgabe*, pp. 404–69 of *Schriften*, vol. 6, at 411.

[100] Given this similarity, it will not surprise that many examples could be given from the intervening centuries. Nicholas of Cusa in the early 15th century, to offer just one, writes

reject the doctrine of natural inequality. Indeed, the claim "that human beings… are naturally free and/or equal" has been called "axiomatic in scholastic philosophy."[101] Salient writers including Luis de Molina, Juan Azor, Roberto Bellarmino, Francisco Suárez, and Leonardus Lessius all declare that human beings are by nature free and equal, often referring to the formulae of Ulpian and Gregory.[102] The same declarations are made (and the same sources used) in the Reformed churches, including the Church of England.[103] Soon after 1628, Robert Filmer sets out in his *Patriarcha* to call into question what he sees as the widespread belief in the "natural equality and freedom of mankind," which was "a common opinion" not only of Jesuits like Parsons (or for that matter Bellarmine) and Calvinists like Buchanan (or for that matter Calvin), but also of those who wish to defend the rights of kings against them, such as John Barclay, Adam Blackwood, and John Heywood. In the second chapter, he turns to argue against contemporaries who had come to interpret even Aristotle himself as having propounded the natural equality of mankind.[104]

This hardly stands as a complete account of the idea of natural equality before Hobbes, but I mean to indicate its incompleteness, to suggest that such a history is wide and deep enough for volumes. One brief survey of the history of the subject concludes that at the outset of the modern age "the concept of

that because men are by nature equal in power and equally free, all legitimate authority must arise from the common consent of those who are subject to it. See his *The Catholic Concordance*, ed. Paul E. Sigmund (Cambridge: Cambridge University Press, 1991), 2.14.127 and 3.4.331 (pp. 98, 230). The thinker who most influentially follows Aristotle on this question is Thomas Aquinas in the 13th century, particularly in the *Summa Theologica*. Even Aquinas subscribes to the orthodoxy that all are by nature equal (2–2.104.5, a view he tries to square with the Aristotelian doctrine of natural slavery at 2–2.57.3 *ad* 2 by distinguishing between two senses of what is natural; see also 1–2.94.5). He nonetheless argues that because the superiority of natural capacity is an endowment from God, natural inferiors are bound to obey their superiors, who have the right to command in human affairs (2–2.104.1; cf., for example, 1.92.1).

[101] Harro Höpfl, *Jesuit Political Thought: The Society of Jesus and the State, c. 1540–1630* (Cambridge: Cambridge University Press, 2004), p. 204. (Robert Filmer came to a similar conclusion in the first chapter of *Patriarcha*, though he believed that the tenet of natural human equality and liberty was a scholastic innovation.) Höpfl here emphasizes that the ideas of natural equality and natural liberty are often twinned in this and earlier periods, even calling them "interchangeable."

[102] Höpfl, *Jesuit Political Thought*, 204, n. 81.

[103] For example, the Calvinist Johannes Althusius in *Politica methodicè digesta atque exemplis sacris et profanis illustrata*, 3rd ed. (Herborn, 1614), 18.18 (cf. 1.34–37 and 6.47); and John Downame, *The Second Part of The Christian Warfare, or the Contempt of the World* (London, 1611), especially 318–19.

[104] Robert Filmer, *Patriarcha and Other Writings*, ed. Johann P. Sommerville (Cambridge: Cambridge University Press, 1991), chapters 1–2, especially pp. 2–3, 13–14. "All men are by nature equal" is a doctrine that is so pervasive in this period that it is attributed to Plato: see Nicholas Ling, *Politeuphuia. Wits Common wealth*, 2nd ed. ([London], 1598), fol. 202^{r-v}. According to the catalogue from *c.* 1630 (Chatsworth MS E.1.A), this work was in Hobbes's library.

natural equality [of individuals] was accepted by everyone."[105] This is an exaggeration, and assimilates importantly distinct conceptions, but it does suggest how mistaken is the entrenched view (which Hobbes himself helped to foster) that, until a champion was born in Malmesbury, no one had dared deny the hegemonic doctrine of natural inequality.

The intellectual history of equality is shot through with important theoretical distinctions and historical specificities that are here passed over. To pick up just one broad distinction: while some endorsed natural equality as part of a case against unequal treatment, most who did so had strikingly different priorities. So Philo, Josephus, and other Jewish writers held that slavery was unnatural, but also argued that it was justifiable.[106] Christian writers such as Augustine allowed for a pre-lapsarian condition of equality that was different in kind from politics after the Fall, in which inequality is justifiable and necessary. And while Roman law declared the illegitimacy of slavery according to *ius naturale*, it recognized its legitimacy under the *ius gentium*.[107] Building on these foundations, Jesuits too were generally content to allow a range of social inequalities: wishing to emphasize that one could become subordinate or inferior by one's own deliberate conduct, they deployed their tenet that human beings are equally free by nature to undercut rival (Calvinist and later Jansenist) doctrines that instead affirmed predestination. Natural equality and liberty proved to be powerful premises in arguments for subordination, for that subordination could then be revealed to have been authorized by one's own actions and choices or by God's response to sin – itself the result of our own decisions, or of choices or actions so essentially human as to be attributable to our own nature. Positing original equal freedom was integral to these demonstrations of pervasive obligation. In grounding the justification of a general obligation to political authority on natural equality and natural liberty, Hobbes is able to draw on a rich history.[108]

Despite comparatively few traces of it in the span of intellectual history we have been considering, there is a distinct and contrasting source for claims of the natural liberty and equality of humankind. This source, to simplify, is the

[105] Edwin DeWitt Dickinson, *The Equality of States in International Law* (Cambridge, MA: Harvard University Press, 1920), p. 31.

[106] See Catherine Hezser, *Jewish Slavery in Antiquity* (Oxford: Oxford University Press, 2005) for a nuanced account of Jewish attitudes toward and practices of slavery; on Philo and Josephus, see in particular pp. 32–3, 58–61, 236–7.

[107] Interpretation of the role of given statements about equality or inequality (are they concessions to convention? hypotheses later superseded? normative commitments or conclusions?) is frequently a fraught enterprise. For a much-contested argument that the central figure of the received Roman law was animated by egalitarian purposes, see Tony Honoré, *Ulpian: Pioneer of Human Rights*, 2nd ed. (Oxford: Oxford University Press, 2002).

[108] Cf. also Grotius, who argues that people are naturally free "so that no one is a slave by nature, but not so that one has a right never to be enslaved" (*De ivre belli ac pacis libri tres* (Paris, 1625), p. 470 (2.22.11): "vt natura quis seruus non sit, non vt ius habeat ne vnquam seruiat").

irrepressible insubordination of those who rejected their treatment as born inferiors. Although an indisputably powerful force in history, such resistance is poorly represented in the elite discourse that constitutes the canonical history of political thought. As it happens, the decade in which Hobbes wrote his political philosophy was also a decade in which the popular rejection of natural hierarchy and of the heritability of authority and subjection was articulated with exceptional trenchancy, especially by the Levellers.

Henry Parker, the energetic defender of parliamentary sovereignty, touched off a firestorm of controversy with his anonymous *Observations* of 1642 in answer to Charles I.[109] Particularly contentious were his claims that power was originally and ultimately in the people, and that every private person retains a right of resistance; but as the replies to the "Observator" made clear, also in dispute was a traditional versus a radical understanding of the underlying doctrine of natural equality and liberty. An early response ran: "The Observator, pag. 1. saith, *That power is originally inherent in the people*, *&c*. To this the answer is, that…Power or dominion is not a gift of Nature, that is to say, naturally inherent in us: for if it were, then might all men have equal power, for that by nature we are all equall."[110] Still in 1642, John Jones argued that political authority came from God, given that it was composed by people out of nothing other than the right and power with which they had been naturally and divinely endowed. "When men first associated themselves into a Commonwealth, they were all of equall Right and Power, so that none … could challenge superioritie the one over the other," says Jones: "For, this divine naturall power, *viz*. *Se defendere*, *et vim vi repellere*, was inherent in every one of them, and obliging them."[111] John Maxwell took aim at those he styles "sectaries," who had unleashed the idea of natural equality, taking aim at "their maxime so much cryed up, and so much abused, *Quisque nascitur liber*, every one is borne a free man." While Maxwell conceded the truth of this proposition when properly understood, he took a different line from Jones's on natural superiority: "it is most true, that *Quisque nascitur liber à servitute*, Every man is borne a free man from slavery; but *Nullus nascitur liber ab imperio*, none is borne exempted from the subjection of lawfull government, without a subordination, and subjection to a superiour."[112] It is striking that each of these conservative replies

[109] [Henry Parker], *Observations upon some of his Majesties late Answers and Expresses* ([London, 1642]).

[110] William Ball, *A Caveat for Svbjects*, *Moderating the Observator* (London, 1642), p. 2. This is reprinted in *An Appendix to the Late Answer Printed by His Majesties Command* ([Oxford?], 1642), a work generally attributed in catalogues to Henry Parker, but which instead criticizes his *Observations*.

[111] John Jones, *Christvs Dei*, *or*, *a Theological Discourse wherein is Proved*, *that Regall or Monarchicall Power is not of Humane*, *but of Divine Right*, *and that God is the sole Efficient Cause thereof*, *and not the People* (Oxford, 1642), p. [11].

[112] [John Maxwell], *Sacro-sancta Regum Majestas: or; The Sacred and Royall Prerogative of Christian Kings* (Oxford, 1644; but note that Thomason has altered this date to 1643), pp. 125–6.

accepts and relies upon the idea that all are equal by nature. By 1642, however, a year that was to see the first battle of the civil war, they are scrambling to regain control of the doctrine from the radicals who have begun to wield it so effectively.

Samuel Rutherford was one who strove to deploy the doctrine against the royalists. In his famous *Lex*, *Rex* of 1644, he asserts that "all are born alike and equall," but that it is Maxwell who has used this doctrine as a sectarian. Rutherford is intent on showing that equal natural liberty is inimical to the idea of natural authority, and on the basis of the Roman law maxim that "all men are born by nature of equal condition" he maintains that no king can have lordly or masterly dominion.[113] In the same year, Henry Parker weighed in again with *Jus Populi*, arguing against the royalist claim that the natural equality of the people precludes them from bearing sovereign majesty.[114] Parker's advocacy of parliamentary authority was also open to more radical attack. Drawing on the familiar formulae to be found in Christian and Roman law sources, the Levellers Richard Overton and John Lilburne make claims about natural freedom and equality that echo the traditional statements.[115] They do not appear in the company of justifications for existing inequality, however, but in the context of a radically egalitarian program. What may not be immediately obvious is that Hobbes was perhaps even more influenced by these demands for equality than by traditional invocations of the premise of equality within non-egalitarian arguments. As we will discuss later, he displays an acute concern with people's natural unwillingness to be despised by their alleged betters. For to display contempt is to destroy peace, whereas to admit natural equality is to preserve it.

ATTRIBUTING EQUALITY

People's proclivity to pride and their vexation at perceived contempt are what brings Hobbes to focus on equality. It is in this sense – and not because of his belief in the natural equality of people's faculties or abilities – that Hobbes's primary concern with equality stems from his view of human nature. His over-

[113] [Samuel Rutherford], *Lex*, *Rex: The Law and the Prince* (London, 1644), pp. 43, 116; see 89–95, 116–23, 139–58, and so forth.

[114] [Henry Parker], *Jus Populi* (London, 1644), p. 10.

[115] See, for example, Richard Overton, *An Arrow Against All Tyrants and Tyrany…* ([London], 1646), p. 3 and *An Appeale from the degenerate Representative Body the Commons of England…* (London, 1647), p. 6; John Lilburne, *The Free-man's Freedom Vindicated* ([London, 1646]), p. 11, and Elizabeth Lilburne, *To the Chosen and betrusted Knights…The humble Petition of Elizabeth Lilburne*. In the debate at Putney on 29 October 1647, Henry Ireton attempts to rebut those who hold that all have naturally equal right and freedom, on the basis that it would follow that everyone would have the right to everything (C. H. Firth, ed., *The Clarke Papers. Selections from the Papers of William Clarke*, vol. 1 (London: The Camden Society, 1891), pp. 307–8.

riding goals are peace and security, which will be undermined by those who deny natural equality or refuse to acknowledge others as their equals.

If people are naturally equal, they are none the less likely to act in ways that will lead to violence if some of them believe that they are superior. If people are naturally unequal, those who are treated as inferior are likely to resort to conflict if they believe themselves to be equal.[116] What people believe about themselves and their relation to others is already a flashpoint in the natural condition. People must be convinced to abandon the beliefs and aspirations that perpetuate strife, or at least to refrain from expressing or manifesting such beliefs. Hobbes emphasizes the natural law requirement not to insult others, that is, not to "declare Hatred, or Contempt of another" whether "by deed, word, countenance, or gesture," for "all signes of hatred, or contempt, provoke to fight."[117] Some who believe in their natural superiority will not recognize that they are demonstrating contempt when they act or speak according to that belief, so Hobbes spells out how any sign expressing another's natural inferiority is a violation of natural law. The argument about natural equality is above all an argument about what individuals should *acknowledge*. Hobbes's conclusion is that "men considered in mere nature, *ought to admit* amongst themselves equality."[118]

Hobbes's detailed view of the state of nature is not only that its residents are not all equal, but more importantly that they do not all admit others as their equals.[119] Conflicts of pride create a situation that is intolerable in the absence of commonwealth, and commonwealth will remain elusive or unstable without tempering the wills of the arrogant by convincing them of the need to recognize others as equals. Hobbes proudly entitles his great work on the commonwealth *Leviathan* in imitation of God, who, "having set forth the great power of *Leviathan*, calleth him King of the Proud,"[120] and pride is the precise name of the violation of the natural law of equality.

Hobbes resists the Aristotelian view that natural inequalities translate into a kind of natural nobility, or natural superiority in terms of recognized worth or virtue. To understand why he asserts natural equality it helps to think of him as attacking claims that there is a natural nobility that must be recognized and respected. Already in the prefatory materials to his edition of Thucydides, he makes a point of calling what Thucydides names aristocracy (rule by the *best*) "the authority of the *Few*"; and he commends the historian for his view that those of the few "that are vnderualued, beare it with lesse patience then in a *Democracy*," where equal liberty is the basis – "whereupon sedition followeth,

[116] See *Leviathan*, XV.21, p. 77; the idea is stated most clearly in the Latin version of this passage.

[117] Ibid., XV.20, p. 76; cf. *The Elements of Law*, I.16.11 and *De Cive*, III.12.

[118] *The Elements of Law*, I.14.2, emphasis added.

[119] Cf. *The Elements of Law*, I.14.4–5; *De Cive*, I.12; *Leviathan*, XIII.2, p. 61.

[120] *Leviathan*, XXVIII.27, p. 166, referring to Job 41.34.

and dissolution of the gouernment."[121] Denying natural nobility in the face of its tendency toward sedition does not require accepting a strong version of natural equality. Hobbes does of course adduce arguments, especially those about everyone's high degree of vulnerability in the natural condition, to show people that they are more equal than they may think. Hobbes aims to persuade them, and particularly the nobility, to doubt the naturalness of their own superiority, and to regard the proper manifestation of any such superiority to be service to the commonwealth. But he recognizes that nature may make people unequal, and also that he will not be able to humble all of the proud into believing in their own equality. Even those who wish to form a lasting commonwealth lack "humility, and patience, to suffer the rude and combersome points of their present greatnesse to be taken off."[122] Pride is the great impediment to peace, for without equal terms there can be no society.[123] His recourse is to encourage the artifice of mutual consent and mutual accommodation.

Hobbes maintains that an Aristotelian doctrine of natural aristocracy should not be propagated even if it were true, because when believed it gives people "colour and pretences, whereby to disturb and hinder the peace of one another."[124] Hobbes expresses reservations about particular features of the Aristotelian account, such as the emphasis on "inherent virtue," but the fundamental reason he thinks the doctrine of a hierarchy of natural differences must be cast aside is that the practical consequences of the doctrine are disastrous. If people espouse a view of natural hierarchy, "it cannot be imagined how they can possibly live in peace."[125] This is because assertion of a doctrine of natural hierarchy correlates highly with assertion of one's superior place therein. Hobbes evidently believed that people are likely to reject a theory of the great chain of being insofar as it assigns them a low place in the hierarchy, and will be stirred up by others' claims that their higher position is due to natural excellence.[126] There is a sense in which people's judgments of their worth converge, but what is shared turns out to be the contradictory presumption of inequality.[127] Every person must acknowledge each other as his or her

[121] From "Of the Life and History of Thucydides," in *Eight Bookes of the Peloponnesian Warre*, tr. Hobbes (London, 1629), sig. (a2)^{r}; cf. *The Elements of Law*, II.8.3.

[122] *Leviathan*, XXIX.1, p. 167.

[123] Cf. the first annotation to *De Cive*, I.2: "sine quibus [viz., conditiones aequas] societas esse non potest."

[124] *The Elements of Law*, I.17.1.

[125] Ibid., I.17.1.

[126] The natural superiorities recognized by Hobbes do not reliably correspond with claims to such superiorities: people "hope for precedency and superiority above their fellows, not only when they are equal in power, but also when they are inferior" (*The Elements of Law*, I.14.3). Presumably for practical reasons, Hobbes does not even mention those whose hopes are matched by superior power.

[127] For example, referring to the vulgar "vain conceipt of ones owne wisdome," Hobbes says that wisdom is something that "almost all men think they have in a greater degree, than the Vulgar" (*Leviathan*, XIII.2, p. 61). Note that an indexical proposition such as "I am hungry"

equal not because one must acknowledge the truth, but "for peace sake": "it is necessary for *the attainment of peace that they be regarded as equals*."[128]

This "acknowledgment" or "regarding as" is no mere observation. It is an "allowance," an "attribution."[129] "For what else is it to *acknowledge* the equality of persons in entering into society but to *attribute* this very equality to those who otherwise would not be required by reason to enter into society?"[130] Arguing that there is more natural equality between humans than is often recognized serves Hobbes's objective that people should not insist that they are naturally superior. Hobbes does not so much want people to acknowledge a state of affairs as to create a state of affairs via their acknowledgment: we are to acknowledge or attribute equality in order to give those acknowledged adequate reason to enter society with us.

Acknowledgment of natural equality is a law of nature, and therefore, for Hobbes, a law of reason.[131] This is not because human equality is a truth of nature: rather, because it is unreasonable to prefer war to peace, so it is unreasonable to be proud or to claim more natural honor than one concedes to others, given that this would lead to contention. The natural condition of war is marked by pride *rather than* acknowledgment of equality ("every man thinking well of himself, and hating to see the same in others, they must needs provoke one another by words, and other signs of contempt and hatred, which are incident to all comparison: till at last they must determine the pre-eminence by strength and force of body"[132]). Hobbes's treatment of pride as a violation

normally aggregates without loss of truth value (if each of us may truly claim hunger, then we are all hungry), whereas it does not when such a proposition is comparative (if each of us claims overall superiority, viz., over the others, then we know that the claims cannot all be true; a confirmation of this is the absurdity of the aggregative claim, that we are all superior to each other). There is a thin and often misleading sense of equality in the former kind of case (we are not equally hungry, but it is equally true of each of us that we are hungry), but this is even more attenuated in the latter case (we are not equally superior, and it is not equally true of each of us that we are superior; it is only equally true of us that we claim superiority). That each person claims or believes himself to be superior is no meaningful kind of equality: more significant is how broad and deep the resistance will be to treatment as an inferior. In this paragraph (XIII.2), as elsewhere (e.g., *De Cive*, I.12), Hobbes ascribes this arrogance to "the nature of men." He does sometimes maintain that the presumption of superiority is not general, being a characteristic of the consequential but particular population of those who are immoderate or intemperate (cf. *The Elements of Law*, I.14.2–3 vs. I.14.4, I.19.5; *De Cive*, I.4; *Leviathan*, XI.10, p. 49, XV.22, p. 77; *De Homine*, XIII.6).

[128] *The Elements of Law*, I.17.1; *De Cive*, III.13 ("necessarium est ad *pacem consequendam vt pro aequalibus habeantur*": these last words mean that others must be held, regarded, or accepted as or like equals).

[129] *The Elements of Law*, I.17.2; cf. I.17.14.

[130] "Tribuere", which I here translate as "to attribute," can mean to ascribe or impute, or to grant or bestow. *De Cive*, III.14, emphases added: "Quid enim aliud est aequalitatem personarum agnoscere in societate ineunda, quàm aequalia ipsis tribuere, quos alioqui societatem inire ratio nulla exigit?"

[131] *The Elements of Law*, I.17.1; *De Cive*, III.13; *Leviathan*, XV.21, p. 77.

[132] *The Elements of Law*, I.14.4.

of the law of nature, and his corollary condemnation of the vice of refusing to concede equality, can be seen as part of his attempt to engineer this concession. Hobbes underlines the importance of equality in this sense when he asserts that it is "the foundation of natural law."[133]

When Hobbes argues in *Leviathan* that "equalitie must be admitted" because otherwise we cannot have peace, and says that it is therefore a law of nature "*That every man acknowledge other for his Equall by Nature*," this should make us wonder about Hobbes's own admission or acknowledgment of natural equality in his chapters on the natural condition. This may seem a dubious procedure, because we are accustomed to understanding the later parts of Hobbes's main works as meant by him to follow from the earlier parts, and the account of natural law comes after the account of the natural condition. Hobbes insists, however, that the natural law is already in place in the natural condition; and he maintains that anyway there may be compelling practical reasons for presenting philosophy out of its logical order.[134]

To read Hobbes's statements of natural equality in light of his recognition of the imperative that we admit such equality, rather than vice versa, runs contrary to an established practice of interpretation. But consider how Hobbes develops his view in his first exposition of the state of nature, in *The Elements of Law*. He here reveals that the obligation to admit equality is at the foundation of his doctrine of the natural condition of mankind, and does not follow up with his own statement of natural equality until late in the chapter on the subject. Hobbes begins with the observation that "the weaker in strength or in wit, or in both, may utterly destroy the power of the stronger."[135] Before any of the other natural laws are laid out in later chapters, he immediately states the requirement that people "ought to admit amongst themselves equality." The normative conclusion is not here presented as following from equality, but from the vulnerability of the superior to the inferior: Hobbes is saying that those superior in strength or wit provoke their inferiors at their extreme peril, and should instead "admit" others as their equals, or as he also puts it here,

[133] Ibid., I.18.6; cf. *De Cive*, IV.12 with III.12–15. Hobbes elsewhere identifies the foundation of natural law with seeking peace (e.g., at *De Cive*, II.2 and *Leviathan*, XIV.4–5, p. 64), but clearly believes that acknowledgment of equality is a prerequisite for peace.

[134] Natural law applies before commonwealth: see, for example, *Leviathan*, XIV.27, p. 69, XV.5, p. 73, XXVI.24, p. 144, XXVI.36–7, pp. 147–8, XXVII.3, p. 152, XXXIII.22, p. 205, XLII.131, p. 318, XLVI.11, p. 369, and "A Review, and Conclusion," para. 5, p. 390. In the preface to *De Cive*, Hobbes says that he has presented arguments out of order due to political imperatives, and that doing so is acceptable if those arguments can be founded on experience. See also *Elements of Philosophy, the First Section, Concerning Body* (London, 1656), I.6.7, pp. 54–5). And note that there are some principles "of Construction onely; that is, not of Science, but of Power; or (which is all one) not of Theoremes, which are Speculations, but of Problemes, which belong to Practice, or the doing of something" (*Concerning Body*, I.6.13, p. 60).

[135] *The Elements of Law*, I.14.2.

"claim" no more than equality, and "be esteemed moderate."[136] What follows from vulnerability is not equality, but the urgent requirement to admit equality. "[T]hose men who are moderate, and look for no more but equality of nature," however, will nonetheless "be obnoxious" to the "vainly glorious," who hope for superiority regardless of their comparative power.[137] What is needed is some way to bring the proud or vainglorious to admit or acknowledge natural equality.[138] One way is to try to convince them to abandon their pride, accepting rough natural equality as true; another, perhaps recognizing that the previous way will fail in many cases, is to get them to accept others as equal even if they themselves are superior (or entrenched in their belief that they are superior), accepting the need to acknowledge equality none the less.

Hobbes sees his demand that we acknowledge or admit natural equality as *consistent* with the condition of natural inequality, as he makes clear in *Leviathan*: "if Nature have made men unequall; yet because men that think themselves equall, will not enter into conditions of Peace, but upon Equall termes, such equalitie must be admitted."[139] That is: natural equality must be acknowledged even by natural unequals. Here is Hobbes in *De Cive*: "If therefore people are among themselves equal by nature, this equality must be acknowledged; but if they are unequal, because they will fight over who will rule, it is necessary for the attainment of peace that they be regarded as equals."[140] This means that we must acknowledge natural equality even if it is not true.

These affirmations pose some intriguing puzzles about the status of Hobbes's claims that people are equal. We could emphasize that Hobbes makes straightforward statements to this effect infrequently, and that when he does so he sometimes eliminates the claim in subsequent editions or turns out to be referring to something less problematic such as people's equal liberty by nature.[141] But the fact remains that he does sometimes make claims for natural equality; and given the evidence from his works of inequality, and his view that we should admit equality even if it is not true, some may thus be tempted by the idea that Hobbes propounds equality as a kind of noble lie. Hobbes would thus be trying to convince his audience (or enough of them) to believe a politically necessary myth for their own collective good. People may be obligated to make or not make utterances as and when required by natural or civil law, according

[136] Ibid., I.14.2. See, for example, *The Elements of Law*, I.6.5, where to admit something is to suppose something that is not evident, and may or may not be true. Elsewhere in the *Elements*, to admit is to allow, authorize, or welcome to a status or office (I.8.6, II.2.8; cf. II.10.10; cf. also *Leviathan*, VIII.8, p. 34, XV.31, p. 78, etc.).

[137] Ibid., I.14.3.

[138] Hobbes sets acknowledgment of natural equality not only against pride, but "most passions, as of anger, ambition, covetousness, vain glory, and the like" (*The Elements of Law*, I.17.9).

[139] *Leviathan*, XV.21, p. 77. I interpret "men…think themselves equall" to mean that they regard themselves as *at least* equal, that is, as equal or superior.

[140] *De Cive*, III.13 (italicization eliminated).

[141] See note 3, above.

to Hobbes, even if the utterances we are required to make are false, or the prohibited utterances are true.[142] So Hobbes's own claims about natural equality could be falsehoods that he regards as conducive to peace. We should, however, consider other ways to read these claims before embracing such a thesis.

A different but related idea would be that Hobbes is not so much trying to convince us directly as to motivate us to convince ourselves, emphasizing the practical benefits of the belief in equality so that we bring ourselves to believe. Pascal's wager shows that such an approach has early modern proponents, and the wager here would be that the belief in equality is warranted given the non-negligible chance that the incalculably large benefit of peace requires it. Hobbes, however, appears to have a less voluntarist conception of belief than would be required for such a view.[143] "Beleef, and Unbeleef never follow mens Commands," and this presumably holds when you are commanding yourself to believe.[144]

Perhaps the claim of equality is instead asserted as an approximate or general statement of the truth. Such assertions play an important role in Hobbes's works. For example, he says that people strive to preserve themselves, while nonetheless providing clear evidence of cases in which people do not so strive. Hobbes apparently does not mean that people always seek self-preservation, but rather that it is reasonable to think that they will do so: prudent actions and good laws will generally require us to proceed on the assumption that others will strive to preserve themselves.[145] The parallel would be that people are generally roughly equal, and that it is reasonable to assume that they are (rather than assuming their superiority or inferiority). This is significantly weaker than some of Hobbes's statements, and leads to the question of what we are to do when we have good reason to believe that the generalization does not hold or circumstances are such that the error in the approximation is significant. In such cases of probability rather than necessity, our guide is not unerring reason, but less reliable prudence.

Prudence does not simply issue from belief, however; it has a role in determining belief (or something like it) as well as action. Especially in the absence of laws that make others' actions reliable, their actions are likely to be uncertain and risky. We are unlikely to know enough to calculate the probability of disaster, especially at the hands of others, but we can know that there is an unacceptably high probability. And practical contexts influence what we accept

[142] See Kinch Hoekstra, "The End of Philosophy (The Case of Hobbes)," *Proceedings of the Aristotelian Society* 106.1 (2006): 33–60, at 37–9, 43–5, 48–50.

[143] For an influential discussion of difficulties with the voluntarist view, see Bernard Williams, "Deciding to Believe," pp. 136–51 of *Problems of the Self* (Cambridge University Press, 1973). See also John Cottingham, "Descartes and the Voluntariness of Belief," *The Monist* 85.3 (2002): 343–60.

[144] *Leviathan*, XLII.11, p. 271; cf. XXVI.40, p. 149.

[145] I set aside the question of whether the main point of this argument is to convince people to regard death as the greatest evil (or to convince them that they are following a necessity of nature, or a moral requirement, in striving for self-preservation).

or assume, even if we would not in other contexts accept the truth of the idea or claim. While reading this sentence, you believe that you will not suddenly lose your balance or topple forward. But the strength of this belief may waver if you reread at the very edge of a cliff.[146] Risk and the prerequisites for social cooperation are two important contextual determinants of what we accept or take for granted.[147] And as Edna Ullman-Margalit emphasized, presumptive reasoning is distinct from deductive and inductive reasoning, for in adopting or rejecting a presumption we may look to the moral or social effects.[148]

Hobbes's concern with belief focuses on how it comes to have social or political effects, and on the effects of the conclusions that people draw about others' beliefs on the basis of their behavior. If we examine Hobbes's language, we see that he chooses terms that may be interpreted to mean either that we must internally assent to the equality of others, or that we must act as if we assent to their equality. He says that we must "allow," "admit," and "attribute" equality, that we must "acknowledge" others as our equals. Let us focus briefly on the last of these cases, which is a central term in this context for Hobbes. He uses both the Latin and English, and it is worth noting (along with the difference between knowledge and acknowledgment) that "agnoscere" is to recognize someone or something subjectively, whereas "cognoscere" is to perceive something to be the case objectively. Thus, "agnoscere" can mean, in the words of Lewis & Short, "*to declare*, *announce*, *allow*, or *admit a thing to be one's own*, *to acknowledge*, *own*." In Roman law, the contrast is between "agnoscere" and "repudiare" or "repellere," where the former is the generic term for the assumption or acknowledgment of a legal duty; "agnoscere filium," for example, is to acknowledge that someone is one's natural son or to adopt someone who is not one's natural son.

It is against this background that Augustine distinguishes between "agnitio" and "cognitio": the latter, lacking the element of will, cannot be sufficient for salvation. Only by the subjective "agnitio" of faith is pride overcome. Many follow Augustine in rejecting the adequacy of reason for salvation and emphasizing the importance of passions and the will. While Oecolampadius, Calvin, Beza, and others foreground the role of acknowledgment in salvation, the commentary on Romans 1:28 by Erasmus should suffice to bring out the idea:

[146] Richmond Thomason has discussed the risk-sensitivity of belief; see particularly "The Context-Sensitivity of Belief and Desire," in *Reasoning about Actions and Plans*, ed. Michael P. Georgeff and Amy L. Lansky (Los Altos, CA: Morgan Kaufmann, 1987), pp. 341–60. Cf. Brad Armendt, "Stakes and Beliefs," *Philosophical Studies* 147.1 (2010): 171–87.

[147] Michael E. Bratman, "Practical Reasoning and Acceptance in a Context," *Mind* 101.410 (1992): 1–15, at 6–7. Bratman argues that these are not determinants of belief, but of "acceptance in a context." One may accept in the context something one does not believe, but such acceptance involves reasoning on the basis of that assumption, not merely acting as if one accepted the assumption (p. 9).

[148] Edna Ullmann-Margalit, "On Presumption," *The Journal of Philosophy* 80.3 (1983): 143–63 at 160–2.

… the meaning here is 'acknowledgment' rather than 'knowledge' ('and they were unwilling to acknowledge him, however known')….For [Paul] had said earlier that God was 'known' by them; but here he says that God was not 'acknowledged.' 'To know' [*cognoscere*] is [said] of one who understands; 'to acknowledge' [*agnoscere*] of one who is grateful and mindful. An ungrateful person 'knows' an act of kindness; but when he pretends that he owes nothing in return, he fails to 'acknowledge' it….it is not their lack of knowledge that is being blamed, but their perverse will…. Thus according to the Greek interpreters the sense is something like this: 'It did not seem good to them to acknowledge and venerate God, whom they knew.'[149]

In these theological contexts, acknowledgment is typically seen as something that one should have in addition to mere knowledge.[150] But knowledge need not be presupposed. As the example of having faith in something or someone already suggests, one may acknowledge or avow something that one does not independently know to be true.[151] To "acknowledge" or "allow" equality may be to *treat* others *as* equals or *grant* them equal influence (as one might grant an equal vote), regardless of whether they *are* equal or would otherwise *have* equal powers of influence.[152] This way of reading what it means to acknowledge or admit others as equals even if they are not equals does not require a false claim of equality, for it is about *treating* people *as* equals. There need be no falsehood in treating a stranger as family, say, nor in a superior treating an inferior as an equal. The requirement is that I comport myself toward you in a certain way, and vice versa; that we not show contempt by our words or actions.

But what if I am intent on getting an answer from you to the question of whether you regard me as naturally equal to you? All of your efforts to treat me as equal will be for naught if you say that no, you think I am inferior or contemptible, but that in order to keep me quiet you are treating me better than you think I strictly deserve. If you really do have to answer, it seems that Hobbes would require you to say something that is not true. If you tell what you believe to be the truth, you will be choosing an action that leads to hostility rather than one that leads to peace, against the basic requirement of

[149] *Collected Works of Erasmus*, vol. 56: *Annotations on Romans*, ed. Robert D. Sider (Toronto: University of Toronto Press, 1994), p. 58. Square brackets and text therein are from this edition.

[150] The idea also surfaces in English in secular contexts, for example in *The Phoenix Nest*, ed. R. S. (London, 1593), p. 32: "Sooner the rocks their hardnes will forgo, / Than she acknowledge that which she doth know." See also Stanley Cavell's "Knowing and Acknowledging," pp. 238–66 of *Must We Mean What We Say?* (Cambridge: Cambridge University Press, 1976).

[151] See *The Elements of Law*, I.11.5, I.11.9, I.11.11.

[152] Hobbes does say in *Leviathan*, XV.21, p. 76, that he has "shewn before" that in the condition of mere nature all are equal. Hobbes's own claims about equality should be read in light of what he has in fact demonstrated about natural equality in what precedes, and of the natural and divine law requirement that equality be admitted even if people are unequal by nature. Note too that Hobbes eliminates this claim (that he has shown before that all are equal in the natural condition) from the Latin *Leviathan*. Not least, Hobbes's emphasis has shifted from chapter XIII to chapter XV from arguments against an inequality of power that would bring about natural rule without conflict, to arguments against claims of greater natural worthiness.

natural law. For Hobbes, you do not have a moral or prudential obligation to tell the truth, but you do have a moral and prudential obligation to admit me or acknowledge me as your equal.

I think that Hobbes would not regard this as especially paradoxical, for he recognizes that language has a range of functions. Not everything that has a propositional form is best understood as a proposition.[153] To say that God is omniscient, for example, is best understood as an oblation, an offering of praise in a case where I cannot know the truth.[154] For you to say that I am your equal may be better understood as a peace claim than a truth claim.[155] If it is to serve as such, if it is to conduce to peace, do I have to misrecognize it as a sincere expression of your belief, and do you have to engage in deception by attempting to bring about that misrecognition? Not necessarily. When you said it was nice to meet me, I did not have to be convinced that you were telling the truth for the utterance to function as a successful social gesture. The gesture would probably fail if you were to give me reason to think you were lying, but it need not fail just because I have no particular guarantee that you are telling the truth.

CONCLUSION

Hobbes argues that people are prone to believe in natural inequality in a way that is exaggerated and pridefully partial, and he adduces reasons why someone might do well to question a belief in his or her own superiority. He provides arguments for natural equality to discourage bellicose presumption, whether in civil society or outside of it. But he does not argue that in principle there can be no natural inequalities; indeed, he insists on and even depends on them. He recognizes natural inequality and argues to consolidate the peaceful order that it can engender. For to enter into peace, a basic *inequality* is required along with the acknowledgment of natural equality. This structural inequality might arise from a widely recognized natural inequality, perpetuated via conquest and consent thereto, or else from an agreement to elevate some person or assembly as the necessary contrivance to move beyond a conflictual stalemate. There is a sense in which equality is not something for which we should strive,

[153] Hobbes also recognizes that something without propositional form can serve as a propositional claim, and he insists that actions frequently function as declarations (see *The Elements of Law*, I.14.11; *De Cive*, Praef. par. 3, I.5, I.12, III.12, XIV.13, XIV.20, XV.11, XV.19; *Leviathan*, XIII.10, p. 62; XIV.7, p. 65; XIV.29, pp. 69–70; XV.20, p. 76; XVIII.5, p. 90; XXVI.15, p. 141; XXVIII.13, p. 163; XXXII.5, p. 196; XLII.11, pp. 271–2; *Behemoth*, pp. 251–2). To treat someone as an inferior is to express contempt.

[154] See *Critique du* De mundo, XXXV.16: "Coetera omnia tribui non ad veritatem philosophicam explicandam, sed ad affectus nostros, quibus Deum magnificare, laudare & honorare volumus declarandos. Itaque verba illa…non exprimunt Naturam Divinam, sed pietatem nostram…non sunt illae propositiones, sed oblationes." Cf. *Leviathan*, XII.7, p. 53; XXXI.33, p. 191; XLVI.23, p. 374; and XLVI.31, p. 376.

[155] See Hoekstra, "The End of Philosophy," pp. 54–60.

but is on the contrary something that we must ultimately avoid. This is because there will be a high risk of contention so long as there is equality.[156]

Hobbes accordingly holds that civil peace generally arises from a condition of *inequality* in the natural state, via a process of acquisition.[157] As long as there are no great odds one way or another, warring parties will not incline to peace.[158] But superiors (in terms of individual or group power) will emerge through contest, as they consolidate dominion over the weaker. This does not reflect an ambiguity in Hobbes's theory, but shows that peace is facilitated both by the institution of inequality (the relinquishing of power to a sovereign monopoly), and by the acknowledgment of equality (the admission of each other as equals). Neither the necessary equality nor the necessary inequality are brute facts of human nature; both are the products of consent and constructed to respond to the facts of human nature.

The logic of warring equals remains embedded in Hobbes's analysis, though it is not the only logic. If people are equal, they will be locked in a natural condition of conflict that they can escape only by covenanting to create inequality in a commonwealth by institution. If people are unequal, they may escape conflict in a commonwealth by acquisition, but only if they acknowledge natural equality. Hobbes generally emphasizes an epistemological cause of war, that people cannot be certain of their inequalities or that they misjudge them, over the ontological claim of actual equality. Thinking in terms of actual equality leads him to the thought that conflict in the state of nature cannot result in victory and so will be perpetual.[159] More often, thinking in terms of uncertainty or widespread arrogance leads him to view the state of nature as a condition where inequalities often become apparent only through conflicts that do result in victory.[160]

It is commonly thought that natural equality is a necessary presupposition of the covenant that founds a commonwealth by institution. This covenant does

[156] Cf., however, *Leviathan*, XXV.16, p. 136, and XLVI.6, p. 368; cf. also Hobbes's translation of Thucydides, III.11 and V.89.

[157] Sufficient inequality in the natural condition gives rise to obligation and authority (see Kinch Hoekstra, "The *De Facto* Turn in Hobbes's Political Philosophy," *Leviathan After 350 Years*, ed. Tom Sorell and Luc Foisneau (Oxford: Clarendon Press, 2004), pp. 48–73, so Hobbes sometimes talks of that condition as necessarily (stipulatively) one of equality). As S. A. Lloyd puts it, "because we are considering a condition in which men have no obligations of obedience, we must posit their rough equality in possession of those qualities that would allow some to dominate others and thus to emerge as natural rulers" (*Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature*. New York: Cambridge University Press, 2009), p. 216.

[158] Cf. *The Elements of Law*, I.8.4, II.5.8; *De Cive*, I.13; *Behemoth*, p. 352. Cf. also Hobbes's translation of Thucydides II.65 (equality gives rise to sedition) and IV.92 (the condition of equality is the condition of liberty). Robert Payne, in a letter to Gilbert Sheldon of 25 April/5 May 1649, reports that Hobbes writes from Paris that he "is of opinion that war here will be reduced to an equality very suddenly; – else he had come over to visit his friends, but now he defers that design till he sees more hopes of peace" ("Illustrations of the State of the Church During the Great Rebellion," *The Theologian and Ecclesiastic* 6, 1848, p. 165).

[159] *De Cive*, I.13. Even here he makes clear that there are victories, though they are unstable.

[160] *The Elements of Law*, I.14.4; *De Cive*, I.6, IX.3; *Leviathan*, XIV.31, p. 70, XX.4, p. 102.

not depend on such equality, however; what is needed is not even an equality of vulnerability, but that the covenanters prefer a commonwealth to its alternative and are willing to do what it takes to institute that commonwealth. What is required for that institution is that everyone be willing to treat everyone else as if they were equal, disallowing any initial privileges based on claims to natural superiority. Those who refuse these terms are the naturally unsociable who cannot form societies, "those who from pride do not deign to accept the equal conditions without which there can be no society."[161] Equality is not just a natural fact and then a normative requirement once society is in place; its acknowledgment is a natural requirement for there to be society in the first place.[162] Someone who follows this natural law will attribute equal right to others, as we have seen in the section on equality of freedom and right that Hobbes himself does; and he will attribute equal power to others, as Hobbes famously does despite the complications noted in the sections on equality of power and effective equality. It may be that Hobbes's pronouncements about equality are consistent with the natural law requirement to "attribute," "acknowledge," or "admit" equality because they follow from it.[163]

Against political radicals aggravated by those who have or claim positions of privilege, Hobbes wishes to show that natural equality, like natural liberty, is less an ideal to follow than a perilous state of affairs to avoid. Against the nobility, or others who believe in their natural superiority, Hobbes argues for a limited natural equality to undercut the idea that elites have any right to their position other than one that is bestowed by the sovereign. Moreover, he depicts the state of nature to convince them that such superiority as they may have will be better recognized and rewarded within commonwealth: natural superiority can hardly reach full flower in the natural condition. Yet whatever inequalities he admits, Hobbes insists that people are closer to equality than they are inclined to recognize. And to check the fatal effects of the natural inclination to arrogance, he insists on a prudential, moral, and religious requirement that people acknowledge or allow all others as their natural equals – that they attribute equality.

A politics of sincere equal respect based on a shared belief that all others are of equal worth may be beyond us, whether now or simply as human beings, and to invoke such an ideal in the public realm may only sound the

[161] Annotation to *De Cive*, I.2.

[162] *De Cive*, III.14.

[163] The point may be clearer if the principle of interpretation implicit here is brought to the surface: if an author claims *x*, and also argues that it is a moral, prudential, and divine imperative for everyone to claim *x* regardless of whether or not it is true, then the status of the author's initial claim must be soberly reconsidered. This is underlined if there is no reason to doubt the importance of the imperative for the author or his sincerity in propounding it, while there are reasons to doubt the arguments underlying the claim of *x*. Somewhat more generally: we should question the status or function of the claim that *x* if its author holds that everyone should claim *x* regardless of whether or not it is true.

gong of hollow moralism. Although this must here remain a mere suggestion, it may be that the practical need to treat others as equals is a firmer foundation for a more attainable politics. Such a politics would emphasize the communicative and symbolic, but would not be merely gestural. This can be seen by considering Hobbes's own version of such a politics, which is more substantial and directive than it may initially appear to be. Strikingly, he argues that acknowledgment of equality requires not only that we communicate that we regard others as equals, but also that we accord them equal benefits.[164] The need to recognize people as naturally equal whether or not they are in fact equal gives rise to the requirement of equity, which contains all of the other laws of nature within it.[165] Hobbes consistently argues that the particular natural laws requiring modesty, equity, common or equal use, and distribution by chance, as well as natural laws governing arbitration, all follow from the need for such acknowledgment.[166] And to acknowledge equality even requires justice – though, revealingly, what it requires is not justice of persons (a question of internal dispositions and character), but justice of actions.[167]

Substantial equal treatment need not be based on the truth of or sincere belief in equal worth or equal capacities.[168] For even if natural differences did make some worthy to rule and others worthy only to be ruled by them, people would

[164] *The Elements of Law*, I.17.2. Without equal benefits, an attempt to acknowledge equality will presumably ultimately fail.

[165] *De Cive*, III.12–15, IV.12. Especially when discussing what judges ought to look to when interpreting a statute or in the absence of a relevant statute, Hobbes sometimes equates equity with natural law as a whole: this is most evident in the *Dialogue*; *Leviathan*, XXVI.17, p. 142 and XXVI.26, p. 145; and *Behemoth*, p. 156 (cf. *Leviathan*, XXVI.28, p. 146, where he calls equity the "principall" law of nature), XXVI.7, p. 138, XXVI.24, p. 144, XXVI.40, p. 150, XXXVI.6, p. 224; and *Behemoth*, p. 264). *De Cive*, IV.12 is striking because Hobbes there refers specifically to the particular natural law of equity, derived from the need to acknowledge equality, as containing within it all of natural law; that is, he there seems to deny that he is talking about different things when talking about general equity and particular equity. Equity is "that habit by which we *allow* equality of nature, arrogance the contrary vice" (*The Elements of Law*, I.17.14, emphasis added; cf. I.17.1–2, I.17.11, *Leviathan*, XV.22, p. 77).

[166] *The Elements of Law*, I.17.1–5 and I.17.7; *De Cive*, III.13–18 and III.21–4; *Leviathan*, XV.21–8 and XV.31–2, pp. 76–8.

[167] *The Elements of Law*, I.16.5: "the injustice of action, consisteth not in the equality of the things changed, or distributed, but in the inequality that men (contrary to nature and reason) assume unto themselves above their fellows." Such passages are generally interpreted as depending on the idea that equality is a truth of nature, but there is frequently another possibility. "There can therefore be no other law of nature than reason, nor no other precepts of NATURAL LAW, than those which declare unto us the ways of peace," and one of these natural requirements of reason is "that every man acknowledge other for his Equall by Nature" (*The Elements of Law*, I.15.1, I.15.21). To declare or act so as to declare that one is better by nature than one's fellows is contrary to this natural law requirement of reason, regardless of whether one is superior, inferior, or equal to them.

[168] As the case of Hobbes suggests, however, one way to promote equal treatment may well be to move people toward a belief in the truth of equal worth and equal capacities.

not agree on who is whom; Hobbes believes that everyone thinks he is at least as able to govern another as another him.[169] What matters in human society is not people's inherent value, but how people understand their own and others' value.[170] The problem is not ultimately equality or inequality, but "what values men are naturally apt to set upon themselves; what respect they look for from others; and how little they value other men; from whence continually arise amongst them, Emulation, Quarrells, Factions, and at last Warre."[171] Hobbes's priority is not to reveal an underlying ontology of equality, but to mitigate the disastrous effects of pride, contempt, and open disagreement about comparative worth.

There is, of course, material that may be marshalled to support the standard position that Hobbes believed that people are by nature equal, and that they should therefore acknowledge that equality. Victor Goldschmidt is among those who interpret Hobbes this way, arguing that the indicative that men are equal by nature grounds the imperative that they must acknowledge this equality.[172] We have, however, found reasons to question Hobbes's belief in natural equality, and to wonder why then he nonetheless attributes such equality to people. I propose that the pieces fit together better in the other direction. Hobbes holds that it is a natural law requirement, necessary for peace and society, that people should acknowledge one another as naturally equal. He therefore acknowledges people as naturally equal in his writings. The imperative grounds the indicative.

We are used to thinking of philosophy as structured such that a moral or political theory is built on a more foundational metaphysics, and we think of Hobbes as a principal advocate of such a structure. To assume that Hobbes is engaged in philosophy in this sense, however, is implicitly to adopt certain ways of reading, and may be to mistake his commitments and his methods.[173] One pivotal issue that has been obscured by bringing a seemingly uncontroversial conception of philosophy to the texts is the nature of Hobbes's commitment to equality. It is not because we are equal that Hobbes says that we ought to treat each other as equals; rather, it is because we ought to treat each other as equals that Hobbes says that we are equal. Although his political philosophy is formed from the materials of his metaphysics, physics, and theory of human nature, Hobbesian equality is not ultimately physical or metaphysical, but political.

[169] *The Elements of Law*, I.17.1. Even in the absence of ontological equality, therefore, people will still be more likely to act in accordance with a doctrine of natural equality than with any particular doctrine of natural hierarchy.

[170] Sources for this view include *The Elements of Law*, I.8 and *Leviathan*, chapter X.

[171] *Leviathan*, XVIII.15, p. 92. Cf., for example, *The Elements of Law*, I.19.5 ("strife about honour or [lack of] acknowledgment" leads to war), *De Homine*, XI.12.

[172] "Les renversements du concept d'égalité," p. 261.

[173] We may read Hobbes as a philosophical foundationalist so long as we allow for the possibility that more "superstructural" considerations may determine what is said and taught about the more "foundational" positions. (See Hoekstra, "The End of Philosophy," pp. 52–4, for an example of a metaphysical position that Hobbes sees as underlying his ethical and political theory, a theory that in turn forbids him to communicate that metaphysical position.)

6

The Representation of Hobbesian Sovereignty

Leviathan *as Mythology*

Arash Abizadeh

Readers of Hobbes have often seen his *Leviathan* as a deeply paradoxical work. On the one hand, recognizing that no sovereign could ever wield enough coercive power to maintain social order, the text recommends that the state enhance its power ideologically, by tightly controlling the apparatuses of public discourse and socialization (universities, churches, and press). The state must cultivate an image of itself as a mortal god of nearly unlimited power, so that it may overwhelm its subjects and instill in them enough reverence and fear to win their unwavering obedience. The state's ideological program must therefore exceed the confines of scientific enlightenment, and nurse its subjects on the new mythology of Leviathan spun by Hobbes's text. Thus, while Hobbes condemned the idolatrous belief in demons and ghosts as potentially subversive of sovereign power, he nonetheless construed the Leviathan state itself as a demonic idol to which persons must attribute powers that it does not intrinsically possess. On the other hand, by drawing explicit attention to the ideological and partly illusory bases of the state's power, *Leviathan*, itself construed as a political intervention designed to appeal to a broad English readership, appears to undermine the very program it recommends. Indeed, many have argued that *Leviathan*'s substantive political–philosophical doctrine is flatly at odds with the authority that Hobbes claimed for himself in order to advance that doctrine. The paradox, I argue, is only an apparent one. Precisely because Hobbes believed that in practice no one could ever become the mortal god that sovereignty requires, that is, that the seat of sovereignty could never actually be securely occupied and fully represented by a mere mortal, he sought constantly to remind his readers of the precariousness of earthly sovereignty by pointing to its partially illusory basis. Far from seeking to undermine the sovereign, however, this reminder was designed to enhance readers' fears, especially the fear that, despite the security they may enjoy today, the slightest misstep may lead them straight into the horrors of the state of nature. Hobbes's purpose was, in other words, to enhance the sovereign's power, by enhancing not merely our fear of *him*, but also of his absence.

PEACE AND THE INSUFFICIENCY OF COERCION

Hobbes famously asserted that nothing in the world has intrinsic value. His categorical statement in the *Elements of Law* (1640), that there is no "such thing as *agathon haplos*, that is to say, simply good," was illustrated with the rather telling example that "even the goodness which we attribute to God Almighty, is his goodness to us."[1] He reiterated the claim in *Leviathan* (1651), insisting that "there is no such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest Good,) as is spoken of in the Books of the old Morall Philosophers."[2] It is human beings themselves who *project* value onto objects in the world – even onto God himself – just as they project the qualities of color and sound, which inhere in their subjective sensory perceptions, onto the external objects whose motions cause those perceptions. As Hobbes put it in a well-known passage:

> 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, *Evil*; and of his Contempt, *Vile* and *Inconsiderable*. For these words of Good, Evil, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evil, to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Commonwealth;) or, (in a Commonwealth,) from the Person that representeth it.[3]

The passage does not endorse metaethical subjectivism.[4] It does not say that an object *is* good by virtue of being desired; it says, rather, that it is *called* good by virtue of being desired. Indeed, desire-satisfaction subjectivism is twice explicitly repudiated in *Leviathan* in the course of Hobbes's attack on the ancient Greek "Schools" whose "Morall Philosophy is nothing but a description of their own Passions," and who "make the Rules of *Good*, and *Bad*, by their own *Liking*, and *Disliking*."[5] Nor does the passage endorse a nihilist theory of value, with the implication that all projections of value are in error. Whether an object is (accurately called) *blue*, *green*, or *good* depends on who has the right or linguistic *authority* to baptize it such, by artifice of language. Where "there is no Common-wealth," the "Rule" is taken from "the Person of the

[1] *The Elements of Law, Natural and Politic: Part I, Human Nature, Part II, De Corpore Politico, with Three Lives*, ed. J. C. A. Gaskin (Oxford: Oxford University Press, 1994), 7.3, p. 44.

[2] *Leviathan*, XI:70 (47), ed. Richard Tuck, Rev. student ed. (Cambridge: Cambridge University Press, 1996). In all references to *Leviathan* in the footnotes to this chapter, the number before the colon is the chapter number, followed by the Tuck page number, and the number in parentheses is the Head edition (1651) page number.

[3] *Leviathan*, VI: 39 (24).

[4] Subjectivism is attributed to Hobbes, for example, by David Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969), pp. 7–8. Stephen Darwall, "Normativity and Projection in Hobbes's *Leviathan*," *The Philosophical Review* 109, 3 (2000): 313–47, rightly draws attention to the fact that Hobbes says that we *call* the objects of our appetite good.

[5] *Leviathan*, XLVI: 461 (369). Cf. *Leviathan*, XLVI: 469 (376).

man" (who, by right of nature, may use language "as he will himselfe"[6]), while "in a Commonwealth," the authority of naming has been transferred to "the Person that representeth it." Hence, one's subjective projection of value onto a desired object may be a "true" projection, or not, depending on whether it is rightly called good by authoritative linguistic artifice. Authority creates value: it is the "Rule" of accurate projection.[7]

There is, however, an exception to the artificial character of value. Hobbes took it to be self-evident that, whatever else is artificially good, being alive is a condition of possibility for enjoying it. If *anything* has value – and some things indeed do, albeit artificially – then one's own life must necessarily have value for oneself. One's own life, although not an intrinsic value, is nonetheless a *necessary* instrumental value – its value does not depend on authoritative baptism.[8] Of course, that every person's life is a self-evident good to themselves does not thereby commit them to value anyone else's life. Yet it does commonly commit them to the social good instrumentally necessary for the preservation of *each* person's life: peace. Hence the scientifically discoverable laws of nature, whose first and fundamental "Precept, or generall Rule, found out by Reason" – from which are derived all the laws of nature – is "*to seek Peace*."[9] These laws, which are "nothing else but the Science of what is *Good*, and *Evill*," identify the shared social means necessary for the preservation of every person's life. They articulate, in other words, the non-artificial half of Hobbes's theory of value: they are "natural," not in the sense of intrinsic, but in the sense of known "by nature," that is, independently of convention. The fact that natural law identifies the shared social means of self-preservation is precisely why all human beings, despite varying in appetites and aversions, can "agree on this, that Peace is Good, and therefore also the way, or means of Peace."[10] The laws of nature provide the scientific foundation for agreement and peace.

It is the fundamental tenet of Hobbes's political philosophy that peace – the one shared good whose value can be scientifically discovered – requires an absolute sovereign. First amongst the rights of sovereignty is, of course, the exclusive right of the sword: for "there must be some coërcive Power, to compel men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach."[11] The sovereign

[6] Ibid., VI: 39 (24).

[7] Thus Hobbes was not what Mackie has called an "error theorist" (J. L. Mackie, *Ethics: Inventing Right and Wrong*. London: Penguin Books, 1977). The suggestion that Hobbes is a nihilist-projectivist is made by Darwall, "Normativity and Projection." Darwall is right to think that Hobbes was a projectivist, but mistaken to think that projectivism entails (and that Hobbes was consequently committed to) nihilism and, so, an error theory of morals.

[8] See Arash Abizadeh, "Thomas Hobbes et le droit naturel," in ed. Xavier Dijon, *Droit naturel, relancer l'histoire?* (Brussels: Bruylant, 2008).

[9] *Leviathan*, XIV: 91–2 (64).

[10] Ibid., XV: 111 (80).

[11] Ibid., XV: 100–1 (71–2).

must not merely prescribe common rules of social conduct, but also judge and punish their violations, especially, if need be, by death, since of all the "Passions that incline men to Peace," the most important is the "Feare of Death."[12]

Yet Hobbes did not believe that any sovereign could ever wield enough coercive power to maintain order on that basis alone.[13] As he put it in *Leviathan*, the rights of sovereignty "need to be diligently, and truly taught; because they cannot be maintained by any Civill Law, or terrour of legall punishment." Social order cannot be secured by the multiplication of coercive laws, for "where the right of Soveraign Power is acknowledged," then "Unnecessary Lawes" are merely "superfluous; and where it is not acknowledged, unsufficient to defend the People."[14] Hobbes reiterated the point in his *Behemoth* (1668), asserting that "the Power of the mighty has no foundation but in the opinion and beleefe of the people," from which Stephen Holmes infers that for Hobbes the "ultimate source of political authority is not coercion of the body, but captivation of the mind."[15] Beyond actual coercive power – that is, the effective capacity to deploy physical force – the state must also wield *symbolic* power. Part of the problem, to be sure, is institutional. Since the strength of his natural person is obviously insufficient to the task, the sovereign's coercive power necessarily relies on other agents: as Hobbes asked in *Behemoth*, "if men know not their duty, what is there that can force them to obey the Laws? An Army, you'l say. But what shall force the Army?"[16] An even greater part of the problem, however, arises directly from the fact that the passions that motivate individuals depend on opinion and imagination. This is why the passions can be misdirected – including, crucially, the passion of fear.

DANGERS OF IMAGINATION

Fear, Aristotle had argued in Book 2 of *On Rhetoric*, is "a sort of pain and agitation derived from the imagination of a future destructive or painful

[12] Ibid., XIII: 90 (63). Again: "to hold men to the performance of their Covenants," which they have undertaken by these laws of nature, the "Passion to be reckoned upon, is Fear." *Leviathan*, XIV: 99 (70).

[13] As noted by a number of recent commentators, including: David Johnston, *The Rhetoric of Leviathan: Thomas Hobbes and the Politics of Cultural Transformation* (Princeton: Princeton University Press, 1986), p. 85; Stephen Holmes, "Introduction," in *Behemoth, or The Long Parliament*, ed. Ferdinand Tönnies (Chicago: University of Chicago Press, 1990); S. A. Lloyd, *Ideals as Interests in Hobbes's Leviathan: The Power of Mind over Matter* (Cambridge: Cambridge University Press, 1992); Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004), p. 39.

[14] *Leviathan*, XXX: 232 (175); XXX: 240 (182).

[15] *Behemoth, or, The Long Parliament*, ed. Paul Seaward (Oxford: Clarendon Press, 2010), p. 128; Stephen Holmes, "Introduction," in ed. Ferdinand Tönnies, *Behemoth, or The Long Parliament* (Chicago: University of Chicago Press, 1990), p. ix.

[16] *Behemoth*, p. 183.

evil."[17] *On Rhetoric* is the one major Aristotelian text to have earned Hobbes's praise,[18] and its definition of fear already intimates the source of Hobbes's anxiety: if fear derives from the imagination, then one can become fearful of entirely imaginary, unreal beings and powers: ghosts, gods, demons. Since what motivates commitment to the instruments of peace is fear of violent death, countervailing fears, particularly those controlled by agents other than the sovereign, are potentially destructive of social order. The danger lies in the fact that human beings are naturally prone to believing in and fearing such "Phantasme[s] of the Imagination."[19] It is precisely by peddling in such fears – that is, the "*Feare* of power invisible, feigned by the mind, or imagined from tales"[20] – that the clergy are able to exercise their potentially subversive power over the populace. Because the fear of "Ghosts" is frequently "greater than other fears," the clergy's power can potentially "Destroy a Common-wealth." The sovereign must therefore not only wield the sword, he must also seize the apparatuses of socialization, such as university, church, and press, and use them to service a scientific program of rational enlightenment. The state's ideological program must not only teach subjects their scientifically justifiable duties, but also replace superstitious fears with more rational ones: "If this superstitious fear of Spirits were taken away," Hobbes predicted, then "men would be much more fitted than they are for civill Obedience."[21]

The potentially subversive belief in ghosts and demons arises from three related confusions afflicting the prescientific mind: between image and thing, sensory perception and imagination, and "subtile" bodies and supposedly "incorporeall" bodies. According to Hobbes, the human mind is susceptible of two different types of "thought": sensory perception and imagination. Sensory perception (which Hobbes simply called "sense") is a mental image produced by the presence of an "Externall Body, or Object," whose motions exert pressure on the sensory organ, "which pressure, by the mediation of Nerves, and other strings" produces an inward motion "to the Brain, and Heart." (Because sensory perceptions are images, Hobbes sometimes, speaking less strictly, called these "Imagination" as well.[22]) When this inward motion encounters

[17] a: 2.5.1. Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy, 2nd ed. (New York: Oxford University Press, 2007), p. 128.

[18] Aubrey reported Hobbes to have said that "Aristotle was the worst Teacher that ever was, the worst Politician and Ethick … but his *Rhetorique* and *Discourse of Animals* was rare." Despite Hobbes's aversion to Aristotelian philosophy, he was immensely indebted to Aristotle's *On Rhetoric*, and particularly its analysis of human psychology. See Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis*, transl. Elsa M. Sinclair (Chicago: University of Chicago Press, 1963); John T. Harwood, "Introduction," in *The Rhetorics of Thomas Hobbes and Bernard Lamy* (Carbondale, IL: Southern Illinois University Press, 1986).

[19] *Leviathan*, XXXIV: 270 (208).

[20] Ibid., VI: 42 (26).

[21] Ibid., XXIX: 227 (172); 2: 19 (7–8).

[22] For example, *Leviathan*, XLV: 440 (352); XLVI: 464 (372). Cf. Karl Schuhmann, "Phantasms and Idols: True Philosophy and Wrong Religion in Hobbes," *Rivista di Storia della Filosofia* 59, 1 (2004): 15–31, p. 20.

resistance from the body's outward "counter-pressure," a mental image or "*seeming*, or *fancy*" arises, which, because it comprises an outward motion, "seemeth to be some matter without." In other words, despite the fact that the sensory image is nothing but a motion in one's own brain, because its motion proceeds "*Outward*," its content is perceived as existing exterior to one's body. For the same reason, although the sensory perception's content, which comprises some particular "*Sensible*" quality, such as a "*Light*, or *Colour figured*," is not actually a quality subsisting *in* the external body whose motion causes it, it nonetheless does appear as if it were in the object, so that "the very object seem invested with the fancy it begets in us." As a matter of fact, however, the sensible qualities we perceive (such as color) inhere only in our mental image, which "in the object that causeth them" correspond to "but so many several motions of the matter, by which it presseth our organs."[23] The outward projection of the content of one's perception is why human beings have a tendency to confuse the sensory image of the object for the external object itself, such that the "Imagination of the Object, from whence the Impression proceedeth,… seemeth not to bee a meer Imagination, but the Body it selfe without us."[24] This is nothing but a great deception of sense: although the "very object seem invested with the fancy it begets in us; Yet still the object is one thing, the image or fancy is another."[25]

The conflation of image and thing (and the projection of subjective sensory qualities onto the external object) facilitates, and is frequently compounded by, a further confusion: between sensory perception and imagination (in the strict sense of the term). Sensory perception is caused by the pressure that the body represented in sensory perception exerts on the sensory organ: the body here must be actually present. The *Leviathan* defines "*Body*" as something with extension in space and whose existence "dependeth not on the imagination, but is a reall part of that we call the *Universe*" (which in turn is composed entirely of bodies).[26] By contrast, the second type of mental image arises without the object it represents being actually present to one's sensory organs, as when "after the object is removed, or the eye shut, wee still retain an image of the thing seen."[27] And whereas a "*simple Imagination*" is "of the whole object, as it was presented to the sense," a "compound imagination" combines the

[23] *Leviathan*, I: 13–14 (3–4).

[24] Ibid., XLV: 440 (352).

[25] Ibid.,I: 14 (4). Thus although, for Hobbes, color is a secondary quality (to use the post-Lockean term), the perception of color is not itself subjective in the sense of illusory or nonveridical; rather, it is subjective merely in the sense of phenomenal, that is, intelligible only with respect to the disposition of the object to produce that sort of perception. (See John McDowell, "Values and Secondary Qualities," in *Mind, Value, and Reality*. Cambridge, MA: Harvard University Press, 1998). The illusion arises when one imagines there to be a quality inherent in the object of perception that *resembles* the color inherent in one's perception.

[26] *Leviathan*, XXXIV: 269 (207).

[27] Ibid.,II: 15 (5).

"parts" of previous sensory impressions in some new combination ("as when from the sight of a man at one time, and of a horse at another, we conceive in our mind a Centaure.")[28] Hobbes divided these "phantasmes" of the imagination into those we experience while asleep, in dreams "caused by the distemper" of the body, and those we experience while awake, such as when "pressing, rubbing, or striking the Eye" we "fancy a light," or when we gaze upon a "Looking-glasse," or when we hallucinate "sometimes in great distemper of the organs by Sicknesse, or Violence."[29] It is true that all such imagination is ultimately derived from (past) sensory perception: "For there is no conception in a mans mind, which hath not at first, totally, or by parts, been begotten upon the organs of Sense"; the "rest are derived from that originall," such that imagination is "nothing but *decaying sense*."[30] It is also true that when we imagine, just as when we have sensory perception, we tend to project the content of the mental image onto some object external to us. The difference is that, in the case of imagination, no such represented object is in reality present to the senses: phantasms of the imagination are mere "Idols of the brain, which represent Bodies to us, where they are not, as in a Looking-glasse, in a Dream, or to a Distempered brain waking." In reality, such phantasms are "nothing; Nothing at all, I say, there where they seem to bee; and in the brain it self, nothing but tumult, proceeding either from the action of the objects, or from the disorderly agitation of the Organs of our Sense." Thus, while "Reall" bodies do not need "the fancy of man for their Existence," by contrast "the Images that rise in the fancy in Dreams, and Visions … are not reall Substances, nor last any longer then the Dream, or Vision they appear in; which Apparitions … [are] not reall Substances, but Accidents in the brain."[31]

The ancients, Hobbes argued, had not fully understood the nature of sensory perception: not having adequately distinguished between image and thing, they were prone to confuse imagination for sensory perception and consequently to confuse imaginary creatures for really existing things: "This nature of Sight having never been discovered by the ancient pretenders to Naturall Knowledge … it was hard for men to conceive of those Images in the Fancy, and in the Sense, otherwise, than of things really without us … As if the Dead of whom they Dreamed, were not Inhabitants of their own Brain, but of the Air, or of Heaven, or Hell; not Phantasmes, but Ghosts."[32] This second confusion is precisely the original source of pagan religions: "From this ignorance of how to

[28] Ibid.,II: 16 (5).
[29] Ibid.,I: 14 (3); XII: 77 (53); XLV: 440 (352).
[30] Ibid., I: 13 (3); II: 15 (5).
[31] Ibid., XXXIV: 270 (207–8), 274–5 (210–11).
[32] Ibid., 45: 440–1 (352). Cf. *Leviathan*, XII: 77 (53): "that which appeareth in a Dream, to one that sleepeth; or in a Looking-glasse, to one that is awake; which, men, not knowing that such apparitions are nothing else but creatures of the Fancy, think to be reall, and externall Substances; and therefore call them Ghosts."

distinguish Dreams, and other strong Fancies, from Vision and Sense, did arise the greatest part of the Religion of the Gentiles in time past … and now adayes in the opinion that rude people have of Fayries, Ghosts, and Goblins; and of the power of Witches."[33] Even "the Jewes had the same opinion with the Greekes concerning Phantasmes, namely, that they were not Phantasmes, that is, Idols of the braine, but things reall, and independent on the Fancy."[34] Yet the ancients clearly realized that the creatures of their imagination could not be external objects like others: for although the imagined creatures could supposedly be sensed in some way, they lacked the usual "degree of Opacity," people "could not feel them with their hands," and they would "vanish away, they know not wither, nor how."[35] To explain the anomaly, the ancients compounded their initial error with another: they concluded that their imaginations must have been caused by some incorporeal substance:

> … as the Gentiles did vulgarly conceive the Imagery of the brain, for things really subsistent without them, and not dependent on the fancy; and out of them framed their opinions of *Daemons*, Good and Evill; which because they seemed to subsist really, they called *Substances*; and because they could not feel them with their hands, *Incorporeall*: so also the Jews … had generally an opinion … that those apparitions … were substances, not dependent on the fancy, but permanent creatures of God.[36]

The belief in incorporeal spirits, ghosts, and demons was strengthened by a third confusion. As a matter fact, there do exist "subtile" or "thin Bodies; as the Aire, the Wind, the Spirits Vitall, and Animall," which, although extended in space like regular "grosser Bodies," nonetheless do not block one's vision or resist the touch, that is, they are things that people cannot "discern by the sense of Feeling, to resist their force, or by the sense of their Eyes, to hinder them from a farther prospect."[37] Insofar as such things are real, they are extended bodies existing independently of the mind. The problem is that the existence of such subtle bodies, which are not fully "visible, or palpable,"[38] further encourages belief in ghosts and demons. For even when the ancients did not take their vivid imaginations to be caused by incorporeal substances, they nonetheless concluded that they were caused by really existing bodies of this "subtile" kind. Thus, whereas one group took the fantastical objects of their imagination to be incorporeal demons or ghosts, another took them to be "Bodies, and living Creatures, but made of Air, or other more subtile and aethereall Matter." The politically relevant result is the same: "Both of them agree on one generall appellation of them, DAEMONS."[39]

[33] Ibid.,II: 18 (7).
[34] Ibid.,XLV: 442 (353).
[35] Ibid., XXXIV: 275 (211); XLV: 440 (352); XLVI: 464 (371).
[36] Ibid.,XXXIV: 275 (211).
[37] Ibid., XXXIV: 274 (211), 270 (207–8).
[38] Ibid.,XLVI: 464 (371).
[39] Ibid.,XLV: 441 (352).

It is the political significance of the fear of ghosts and demons that in part explains why Hobbes took his materialist natural philosophy, and not simply his moral and political philosophies, to be a crucial component of the state's ideological program. For belief in incorporeal spirits was not confined to the ancients: the "Graecians" had "communicated" the "contagion" of "their *Daemonology*" first to the Jews[40] and, subsequently, through the infiltration of Hellenic philosophy, to the Roman Church, whose clerics in fact purposefully introduced "the Daemonology of the Heathen Poets" by propagating the doctrine "that there be Incoporeall Spirits."[41] The widespread fear of demons amongst the ancients had already prompted the "Governours of the Heathen Common-wealths" to "regulate this their fear" for "the Publique Peace," by establishing a "DAEMONOLOGY" of good and evil demons, "the one as a Spurre to the Observance, the other, as Reines to withhold them from the Violation of the Laws."[42] But whereas amongst the pagans it had been the civil sovereign who, acting simultaneously as high priest, directed the people's fears to his own ends, in Christian Europe it was now the independent clergy who harnessed such fears to rival the authority of civil sovereigns. For "by their Daemonology, and the use of Exorcisme," the clergy keep "the People more in awe of their Power."[43] This, according to Hobbes, is also the political function of the deceitful practices of "Conjuration, or Enchantment" by which the Church of Rome claims to turn "Bread into a Man; nay more; into a God; and require[s] men to worship it" – in a "daily act of the Priest" amounting to a "most grosse Idolatry."[44]

Hobbes was particularly incensed that, as he saw it, Christian Europe's university system amounted to little more than a systematic breeding ground for this superstitious ideology. The intellectual source of the ideology is the "Vain Philosophy" of Aristotle, whose authority was so entrenched in the universities that the material studied there "is not properly Philosophy … but Aristotelity." Although Hobbes did not hesitate to attack the supposedly subjectivist ethics and republican politics of Aristotle, he reserved his most acerbic barbs for the metaphysical system that he thought the scholastics had inherited from him, and in particular their doctrine of "separated essences." From Aristotle's "Metaphysiques, which are mingled with the Scripture to make Schoole Divinity, wee are told, there be in the world certaine Essences separated from Bodies, which they call *Abstract Essences*, *and Substantiall Formes*."[45] For Hobbes, this doctrine – which provides the pseudo-philosophical foundation for ghost-fearing and transubstantiation – is perfectly nonsensical: an

[40] Ibid., XLV: 441 (353).
[41] Ibid., XLIV: 418 (334); XLV: 445 (356).
[42] Ibid., XLV: 441: (352–3).
[43] Ibid., XLVII: 477 (383).
[44] Ibid., XLIV: 422–3 (337–8).
[45] Ibid.,XLVI: 462–3 (370–1).

"essence" is not some mysterious thing or entity that could be detached from a body, but is simply the abstract name of a body considered in light of the fact (and only in light of the fact) that it is something existing.[46] As for "substance," it is also simply another word for body: "because Bodies are subject to change, that is to say, to variety of apparence to the sense of living creatures," any particular body is also called a substance to indicate that it is "*Subject*, to various accidents" or properties – which is why "*Substance incorporeall*" is, strictly speaking, an oxymoron.[47]

Scholastic metaphysical speculations worried Hobbes above all for their political implications. To the question why he would engage in such extensive metaphysical "subtilty" in a work of *Leviathan*'s character, "where I pretend to nothing but what is necessary to the doctrine of Government and Obedience," Hobbes pointedly responded:

> It is to this purpose, that men may no longer suffer themselves to be abused, by them, that by this doctrine of *Separated Essences*, built on the Vain Philosophy of Aristotle, would *fright them from Obeying the Laws of their Countrey*, with empty names … For it is upon this ground, that when a Man is dead and buried, they say his Soule (that is his Life) can walk separated from his Body, and is seen by night amongst the graves. Upon the same ground they say, that the Figure, and Colour, and Tast of a peece of Bread, has a being, there, where they say there is no Bread: And upon the same ground they say … a great many other things that *serve to lessen the dependence of Subjects on the Soveraign Power* of their Countrey. For … who will not obey a Priest, that can make God, rather than his Soveraign; nay, than God Himselfe? Or who, that is in fear of Ghosts, will not bear great respect to those that can make the Holy Water, that drives them from him?[48]

The historical lesson is clear: the vain "Metaphysiques, Ethiques, and Politiques of Aristotle, the frivolous Distinctions, barbarous Terms, and obscure Language of the Schoolmen, taught in the Universities, (which have been all erected and regulated by the Popes Authority,)" were purposefully "derived to the Universities, and thence into the Church" by a clerical "*Confederacy of Deceivers*" purely in order to enhance their power at the civil sovereign's expense.[49]

This confederacy of deceivers builds upon the fear of ghosts an even more pernicious fear: the fear of eternal damnation. For it is only the belief

[46] As he put it in the appendix to the Latin *Leviathan*, "the essence of a being without qualification is the name of the being, but considered simply, insofar as it is a being." Latin *Leviathan*, citing *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin Curley (Indianapolis: Hackett, 1994). Appendix, p. 515.

[47] *Leviathan*, XXIV: 270 (207).

[48] Ibid.,XLVI: 465 (373), second and third emphases mine.

[49] Ibid.,XLVII: 477 (383); XLVI: 462 (371); XLIV: 417 (333). Cf. *Leviathan*, XLVII: 481 (386): "the Operatories of the *Clergy*, are well enough known to be the Universities, that received their Discipline from Authority Pontificall."

in incorporeal substances like ghosts that makes possible the politically pregnant belief in the soul's immortality, from which is born the clergy's "Dark Doctrine" of "Eternall Torments."[50] Hobbes gravely warned the sovereign that since the "maintenance of Civill Society" depends on his disciplinary "power of Life and Death," it "is impossible a Common-wealth should stand, where any other than the Soveraign, hath a power of giving greater rewards than Life; and of inflicting greater punishments, than Death." And since "*Eternall life* is a greater reward, than the *life present*; and *Eternall torment* a greater punishment than the *death of Nature*,"[51] if salvation depended on an authority other than the sovereign – such as a church whose authority was independent of the state – then the sovereign's capacity to maintain order would be radically compromised.[52] The maintenance of "Civill Power" is vulnerable not only to "the opinion men have of their Duty" to the sovereign, but also to "the fear they have of Punishment in another world."[53] The sovereign must accordingly take great pains to shape his subjects' opinions about, and reduce their fear of, life after death. Even as the state's ideological program demonstrates the need for absolute sovereignty, and illuminates the duties of subjects, it must also scatter the "Darknesse" of scholastic obfuscation and clerical pretension with the scientific tenets of Hobbesian philosophy.

In the final paragraph of Book 2 of *Leviathan*, Hobbes highlighted the indispensability of philosophy or science to the ideological program of the state by an explicit appeal to Plato: "For he also is of the opinion that it is impossible for the disorders of the State … ever to be taken away, till Sovereigns be Philosophers." Plato, like Hobbes after him, had constructed his ideal commonwealth by reasoning in speech, and Hobbes, "considering how different" his own "Doctrine is, from the Practise of the greatest part of the world," worried that perhaps scientific ratiocination without political power may be insufficient to the task: "I am at the point of believing," he lamented, "this my labour, as uselesse, as the Common-wealth of *Plato*." It was precisely at this moment that Hobbes expressed his "hope, that one time or other, this writing of mine, may fall into the hands of a Soveraign, who … in protecting the Publique teaching of it, convert this Truth of Speculation, into the Utility of Practice."[54]

The appeal to Plato's *Republic* in laying out the state's ideological agenda is equivocal, however. It is true that Plato portrayed Socrates as constructing a city in speech, that is, in *logos*, which, as Hobbes pointed out, was for

[50] Ibid., XLIV: 426 (340).

[51] Ibid., XXXVIII: 306–7 (238). Cf. *Behemoth*, pp. 125–6.

[52] See *Leviathan*, XXIX: 227–8 (172): "when the Spirituall power, moveth the Members of a Common-wealth, by the terrour of punishments, and hope of rewards … otherwise than by the Civill Power … it must needs thereby Distract the people, and either Overwhelm the Common-wealth with Oppression, or cast it into the Fire of a Civill warre." See also *Leviathan*, XLII: 372 (295).

[53] *Leviathan*, XLII: 373 (296).

[54] Ibid., XXXI: 254 (194).

the Greeks "but one word … for both *Speech* and *Reason*."[55] Socrates and his companions "watch a city coming into being in speech," dialectically following "wherever the argument [*logos*], like a wind, tends."[56] It is also true that, in the name of reason and philosophy, Socrates begins by attacking the poets for the myths that they tell. Yet precisely because *logos* does not merely mean reason, *mythos* is also a type of *logos*, and at crucial junctures Plato made it clear that the construction of his city requires the telling of tales or *mythoi*: "Come, then, like men telling tales in a tale [*mythos*] and at their leisure, let's educate the men in speech [*logos*]."[57] It is not merely that Plato's city depends on Book III's infamous Myth of the Metals, or that the *Republic* ends with the Myth of Er – although both of these facts are surely significant. It is also that the entire *Republic* is itself told as a tale, a *mythos*. As Socrates at one point puts it to his companions, "let these things be turned over to Damon," since to "separate them out" – which is the taxonomic task of dialectical reason – "is no theme for a short argument [*logos*]."[58] Similarly, as we shall see, the *Leviathan* is concerned with regulating the "tales publicly allowed"[59] in order to inaugurate a mythology of its own: the mythology of the state.

THE MYTHOLOGY OF LEVIATHAN

The conflation of mental image and thing, Hobbes suggested, is a species of idolatry. In making this suggestion, Hobbes was in part drawing on the etymology of the word *idol*, whose meaning in the original Greek evolved (according to the *Oxford English Dictionary*) in apparently the following order: "'appearance, phantom, unsubstantial form, image in water or a mirror, mental image, fancy, material image or statue', and finally, in Jewish and Christian use, 'image of a false god'." Although the final, religious sense was the only meaning of the word in Middle English, during the 16th century the other senses were introduced into English from Greek and Latin – but in a way still colored by the word's religious meaning. Thus reaching back to the pre–Judeo-Christian sense of the term, Hobbes could persuasively assert that mental images or "Phantasmes" are nothing but "Idols of the braine," while simultaneously invoking the religious connotation of false worship.[60]

By calling phantasms idols, then, Hobbes was primarily making not an etymological but a substantive point. For what he meant by an idol, in the first instance, is something to which is attributed qualities or powers that it does not intrinsically

[55] Ibid.,IV: 29 (16).
[56] *Republic*, 369a (p. 45), 394d (p. 73). Quoting Plato, *The Republic of Plato*, trans. Allan Bloom, 2nd ed. (Chicago: University of Chicago Press, 1968).
[57] Ibid., 376d (p. 54).
[58] Ibid., 400c (p. 79).
[59] *Leviathan*, VI: 42 (26).
[60] Ibid., XLV: 442 (353).

possess. To worship a statue or other material image as if it were a god is idolatrous, for example, precisely because doing so involves such an attribution: to worship something is simply to exhibit "externall signes" of honour in one's "Words, and Actions"; to honour, in turn, "consisteth in the inward thought, and opinion of the Power, and Goodnesse of another."[61] Thus, to "pray to a King for such things, as hee is able to doe for us" is "but Civill Worship" and not idolatry, since doing so attributes no false intrinsic powers; but "to pray unto him for fair weather, or for any thing which God onely can doe for us, is Divine Worship, and Idolatry."[62] Similarly, to "be uncovered, before a man of Power and Authority, or before the Throne of a Prince" is simply "Civill Worship" of the man's actual power, but "if hee that doth it, should suppose the Soule of the Prince to be in the Stool, it were Divine Worship, and Idolatry."[63] Again, it is not idolatry to worship God by turning "towards an Image, or determinate Place" deemed holy, because doing so "implies no new quality in the Place, or Image"; but it is idolatry "to worship God, as inanimating, or inhabiting, such Image, or place."[64]

By analogy, to impute to the content of phantasms a type of existence that is true only of the bodies causing the phantasms is to turn the phantasms into idols – not just in the Greek sense of mental image, but in the sense relevant to *idolatry*, that is, the nonveridical attribution of intrinsic qualities or powers. This is also why belief in the real, mind-independent existence of demons or ghosts is a form of idolatry: it is to attribute the qualities and powers of bodies – indeed, of animate bodies – to mere phantasms.

A peculiar feature of idolatry, however, is that sometimes the very act of attributing qualities or powers to something itself causes the thing, whether real or imaginary, to *acquire* those qualities or powers, in simulacrum. This is what transforms an idol into a demon. However imaginary, demons and ghosts *do* in fact wield considerable powers over the human beings who imagine them to be real. Hence the potentially terrifying power of the imagination and, concomitantly, the politically crucial role of demonology, that is, of the ideological regulation of the fear of demons. These constructed but nonetheless real and consequential fears must be harnessed and regulated to bolster the state's power, rather than be allowed to challenge it.[65]

Indeed, the *Leviathan* suggests that the state must itself become an idol. The sovereign, whose actual coercive capacity is insufficient to maintain order, must ideologically *construct* an image of state power in order to enhance its brute physical power: for the "Reputation of power, is Power." He must politically

[61] Ibid., XXI: 248 (188).
[62] Ibid., XLV: 449 (360).
[63] Ibid., XLV: 449 (359).
[64] Ibid., XLV: 450 (360).
[65] Compare Hoekstra's discussion of self-fulfilling prophecies in Kinch Hoekstra, "Disarming the Prophets: Thomas Hobbes and Predictive Power," *Rivista di Storia della Filosofia* 59.1 (2004): 97–153.

construct devotion, reverence, and fear, because "what quality soever maketh a man beloved, or feared of many; or the reputation of such quality, is Power."[66] To supplement his physical power with symbolic power, the sovereign must above all stoke his subjects' imagination, and magnify the state's image into a presence that, as Corey Robin has put it, appears "larger, more threatening" than the brute physical presence of its agents.[67] Like the figure of Leviathan whose enormity dwarfs the country he oversees in *Leviathan*'s famous 1651 frontispiece, the ideal sovereign is one whose unsheathed sword is always visible, rarely used, but the magnified stately apparition of which hovers constantly before the eyes of the subjects who empower and worship him.[68] The sovereign requires a civil mythology or religion that inspires believers to revere the state as a god, and teaches them the worship "of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortal God*, our peace and defence."[69]

Even the mysterious title of Hobbes's masterpiece intimates the open secret that the state is a demonic idol, and its literary namesake, its founding textual myth. Hobbes traced the mythology of Leviathan to the Hebrew Bible: speaking of the "great power" of the "Governour" who rules over civil society, "whom I compared to *Leviathan*," Hobbes noted that he had taken "that comparison out of the two last verses of the one and fortieth of *Job*; where God having set forth the great power of *Leviathan*, calleth him King of the Proud. *There is nothing*, saith he, *on earth, to be compared with him. He is made so as not to be afraid. Hee seeth every high thing below him; and is King of all the children of pride*."[70] The Book of Job describes Leviathan as a massive, terrifying sea creature, out of whose "mouth goe burning lampes, and sparkes of fire," whose "breath kindleth coales," whose mail or "scales are his pride, shut up together as with a close seale," who "laugheth at the shaking of a speare," and before whom "Darts are counted as stubble." The biblical portrayal of Leviathan as an enormous, fire-breathing sea dragon lent itself to the Christian interpretation, common by the Middle Ages, of Leviathan as a demon and perhaps even the Devil, a creature whom God lured out of the sea, with Christ as its bait, who tried to devour Christ but was caught, as on a fishhook, by the cross.[71] Thus in

[66] *Leviathan*, X: 62 (41).

[67] Robin, *Fear: The History of a Political Idea*, p. 43. See also Yves Charles Zarka, *Hobbes et la pensée politique moderne* (Paris: Presses Universitaires de France, 1995); Christopher Pye, "The Sovereign, the Theater, and the Kingdome of Darknesse: Hobbes and the Spectacle of Power," *Representations* 8, Fall (1984): 84–106.

[68] For the frontispiece, see Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2002), chapter 7.

[69] *Leviathan*, XVII: 120 (87).

[70] Ibid., XXIX: 221 (166–7).

[71] "Canst thou draw out leviathan with an hook?," asks Job, 40.1. See Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, transl. George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996), pp. 6–8.

his *De la Démonomanie* of 1580, Jean Bodin took Leviathan to be the name of the Devil, "whose might cannot be resisted," while Jean Calvin, in his commentary on the Book of Isaiah, took the prophet's words about Leviathan to refer "by way of Allegorie" to "Satan and his whole kingdome."[72]

Significantly, however, the visual representation of Leviathan in Hobbes's title page is not of a fire-breathing sea dragon. Depicted, rather, is an enormous man rising above the city and its lands, his mail composed of all the realm's inhabitants, his head bearing the royal crown, and his hands holding up the symbols of both religious and secular power. The Hobbesian appeal to Leviathan, in other words, consciously fuses together two rather distinct mythologies:[73] the biblical mythology of a giant sea creature, a demonic presence so mighty and fearless that it dared to challenge God himself, and the Platonic mythology of the *makros anthropos*, in whom justice and the good are to be found writ large. The giant man of Platonic myth is, of course, the imagined republic or commonwealth conjured "into being in speech," an artificial person in whose image Socrates proposes to find, written in larger characters than in the soul of a natural man, the nature of justice. Plato did not explicitly refer to the polis as a giant man, but the whole discussion of justice in the *Republic* is motivated by this analogy between individual and city, a person's soul and a city's constitution: to read the nature of "justice in one man," Socrates suggests, one should first read the "justice of a whole city," where "the same letters" are found "but bigger and in a bigger place," making the letters "easier to observe closely," and only then "to consider the littler ones having read these first."[74] Although, as we have seen, it is not until the end of Part 2 that Hobbes explicitly drew the parallel between his project and "the Common-wealth of Plato," it is in *Leviathan*'s very first paragraph that he already depicted the state as a giant, artificial man:

> 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*.[75]

Like Plato's commonwealth, Hobbes's too is produced in and by speech, a speech resembling "that *Fiat*, or the *Let us make man*, pronounced by God in the Creation."[76]

[72] Jean Calvin, *A Commentary upon the Prophecie of Isaiah ... Translated out of French into English: by C. C.* (London: Felix Kyngston, 1609), chapter 27, p. 260. See Patricia Springborg, "Hobbes's Biblical Beasts: *Leviathan* and *Behemoth*," *Political Theory* 23.2 (1995): 353–75, at 359–60.

[73] For this suggestion, see Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, p. 19.

[74] *Republic*, 368d–e (p. 45). I am not suggesting that Plato equated the polis to a giant man: the analogy between polis and man is just that – an analogy – and there are significant differences between the two in Plato's text. Nor, for that matter, does Hobbes equate the commonwealth to a natural person.

[75] *Leviathan*, Introduction: 9 (1).

[76] Ibid., Introduction: 10 (1).

The decisive effect of Hobbes's conflation of these two mythologies – of the giant aquatic demon and of the *makros anthropos* – is to lead his readers to understand that the giant man of the state is a demonic artifice. But, like the "Damon" who attends to Socrates's construction of the polis, the sovereign Leviathan is very far from the evil demon of Christian mythology. It is true that, where Plato had sought justice, Hobbes found in the soul of the state the animating principle of sovereignty instead. But sovereignty for Hobbes is nevertheless the very fountain of justice and the good: for "the Makers of Civill Laws, are not onely Declarers, but also Makers of the justice, and the injustice of actions," and "the Person that representeth" the state is himself the "Rule of Good and Evil" in civil society.[77] Hence if Hobbes's Leviathan is a demon, it is a demon only in the sense of being an idol whose power and goodness are derived from an act of attribution experienced as the recognition or *acknowledgement* of powers it already intrinsically possesses. Such an act must be an act of worship worthy of a "*Mortall God*," in which the subject gives outward expression to his "inward thought, and opinion" of the idol's "Power, and Goodnesse." This inward thought cannot simply be willed into being: it must be experienced by the subject as the necessary acknowledgement of an external reality that simultaneously resonates with what the subject reads deep in his own soul.

In other words, if sovereign power is a demonic artifice, it is subject to the paradox lying at the heart of demonic power. Demonic power is premised on simultaneously fulfilling two seemingly contradictory imperatives. On the one hand, the demon's power over the pagan *depends* on the pagan having authored it himself: unless he conjures up the demon in his own imagination, it does not exist to him. Indeed, for the demon to inspire dread, at some level the pagan must even *experience* it as the creature of his own fears: the demon not only owes its existence, as a sheer phantasm, to the lingering trace of the pagan's own sensory perceptions (his "*decaying sense*"[78]), it owes its dreadful power to the fact that it reflects and resonates with these perceptions that the pagan knows to be his own. On the other hand, the demon's power over the pagan requires that he experience his own creation as a presence and power completely independent of himself. Demonic dread is the dread of what he has himself authored, the dread of his own fantastical self projected outward and experienced as if it were an other completely unknown to him – "some *Power*, or Agent *Invisible*."[79] The paradox of demonic power is that its source

[77] Ibid., XLII: 386 (306); VI: 39 (24).

[78] Ibid., 16 (5).

[79] Ibid., XII: 76 (52). See Pye, "The Sovereign, the Theater, and the Kingdome of Darknesse." Pye makes a similar point: "the pagan feels dread of an unknown and unlimited power, not because he fails to perceive that the apparitions originate from him, but because he recognizes that the lingering and originless fantasms do indeed reflect him. The figure who says "he saw his own Ghost in the Looking-Glass" takes a secondary reflection for an

is simultaneously experienced as wholly self and other: it is, in other words, premised on a *split* in the subject. It is this split that makes possible the ideological construction of the state and sovereign power: as *Leviathan*'s frontispiece vividly illustrates, the state is a presence whose spectacular power requires its *spectators* simultaneously to be its *authors*. They must be able to read themselves in the artificial man whose awesome, alien, and unfathomable presence inspires fear, reverence, and devotion. Hobbes already intimated this point in the introduction to *Leviathan*: his description of the state as an artificial man is immediately followed with the injunction – in Hobbes's conspicuous mistranslation of "*Nosce teipsum* [know thyself]" – to "*Read thy self*" in order ultimately to understand the nature of the state.[80]

The state's ideological program therefore cannot be restricted to a scientific agenda of debunking superstitious beliefs and idolatrous attributions. It must also engender a new form of idolatry, whose civil mythology – of which *Leviathan* itself is the civil scripture – must do two things at once: enact the ideological construction of sovereignty, and attribute that sovereignty to the artificial person of the state.[81] This feat can be achieved only by negotiating the paradox of demonic power: the state's sovereign power over its subjects requires that they give their own projections a reality independent of and external to themselves. As we shall see momentarily, since in reality the state is a *persona ficta*, such an idolatrous feat can be achieved, Hobbes argued, only by authorizing someone else to represent it and act in its name, and thereby to bear its person. The subject must *authorize* the state's existence and power, but its actual existence must depend on, and its power be wielded by, a third party, who represents not the subject, but the demonic locus of sovereign power. The subject's idolatrous projection is thereby to receive a real but *conventional* or "artificial" existence independent of the subject.

REPRESENTATION AND AUTHORIZATION

It is the introduction of conventional relations of ownership, authorization, and representation that lays the groundwork for the "solution" that Hobbes proffers to the paradox of demonic power. When the mind attributes qualities or powers to an object that the object does not intrinsically possess, the attribution is mere projection. But when the projection is effectively sanctioned

independent form with a life of its own. But he feels terror because he sees it specifically as "his own Ghost," as an alien presence which derives from him and mirrors his own ghostliness" (p. 95).

[80] Ibid., Introduction: 10 (2). The phenomenon of splitting is at the heart of Hobbes's analysis of illusion and representation. See especially part 2, chapter 3 of *A Minute or First Draught of the Optiques* (1646), and the discussion in Malcolm, *Aspects of Hobbes*, pp. 226–7.

[81] On *Leviathan* as civil scripture, see Tracy B. Strong, "How to Write Scripture: Words, Authority, and Politics in Thomas Hobbes," *Critical Inquiry* 20.1 (1993): 128–59.

by authoritative convention, it gains, according to Hobbes, a real existence independent of one's own momentary will. As we have seen, the attribution of goodness is an instance of this process: the person who, by linguistic artifice, authoritatively baptizes an object as good bestows upon the object a quality that becomes independent of the passing desires of those subject to the person's authority. A shared convention in particular allows its authors to experience their creation simultaneously as their own creation and as an external object whose "objectified" existence is independent of their own will. Although in theory Hobbes's materialist ontology officially recognizes the existence of only purely natural or material bodies, in practice he also acknowledged the reality of social and institutional facts and entities, such as artificial bodies of which the state is Hobbes's most salient example.

The critical role of authorization explains why Hobbes used the terms idol and idolatry in two distinct, and seemingly incompatible, senses. In the first, *nonveridical* sense in question up to now, an idol is something to which one attributes qualities or powers that do not inhere in it intrinsically. But in the second, *unauthorized* sense, an idol is something to which one attributes qualities or powers without the authority to do so. In this second sense, even if one worships God in a "place, or Image" without supposing that God is actually "inanimating, or present" in it, but simply "to the end to be put in mind of him," nonetheless "in case the Place, or Image be dedicated, or set up by private authority, and not by the authority of them that are our Soveraign Pastors," it "is Idolatry."[82] Conversely, "he that worshippeth the Creator of the world before such an Image, or in such a place as he hath not made, or chosen of himselfe, but taken from the commandment of Gods Words … commiteth not Idolatry."[83] Thus when the "Gentiles worshipped for Gods, Jupiter, and others," it "was Idolatry, because they made them so themselves, having no authority from God." Conversely, "though our Saviour was a man," and even though "wee also believe [him] to bee God Immortall, … yet this is no Idolatry; because wee build not that beleef upon our own fancy, or judgment, but upon the Word of God" himself.[84]

For the state to be a nonveridical idol endowed with demonic powers requires that it not be an idol in Hobbes's second sense of the word. The sovereign state must not be an unauthorized idol because its very existence, as an artificial person, depends on attributing sovereign power to it in a successful act of *authorization*. It is the conventional act of authorization that is meant to enable the state to negotiate the paradox of demonic power. Hobbes's account of authorization draws on a critical distinction between two types of person: a "*Feigned* or *Artificiall person*" and "a *Naturall Person*." Artificial persons are those who by convention either represent, or are represented by, some other person. Hobbes's explicit definition of an artificial person in the English *Leviathan* equates it with

[82] *Leviathan* XLV: 450 (360–1).
[83] Ibid., XLV: 453 (362).
[84] Ibid., XLV: 451 (361).

a "*Representer*, or *Representative*" whose words or actions "are considered as representing the words and actions of an other," but his characterization of the state as "an Artificiall Man," and his parallel claim that a "Multitude" of natural persons "are made *One* Person" when represented, manifestly indicate that the category extends to persons *represented* as well.[85]

Natural persons, by contrast, are those who "personate" or represent *themselves* to others, that is, persons who "own" their own words or actions in the sense of being accountable or responsible for them. Natural persons are also capable of *authorizing* someone else to personate them, in which case (to use Hobbes's terminology) the authorized representer is the "actor" and the person represented is the "author" and owner of the actor's actions. (Thus some natural persons are also artificial persons, either because they represent, or are represented by, an other.) Although the authorized actor/representer is *by nature* the person who acts, the represented author is the actions' owner *by convention*: the actions are "attributed" to the author, which means that the author is obligated to take responsibility for (or own up to) the actor's actions.[86]

[85] Ibid., XVI: 111–4 (80–2). Hobbes also rather obviously implied this flexibility when, having in chapter XVI defined a person as one who represents, he contended in chapter XLII that he had "shewn before" that a person "is he that is Represented." When, in the same paragraph, he claimed that "God, who has been Represented (that is, Personated) thrice, may properly enough be said to be three Persons," he very obviously meant that God is three *artificial* persons by virtue of being thrice represented. He followed the same definition of person (as the one represented) in *De Homine*. From this fact, Skinner concludes that Hobbes's considered view was that artificial persons are those who are represented, and not representers. (This is also the definition adopted by David Copp, "Hobbes on Artificial Persons and Collective Actions," *The Philosophical Review* 89.4 [1080]: 579–606.) However, as David Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," *The Journal of Political Philosophy* 8.2 (2000): 268–78, has pointed out, Hobbes clearly had to hold that representers are also artificial persons, since in cases where the sovereign representative is an assembly, it is a person but clearly not a natural person. (Hobbes was explicit about this: assemblies that bear the "Body Politique" are "artificiall, and fictitious Bodies" (*Leviathan*, XXII: 157 (116).) Moreover, Skinner's chronology, according to which Hobbes gradually shifted from defining artificial persons as representers to those represented, is challenged by the Latin *Leviathan*'s continued definition of a person, at the beginning of chapter XVI, as one who represents. It may be due to difficulties such as this that, in the revision to his original article, Skinner concludes that artificial persons are perhaps best understood to be both representers and those represented. Skinner calls this interpretation "hermeneutically daring," presumably because he thinks it requires systematically culling passages from different works of Hobbes. Quentin Skinner, *Visions of Politics*, vol. III: *Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), pp. 188–90. However, as I have argued, there is strong evidence internal to the English *Leviathan* itself for adopting this interpretation, that is, Hobbes's explicit definition (for those who represent), combined with his use and application of the term (for those who are represented).

[86] Here is where Hobbes's analogy with ownership breaks down: the owners of objects, insofar as they remain the owners, always retain dominion or *ownership* of the objects; by contrast, the author of an action who authorizes another to act as representer remains the author and owner, but gives up the *authority* of acting to the representer.

On Hobbes's taxonomy, "Children, Fooles, and Mad-men" are not natural persons, since, having "no use of Reason," they "can be no Authors": they can neither take responsibility for their words or actions, nor authorize another to represent them. However, although natural nonpersons are incapable of authorizing their own representers, they are nevertheless still capable of being represented. What is distinct about natural nonpersons, such as children, is that only a *third party* enjoying the appropriate rights (of ownership over them, for example) can authorize an actor to represent them. Thus while "some [representers] have their words and actions *Owned* by those whom they represent,"[87] others do not: they have their actions authorized *and owned* by a third party. Hobbes made this point by distinguishing between cases in which the actor's words or actions are "*Truly*" attributed to the person represented, and cases in which they are attributed merely "*by Fiction*."[88] The former are truly the authors of the actions, the latter are authors only in a fictional sense. This distinction corresponds to two kinds of representation: what we might analogously call "true" representation, and what Hobbes explicitly called representation "by Fiction."[89]

There are therefore two classes of represented artificial persons: those who are also natural persons, and those who are not. The latter are *personae ficta*, natural nonpersons who in being represented become artificial persons, but only by fiction.[90] Hobbes in fact claimed that practically nothing is "uncapable of being represented by Fiction," whether inanimate bodies, irrational animate bodies, or even imaginary beings: (1) "Inanimate things, as a Church, an Hospital, a Bridge, may be Personated by a Rector, Master, or Overseer"; (2) "Children, Fooles, and Mad-men that have no use of Reason, may be Personated by Guardians, or Curators"; and (3) even an "Idol, or meer Figment of the brain, may be Personated; as were the Gods of the Heathen; which by such Officers as the State appointed, were Personated, and held Possessions, and other Goods, and Rights." Artificial persons of this third class are not merely *personae ficta*, but are *purely imaginary*, since not only their *personhood* but also their very *existence* depends on their being imagined and authoritatively represented. However, once purely imaginary things are successfully represented, their existence and personhood gains an "objectified" conventional reality beyond the momentary ebb and flow of the subject's imaginations: they really do exist, not as material things, but as conventional facts, just as goodness, subjectively

[87] *Leviathan*, XVI: 112 (81).

[88] "A Person, is he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly, or by Fiction*" (*Leviathan*, XVI: 111 (80)).

[89] *Leviathan*, XVI: 113 (81).

[90] As Runciman points out, *pace* Skinner, for a natural nonperson to become a person (i.e., an artificial person by fiction), it is necessary for it actually to be represented, and not merely be *capable* of being represented (which Hobbes said practically everything could be). Runciman, "What Kind of Person Is Hobbes's State?," p. 270.

projected onto an object, gains reality by convention once the object has been authoritatively baptized as good. And notwithstanding the distinction between the two types of representation – true and by fiction – insofar as both are properly *authorized*, they are genuine instances of representation. Although natural nonpersons themselves "cannot be Authors," a third party who enjoys the appropriate rights over them – such as the "Owners, or Governours of those things," or the "appointed" state "Officers" – can authorize an actor to represent them. Representation by fiction is not misrepresentation.

This last point is politically crucial because the state itself is a *persona ficta*: an artificial person who is also a natural nonperson.[91] Beyond inanimate bodies, irrational animate bodies, and purely imaginary things, Hobbes listed a further category of *persona ficta*, of which the state is Hobbes's most important example: a sundry array of individual bodies, a "Multitude of men," who may by fiction be represented as a single, corporate "Body Politique."[92] It is true that, like other corporate bodies, the state is not strictly speaking purely imaginary: Hobbes described the sundry array of individuals who comprise a multitude as the "*Matter*" of which the "Artificiall man" of the state is composed.[93] Thus the state's artificial personality has a spatio-temporal location, superimposed on individuals' natural bodies. Nonetheless, although the state's corporate, artificial body is superimposed on natural "matter," its unified *form qua* single body is imaginary prior to representation, that is, it lacks not only *personality*, but also existence. Therefore, in one important respect, this category of *personae ficta* strongly resembles the third category (viz. purely imaginary things): the single "Body Politique" simply does not exist beyond the imagination prior to being represented. A multitude "naturally is not *One*, but

[91] I do not follow Skinner's contention (which I believe has been decisively refuted by Runciman) that the state is artificial but not fictitious. Skinner, *Visions of Politics III*, chapter 6; Runciman, "What Kind of Person Is Hobbes's State?" Skinner recognizes that Hobbes himself described the state as represented "by fiction," but nonetheless argues that "it is crucial to his theory that, although the state is an artificial person, it is very far from being fictitious in the strict sense of being imaginary" (p. 188). The reason Skinner says this is apparently in part because he believes that fictional persons are all akin to characters in a work of fiction, and so either politically innocuous or incapable of bearing rights or legal status. This was precisely not Hobbes's view of the political role of the imagination or imaginary persons. According to Hobbes, such persons can enjoy rights and, indeed, tremendous power. Moreover, Skinner also appears to believe that attributing actions "by fiction" to a person is a *false* attribution, a "misrepresentation." This is also incorrect: in matters of representation (as opposed to what Hobbes called "resemblance") what is at issue is *authority*, not *veridicality*. A misrepresentation occurs when an action is attributed to someone without authority. The difference between fictional characters and other kinds of *personae ficta* is that the former are not normally represented as *legal* persons with rights; but if fictional characters are given legal status – such as was the case, Hobbes noted, with heathen gods – then that difference is eliminated.

[92] Hobbes also called bodies politic regular "Systemes" (*Leviathan*, XXII: 155 (115)).

[93] *Leviathan*, Introduction: 10 (2).

Many" natural bodies; its singular corporate body is an artificial *creation*.[94] In this respect, the state is like a pagan god, an "Idol, or meer Figment of the brain" without natural existence.

Thus, like the "Gods of the Heathen," the state, to exist as a state, must have a properly authorized representer. But because the state itself, as a natural nonperson, cannot strictly speaking authorize anyone, the question is who can authorize the sovereign to act in its name. Hobbes's well-known answer is that the sovereign representative must be severally authorized by each and every individual in the multitude who, once the sovereign is authorized, becomes united with the others in the person of the state.[95] The sovereign is authorized, then, not in a single "social contract" or "social covenant" – Hobbes himself never used these terms – but via a series of individual covenant*s* by which each person individually authorizes the sovereign. In light of this crucial point about the plurality of covenants, and in spite of the weight of traditional commentary, I shall refer to the covenants authorizing the sovereign as *sovereignty-covenants*, rather than as a social contract.[96]

The political punch of Hobbes's answer – that the sovereign has "many Authors"[97] – is this: the sovereign is *not*, as theorists of popular sovereignty had been arguing throughout the 1640s, authorized by "the people."[98] "The people" as a collectivity capable of acting, that is, with an artificial but unified corporate personality, is simply the state itself: they are one and the same artificial person.[99] As with every corporate *persona ficta*, the people/state does not even exist before being represented:

[94] As Malcolm has brilliantly shown, this is the central point of the quasi-anamorphic depiction of the state in the *Leviathan*'s title page. The anamorphic art fashionable in Hobbes's time relied on newly invented devices using mirrors or lenses that enabled viewers to see two images almost simultaneously: one with the naked eye, another through the device. An example that Hobbes himself had likely seen was a picture of fifteen Ottoman sultans, figures that, when looked through the accompanying optical device, combined into a portrait of Louis XIII. Like the individual subjects that make up the Leviathan in Hobbes's title page, the multiple objects are both subordinate to the master image that they combine to make, and are prior to it insofar as they exist naturally (by contrast to the master image created "artificially" from them). See Malcolm, *Aspects of Hobbes*, chapter 7.

[95] *Leviathan*, XVI: 114 (82); XVII: 120–1 (87–8).

[96] In "sovereignty by institution," each person covenants individually with each other, "every man with every man," except the sovereign himself, who is not party to any covenant; in "sovereignty by acquisition," each covenants individually with the sovereign.

[97] *Leviathan*, XVI: 114 (82).

[98] See Quentin Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13.2 (2005): 155–84.

[99] Of course Hobbes's conflation of the people with the state – indeed, his collapsing of the former into the latter – inaugurated a momentous and convoluted battle, in the subsequent history of political thought, between the doctrine of popular sovereignty and the doctrine of state sovereignty. Although in principle the two doctrines are diametrically opposed, in practice the modern democratic state has fused them together in a tense and uneasy ideological alliance. On the distinction between popular and state sovereignty, see Quentin Skinner,

A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: And *Unity*, cannot otherwise be understood in Multitude.[100]

Since before representation there exists only a multitude, not a people, the representative sovereign "who beareth the Person of the people"[101] paradoxically exists logically prior to the person represented.[102] The political upshot is that "the people" can neither resist nor depose its own representative sovereign: it can act only through the sovereign who bears its person, and it ceases to exist without him. Anyone who resists the sovereign acts as a private person, never in the name of the people.

The reversed priority of representer to represented is the mirror through which the state is meant to stare down the paradox of demonic power. On the one hand, the fact that all subjects individually recognize themselves to be Leviathan's authors prompts them to see in the creature their own deepest fears reflected back to them. On the other, the state's dependence, for its very existence, on a third-party representer gives the state a presence completely independent from the subjects who are supposedly its authors. The power of the state's demonic apparition lies in its being experienced as conjured up from within the subjects' own minds, and wholly alien to them at one and the same time.

SECULAR AND DIVINE IN SOVEREIGNTY-COVENANTS

The paradox of demonic power is reproduced in the normative register of Hobbes's theory as a paradox of self-authorization. The paradox behind the authorization of the sovereign springs from the fact that representation by fiction is seemingly possible only after the sovereign has already been established. Any particular, *substantive act* of authorizing representation by fiction presupposes that the institutional *framework* for such representation already exists, and Hobbes suggested that the state itself is what provides that framework: the authority to represent *personae ficta* proceeds "from the State: and therefore before introduction of Civill Government, the Gods of the Heathen could not be Personated."[103] It is the state's sovereign representer

Visions of Politics, *Volume II: Renaissance Virtues* (Cambridge: Cambridge University Press, 2002), chapter 14.

[100] *Leviathan*, XVI: 114 (82).

[101] Iboid.,XIX: 131 (95).

[102] It is true that the artificial person of the sovereign exists only insofar as it represents the state. But the *unity* of the sovereign – whether the office be filled by a natural person or an assembly – exists prior to, and is independent of, the fact of representation.

[103] *Leviathan*, XVI: 114 (82).

who, by convention, makes it possible for a third party to authorize someone else to represent a natural nonperson. Yet the representation of the state by fiction is precisely what the sovereignty-covenants are meant to authorize, *prior* to the existence of sovereign and state. The problem is to explain how natural persons can authorize someone to represent the state by fiction, without the prior sanction of the state itself. What seems to be required to bring the state into existence is a kind of *self-authorization* or *self-binding* – an elision of the institutional framework that representation by fiction presupposes, on the one hand, and the act of authorizing the representation itself, on the other.[104]

Hobbes's treatment of the category of God is an expression of this problem. For Hobbes, "God" and the names that human beings seemingly use to describe him are in fact the linguistic signs either of our incapacity to conceive of an infinite, unbounded being, or of our desire and will to honor the unboundedness we cannot conceive: since we can have "no Idea, or conception of any thing we call *Infinite*," when "we say anything is infinite, we signifie onely, that we are not able to conceive the ends, and bounds of the things named; having no Conception of the thing, but of our own inability. And therefore the Name of *God* is used, not to make us conceive him … but that we may honour him."[105] Properly understood, "God" therefore initially signifies not a conception of something external to the human subject, but of something inhering in the subject, even as it simultaneously purports to be about something wholly transcending the subject. The pretence of outward projection is not, however, simply an error in our understanding of the sign: it is a constitutive feature of our use of it that we understand it to signify a conception of something beyond us. It is in the sign's very failure to signify a conception of something external that it succeeds in representing our capacity to exercise and bind our own will: "God" is the blank sign of an absolute absence,[106] a canvas onto which we project our own desires and will, by which we represent them to ourselves as split apart from us, and by which we bind ourselves in devotion and fear to the awesomeness of our own projection.

Yet for "God" to serve as such a device for binding the subject's will, God must have an existence beyond the momentary vicissitudes of the subject's imaginations and desires. In traditional Christian theology, God did indeed have such an independent existence: the subject's will is bound precisely because God is an all-powerful external agent who commands and thereby binds the will. God, in other words, provides the Christian with a prepolitical source of binding moral obligation. The contention that Hobbes more or less shared this

[104] For a different account of this seeming paradox, see Victoria Kahn, *Rhetoric, Prudence, and Skepticism in the Renaissance* (Ithaca, NY: Cornell University Press, 1985), chapter 6.

[105] *Leviathan*, III: 23 (11).

[106] See James R. Martel, *Subverting the Leviathan: Reading Thomas Hobbes as a Radical Democrat* (New York: Columbia University Press, 2007), p. 84.

view[107] has spawned a well-known and ongoing debate about the sincerity of Hobbes's theism, with one party construing Hobbes as a not-so-closeted atheist, the other defending the sincerity of his theistic pronouncements. The former portrays Hobbes's God-talk as the conceit of a Machiavellian who uses "God" for wholly instrumental political purposes, a device for rhetorically whitewashing the paradoxes confronting political authority; the latter defends Hobbes's sincerity, portraying him as a kind of Socinian, an early-modern advocate of natural theology, or even a Calvinist.[108] This debate, it seems to me, fundamentally misconstrues the essence of Hobbes's theology: Hobbes believed in God's existence, but not in the sense typically presumed by both sides of the debate.

The Hobbesian God – the God who is capable of acting in the world – does not exist by nature. Like the state, he is a natural nonperson who exists as a person only insofar as he is by fiction represented. He is a *persona ficta*, a point that Hobbes made dangerously clear in chapter XVI of *Leviathan*. Having declared that few things "are uncapable of being represented by Fiction," he proceeded to provide five illustrations of representation by fiction in five successive paragraphs: the three categories of inanimate bodies, animate irrational bodies, and purely imaginary things, followed immediately by the examples of the "true God" and – as we have seen – of the "Multitude of men" made into "*One* Person."[109]

[107] A. E. Taylor and Howard Warrender famously defended the view that Hobbes is a traditional theist according to whom the moral obligation to obey one's own covenant arises simply because of an anterior obligation to obey God's commands, which by nature includes the command to keep one's covenants. A. E. Taylor, "The Ethical Doctrine of Hobbes," in ed. K. C. Brown, *Hobbes Studies* (Oxford: Basil Blackwell, 1965); Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press, 1957). I think it safe to say that their interpretation has been largely discredited. See Edwin Curley, "Reflections on Hobbes: Recent Work in His Moral and Political Philosophy," *Journal of Philosophical Research* 15 (1989–90): 169–250.

[108] For Hobbes the atheist, see Edwin Curley, "'I Durst Not Write So Boldly' or, How to Read Hobbes' Theological-Political Treatise," in ed. Daniela Bostrenghi, *Hobbes e Spinoza, scienza e politica* (Naples: Bibliopolis, 1988); Edwin Curley, "Calvin and Hobbes, or, Hobbes as an Orthodox Christian," *Journal of the History of Philosophy* 34.2 (1996): 257–71; Douglas Jesseph, "Hobbes's Atheism," *Midwest Studies in Philosophy* 26 (2002): 140–66; Jeffrey R. Collins, *The Allegiance of Thomas Hobbes* (Oxford: Oxford University Press, 2005). For Hobbes the theist, see K. C. Brown, "Hobbes's Grounds for Belief in a Deity," *Philosophy* 37.142 (1962): 336–44; Willis B. Glover, "God and Thomas Hobbes," in ed. K. C. Brown, *Hobbes Studies* (Oxford: Basil Blackwell, 1965); R. W. Hepburn, "Hobbes on the Knowledge of God," in eds. Maurice Cranston and Richard S. Peters, *Hobbes and Rousseau: A Collection of Critical Essays* (Garden City, NY: Anchor Books, 1972); Peter Geach, "The Religion of Thomas Hobbes," *Religious Studies* 17.4 (1981): 549–58; A. P. Martinich, *The Two Gods of Leviathan* (Cambridge: Cambridge University Press, 1992); Robert Arp, "The *Quinque Viae* of Thomas Hobbes," *History of Philosophy Quarterly* 16.4 (1999): 367–94.

[109] *Leviathan*, XVI: 114 (82).

One obviously unorthodox implication of Hobbes's contention that God is a natural nonperson represented by fiction is that he is capable of covenanting with others only through a representer – a conclusion that Hobbes twice drew explicitly in *Leviathan*.[110] The even more startling implication is that God is incapable of authorizing his own representer. It is true that, deferring to Christian sensibilities, Hobbes sometimes appeared to speak of God himself having authorized the biblical prophets and Jesus to bear his person.[111] But in *Leviathan*'s chapter XVI, Hobbes strongly implied that God, like any other *persona ficta*, could do no such thing. In his discussion of each of the first three categories of *persona ficta*, Hobbes established a prosaic rhythm joining together two phrases in succession from one paragraph to the next: "Inanimate things … may be Personated," but "things Inanimate, cannot be Authors"; animate irrational

[110] The first instance is at *Leviathan*, XIV: 97 (69): "To make Covenant with God, is impossible, but by Mediation of such as God speaketh to, either by Revelation supernaturall, or by his Lieutenants that govern under him, and in his Name: For otherwise we know not whether our Covenants be accepted, or not." In *Leviathan*, XXVI: 198 (149), Hobbes made it known that even mediation does not make it certain that one's covenant has been accepted: "no man can infallibly know by naturall reason, that another has had a supernaturall revelation of Gods will; but only a beliefe; every one (as the signs thereof shall appear greater, or lesser) a firmer, or a weaker belief." The second instance is at *Leviathan*, XVIII: 122 (89): "there is no Covenant with God, but by mediation of some body that representeth Gods Person; which none doth but Gods Lieutenant, who hath the Soveraignty under God." For discussion of Hobbes's "mediation doctrine," see Edwin Curley, "The Covenant with God in Hobbes's *Leviathan*," in eds. Tom Sorell and Luc Foisneau *Leviathan After 350 Years* (Oxford: Clarendon Press, 2004). In my view Curley (p. 202) is mistaken to treat the covenant with Abraham as an exception to Hobbes's mediation doctrine

[111] Hobbes wrote, e.g., that "The Person, therefore, whom Abraham, Isaac, Jacob, Moses and the Prophets beleeved, was God himself, that spake unto them supernaturally" (*Leviathan*, XLIII: 405 (323)). Yet in a paragraph that scandalized his Anglican critics (see *The English Works of Thomas Hobbes of Malmesbury*, ed. William Molesworth, 11 vols. London: John Bohn, 1839–45, vol. 4, p. 334), Hobbes flatly attacked those "that pretend Divine Inspiration, to be a supernaturall entring of the Holy Ghost into a man, and not an acquisition of Gods graces, by doctrine, and study" (*Leviathan*, XLV: 451 (361)), going on to insist that "Visions, and Dreams, whether naturall or supernaturall, are but Phantasmes" (*Leviathan*, XLV: 454 (364)). As Schuhmann points out, according to Hobbes, "regarding the origin of phantasms, we know of but one explanation. Talk of supernatural causation of phantasms therefore is to remain an empty possibility that cannot be filled by any means accessible to reason … So the distinguishing character of angels in the Old Testament is to be looked for neither in the unverifiable origin of certain phantasms nor in the specific content of some given dream … but rather in this, that certain phantasms have special signification." Schuhmann, "Phantasms and Idols," p. 29. Therefore, as Hobbes put it, although "there can nothing else be understood by the word *Angel*, but some image raised (supernaturally) in the fancy, to signifie the presence of God" (*Leviathan*, IIIIV: 275 (211–2)), yet it is the receiver who *attributes* signification to a sign: "a signe is not a signe to him that giveth it, but to him to whom it is made; that is, to the spectator" (*Leviathan*, XXXI: 249 (189)). Cf. *De corpore*, vol. 1 of *English Works*, p. 57: things do not, "as signs, promise any thing which they do not perform; for they indeed do not promise at all, but we from them; nor do the clouds, but we, from seeing the clouds, say it shall rain."

bodies "may be Personated," but they "can be no Authors"; purely imaginary beings "may be Personated," but they "cannot be Authors." The "true God may be Personated," but … This time Hobbes did not explicitly follow the phrase "may be Personated" with "but can be no author," but in its fourth iteration he did not need to: the latter phrase audibly trails the former like a phantom limb reverberating to the rhythm already set in motion by Hobbes's prose. The rhythm is picked up again in the very next paragraph, where Hobbes made clear that a multitude may be personated, but itself can be no author. In other words, Hobbes made his point about God here by deploying – as he would elsewhere in *Leviathan* – the rhetorical technique of conveying meaning by omission.[112] Had he wanted to say that God, unlike all the other examples of *persona ficta* between which he had sandwiched him, can be an author, he would have had to assert it explicitly and explain the exception. Indeed, given the dangers involved in implying that God cannot be an author, he would have had every reason to make his point explicit. That he left the truth unsaid was to avoid adding insult to injury, that is, to avoid "dishonoring" God.[113]

In fact, the Hobbesian God appears even closer than the state is to the third category of purely imaginary *persona ficta*. On the one hand, like the state, whose subjects' bodies serve as the "matter" from which it is constructed, God too appears to have a spatiotemporal location onto which we superimpose, so to speak, his artificial personality. We impose the divine personality onto the physical entity that we suppose to be the "first cause" in the chain of natural causes; indeed, Hobbes suggested – explicitly after 1668 – that, insofar as we attribute existence to God, and insofar as we understand him not to be a mere "phantasm," we are compelled to ascribe to him a material body.[114]

[112] Another instance in *Leviathan* in which Hobbes expressed himself by establishing a prosaic rhythm, only to leave his point unsaid, appears in chapter XLVII. After seven short, consecutive paragraphs, each comparing priests to fairies, Hobbes deployed the figure of aposiopesis to magnify the sting of his eighth barb: "The *Fairies* marry not; but there be amongst them *Incubi*, that have copulation with flesh and bloud. The *Priests* also marry not" (*Leviathan*, XLVII: 481 (387).) For discussion, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996), p. 419. The chapter 16 example is not, strictly speaking, an aposiopesis, if by that figure we understand a *sentence* that stops suddenly to leave its point implied. But in other respects the literary devices Hobbes used in the two instances are the same.

[113] *Leviathan*, XVI: 113–4 (81–2). Some readers may wonder whether, by omitting the explicit claim that God can be no author, Hobbes meant to imply that, unlike other *personae ficta*, God *can* be an author. The problem with such a reading of the omission is that, unlike the one I have given, it is completely unmotivated: Hobbes would have had no reason for passing in silence a view that God can be an author. Indeed, he would have had much reason to make it explicit, if this is what he wanted to say. He did not.

[114] Hobbes explicitly endorsed the claim that God is a body in the Appendix to the Latin *Leviathan* of 1668, after having denied that God is "a mere phantasm, such as is called a spectre, or like the demons the Gentiles worshipped." Latin *Leviathan*, Appendix, i.4, p. 499; iii.6,

On the other hand, this corporeal first cause, which ostensibly serves as the material substrate for God's personality, appears at most to be a hypothetical supposition of natural philosophy. For Hobbes did not think that the existence of God, understood in the naturalistic or material terms of science, could be rationally demonstrated. As he put it explicitly in *De Motu*, his unpublished 1642/3 critique of Thomas White's *De Mundo*, "those who declare that they will show that God exists … act unphilosophically."[115] Such declarations are "unphilosophical" in the precise sense that theology does not fall within the purview of philosophy: whereas philosophy engages in rational demonstration of the truth of (conceivable) propositions, theology establishes faith via "the reasons derived from the authority of the person who speaks."[116] Thus when Hobbes rehearsed, as he often did, the cosmological argument for God's existence, he did so not as a philosophical demonstration but, first, to provide a psychological explanation for why inquiry into causes inclines human beings to *believe* in or *acknowledge* God's existence and, second, to argue that the philosopher has reason hypothetically to *suppose* an eternal first cause, as a kind of ultimate warrant for the chain of natural causes.[117] "Beleefe" and "acknowledgement" are terms of art for Hobbes: they ally with "Opinion," and "*Faith*," not philosophical knowledge, and are ultimately based on trust in authority.[118] Philosophical reason itself warrants only "supposing" the

p. 540. He repeated both points in his *Answer to Bramhall* of 1682 (*English Works*, 4, pp. 308, 310, 313).

[115] Hobbes, Thomas. *Thomas White's* De mundo *Examined*, translated by H. W. Jones (London: Bradford University Press: 1976). Chapter XXVI.2, p. 305. Hobbes repeated the point in *De corpore*, XXVI.1, pp. 412–13.

[116] Ibid., XXVI.4, p. 306. Cf. "The *subject* of Philosophy … excludes *Theology*" (*De corpore*, I.8: 10).

[117] Hobbes's first published statement of the cosmological argument appeared in 1640, in his "Objections" to Descartes's *Meditationes*, and refers to the "man who recognizes that there must be some cause of his images or ideas, and that this cause must have a prior cause, and so on; he is finally led to the supposition [*suppositionem*] of some external cause which never began to exist and hence cannot have a cause prior to itself, and he concludes that something eternal must necessarily exist. But he has no idea which he can say is the idea of that eternal being; he merely gives the name or label 'God' to the thing that he believes in [*creditam*], or acknowledges [*agnitam*] to exist" (*Third Set of Objections* with Author's Replies, in eds. John Cottingham, Robert Stoothoff and Dugald Murdoch, *The Philosophical Writings of Descartes*, vol. 2. (Cambridge: Cambridge University Press, 1984), pp. 127, 180).
See *Thomas White's* De mundo *Examined*, XXVI.2: 305 (fol. 287) for elaboration on God as a hypothetical supposition. Hobbes's re-statement of the cosmological argument in *Leviathan* concludes that inquiring into the chain of "naturall causes" will necessarily lead to "being *enclined* thereby to *believe* there is one God Eternall" (*Leviathan*, XII: 74 (51), my emphasis). Cf. his formulation of the cosmological argument at *Leviathan*, XII: 77 (53): he who should "plonge himselfe profoundly into the pursuit of causes; shall at last come to this, that there must be … one First Mover," and thus be led to "the *acknowledging* of one God" (my emphasis). On God as the ultimate warrant for the chain of natural causes, see Arrigo Pacchi, "Hobbes and the Problem of God," in eds. G. A. J. Rogers and Alan Ryan, *Perspectives on Thomas Hobbes* (Oxford: Clarendon Press, 1988); Cees Leijenhorst, "Hobbes' Corporeal Deity," *Rivista di Storia della Filosofia* 59.1 (2004): 73–95.

[118] *Leviathan*, VII: 48–9 (31–2).

existence of a first cause since, as Hobbes put it in *De Corpore*, the inquirer following the chain of antecedent causes "will not be able to proceed eternally, but wearied will at last give over, without knowing whether it were possible for him to proceed to an end or not."[119] Hobbes's references to God as a "body" or "first cause" in fact have no ontological implications about his material nature. Utterances about God and his attributes are meaningful, not as philosophical "propositions" describing him but, rather, as performative expressions or "oblations" of piety: "in the Attributes which we give to God, we are not to consider the signification of Philosophicall Truth; but the signification of Pious Intention, to do him the greatest Honour we are able."[120] To call God "corporeal" or even the "first cause" is to speak of God as we always do when we attribute anything to him: philosophically, to express our incapacity to conceive of God's existence without attributing magnitude to him, or to imagine an infinite chain of causes, without a first cause; and theologically, to express our desire to honour him. It is emphatically not to utter a proposition actually describing his nature.[121]

The crucial point is that – whatever its ontological status – the first cause supposed by philosophical reason, and to which we attach the name of God, is a natural nonperson. The philosophical God does not amount to the fully Hobbesian God, the God capable of acting in history, the God capable of commanding human beings through his "*Prophetique*" word.[122] The God of history exists but, like the state, only artificially. It is we ourselves who, by convention, author God's person into existence: ultimately, our God-talk does not

[119] *De corpore*, XXVI.1: 412.

[120] *Leviathan*, XXXI: 252 (191). Hobbes distinguished between propositions and oblations in *Thomas White's* De mundo *Examined*, XXXV.16: 434: "while I hold that the nature of God is unfathomable, and that propositions are a kind of language by which we express our concepts of the natures of things, I incline to the view that no proposition about the nature of God can be true save this one: God exists … Everything else, I say, pertains not to the explanation of philosophical truth, but to proclaiming the state of mind that govern our wish to praise, magnify and honour God … Therefore the [words cited] are rather oblations than propositions … the words under discussion are not propositions of people philosophising but the actions of those who pay homage."

[121] The failure to take this point seriously lies behind the flawed conclusion that Hobbes must have been an atheist because he supposedly wrote contradictory propositions about God's nature. See, for example, Jesseph, "Hobbes's Atheism."

[122] *Leviathan*, XXI: 246 (187). By 1656, Hobbes was making this point by distinguishing between being the *cause* and being an *author* of actions: "though God be the cause of all motion and of all actions," it does not follow that he is their "author," "because not he that necessitateth an action, but he that doth command and warrant it, is the author" (*English Works*, 5, pp. 138–9). See also chapter XLVI, paragraph 22 of the Latin *Leviathan* for the same distinction. The context of both discussions is theodicy, and Hobbes's point was to deny that God is the author of people's sinful actions. This might be taken implicitly to suggest that God is the author of the actions he has commanded. If my interpretation is correct, however, God can be the author of these actions only in a "fictional" and derivative sense. For discussion, see George Wright, *Religion, Politics and Thomas Hobbes* (The Netherlands: Springer, 2006), chapter 4.

describe an already existing natural entity, but comprises a performative use of language by which we artificially conjure into being the very thing our language seemingly only describes.

If the Hobbesian God gains a real existence, independent of the vicissitudes of the subject's imagination, by convention, then he appears capable of binding human beings' wills only once he has already been authoritatively represented by an other. This representative role Hobbes assigned to the sovereign who, simply by virtue of representing the state, simultaneously represents the true God. The "earthly Soveraign may be called the Image of God," not in the sense of resembling any "fancy" that one may have of God, but in the sense of being a "Representation" of him in the economy of conventional signs.[123] This is why "none but the Soveraign in a Christian Common-wealth, can take notice of what is, or what is not the Word of God," and why sovereigns "are the onely Interpreters of what God hath spoken."[124] Thus at first glance it appears that one first acquires sovereignty, and then subsequently, as a consequence, the right to personate God. But, as we shall see, "God" is a sign that Hobbes portrayed as necessary for realizing the feat of self-authorization and self-binding implicated in the demonic construction of sovereignty in the first place. The representer of the state is *necessarily* the representer of God, because the state is itself a theological construct: Hobbes's political theory of the state is in this sense a political theology. The capacity to personate God is one of the ideological *bases* of sovereign power.

Hobbes drew the parallel between the state and God by spinning the tale of not one, but two types of sovereignty-covenant: the ostensibly secular ones narrated in the first half of *Leviathan*, and the explicitly divine sovereignty-covenants described in the second half, i.e., the biblical "Old Covenant" establishing the civil sovereign not only as the representer of the state, but as the prophetic representer of God.[125] The first iteration of this divine covenant is ostensibly

[123] *Leviathan*, XLV: 448 (359).

[124] Ibid., XL: 324 (250).

[125] J. G.A. Pocock, *Politics, Language, and Time: Essays on Political Thought and History* (Chicago: University of Chicago Press, 1989), chapter 5, takes the two types of sovereignty-covenant to be radically different. I do not. According to Pocock, there exist "in *Leviathan* two structures of authority, one as a-historical as the other is historical," the former secular and the latter sacred, the former independent of, and the latter dependent on, opinion, faith, and history (pp. 166–7, 191). As I argue in the body of this essay, however, the ideological construction of sovereignty is necessarily a theological construction, which is why not just the Israelites' sovereign, but *every* sovereign represents God to his people. To maintain the conceptual separation between two independent sources of authority, Pocock argues that, according to Hobbes, although "the magistrate may be the supreme and unchallenged interpreter of God's word," he is clearly not the "author" of God's word, so that "the secular ruler finds himself inhabiting a history which he did not make" (p. 168). In fact, however, Hobbes portrayed sovereigns as not only the sole "Interpreters of what God hath spoken," but also the only ones who "can take notice of what is, or what is not the Word of God" (*Leviathan*, XL: 324 (250). What counts as scripture is ultimately determined by sovereign authority. The answer

between Abraham and God himself *qua* independent agent.[126] But Hobbes's deeply paradoxical construal suggests that the Abrahamic covenant is, in fact, an instance of self-binding, a kind of covenant between Abraham and his own alienated self, projected outward by his imagination. Consider its content: "the Covenant which Abraham made with God," Hobbes declared, "was to take for the Commandement of God, that which in the name of God was commanded him, in a Dream, or Vision; and to deliver it to his family, and cause them to observe the same."[127] So Abraham hears a voice in his dream, speaking "in the name of God," and covenants with someone to "take" that voice to be God's. Yet Abraham's covenant cannot be *with* God himself, since prior to the covenant the voice that he imagines does not yet represent God to him: after all, it is the point of his covenant to identify the voice with God. So with whom does he covenant? Evidently, the voice in his dream. Abraham covenants with a voice in his own dream to take that very same voice to be God's: the voice is both the subject and the object of his covenant. It is only after Abraham has covenanted to take this voice to bear the person of God that God becomes a person to him. Who authorizes Abraham to take the voice he imagines to be the voice of God? Abraham himself. The biblical covenant between Abraham and God is thus transformed in Hobbes's hands into the paradigm case of self-authorization and self-binding by a split self. As with the production of the state, the very existence of God (the person) requires

to the question "of *when*, and *what* God hath said … to Subjects that have no supernaturall revelation, cannot be known, but by … the authority of their severall Common-wealths; that is to say, of their lawfull Soveraigns," so that "I can acknowledge no other books of the Old Testament, to be Holy Scripture, but those which have been commanded to be acknowledged for such, by the Authority of the Church of *England*" (*Leviathan*, XXIII: 260 (199). Although it is often thought that, in the first half of *Leviathan*, Hobbes characterized sovereignty-covenants without any reference to God, restricting himself exclusively to mentioning "every particular man" who covenants to join the commonwealth, in fact it is precisely in articulating the nature of the supposedly secular sovereignty-covenant that Hobbes referred to the state as "that *Mortall God*, to which wee owe under the *Immortal God*, our peace and defence" (*Leviathan*, XVII: 120 (87). For a recent variant on Pocock's argument, see Bryan Garsten, "Religion and Representation in Hobbes," in ed. Ian Shapiro, *Leviathan, Or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (New Haven, CT: Yale University Press, 2010). Garsten portrays the divine authority of the Israelites' rulers as the antithesis of the sovereign authority of kings: while the latter "represent" God, the former are his direct instruments. Yet Hobbes described Moses not only as a sovereign, but (as Garsten acknowledges) as God's representer; in my view, moreover, the Hobbesian God cannot act except insofar as he is represented.

[126] *Leviathan*, XXXV: 281 (217): "a Contract between God and Abraham; by which Abraham obligeth himself, and his posterity, in a peculiar manner to be subject to Gods positive Law" (*Leviathan*, XL: 322–3 (249): "with him was the Covenant first made; wherein he obliged himself, and his seed after him, to acknowledge and obey the commands … [that] God should in speciall manner deliver to him by Dreams, and Visions," in exchange for God's "promise of the Land of Canaan."

[127] *Leviathan*, XL: 323 (249).

an act of self-authorization, and "God" (the sign) is what seemingly enables Abraham to accomplish this feat. By baptizing his own dream as the voice of God – that is, by giving his dream the *name* of God – Abraham authorizes the content of his own imagination, projected outward onto a blank external canvas, to bear the person of God and thus to personate what he *cannot* imagine: the darkest, most fantastical corners of his own mind.[128]

The question is how Abraham can do this. How can Abraham authorize the voice in his own dream to personate a third party? By the same process of projection implicated in the production of demonic power, whereby the subject is split into two. The split is instigated by the awe and wonder that Abraham, confronted with a strange sensory image whose origin he cannot explain, experiences upon hearing the awesome voice in his own dream. The feat is realized, in other words, by the *miracle* in his dream, a phenomenon that Hobbes characterized in a decidedly unorthodox manner: a miracle is an event "which men wonder at, and call Admirable," either because it is "strange" to them, that is, it has "never, or very rarely" been witnessed before, or because they "cannot imagine it to have been done by naturall means," that is, it is inexplicable to them. Being a miracle is therefore relative to the "knowledge and experience" of the witness, so that the "first Rainbow that was seen in the world, was a Miracle," but "at this day, because they are frequent, they are not." The political significance of miracles so-characterized is that the "Admiration and Wonder" they inspire frequently prompt those who witness them to read them as "*Signes*" of the "commandment" of an unfathomable, unbounded person, that is, the true God.[129] And this – as with all those who "stand in awe of their own imaginations"[130] – is precisely the reaction that Abraham's dream elicits.

The politically crucial moment is when Abraham gives his projection a conventional persona, by naming it and representing it to *others* in his family. This conventional representation solidifies the projection as something stable and independent of the vicissitudes of his own imagination. In this sense Abraham *needs* his family to give "God" stability as a sign, and to bind himself to his promise to God, since without a settled convention shared with other persons, the same inconstancy that Hobbes described for other attributions of value applies to "God" as well. (The "same man, in divers times," Hobbes had observed, "differs from himselfe; and one time praiseth, that is, calleth Good, what another time he dispraiseth, and calleth Evil."[131] For terms

[128] The impenetrability of God's nature ultimately stems from the same impenetrability that characterizes our very own selves: "the Principles of naturall Science … are so farre from teaching us any thing of Gods nature, as they cannot teach us our own nature" (*Leviathan*, XXI: 252 (191)).

[129] *Leviathan*, XXXVII: 300–1 (233–4). "Admiration and Wonder, is consequent to the knowledge and experience, wherewith men are endued."

[130] *Leviathan*, XII: 75 (51).

[131] Ibid., XVI: 110–1 (79).

inherently linked to the passions, it is only a shared convention that overcomes this inconstancy.) The prophet depends on his audience to accomplish the feat of self-authorization. At the same time, however, in binding himself and his family to the word of God, Abraham has not actually bound *himself* to anything substantive: the word of God is whatever Abraham himself declares it to be. "God," in other words, is a blank sign of the institutional framework that makes authorizing representation by fiction possible. It is not the sign of any substantive obligation. Abraham merely "binds" himself to the very possibility of political authority and obligation, the blank framework presupposed by representation by fiction.

We may alternatively pose a more strictly normative question, asking *by what right* Abraham authorizes his projected self to personate God to the others in his family. For, as Hobbes slyly put it, a person's saying that God "hath spoken to him in a Dream, is no more then to say he hath dreamt that God spake to him"; and to "say he speaks by supernaturall Inspiration, is to say he finds an ardent desire to speak, or some strong opinion of himself, for which hee can alledge no naturall and sufficient reason."[132] In Abraham's case, the source of his authority to personate God by fiction is rather straightforward: it derives from the fact that – on Hobbes's rendition – Abraham is *already* the family's "Father, and Lord, and Civill Sovereign."[133] By presupposing sovereign power, the case of Abraham gently side-steps the paradox of its construction.

This is what makes Hobbes's treatment of the Mosaic covenant so revealing: Moses successfully bids to personate God even though he is not already the civil sovereign. It is Moses's renewal of the "Old Covenant" with God that, properly speaking, underwrites the construction of sovereignty, definitively establishing God as the king of his "Peculiar Kingdome" over the Israelites, with Moses as his Lieutenant. But since Moses was not the Israelites' already-established sovereign representer, that is, "seeing Moses had no authority to govern the Israelites, as a successor to the right of Abraham, because he could not claim it by inheritance," the question is what "ground there was" for the Israelites' "obligation to obey him" and to take his words as God's. Just as in the case of Abraham, the direct "commandment of God" cannot be the ground of obligation, "because God spake not to them immediately, but by the mediation of Moses himself." Hobbes's answer is that Moses was authorized to represent God *by the Israelites themselves*, in a "promise of obedience" by which "they obliged themselves to obey whatsoever he should deliver to them for the Commandement of God." The Israelites themselves are the authors of Moses's capacity to personate God: Moses's authority, "as the authority of all other Princes," is "grounded on the Consent of the People, and their Promise to obey him." The Mosaic covenant by which God is personated thus comprises a series

[132] Ibid., XXXII: 257 (196).
[133] Ibid., XL: 323 (249).

of sovereignty-covenants by which the state is personated and, simultaneously, by which individuals bind themselves to the state's external authority.[134]

The relevant question is how the Israelites could bind themselves in this way, authorizing Moses to represent both God and state. Recall the seeming paradox of authorizing sovereignty: on the one hand, representation by fiction requires an already-constituted sovereign power to authorize it; on the other, constituting the sovereign power is itself supposed to occur via an act of representation by fiction. Hobbes diffused the paradox by deploying the sign of "God" to separate these two moments into two sequential stages: instituting the framework presupposed by representation by fiction first, and then actually authorizing the representation of the state. It is only in the second stage that the Israelites promise to recognize Moses's authority and so fully oblige themselves.

In the first stage prior to their promise, Hobbes characterized the Israelites as nonetheless already "obliged" to Moses in a weaker sense. This fragile, pre-political "obligation" – as yet not anchored in any convention, and which, as we shall see, Hobbes elsewhere called "Reverence" rather than obligation – even corresponds to a pre-political (but politically significant) "authority," which Moses enjoyed over the Israelites prior to their sovereignty-covenants. Before their promise, "the people were obliged to take him for Gods Lieutenant" as long as but no

> … longer than they beleeved that God spake unto him. And therefore his authority … depended yet merely upon the opinion they had of his Sanctity, and of the reality of his Conferences with God, and the verity of his Miracles; which opinion coming to change, they were no more obliged to take any thing for the law of God, which he propounded to them in Gods name.[135]

The pre-political "authority" that inspires spontaneous obedience is more properly called a *charisma*; it is this charisma that the voice in Abraham's dream possessed; and it is the foundation that makes the construction of sovereign power possible. That is to say, the miraculous charisma of the prophet is a pre-political simulacrum of sovereign authority, and substitutes for the latter as the prerequisite framework that representation by fiction normally presupposes. It establishes the framework for political authority and obligation, without imposing any obligation in particular. It is the blank paper on which the sovereignty-covenants may be written.

In chapter XII of *Leviathan*, "Of Religion," Hobbes listed the ideological bases of charismatic authority as "the reputation of Wisedome," "the reputation of Sincerity," "the reputation of Love," and "the operation of Miracles," which, of course, people invariably take to be signs of divine revelation:

[134] Ibid., XL: 324–5 (250–1). Cf. "Moses … was alone he, that represented to the Israelites the Person of God; that is to say, was their sole Soveraign under God."

[135] Ibid., XL: 234 (250).

…all formed Religion, is founded at first, upon the faith which a multitude hath in some one person, whom they believe not only to be a wise man, and to labour to procure their happiness, but also to be a holy man, to whom God himselfe vouchsafeth to declare his will supernaturally.[136]

The qualifying phrase "at first" reflects the fact that Hobbes was treating the first, pre-political stage in the construction of power, the stage in which the framework for authority is established. In chapter XLVII, when discussing the pre-political authority that the Apostles enjoyed over new converts in the Roman Empire, Hobbes again referred to "the *first* Elements of Power, which are Wisdom, Humility, Sincerity, and other virtues of the Apostles, whom the people converted, obeyed, out of Reverence, not by Obligation."[137]

Peace and security require that the first stage be followed by the second. The problem with charismatic authority is that it is precarious: it has no anchor outside the vicissitudes of individual subjects' opinions and passions. "It followeth necessarily" from the nature of pre-political charismatic authority that if "either the wisedome of those men, their sincerity, or their love" comes to be "suspected; or that they shall be unable to shew any probable token of Divine Revelation," then "the Religion which they desire to uphold, must be suspected likewise; and (without the feare of the Civill Sword) contradicted and rejected."[138] Charismatic authority may be what makes the construction of sovereign power possible, but without sovereign power – "without the feare of the Civill Sword" erected by covenant – charismatic authority is prone at any moment to collapse.[139]

The charismatic basis of sovereign power, however, is not a ladder that the sovereign can simply kick away once he has fully acquired the trappings of sovereignty. Sovereignty depends on the perpetuation of charismatic authority, which is why the state requires a civil religion or mythology, and must be worshipped as a god. The reproduction of sovereign power requires that charisma, which initially inhered in the prophetic personality, become routinized,

[136] Ibid., XII: 83–4 (58–9).

[137] Ibid., XLVII: 479 (384), emphasis added. Cf. *English Works*, 4, p. 339.

[138] Ibid.,L XII: 84 (58). On the precariousness of relying on prophetic charisma, see Hoekstra, "Disarming the Prophets."

[139] Fear of the sword is certainly a crucial pillar of sovereign power. But just as crucial, in the passage to the second stage of its construction, is the recognition, by those subject to it, that they themselves are its *authors*. To be sure, the prophet's pre-political, charismatic authority already depends for its existence on being recognized by his disciples: the disciples' "Reverence" for the prophet, like the pagan's dread of the demon, in part arises from the recognition of their own anamorphic reflection in the God in whose name the prophet claims to speak. But their sovereignty-covenants solidify this recognition by giving it a conventional existence and content beyond their own momentary imaginations. The sovereignty-covenants thus intensify the sovereign's grip on each horn of the dilemma facing the demonic construction of sovereign power: they establish the subjects' authorship of God and state even as they set each up as an alien, unfathomable power over them.

so that it attaches to the state itself – to its offices, rather than to any natural person(s) who occupy them. The problem is that there remains an indissoluble link between the charisma of the office and the actions of officers. Charismatic "power is preserved by the same Vertues by which it is acquired; that is to say, by Wisdome, Humility, Clearnesse of Doctrine, and sincerity."[140] Hobbes paraded a litany of historical examples in which political authority crumbled when charismatic authority was compromised by the actions of officers, the most dramatic of which was the revolt by "the people of Israel" against God their king, when the "sons of *Samuel*, being constituted by their father Judges in *Bersabee*," compromised the people's reverence when they "received bribes, and judged unjustly."[141] The upshot is that the demonic construction of sovereign power remains perpetually precarious:

> …though Soveraignty, in the intention of them that make it, be immortall; yet is it in its own nature, not only subject to violent death, by foreign war; but also through the ignorance, and passions of men, it hath in it, from the very institution, many seeds of a naturall mortality, by Intestine Discord.[142]

The fragility of sovereign power derives "from the very institution" of sovereignty.[143]

CONCLUSION

Although the construction of sovereignty also relies on brute physical power, it relies even more heavily, as Hobbes was keenly aware, on conventional or *symbolic* power – the power that arises thanks to what philosophers today call collective intentionality.[144] Whereas brute physical power depends solely on the

[140] *Leviathan*, XLVII: 480 (386).

[141] Ibid., XII: 85 (59); cf. XL: 328 (253–4).

[142] Ibid.,XXI: 153 (114).

[143] The prophetic founder is not the only Hobbesian character capable of forging, by the charismatic force of his natural person, the pre-political bases of sovereign power. The other such figure is the preternatural warrior, whose conquering power depends both on the physicality of his violence and on the awe his charismatic violence inspires in those spared long enough to behold it. If the prophet constructs and acquires sovereignty "by institution," the conqueror establishes the pre-political bases of sovereignty "by acquisition." But "acquisition" by itself does not amount to sovereign power, for it is not "the Victory" that obliges "the Vanquished, but his own Covenant." Like the prophet, the conqueror must solidify his power by inspiring sovereignty-covenants, without which he remains confined to a precarious, pre-political rule over captives or "Slaves" who, having "no obligation at all" to him, may at the first opportunity quite justly "break their bonds, or the prison; and kill, or carry away captive their Master" (*Leviathan*, XX: 141 (104)). Even the warrior's power ultimately depends on his ability to represent the state.

[144] Intentionality, as John Searle has characterized it, is the capacity of the mind to *represent* external objects and states of affairs to itself, whether in beliefs, desires, or intentions; collective intentionality is the capacity for representations by an array of individuals, each of whom believes,

physical constitution of bodies and their physical environment, symbolic power inherently depends on agents' intentional states: beliefs, desires, or intentions. A brick wall can serve as a barrier to prevent unwanted entry thanks solely to its physical constitution, but a line drawn in the sand can serve the same function only if accompanied by the appropriate beliefs, desires, or intentions in the people whose movements it is meant to regulate. Some objects serve the function they do by virtue of their intrinsic physical properties; other objects, lacking the required intrinsic properties, can serve the function they do only in virtue of having been collectively assigned a symbolic status by agreement or acknowledgement, whether explicit or tacit.[145] The assignment of what John Searle has called "status functions" is a constitutive element of the construction of social (or what Hobbes might have called "artificial") reality.

Not every instance of symbolic power – not every symbolic assignment of a status function – involves illusion or deception. A line in the sand can serve as an artificial barrier if we (wrongly) come to believe that the gods will eternally torment us should we cross it, but it might also serve the same function if we (correctly) believe that we shall be ostracized by our community should we do so. The ideological construction of sovereign power relies on both the nonillusory and illusory assignment of status functions. Although the sovereign must be attributed powers that he does not intrinsically possess, such attribution need not always involve deception: it may simply involve (tacit) agreement or convergence of intentional states. Even the state's brute physical power, for example, relies on an institutional apparatus that, in turn, functions only thanks to conventionally assigned roles and the beliefs, desires, and intentions of the individuals involved. But the construction of Hobbesian sovereignty also relies on illusion, the illusion that enables a split self simultaneously to experience the state as wholly alien to itself and as its own construction, simultaneously to "see" the illusion represented by the sovereign but also to see it *as* an illusion. Social order, Hobbes believed, is possible only if people attribute powers to the state that they experience as intrinsic to the state even as they simultaneously know them to be their own attribution. Indeed, it requires the attribution of powers that in principle no human representer of the state could ever really possess: the powers of a god.

desires, or intends something only as part of everyone in the group doing so together. See John R. Searle, *The Construction of Social Reality* (New York: The Free Press, 1995), pp. 6–7, 23–6. Hobbesian sovereignty-covenants, by which each individual intends that everyone authorize the sovereign to represent a mortal god, are a paradigmatic Hobbesian example of collective intentionality. See Hobbes's formulation at *Leviathan*, XVII: 120 (87): "*I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner*."

[145] Human beings can, Searle argues, "through collective intentionality, impose functions on phenomena where the function cannot be achieved solely in virtue of physics and chemistry but requires continued human cooperation in the specific forms of recognition, acceptance, and acknowledgement of a new *status* to which a *function* is assigned." Ibid., p. 40.

This is why fragility is intrinsic to "the very institution" of sovereign power: because in practice no natural person can ever fully represent a god. The "earthly Soveraign may be called the Image of God," but only in the sense of being a *nomological* representation of him and not, as would be required for *irresistible* power, in the sense of actually *resembling* a god. The terrifying chasm between these two kinds of representation – between a "similitude" or "the Resemblance" of something versus "the Representation of some thing" in "no more but by the Names onely"[146] – is something that the ideological construction of sovereignty can never completely fill. The spectacular illusion that the sovereign can in fact fill this chasm and personate divinity – indeed, the illusion that the earthly state is also a god – is ultimately itself the product of the manipulation of "Names onely": a mythology of Leviathan conjured into being in speech.[147] It is an illusion that, like a good metaphor, properly announces its own artifice.

Hobbes constantly reminded his readers of the ideological and partially illusory basis of earthly sovereignty – not to undermine sovereign power, but to shore it up. By making vivid to his readers the fragility of sovereignty, he hoped to reinforce their fear of the sovereign's always-possible absence and the ensuing horrors of the state of nature. Ironically, this is also in part why Hobbes insisted on the individual's inalienable right of self-defense, an insistence that has puzzled many of his readers, given Hobbes's obvious wish to defend absolute, unlimited sovereignty. Its political function is not to provide a covert *justification* for resistance theories. Rather, by reminding his readers of their right but doing so while addressing them as isolated atoms whose resistance would be hopeless, Hobbes sought to remind each one of the ultimate impossibility of securely filling the seat of sovereignty, without encouraging anyone actually to resist the most promising pretender. Like God-talk, Hobbes's representations of sovereign power do not ultimately comprise descriptive propositions at all: they are expressions of praise and honor designed to help create the very thing they purport to describe. Hobbes was keenly aware that indivisible state sovereignty is an ideological construct whose terms are never ever fully realized in practice.

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[146] *Leviathan*, XLV: 448–9 (359). In this passage, Hobbes used the word "Resemblance" for the former, and "Representation" for the latter, with "Image" as the more general term encompassing both.

[147] For the capital importance of the manipulation of signs in *Leviathan*, see Zarka, *Hobbes et la pensée politique moderne*.

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PART II

APPLICATION TO CIVIL SOCIETY AND DOMESTIC INSTITUTIONS

7

Hobbes's Challenge to Public Reason Liberalism

Public Reason and Religious Convictions in Leviathan

Gerald Gaus

CONTEMPORARY PUBLIC REASON LIBERALISM AND THE SHARED REASONS DOCTRINE

The dominant contemporary account of liberalism is aptly called "public reason liberalism." Public reason liberalism, most notably in the work of John Rawls, takes as its starting point the reasonable diversity of conceptions of the good life and the valuable, as well as differences in metaphysical beliefs about the ultimate nature of reality, and the place of humans in the scheme of things. At the heart of public reason liberalism is the conviction that, if all are to be treated as free and equal persons, the justification of the political order cannot presuppose the truth of one such reasonable doctrine over its competitors. To treat another as a free and equal person requires that he is not subjected to terms of political association that are justifiable only in terms that, as a reasonable moral person, he cannot endorse. Now there are two (not necessarily incompatible) ways for public reason liberalism to meet this requirement. Public reason may be understood as what is *endorsed by the reason of all*. The reason of all endorses the liberal political order if each, reasoning on the basis of her reasonable conceptions of value, metaphysics and so on, has her own reasons to affirm the liberal order. In this case, while the liberal order does not depend on the truth of one such reasonable doctrine over its competitors, its justification can draw on the truth claims of a variety of reasonable doctrines. Public reason, however, also can be understood as the *shared reason of all*. Here the public reason liberal seeks to prescind from reasonable disputes about metaphysical, religious, and ethical truth by grounding the liberal order on a set of reasons

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that all citizens share.[1] Again, the justification of the political order does not require endorsing one controversial doctrine over others, but now the aim is to refrain from *any* appeal to controversial doctrines. Whereas the first view holds that a political order that appeals to a variety of controversial doctrines treats all as free and equal so long as each finds her own justifying reasons in doctrines she holds to be true or justified, the second (i.e., the shared reasons view) insists that only reasons that everyone finds uncontroversial can justify.

Public reason as the shared reasons of all is the dominant strain in public reason liberalism.[2] Rawls's critical argument from the original position is an effort to base justification primarily on shared reason. The veil of ignorance excludes "knowledge of those contingencies which set men at odds."[3] All parties are assumed to reason on the same basis: the aim to obtain primary goods. Insofar as they consider themselves from the common perspective as agents devoted to some ends, these goods are desired by all. When abstracted to the common status of agents devoted to their own (unknown) evaluative standards (values, comprehensive conceptions of the good and so on), because "everyone is equally rational and similarly situated, each is convinced by the same arguments."[4] Rawls contends that the argument from the original position is "freestanding:" it isolates the evaluative considerations that follow from our conception of persons as reasonable and rational, free and equal – a conception that is said to be implicit in our democratic society, and so shared by all.[5] Justice as fairness thus expresses "shared reason:"[6] it is a justified political conception because it articulates the requirements of the concepts of the person and society that all reasonable citizens in our democratic societies share. Rawls, though, does not stop there: this argument from what we share does not exhaust justification. Indeed, he says that this freestanding justification is simply a *pro tanto* (so far as it goes) justification.[7] In what Rawls refers to as "full" justification citizens draw on their set of values, metaphysical beliefs and so on, and find *further reasons* for endorsing the political conception. At this stage,

[1] This is the same distinction as between convergence and consensus justification. See Fred D' Agostino, *Free Public Reason: Making It Up as We Go* (Oxford: Oxford University Press, 1996), p. 30. For a similar statement of the distinction, see Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy and Public Affairs* 16 (1987): 218.

[2] Something that Kevin Vallier and I criticize in "The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry and Political Institutions," *Philosophy & Social Criticism* 35 (January 2009): 51–76. For a defense of the shared reasons requirement see Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, forthcoming), chapter 9.

[3] John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Belknap University Press of Harvard University Press, 1999), p. 17.

[4] Ibid., p. 120.

[5] Rawls, *Political Liberalism*, paperback ed. (New York: Columbia University Press, 1996), p. 10.

[6] Ibid., p. 9.

[7] Ibid., p. 386.

Rawls tells us, the *pro tanto* (freestanding) justification "may be overridden by citizen's comprehensive doctrines once all values are tallied up."[8] What was simply freestanding or isolated must, if it is to be fully justified, serve as a "module" that fits into each free and equal reasonable moral person's set of evaluative standards.[9]

Although full justification, and its notion of "overlapping consensus," appeals simply to the reasons of all (and so does not suppose that these further reasons are shared), it is nevertheless supposed that the core case for justice as fairness – the freestanding argument, based on shared reasons – is unaffected by inclusion in a more comprehensive set of reasons. Thus the importance of the idea that it is a "module:" the freestanding argument fits into all these doctrines without altering its character. The shared reasons case for Rawls's public reason liberalism, we might say, is assumed to be *insulated* from these wider disputes: it stands on its own, though it may well receive additional support from them. Many second- and third-generation Rawslians put even more stress on shared reasons. Jonathon Quong has recently insisted that Rawlsian public reasons are necessarily shared reasons.[10] Steven Macedo too has constantly stressed the need for public justification to be framed in terms of shared reasons.[11] From a somewhat different perspective, Robert Audi also has insisted on the need for common, secular reasoning in a liberal polity.[12]

What we might call the "shared reasons requirement" is employed in two different contexts in public reason liberalism. The so-called "duty of civility" appeals to shared reasons as a test for acceptable political discourse: when participating in a public, political forum, one should advance only reasons that other citizens in some way share. In this sense, the shared reasons view is a constraint on what can be said, or publicly advocated. Since it is rightly supposed that religious reasons are not among those we share, this purported duty implies a "principle of restraint" on appealing to religious reasons in political discourse.[13] Understandably, many of those who take their religious

[8] Ibid.

[9] Rawls employs the idea of a "module" when explaining "overlapping consensus" (ibid., pp. 12–13; 144–5) whereas "freestandingness" applies to the appeal to shared conceptions of the person and lack of metaphysical and other commitments of the argument for the two principles (ibid., pp. 10, 40, 133, 144).

[10] Quong, *Liberalism without Perfection*, chapter 9.

[11] Stephen Macedo, "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?" in eds. Robert P. George and Christopher Wolfe, *Natural Law and Public Reason* (Washington, DC: Georgetown University Press, 2000), pp. 11–49, at p. 35.

[12] Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), pp. 86–100; see also Audi's "Liberal Democracy and the Place of Religious Argument in Politics" in eds. Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, MD: Rowman and Littlefield, 1997), pp. 25–33.

[13] See Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), p. 68.

convictions seriously find this an onerous and unjustified requirement.[14] I have elsewhere argued that they are largely correct, and this principle of restraint should largely be dismissed.[15]

More fundamentally, though, the shared reasons requirement can be understood as a constraint on what constitutes an adequate public justification of a basic political principle or a law. On this more fundamental level, the public justification of political principles ultimately should be restricted to considerations that we all share as citizens, qua citizens. This would appear an attractive but elusive ideal. It is attractive insofar as, should it succeed, we would have a full public justification of our common political order, one based on shared reasons that all free and equal persons affirm.[16] It is elusive insofar as in a world in which we disagree about so much – about how to live, how to bring up our children, and our ultimate place in the universe – universal rational endorsement of the terms of our political association seems a hopeless quest. Suppose, though, that we could (1) isolate a perspective that we share qua citizens; (2) that from this shared perspective we could agree on certain basic interests; (3) that this basic shared core uncontroversially justifies a set of political principles; and (4) our agreement on this shared core could be insulated from our other disagreements, so that despite these disagreements we could continue to endorse the shared core as of great, and typically overriding importance. Thus Rawls's project: (1) and (2) identify the original position; (3) is a freestanding argument for justice as fairness that (4) is not overturned at the stage of full justification, but is consistent with overlapping consensus.

The Rawlsian seeks political agreement in the midst of extensive pluralistic disagreement by locating a common grounds for justification. Many are dubious that this can be secured. Jeffrey Stout, for example, questions not simply the practicality, but the desirability, of this insistence on a "common justificatory basis" for political principles.[17] Why should we think that a religious person's deepest convictions have no implications for the political principles that she has reason to endorse? Does the liberal really, seriously, think that this common core (if there is one) can be insulated from deep beliefs outside the common core? Thus we arrive at the contemporary debate about the plausibility of public reason liberalism, especially as it pertains to the place of religious conviction.

[14] See, for example, Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 120.

[15] "The Place of Religious Belief in Public Reason Liberalism," in eds. Maria Dimovia-Cookson and P.M.R. Stirk, *Multiculturalism and Moral Conflict* (London: Routledge, 2009), pp. 19–37.

[16] On the importance of a public basis of justification, see Samuel Freeman, "Reason and Agreement in Social Contract Views" in his *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), pp. 17–44.

[17] Jeffrey Stout, "Religious Reasons in Political Argument," in ed. J. Caleb Clanton, *The Ethics of Citizenship: Liberal Democracy and Religious Conviction* (Waco, TX: Baylor University Press, 2009), pp. 261–92, at p. 266. Emphasis in original.

All this seems *very* contemporary, and very much about the Rawlsian project and its trials and tribulations: the freestanding argument from the original position, the nature of the "reasonable," shared political values, claims about overlapping consensus, publicity, and so on. Not so, I argue in this essay. Once again contemporary philosophy is deeply impressed by its reinvention of the wheel. The fundamental debate as to whether we can identify shared (inevitably secular) beliefs that form a core public reason, and that can be insulated from the disagreements of private judgment about religion, has characterized the public reason project since its inception in the work of Hobbes. I begin by arguing that Hobbes lays down the fundamental challenge to this shared reasons liberal secularism:[18] political beliefs cannot be insulated from our broader disagreements. I then examine Locke's counterprosals; I shall argue that Locke's liberal reply to Hobbes presents a well-developed version of the insulation thesis (that shared political convictions can be insulated from religious disagreements), as well as a doctrine of what I shall call "bounded disagreement" – that although we disagree even about political principles, this disagreement is not unlimited. I hope to show that from Locke onwards public reason liberals have paid far too much attention to the insulation thesis, when the real work in a liberal theory is done by the bounded disagreement doctrine. Without bounded disagreement, the insulation thesis will not avoid the Hobbesian challenge; with bounded disagreement, the insulation theory turns back Hobbes's authoritarianism without appeal to the insulation thesis.

HOBBES ON THE AUTHORITY OF PUBLIC REASON

The Fifth Monarchy Men

Although it omits much of a complex story, the familiar, somewhat stylized history of liberalism as arising out of the religious conflicts of the 16th and 17th centuries identifies the heart of the liberal project: securing a free political order in the face of diversity of private judgment.[19] Although it is often claimed that liberalism arose out of Luther's doctrine of the priesthood of all believers – and of course there is some truth in this – we must not forget that early Protestants were as committed as Roman Catholics to uniformity of religious belief and practice. If each was to interpret the Bible himself, there was still the expectation that these readings would largely agree. The priesthood of all believers was no excuse for idiosyncratic interpretations of Scripture. And it was certainly no excuse for religious toleration. The religious conflicts in England – out of which the Whig Party, and ultimately Anglo-American

[18] Perhaps we should call it a "pre-challenge," since it was formulated before the main statements of liberal secularism.

[19] I consider a number of other influences in *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London: SAGE, 2003), chapter 1.

liberalism grew – began as disputes over what the state religion should be. Henry VIII sought a sort of nationalized version of the Catholic Church, but was pushed toward a more Protestant state church, and under his son, Edward VI, this trend accelerated. "Bloody Mary" sought to remake England into a Roman Catholic state; Elizabeth reversed course once again. Oliver Cromwell sought to create a Puritan Commonwealth – even Anglicans were subject to penalties for celebrating Christmas. After the restoration, both Puritans (now, appropriately labeled "dissenters") and Catholics were subject to penalties, and acts of conformity (to the Church of England) were required.

The period during, and immediately after, the English Civil War was one of freedom of conscience and speech. The supposition that *of course* citizens would, and must, agree on religious matters was challenged on a wide variety of fronts. Freedom of conscience resulted in a plethora of radical religious doctrines that sometimes led to radical political views. Sects such as the Quakers, the Shakers, the Ranters, and the Muggletonians arose. Among the most interesting of these sects were The Fifth Monarchy Men, who interpreted Daniel's dream (Dan. 7) as indicating that there would be five great legitimate monarchies: the last of which would be that of Christ. They believed that the fourth monarchy, the Roman Empire, had been overturned by the Church of Rome, and so were awaiting the fifth monarchy: the reign of Christ. Consequently, on the basis of their reading of the Bible they denied the legitimacy of all states between the Roman Empire and the Reign of Christ (which, unfortunately for them, included the Commonwealth). The Fifth Monarchy Men brought home two great lessons. First, once freedom of thought was allowed the proliferation of interpretations of the Bible would be endless: the hope that the priesthood of all believers would lead to consensus was an illusion. Second, the same freedom of thought that led people to conflicting religious beliefs could lead them to conflicting political convictions.

Famously, Milton defended freedom of thought and speech in *Areopagitica* (1643), but the Puritan, and later the Anglican state, were appalled by these flights of personal interpretation and claims to freedom of conscience. The brief experiment with freedom of conscience seemed to quickly lead to chaos of belief and the undermining of the social order. The distinctively modern problem of public order under conditions of deep and enduring pluralism of normative beliefs had arisen.

Private Judgment and Public Reason

A close reading of *Leviathan* reveals that Hobbes's main aim was to solve this problem. Despite the common interpretation of Hobbes as concerned only with the clash of self-interest, his analyses of the roots of disagreement and conflict are much more subtle and wide ranging. *Leviathan* focuses on problems of rationality and disagreement that arise when individuals rely on their private judgment of what reason requires. The exercise of our rationality is

fallible: "no one man's reason, nor the reason of any one number of men, makes the certainty."[20] Rational people aim at what Hobbes calls "right reason" – true rationality, which reveals the truth. However, because everyone's exercise of rationality is fallible, we often disagree about what is right reason; the private use of reason leads to disagreement and, thought Hobbes, conflict. Although in such controversies each person claims that the use of his own private reason is "right reason," these claims only exacerbate the conflict: "when men that think themselves wiser than all others clamour and demand right reason for judge, yet seek no more but that things should be determined by no other men's reason but their own, it is … intolerable in the society of men." Indeed, Hobbes insists that those who claim that their reason is obviously correct reason betray "their want of right reason by the claim they lay to it."[21] Someone who insists that *his* reason is right reason, and so *his* reason should determine the resolution of disputes, is not only a danger to society, but because he sees "every passion" of his as an expression of "right reason," he is also *irrational*: he demonstrates the lack of right reason by virtue of the claim he lays to it. On Hobbes's view, then, a stable and prosperous social life is only possible among individuals who acknowledge that their private judgment of the demands of reason cannot hold sway in their controversies with others; our very interest in a secure and peaceful social life instructs us to abandon reliance on our private judgment. Hobbes thus sides with those who are convinced that all appeals to the sanctity of individual conscience based on private judgment threaten the social order.

Hobbes is convinced that public, substantive rules of conduct cannot themselves solve the problem of conflict arising from diverse private judgment.[22] In the abstract, of course, we can see that the "laws of nature" are necessary for peaceful coexistence. All rational individuals will endorse the same general rules of social conduct (e.g., seek peace, keep covenants, be equitable when judging disputes). Thus at first glance it would seem that Hobbes advocates the liberal secular insulation thesis: we can disagree about "comprehensive conceptions of the good" (say religion) so long as we agree on "the right" – core principles about how to organize our social life. The example of the Fifth Monarchy Men should make us cautious about this apparently easy solution. Hobbes, though, advances a more systematic worry. "All laws, written and unwritten,"

[20] Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), V.3 (references to *Leviathan* are followed by chapter and paragraph number, followed by page number), p. 23.

[21] Ibid., V.3, p. 23. See further David Gauthier, "Public Reason," in eds. Fred D' Agostino and Gerald F. Gaus, *Public Reason* (Brookeville, VT: Ashgate, 1988), pp. 43–66 at pp. 50ff. This same point was made earlier, and in more detail, by E.W. Ewin, *Virtues and Rights: The Moral Philosophy of Thomas Hobbes* (Boulder, CO: Westview, 1991), chapter 2.

[22] See here the dispute between Gauthier in "Public Reason" and Michael Ridge "Hobbesian Public Reason," *Ethics* 108 (April 1998): 538–68. For further discussion see Shane Courtland, "Public Reason and the Hobbesian Dilemma," *Hobbes Studies* 20 (2007): 63–92. See footnote 26.

he argues, "have need of interpretation. The unwritten law of nature, though it be easy to such as without partiality and passion make use of their natural reason, and therefore leaves the violators thereof without excuse; yet considering there be very few, perhaps none, that in some cases are not blinded by self-love, or some other passion, it is now become of all laws the most obscure, and has consequently the greatest need of able interpreters."[23] When we employ our "private reason" there is, says Hobbes, great dispute about the laws – both the laws of nature and civil laws, and so we require the sovereign, the determiner of public reason, to provide a common interpretation of what the law requires.[24]

At the heart of Hobbes's social contract theory is the claim that agreement on substantive rules of conduct cannot itself solve the problem of diversity of private judgment. Given the limits of human reason and tendencies to bias, the interpretation of the basic moral rules is always rationally disputable. So the principles of social conduct are given a public determinative character by identifying a person (or a collective operating under a procedure, such as a legislature), and then taking its decision as the voice of public reason. The crux of the Hobbesian case for the primacy of an arbitrator as determining public reason (over substantive rules or principles) is the greater scope for disagreement and dispute about rules than about decisions of the arbitrator.[25]

Hobbes thus proposes that disagreements in private reason (including disputes about the demands of the laws of nature) are to be resolved by the sovereign, who is to serve as an arbitrator. This procedural solution to disagreement in private judgment has much to recommend it: even if we cannot agree on the merits of substantive doctrines or opinions, we may be able to resolve disputes through appeal to a judge or umpire, who provides a public decision about what to do. The conflict between the conclusons of our practical reasoning can

[23] *Leviathan*, XXVI.20, p. 180.

[24] Ibid., XV.30, p. 98 (emphasis in original).

[25] Michael Ridge objects that this case defeats itself since the sovereign must rely on rules to communicate his commands. Thus, says Ridge, "in assuming that the sovereign is genuinely capable of communicating with his subjects, he seems to be supposing that some edicts or commands (or, at least, some of his clarifications/interpretations of those edicts or commands) are not particularly subject to competing interpretations." If, though, this is true, Ridge argues, "it is no longer obvious that we need a sovereign." That is, if the commands of the sovereign are not open to a regress of interpretation, then there is no reason to suppose that all substantive principles are open to such endless interpretative controversies; and if the commands of the sovereign are open to such endless interpretive disputes, then the sovereign cannot solve the problem either. Hobbes, however, does not insist that all types of statements and commands are open to the same degree of interpretative controversy. Commands that contain reference to specific people doing things are less open to interpretative difference than are statements of general rules and principles. The question is: for any given interpretive controversy over any statement, what are we to do? The core of the Hobbesian case is that employing the specific commands of an interpreter and his agents *reduces* the range of controversy at each stage of disagreement. See Ridge, "Hobbesian Public Reason," p. 557. I consider Ridge's objection in more depth in *Contemporary Theories of Liberalism*, chapter 2.

be resolved by following the practical reason of the judge. This "umpiring" or procedural solution seems uncontroversial enough when applied to political disputes; however, given Hobbes's analysis it also applies to all moral disputes as well. Remember, Hobbes starts out with disputes about the laws of nature – basic rules of ethical social conduct.[26] His solution is to politicize all disputes about interpretations of these rules of social conduct by submitting them to the sovereign. If we closely follow Hobbes, it looks as if the political procedure will be determinative of all moral disputes about interpersonal conduct – having justified a judge or an umpire, we appear to have reason to appeal to her when we disagree about the dictates of the basic rules of ethical social conduct. Politics seems to swallow up morality. If the insulation thesis totally fails – if our disputes about the rules and principles regulating social life cannot be insulated from our religious and other disagreements – how else can we resolve our conflicts?

Those who would seek to extend "Hobbesian social contract" theory to develop a Hobbesian "moral theory" fundamentally misunderstand Hobbes's solution to the problem of public order and diversity of private judgment. A typical view is that the core Hobbesian problem is how egoistic people can live with one another; and the real threat to social order is presented by Hobbes's "foole" who says in his heart that there is no justice, and so sees no reason not to cheat on moral rules. On this view, the real problem Hobbes seeks to address is the rationality of defection on moral rules that structure mutually beneficial conduct. A Hobbesian moral theory is thus seen as one that identifies mutually beneficial rules and shows the rationality of conformity to them even in cases in which one would do better by cheating. Now to be sure, Hobbes is certainly worried by the fool's radical stance, but there is a long interpretive road from this to the common claim that these few paragraphs get to the heart of *Leviathan*. The fool passage paraphrases the Psalms, where the fool says that there is no God – a radical position indeed.[27] This suggests that Hobbes is not addressing the standard problem but a radical challenge to his core claim that the laws of nature provide each with reasons to act. What is really crucial and revolutionary about Hobbes's argument is that those who are *not* fools – those who accept that the laws of nature are indeed rational maxims which we all should follow – will *still* be unable to solve the problem of order given diversity of private judgment. Because all laws, written as well as unwritten, must be interpreted, and so each interpreter must employ his own private judgment,

[26] Hobbes does describe these as disputes about just conduct. For Hobbes, the concept of justice is conceptually tied to speech acts (contracts); the laws of nature identify not the demands of justice, but that of "ethics" or "equity." This is clear in his classification of the sciences in *Leviathan*, 9, p. 48. For an excellent account of the laws of nature and their normative status, see S. A. Lloyd, *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge: Cambridge University Press, 2009), Part 2.

[27] See Edwin Curley's editorial note, *Leviathan*, p. 90, n. 2.

even if there are no fools, and we all accept that the laws of nature give us reason to act, we will not secure peaceful order. We must not forget that the problem of diversity and order, which was the background of Hobbes's work, was not posed by "fools" who denied in their hearts there was a God, but by those such as the Puritans and the Fifth Monarchy Men who accepted the word of God as law: it was their interpretations of the law of God, Hobbes thought, that led to the English Civil War. Similarly, the core problem of the moral order is not posed by fools who deny in their hearts there is justice, but by those who insist that their own interpretations of the demands of justice are the dictates of right reason.

The Unlimited Authority of Public Reason

Because he sees *all* private judgment as potentially a threat to the social order, Hobbes puts no limit on the authority of the sovereign to determine disputes. Hobbes endorses the judgment of Cromwell and later the Tory Restoration parliaments: the experiment in free private judgment was an appalling threat to social order. Private judgment must be subservient to the public reason of the sovereign. Underlying this conservative response to rising diversity of belief is the important insight that there is no neat way to insulate the political from the religious: as the Fifth Monarchy Men showed, disputes about the former can always lead to disputes about the latter. Faced with the tendency of all beliefs to become political, Hobbes puts the teaching of all doctrines under the authority of the sovereign. "For the actions of men proceed from their opinions; and in the well-governing of opinions, consisteth the well-governing of men's actions, in order to their peace, and concord."[28]

Indeed, Hobbes suggests that we alienate to the sovereign some authority over our beliefs, or at least the conditions under which they are expressed and formed. Whether Hobbes had a consistent doctrine about the extent of the sovereign's authority over belief is, I think, unclear. On the one hand, he certainly insisted that belief itself could not be commanded: "A private man has always the liberty (because thought is free) to believe or not believe."[29] And, he insists, human governors can take no notice of the "inward thought and belief of men.... they are not voluntary, nor the effect of the laws, ... and consequently fall not under obligation."[30] Yet he also states that in creating the sovereign, subjects "submit their wills, every one to his will, *and* their judgments, to his judgment."[31] The idea of accepting and authorizing the judgment of the sovereign occurs repeatedly. It is important that for Hobbes that while the *will* concerns deliberation about action, *judgment* is "the last opinion in the search

[28] *Leviathan*, XVIII.9, p. 113.
[29] Ibid., XXXVII.13, p. 300.
[30] Ibid., XL.2, p. 318.
[31] Ibid., XVII.13, p. 109 (emphasis added).

of the truth."[32] Hobbes identifies public reason with reason of the sovereign, and so the sovereign provides a public determination of the truth, for example, of a claim that a miracle has occurred.[33] When disagreeing whether a miracle occurred, Hobbes tells us that "we are not every one to make our own *private reason* or conscience, but the public reason (that is the reason of God's supreme lieutenant), judge." Certainly Hobbes thinks that "when it comes to confession of that faith, *the private reason must submit to the public*."[34] Perhaps the best view is, that while we cannot be directly commanded to believe, (1) the sovereign has authority to proclaim public truths from which we are obligated not to dissent; (2) we can be obligated to publicly affirm these truths; and (3) the sovereign has authority to shape the environment in which opinions are formed.[35] Hobbes certainly endorses a sweeping authority of public reason over private judgment, in matters civil and religious.

Hobbes thus insists that *whatever* the sovereign proclaims is public reason *is* public reason. No limits can be placed on the sovereign's authority: "he is judge of what is necessary for peace; and judge of doctrines: he is sole legislator; and supreme judge of controversies."[36] Hobbes denies, then, that a sovereign's authority can effectively be limited within some range of reasonable disputes; we cannot say that for all disputes within some range *R*, the sovereign is definitive, but outside of this range he has no authority. For Hobbes, identifying any such range *R* will engender new disputes: some will employ their private reason to say that the sovereign has acted outside *R*, and so set up his own private judgment in opposition to the sovereign. This is precisely the problem Hobbes sought to avoid: each is insisting that "things should be determined by no other men's reason but their own." If you set yourself up in opposition to the sovereign, and insist that you shall be guided by your private reason, there will arise disputes, controversies, and at last war. Thus, any time that you dispute the sovereign's claim that he is acting within the range of legitimate disputes, this *ipso facto* is the type of dispute in which the clash of reason endangers society. Hobbes is convinced that such disputes are not only dangerous, but likely. Disagreement resulting from the use of private reason is endemic: there is no matter about which we can be confident that people will not disagree.

The Claims of Hobbesian Public Reason

Hobbes's analysis of the problem of social order given the diversity of private judgments leads him to four key claims:

[32] Ibid., VII.2, p. 35.

[33] Ibid, XXXVII.13, p. 299, and in note 21 to the Latin ed.

[34] Ibid., XXXVII.13, p. 300 (emphasis added). See also Lawrence B. Solum, "Constructing an Ideal of Public Reason," *San Diego Law Review* 30 (Fall 1993): 729–63 at pp. 754–55.

[35] I have greatly benefited from discussions with Shane Courtland on this matter.

[36] *Leviathan*, XX.3, p. 128.

1. *The ubiquity of disagreement*. Our private reasoning leads to disagreement in all matters. We disagree not only about religion, but about the demands of natural equity (the laws of nature), and the requirements of the civil law. There are really two claims here: (*i*) for any type of doctrine, principle, law, or rule, there will be divergent interpretations of private reason, and (*ii*) these disagreements are not bounded within some range on which all people agree.
2. *Non-insulation*. There is no way to insulate disputes in one area from other aspects of social and political life. Religious differences lead to political disputes. In contemporary terms, disputes about the "good" flow into disagreements about the "right" and law. There is also no effective way to erect boundaries between these different areas.
3. *Proceduralism*. Because of (1) and (2) no set of impartial substantive rules can effectively order social life. We must appeal to a judge or umpire to determine right reason.
4. *Unlimited procedural authority*. Given (1), (2), and (3), only if each submits his or her private judgment to the public judgment on all matters (on which the sovereign decides to issue a public judgment) can public order be secured.

Hobbes's analysis is distinctively modern, recognizing how the exercise of private judgment leads people to disagree. But given these four claims, his ultimate position is antimodern: diversity of private judgment in all matters is a potential threat to the social order, and so all must submit to the reasoning of the sovereign in all matters on which he speaks. For Hobbes the lesson of the English Civil War was the pervasive threat that private reason poses to social order. Those who seek to defend a free social order – one in which free thought and diversity of belief are central – will have to challenge some or all of Hobbes's four claims.

LOCKE'S BOUNDED THEORY OF PUBLIC REASON

Hobbesian Themes

In the canon Locke is Hobbes's protagonist. Whereas Hobbes provides a modern defense of absolutist claims, Locke is the voice of the emerging Whig view that citizens possess rights against the sovereign, and that Parliament expresses the will of the people. And for Jean Hampton, whereas Hobbes would make the sovereign our master, Locke depicts government as our agent – an agent that can be dismissed when it no longer performs its task.[37] This tendency to perceive Hobbes and Locke simply as protagonists obscures important, deep, agreements. Most fundamentally, Locke agrees that diversity of private

[37] Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), pp. 224ff.

judgment about religion is a fundamental social fact that must be reconciled with the demands of social order. Moreover, he accepts the crux of Hobbes's analysis of the causes of disputes about the laws of nature and how they are to be resolved. In a passage that recalls Hobbes's complaint that, while the laws of nature are clear to all, we nevertheless disagree because we are "blinded by self-love," Locke holds that "though the Law of Nature be plain and intelligible to all rational Creatures; yet men being biassed by their Interest, as well as ignorant for want of studying it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases."[38] Peace and justice, Locke concludes, can only be secured by "all private judgment of every particular Member being excluded, the community comes to be Umpire by settled standing Rules, indifferent, and the same to all Parties."[39] It is the task of government to serve as the Umpire. Once again, the solution is essentially procedural and, once again, the political order becomes the interpreter of the moral order regulating interpersonal actions.

As with Hobbes, the core problem of political philosophy is justifying the authority of the Umpire over the private judgment of citizens. Locke begins by supposing that "the *Natural Liberty* of Man is to be free from any superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule."[40] To be sure, he accepts that we are bound by the laws of nature, but in the state of nature each employs his own private judgment in deciding what these laws require. The clash of our private judgments leads us to see the need for a public determination of the law: justifying such authority is the central aim of the social contract.

Locke's Insulation Thesis

The canon is correct, of course, that Locke denounces the absolute authority of the sovereign as the voice of public reason. Locke's account of government as the voice of public reason rejects Hobbes's absolutism because he is convinced that the demarcation problem is tractable. Employing our private reason, we can come to agree on the range of government authority in which public reason displaces private reason. "The commonwealth seems to me," says Locke, "to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interest I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."[41] Locke is much more confident than is Hobbes that

[38] Locke, ed. Peter Laslett, *Second Treatise of Government* in *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), §124.

[39] Ibid., §87.

[40] Ibid., §22 (emphasis in original).

[41] Locke, "A Letter Concerning Toleration," in the *Works of John Locke in Nine Volumes*, 12th ed. (London: Rivington, 1824), vol. 5, p. 10.

public reason's determination of disputes about civil interests can be insulated from disputes about religious belief. A clear demarcation between religious and civil disputes is both possible and necessary. "I esteem it above all things," Locke continues, "necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth."[42] Thus Locke argues that private judgment should rule in religious matters. In controversies between churches about whose doctrine is true "both sides [are] equal; nor is there any judge … upon earth, by whose sentence it can be determined."[43] For the magistrate to seek to regulate such matters would be simply an exercise of private, not public, reason: "as the private judgment of any particular person, if erroneous, does not exempt him from the obligation of law, so the private judgment, as I may call it, of the magistrate, does not give him any new right of imposing laws upon his subjects, which neither was in the constitution of the government granted him, nor ever was in the power of the people to grant."[44]

Locke, then, challenges Hobbes's second claim there that is no way to insulate disputes in one area from other areas of social and political life. Thus the core idea of shared reasons liberal secularism: we set aside as "private" those matters on which we disagree, but as rational people we share many judgments about the public rules regulating social life that are independent of these "private disputes." Although the Fifth Monarchy Men were an extreme case, we should not forget the lesson such sects taught Hobbes: erecting a clear and distinct line between private disagreement and political agreement is impossible. Even Locke does not think that political agreement can always be insulated from private disputes. By the time he was writing the radical sects had receded, but the Roman Church is seen by Locke as posing the same danger: its religious doctrines have dangerous political implications. The Popes claimed that excommunicated monarchs were not owed obedience, and "they thereby arrogate unto themselves the power of deposing kings."[45] Locke's case for toleration thus does not extend to Roman Catholics: it only applies to religious views that do not have implications which challenge public reason's authority over core civil interests.[46] That is, *only if the private doctrine itself endorses the insulation thesis is it to be tolerated*. Note how close this is to the deeply contentious

[42] Ibid., pp. 9–10.
[43] Ibid., p. 19.
[44] Ibid., p. 43.
[45] Ibid., p. 46.
[46] We have to remember that the Glorious Revolution, which Locke was supporting, was to a large extent a Whig revolt against James II's toleration of Roman Catholics, and the prospect of continued Catholic rule. So excluding Catholics was not an exception to their political program, but central to it.

Rawlsian doctrine that "reasonable" political doctrines endorse the results of the freestanding argument. As long as churches remain voluntary organizations for saving the souls of their members – and it is not part of their doctrine that this requires them to act on their private judgment against the results of the "freestanding" core arguments about civil interests – churches are to be allowed to follow their private judgments.

We can distinguish two versions of the insulation thesis. On what might be called the bracketing interpretation, in identifying the principles of public reason we must bracket or ignore "private" aspects of doctrines such as religious convictions. Doctrines, we might say, can be divided into two parts: those that concern civil interests and those that concern private or religious matters.[47] Doctrines are admissible in a diverse liberal order if they acknowledge that only the former is relevant to evaluating the principles of public order.[48] Alternatively, an insulation thesis may seek to show that public principles are *robust* in relation to the disputes stemming from private judgment about religion or, more generally, conceptions of the good. Public principles are insulated from these disagreements, on this latter view, not because admissible doctrines ignore private views when evaluating public principles, but because once doctrines have been evaluated on the basis of civil interests, the results will not be overturned by considerations of other aspects of one's overall doctrine. This is the version of the insulation thesis advanced by Rawls's doctrine of overlapping consensus discussed above, and perhaps also by Locke.[49] But as we see with Locke's doctrine concerning the Roman Catholic Church, and Rawls's remarks concerning Fundamentalists,[50] in the end doctrines that insist that their private reason is determinative in the public sphere are not part of this "reasonable overlapping consensus" on the insulated public principles.

Bounded Disagreement

The insulation thesis is not, in any case, sufficient to turn back Hobbes's defense of the absolute authority of the sovereign's reason. Even if we can insulate the rules of the social order from private disputes, we must come to grips with Hobbes's first claim: viz., that our private reasoning leads to disagreement in all matters – we not only disagree about religion, but about the demands of natural law and the requirements of the civil law. The effect of self-bias in

[47] I consider how the distinction between these two sets informs Rawls's theory in "A Tale of Two Sets: Public Reason in Equilibrium," *Public Affairs Quarterly* 25 (October 2011): 261–80.

[48] Rawls's claim that only "reasonable" doctrines are to be tolerated may be interpreted as this type of view. However, Rawls has reservations about this version of the insulation thesis.

[49] Recall that Locke spends much of his *Letter on Toleration* trying to show that Protestant doctrines support the insulation thesis.

[50] Rawls, "The Idea of Public Reason Revisited" in his *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 173.

private judgment, Hobbes insisted, is pervasive. Locke partly follows Hobbes here. Locke definitely does *not* say that, while we disagree about religious matters, we entirely agree in our interpretations of the law of nature. Dispute arises in the state of nature just because, biased by self-interest, we disagree in our interpretation and application of natural law. Thus Locke develops Hobbes's insight that the core instability of life without government is not that fools are tempted to cheat on rules, but that those who are devoted to the law will nevertheless disagree and so come to blows. "To avoid this State of War (wherein there is no appeal but to Heaven, *and wherein every the least difference is apt to end*, *where there is no Authority to decide between the Contenders*) is one great *reason of Mens putting themselves into Society*, and quitting the State of Nature: for where there is an Authority, a Power on Earth, from which relief can be had by *appeal*, there the continuance of the State of War is excluded, and the controversy is decided by that Power."[51]

Locke avoids Hobbes's absolutism by weakening the *ubiquity of disagreement* claim. Although rational people disagree about the laws of nature as well as religion, Locke holds that the tendency to disagreement about the laws of nature is *bounded*. Because individuals in the state of nature disagree about the interpretation of the law of nature, they consent to an authority to umpire their disputes. However, Locke's theory of revolution supposes that, while the range of disagreement among rational persons is wide, it is not unlimited. Citizens will converge in their judgments that the government is a tyranny when a political authority systematically renders decisions that are outside the range of interpretations of the laws of nature held by most citizens. Of course in any given case someone might think that the government has exceeded its justified authority by giving decisions that she is convinced cannot not plausibly be construed as a good-faith attempt to umpire disputes about the laws of nature. In such cases, though, the "Body of the People do not think themselves concerned in it, as for a raving mad Man, or heady Male-content, to overturn a well-settled State, the People being as little apt to follow the one, as the other."[52] However, if the majority becomes convinced "in their consciences, that their laws, and with them their estates, liberties, and lives are in danger, and perhaps their religion too," "if a long train of Abuses, Prevarications and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel what they lie under, and see whither they are going; 'tis not to be wonder'd, that they should then rouze themselves, and endeavour to put the rule into such hands which may secure to them the ends for which Government was at first erected."[53] In these cases the people "*universally have a perswasion*, *grounded upon manifest evidence*, that designs are carrying on against their Liberties, and the general course and

[51] Locke, *Second Treatise*, §21 (first emphasis added; others original).
[52] Ibid., §208.
[53] Ibid., §§209, 225.

tendency of things cannot but give them strong suspicions of the evil intention of their Governors."[54]

For Locke there is some range of reasonable interpretative dispute that is defined by the convergence of judgments of the great body of people about the plausible interpretations of natural law. So long as the government remains within this range it will be seen by the great majority of citizens as performing its proper role of umpiring disputes generated by disagreements in private judgments about the law of nature. When in the view of the citizens the decisions of government are systematically outside of the range of reasonable judgments – it makes decisions that our private judgments converge upon in deeming unreasonable – the people will conclude that it violates their conscience and is tyrannical.

The Lockean doctrine of bounded dispute is, I believe, the core of an adequate liberal account of public reason, and the best liberal reply to Hobbes. Contemporary liberals – including political liberals such as Rawls – put far too much weight on the insulation thesis, and not nearly enough effort into analyzing the implications of living according to a common rule under conditions of bounded disagreement. Let us see how that is so.

LIVING WITH BOUNDED DISAGREEMENT

An Insulated Core Based on Shared Reasons

To better see the problem of the shared reasons/insulation thesis, let us grant its main suppositions. Suppose that we have identified some set of reasons that we all share, and the reasons are insulated from disagreements based on private judgment outside the core. Now the question is this: if we grant these strong assumptions, do we achieve the Holy Grail of public reason liberalism – a shared conception of justice? Not unless we also reject Hobbes's claim of the ubiquity of conflict, viz., for any type of doctrine, principle, law, or rule, there will be divergent interpretations through the use of private reason. But it is, I think, implausible to deny this aspect of Hobbes's challenge. We *do* disagree about justice and the right, as we do about the nature of, and existence of, God. And we have seen, Locke agrees with Hobbes: although the laws of nature should be clear, given our biases and ignorance we disagree about them. Rawls too came to concur, acknowledging that reasonable persons will not agree on a "particular liberal conception of justice down to the last details of the principles defining its content."[55] Instead, Rawls insists that reasonable citizens will share a general idea of a liberal view of justice. "By this I mean three things: first, it specifies certain basic rights, liberties, and opportunities (of the

[54] Ibid., §230 (emphasis added).
[55] Rawls, *Political Liberalism*, p. 226.

kind familiar from constitutional democratic regimes); second, it assigns a special priority to these rights, liberties and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, it affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities."[56] Because, Rawls says, "each of these elements can be seen in different ways, so there are many liberalisms."[57] Consequently, he tells us that "the view I have called 'justice as fairness' is but one example of a liberal political conception; its specific content is not definitive of such a view."[58]

The problem is that, even if we share a set of shared reasons, we nevertheless will disagree on the ordering of these reasons or, to be more precise, the relative weights we give to these reasons in any specific instance. To agree on a shared set of reasons that are relevant to a justificatory problem will lead to consensus on a solution to the problem only under very special circumstances. If, say, we are considering three conceptions of justice $\{j_1, j_2, j_3\}$, on the grounds of three relevant reasons $\{r_1, r_2, r_3\}$, and r_1 is a reason for j_1, and r_2 and r_3 are reasons against j_2 and j_3, then all will concur on j_1. But, as I said, this is a rather special case. If we suppose, instead, that r_1 is a reason for j_1, r_2 is a reason for j_2, and r_3 is a reason for j_3, and if the relevant deliberators give different weight to the reasons in this context, then a shared set of reasons will still generate a number of different views about the best conception of justice. Without (1) a shared set of weights and (2) a common information set such that everyone agrees what reasons map on to what conception (we might agree on a common set of weights but disagree on the way these relate to the conceptions of justice on offer), a shared set of reasons may do little to induce agreement on a common standard of justice. In the end, Hobbes was right about the ubiquity of disagreement, even in the shared core.

Modeling Bounded Disagreement within the Insulated Core

So even if we accept the shared reasons requirement *and* the insulation thesis, we must accept that at least one aspect of Hobbes's challenge is unmet: there is no matter about which the use of private reason does not lead to disagreement. The best the shared reasons/insulation thesis can hope for is (1) a core of shared reasons that is (2) insulated from our wider disagreements outside the core but, (3) even within the core we disagree on the most reasonable liberal theory of justice. To make ideas more precise, assume that the deliberators (reasoning only on the shared core) have agreed on a set of very abstract or vague principles, but need to further interpret them if they are to have anything like a shared conception of justice. We can model this in terms

[56] Ibid., p. 223.
[57] Ibid.
[58] Ibid., p. 225.

of each deliberator proposing what she sees as the most reasonable conception of justice; if each deliberator (1 through n) does this, we will have a set of conceptions of justice $\{j_1 \ldots j_n\}$. Now suppose further that each deliberator assigns a score to each conception between 1 and –1. A score of 0, let us say, means that some proposal j_i is one that, given her understanding of the relevant shared reasons, she has no reason to endorse. Surely this can occur. There might be an abstract principle which can be interpreted in some way that, in the opinion of some person, she simply has no reason to endorse. Suppose, for example, as has sometimes been advocated, an interpretation of freedom of religion is advanced that does not include a freedom not to be religious. Some deliberator may think this is not really an interpretation of freedom of religion at all, and so she has no reason to endorse such an interpretation. We can go further, and conceive of interpretations that some have strong reason to oppose, such as an interpretation of freedom of religion that allows each to freely practice the religion of her parents, but prohibits the conversion from some religions to others.[59] A deliberator may well give a negative score to such proposals. On the other hand, there may be many interpretations that a deliberator has reason to endorse (she scores these between 1, which she has most reason to endorse, and 0).

We can define a deliberator's *eligible set* as all proposals she scores as greater than 0; *the socially eligible set* is all proposals that everyone ranks as greater than 0. For all such proposals, each deliberator has some reason to endorse them. As Rawls would say, everyone judges each member of the socially eligible set as a reasonable, if not the most reasonable, conception (each deliberator scores as 1 the proposal she sees as "most reasonable"). Now we face the possibility that there are no interpretations left in the socially eligible set; it might occur that for every proposal at least one person scores it as 0 or below. Surely this could, in principle, happen. Consider an abstract principle that two potential sovereigns might agree on: "Let one of us command and the other obey!" We can easily imagine no specific interpretation of *that* principle will be acceptable to both. Let us, however, concede to Rawls and others in the liberal tradition that there is a nonempty set of socially eligible interpretations. This is just to reject the second part of Hobbes's claim about the ubiquity of disagreement – that when we do have a dispute, it is not bounded within some range on which all can agree (see "The Claims of Hobbesian Public Reason", 1.ii). A plausible public reason liberalism thus *must* follow Locke in accepting the first part of Hobbes's ubiquity claim while rejecting the second: we disagree about everything but, at least on some matters, this disagreement is bounded. We disagree, but only within some range – and we agree that some proposals are outside the range.

[59] As is, roughly, the case in Malaysia, which except in unusual cases prohibits conversion out of Islam.

Given this, a plausible public reason liberalism must hold that the best we can hope for is a socially eligible set with more than one element (the set is a nonempty set because disagreement is bounded, it has more than one member because disagreement is ubiquitous). Thus all plausible public reason liberalisms must devise some way to select from the socially eligible set. Public reason does not tell us how to choose, but it does tell us that any member of the set is, from the public point of view, better than conceptions outside the set.[60] Rawls, unfortunately, gives us little idea as to how this selection may occur. A Lockean will hold that we can appoint a constitutional umpire, who is constrained to provide determinations within the socially eligible set. I have argued that the Lockean solution can be complemented by a social process that yields a moral equilibrium on one member of the set.[61] However, for present purposes the important point is not specifically how a liberal theory of public reason selects from the eligible set, but that it must have some account of how to do so even in the insulated shared core. Some account of how we sort through bounded disagreement and select from the eligible set is necessary for any plausible liberal theory of public reason, given Hobbes's and Locke's insight of the ubiquity of disagreement. Neither appeal to shared reasons, nor to the insulation thesis, can avoid this.

Dropping Insulation

Thus far I have been assuming the insulation thesis: the shared reasons are insulated from disagreements of private reason outside the core. But there are disagreements of private reason (the way a person weights the shared reasons) within the insulated core. So long as (1) there is a socially eligible set and (2) there is some way to select from it that leads to a publicly justified outcome, the disagreement in private reason can be overcome. The question is: Given this, do we need the controversial insulation thesis? Suppose we drop it; that is, suppose that people's interpretations of the shared core are not only affected by their private reasoning about the shared values, but can be affected by their reasoning about matters outside the core, such as religious beliefs. We must ask: what will this change? And we now see that the only relevant factor is the impact on the socially eligible set. There is no new choice problem or indeterminacy introduced so long as there remains a socially eligible set. The important question for public reason liberalism – the one on which it should be concentrating – now becomes clear: Does a socially eligible set remain once

[60] Roughly, we can say that public reasons give us a maximal set but not an optimal choice. See Amartya Sen, "Maximization and the Act of Choice," in his *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002), pp. 159–205.

[61] See my "The Demands of Impartiality and the Evolution of Morality," in eds. Brian Feltham and John Cottingham, *Partiality and Impartiality* (Oxford: Oxford University Press, 2010), chapter 2.

we drop the insulation thesis? Or, to put the question in more traditional terms, are our wider disagreements about conceptions of the good, religion, and so on, sufficiently bounded so that, once we bring them into political justification, there remain some political arrangements that all have reason to endorse? If the insulation thesis is not needed to maintain a nonempty eligible set, surely such a controversial requirement should be dropped.

Abandoning the insulation requirement could, to be sure, reduce the socially eligible set. This is the worry that gnaws at public reason liberals: the socially eligible set will shrink – perhaps to nothing – once these "private" reasons are deemed relevant to the justification of conceptions of justice. When all the values are tallied up, many liberals fear that some free and equal moral persons simply have insufficient reason to accept any common conception of how we are to live together based on principles of freedom and mutual respect. Now we cannot say that this fear *must* be unfounded: certainly in the 16th and 17th centuries a principle of religious toleration was outside the eligible set of many (the Dissenters turned down James II's offer of toleration as it came at too high a price – the toleration of Catholics!). Surely the development of value and belief systems that recognized that rules of freedom and respect were worthy of endorsement was an historical achievement, and we should not suppose that all societies possess it, or that we could not lose it.[62] On the other hand, it is surprising that public reason liberals seem (at least in their own private meditations) so convinced that the socially eligible set will shrink away if it is not insulated from wider disputes. After all, one would think that, being convinced by the liberal project, they think that, really, all free and equal moral persons do have sufficient reasons to endorse some regime of justice and freedom for all.

Suppose, though, that the insulation thesis is, after all, required to maintain a nonempty socially eligible set. We now see how ineffectual it is in securing public justification. It makes a difference only when, once we consider the full range of reasons, the socially eligible set shrinks to nothing – all shared conceptions in the socially eligible set are, in Rawls's terms, "overridden by citizens' comprehensive doctrines once all values are tallied up."[63] But then, as Rawls himself noted, the core fails to be fully justified. Some citizens are subjected to conceptions of justice that, all things considered, they have reason to reject. The conclusion based on shared reasons cannot be insulated from these "private judgments" that may well be at the very core of a person's view of the world. The advocate of the shared reasons/insulation thesis says: "If you did not know most of your values and concerns, you would accept my conclusions." It is reasonable to reply: "But what conclusions will I accept when I

[62] I have considered the sorts of value systems that are prerequisites of a mutually acceptable scheme of rights in "Recognized Rights as Devices of Public Reason," *Philosophical Perspectives: Ethics* (2009): 112–36.

[63] Rawls, *Political Liberalism*, p. 386.

know what is important to me?" One cannot decide on what one thinks about the shared core, until one knows what has been excluded from consideration. That is why the simple bracketing strategy begs all the real problems of public justification.

Steven Macedo tells us that his objection to nonshared reasons into public justification is that "some of us believe that it is wrong to seek to shape basic liberties on the basis of religious or metaphysical claims."[64] But we must remember there is no unequivocal shape to our basic liberties that results from the perspective of shared reason: there are many "reasonable" conceptions within the socially eligible set. Different selection procedures will yield different schemes of liberty. Thus the scheme of liberties with which we end up is inevitably path dependent: it depends on the particular selection mechanisms we employ to choose from a certain socially eligible set. Given this, why would it be wrong for the religious beliefs of citizens to shrink (or, we must allow, expand) the socially eligible set, as long as we eventually manage to settle on some conception that all see as worthy of endorsement, given the reasons each takes as important? The suspicion arises that public reason liberals such as Macedo are devoted to an extensive and controversial political program, and they are rightly convinced that it cannot be endorsed by the reasons of all (there is no socially eligible set in favor of such a program), and so they seek to restrict public reason to a smaller set of reasons that support their program.

Dropping the Necessity of a Core

If the insulation thesis is not necessary, neither is, in the end, a core of shared reasons. Abstracting to a core of shared reasons may be important in some contexts: it may help us see that despite our disagreements we also agree on a lot, and that these shared reasons matter a great deal to us. It is important to appreciate what we have in common, as well as that about which we disagree. But in the end, even without a shared core, we may come to converge on common principles for our different reasons. The socially eligible set may well *expand* when we allow a diversity of reasons to enter into public justification. We each may have quite different reasons for, say, supporting environmental norms: some may appeal to human interests, others to our convictions about stewardship of the planet, others to ecological values, and yet others to the sanctity of property rights (environmental harms are, after all, almost always negative externalities). If we restrict ourselves to a common core of shared reasons, we might find there is no socially eligible set at all. Suppose we reason simply on the basis of human interests, as the relevant reasons we all share. Free and equal persons weigh human interests differently, and some may be convinced that the main human interests are in economic development, and so

[64] Macedo, "In Defense of Liberal Public Reason," p. 35

reject environmental norms that might hinder it. But if we add other diverse considerations, we may create a significant eligible set of environmental norms. Again, this cannot be guaranteed. Once again, the task of the public reason project is to seek to uncover that which we all can endorse. I merely stress that we should not see every disagreement as reducing the socially eligible set, for we can converge on common norms from different directions.

CONCLUSION

If we are to treat all as free and equal, the political order that we live under must be endorsed by the reason of all. That, as I see it, is the heart of public reason liberalism. To insist that this means our order must be endorsed by, and only by, the shared reasons of all is an error. Given the ubiquity of disagreement, even if we restrict ourselves to shared reasons, we still disagree. Even the proponent of the shared reasons view must face the fact of rational disagreement, and devise ways to cope with it. So long as Hobbes was wrong – so long as our disagreement is bounded and there is a socially eligible set – we can cope with our differences and come to converge on a common conception of justice, and a common moral and political order. The justification of this conception cannot be insulated from our wider beliefs and disputes; what a person has sufficient reason to endorse turns on her total set of relevant reasons, not just a subset. As Hobbes effectively stressed, we cannot erect a barrier between the political and the religious, for religious doctrines often have political implications. But this barrier is not necessary if, again, our differences are bounded – if once citizens consider the full range of their values and beliefs there is still a socially eligible set of conceptions of a just and free political order. Our worry is that Hobbes was right here too: that not only is disagreement ubiquitous, but so deep that there is no substantive conception that all have reason to endorse. It is this challenge to which public reason liberalism must rise. Seeking to do so by insulating the shared political from our deep concerns is both implausible and ineffective. It is not to answer Hobbes's challenge, but to ignore it.

8

"Thrown amongst Many"

Hobbes on Taxation and Fiscal Policy

Neil McArthur

Thomas Hobbes does not occupy a position within the canon of economic thought. Surveys of economic thought in the early modern period normally ignore him, and discussions of his philosophy rarely pause to consider economic questions. "There is no place for an economy in his [Hobbes's] politics in any important sense," says Istvan Hont in his important book on early modern economic thought. "It is practically pure politics."[1] This is certainly true to the extent that we find in Hobbes no extended discussion of, or original thoughts concerning, topics such as money, pricing, or the behaviour of private firms. He is concerned above all with the nature of the state, its actions and its relations with its subjects. However, he thinks that economic activity plays a crucial role in determining people's well-being – and thus, ultimately, social stability – and he insists that the state must pay attention to, and be active in regulating, people's behavior in the market. He also thinks that the government must be willing to expend resources in order to ensure the welfare of the people. His views on the relationship between the state and the economy deserve closer examination than they normally receive.

HOBBES AND MODERN ECONOMICS

There is some injustice in the failure of economists fully to recognize the influence of Hobbes on their discipline. As Thomas Ulen writes in a standard reference work on law and economics: "Rational choice theory is at the heart of modern economic theory."[2] And Hobbes is at the heart of rational choice theory. It was Hobbes who formulated, within the context of a rigorous

[1] Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, MA: Harvard University Press, 2005), p. 2.

[2] T. S. Ulen, "Rational Choice Theory in Law & Economics," in eds. Boudewijn Bouckaert and Gerritt De Geest, *Encyclopedia of Law and Economics*, 5 vols.(Cheltenham, UK: Edward Elgar, 2000), vol. 1, pp. 790–818 at 791.

philosophical system, the basic premises underlying rational-choice analyses of human behavior: that under normal circumstances, humans seek to maximize their ability to satisfy their own interests, and they use a process of rational deliberation in order to do so. Rational choice theorists assume certain further Hobbesian premises, as Brian Skyrms notes: "People have conflicting desires and limited altruism. They are roughly equal in their mental and physical powers. Elements of competition intrude."[3] Also, rational choice theory holds that, if we accept these premises about human nature, people's behavior in society can therefore be modeled through the use of various sorts of games and artificial situations. Such models bear a notable similarity to Hobbes's use of the "state of nature." He employs this device to show how people, under artificially constrained circumstances, can find a basis for cooperation that serves the interests of all; he then concludes that the expected behavior of rational actors within the confines of this model both predicts certain kinds of behavior, and legitimates certain kinds of arrangements, in the actual world.

Readers may find more detailed discussions of Hobbes from the perspective of rational choice theory in the classic studies by David Gauthier, Gregory Kavka, and Jean Hampton.[4] I want to note here that Hobbes's potential contribution to modern economics goes further than providing a rigorous and elegant statement of certain crucial game-theoretic axioms. He also anticipates certain arguments that have been put forward by proponents of public choice theory, a more recent development in economics that further develops rational choice techniques. Public choice theory attempts to apply the insights of economics and rational choice theory specifically to the political sphere. Given Hobbes's preoccupation with political questions, it should not surprise us that he is potentially valuable in this context. More specifically, Hobbes speaks directly to two areas that public choice theorists take to be of central concern: first of all the deliberations of citizens in choosing their governors, and second the behavior of politicians and public officials while in office.

To see what Hobbes has to say on these matters, we may examine his use of a story from the Old Testament: 1 Samuel 8. In this passage, the Israelites call on the aged Samuel, who has retired from the throne, to give them a king. Samuel, however, believes that he has already provided them with sovereign authority: he has appointed his sons as his successors. However, they have proven corrupt and iniquitous as rulers, provoking the people's appeal to him to provide a

[3] Brian Skyrms, "Correlated Equilibria and the Dynamics of Rational Deliberation," *Erkenntnis* 31 (1989): 347–64 at 354.

[4] David Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969); Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Pirnceton, NJ: Princeton University Press, 1986); Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1988). For a recent survey of the relevant literature, see Glen Newey, *Routledge Philosophy Guidebook to Hobbes and Leviathan* (New York: Routledge, 1988), 67ff.

new, undivided sovereignty. Samuel takes this appeal as a challenge to his own authority, since it entails a rejection of his designated heirs. But God consoles him, telling him to inform the Israelites that they shall have their king, but that they should be under no illusions about what this will mean for them. They will not, merely by changing the sovereign power in their state, achieve the perfect justice they seek. Hobbes conveys God's warning, as sent through Samuel:

> Concerning the Right of Kings, God Himself, by the mouth of *Samuel*, saith, *This shall be the Right of the King you will have to reigne over you. He shall take your sons, and set them to drive his Chariots, and to be his horsemen, and to run before his chariots, and gather in his harvest; and to make his engines of War, and Instruments of his chariots; and shall take your daughters to make perfumes, to be his Cookes, and Bakers. He shall take your fields, your vineyards, and your olive-yards, and give them to his servants. He shall take the tyth of your corne and wine, and give it to the men of his chamber, and to his other servants. He shall take your man-servants, and your maidservants, and the choice of your youth, and employ them in his businesse. He shall take the tyth of your flocks; and you shall be his servants.* [I Samuel, 8. 11–17] This is absolute power, and summed up in the last words, *you shall be his servants*. Againe, when the people heard what power their King was to have, yet they consented thereto, and say thus, *We will be as all other nations, and our King shall judge our causes, and goe before us, to conduct our wars*. [Ibid., 8. 19, 20] Here is confirmed the Right that Soveraigns have, both to the *Militia* and to all *Judicature*; in which is conteined as absolute power, as one man can possibly transfer to another.[5]

Hobbes seems to take this parable to illustrate why the rule of a single authority is preferable to divided sovereignty, a recurring bugbear of his. However, there is something else going on as well. To a public choice theorist, as Geoffrey Brennan points out, Hobbes's use of Samuel as a parable of kingship provides an impressively clear-sighted view of the relationship between the governors and the governed.[6] Hobbes is telling us here that, to use modern language, the choice of rulers is made under constraint, and the result is bound to be less than ideal. The choice remains necessary, and the result is legitimate for all its imperfections. It is important for the story that, having heard God's stern caveat, "yet [the Israelites] consented thereto."

Hobbes further informs us through the parable that the inevitable imperfection of the result comes from the fact that the rulers who must be chosen are not gods or saints but rather imperfect creatures like ourselves, subject to the same egoistical motives and the same failures of calculation in trying to determine the best outcome. We need not impute either to Hobbes or to public choice theory a pervasive cynicism about governors ever acting in the best interest of their subjects – Hobbes thinks they may often do so, and (as we shall see) he has advice for those who wish to do so – to accept the central insights on

[5] *Leviathan*, XX.20, pp. 143; italics in original. All references to *Leviathan* are to Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991).

[6] Geoffrey Brennan, "Hobbes's Samuel," *Public Choice* 141 (2009): 5–12.

offer here: that these governors often do not act in this interest, and that their failure to do so does not diminish the need for their existence, if our collective security is to be maintained.

While Hobbes insists we must accept this central, and perhaps regrettable, fact about political society – that people must establish a supreme authority, and that they must be realistic about the potential unwillingness of such an authority to act in an optimally just and equitable fashion – this does not force us to conclude that optimal state behaviour cannot be specified. It only tells us that the sovereign's right to rule does not depend on such optimal behavior. It remains open to us to consider how a well-intentioned sovereign should behave, and to urge on existing sovereigns a duty to follow these precepts. Hobbes makes this point in *De Cive*, when he says, after laying out his basic theory: "We have as yet said nothing of the *duties* of rulers, and how they ought to behave themselves towards their subjects; We must then distinguish between the *right*, and the *exercise* of supreme authority, for they can be divided."[7] And as I now argue, he thinks that sovereigns have specific duties when it comes to the exercise of their power in the economic and fiscal spheres.

THE MARKET AND THE ROLE OF GOVERNMENT

Hobbes's philosophy provides the basis for a distinctly liberal vision of the role of government: a liberal vision, that is, in the specific sense that he thinks government should provide the security necessary for people to realize their own personal conceptions of well-being through the goods and services obtained in the market. He says that the sovereign "can confer no more to their [i.e. the people's] civil happiness, than that being preserved from foreign and civil wars, they may quietly enjoy that wealth which they have purchased by their own industry."[8] Hobbes is of course regarded as famously *il*liberal when it comes to the structure of government itself, supposedly favoring authoritarian rulers over more democratic structures. It is certainly true that he thinks strong monarchs provide an optimal means of guaranteeing a stable social order, though he does not rule out that other forms of government may also accomplish this aim. But whatever the strength of Hobbes's authoritarian sympathies, we must bear in mind that any form of government is for him instrumental to the state's ultimate ends, central among which is protecting people's private liberty within the context of a free market.

If Hobbes's view of government's role is, in this specific sense, a liberal one, we should not assume that it is also a minimalist one. That is, he does not think government must, within the sphere of economics, do *no more than* provide the security necessary for people's private market activity. He certainly

[7] *De Cive*, XIII.1; *The English Works of Thomas Hobbes*, ed. William Molesworth, 11 vols. (London: Bohn, 1839–45), II, p. 165. Italics in original.

[8] *De Cive*, XIII.6; *English Works*, II, p. 169.

accepts certain basic principles that we have come to see as fundamental to any open free-market system. For instance, he insists that the price of goods and services must be set by the negotiations of buyer and seller rather than dictated by the state, in the name of a "just price" or for any other reason. "The value of all things contracted for," he says, "is measured by the Appetite of the Contractors: and therefore the just value is, that which they be contented to give."[9] And he generally takes a dim view of monopolies. He is willing to countenance them in foreign trade, saying that they may be "very profitable for a Common-wealth" since they allow it to maximise the price extracted from foreigners. But he insists that "at home" every man must be "at liberty … to buy, and sell at what price he could."[10] Besides accepting such free-market axioms, however, he thinks that because a flourishing economy is a key ingredient to a successful commonwealth, the state may legitimately act to promote this flourishing where it can do so effectively. Outlining the four kinds of benefits a sovereign can provide to subjects, Hobbes lists as the third of these: "That they [the subjects] be enriched as much as may consist with publique security."[11] The sovereign has a duty, in other words, to maximize the output of the market where this is possible and consistent with social stability. He goes on:

> Since therefore there are three things only, the fruits of the earth and water, labour, and thrift, which are expedient for the enriching of subjects, the duty of commanders in chief shall be conversant only about those three. [I] For the first those laws will be useful, which countenance the arts that improve the increase of the earth and water, such as are *husbandry* and *fishing*. [II] For the second all laws against idleness, and such as quicken industry, are profitable; the *art of navigation* (by help whereof the commodities of the whole world, bought almost by labour only, are brought into one city) and the *mechanics*, (under which I comprehend all the arts of the most excellent workmen) and the *mathematical sciences*, the fountains of navigatory and mechanic employments, are held in due esteem and honour. [III] For the third those laws are useful, whereby all inordinate expense, as well in meats as in clothes, and universally in all things which are consumed with usage, is forbidden. Now because such laws are beneficial to the ends above specified, it belongs also to the office of supreme magistrates to establish them.[12]

I have divided this passage into three sections for the purposes of a more detailed analysis.

[I] seems to give the state a potentially significant role in the society's economic life, yet it is frustratingly laconic and obscure. Hobbes recommends laws "which countenance the arts that improve the increase of the earth, and water, such as are *husbandry*, and *fishing*." Yet he gives no further guidance on how the state should "countenance" specific arts. In other contexts, he uses the term

[9] *Leviathan*, I.15, p. 105.
[10] Ibid., II.22, p. 161.
[11] *De Cive*, XIII.6; *English Works*, II, p. 169.
[12] Ibid., XIII.14; *English Works*, II, pp. 177–8. Italics in the original.

"countenance" to mean simply tolerate. But it is hard to imagine him expecting very many states to forbid or impede such arts by law, given their obvious necessity. We might read slightly more into this passage, and argue that Hobbes wants the state to take active measures to foster the expansion of such industries. He in fact makes this explicit in *Leviathan*, where he says: "there ought to be such Lawes, as may encourage all manner of Arts; as Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour."[13] Unfortunately Hobbes gives no indication of how such policies might be formulated. One possible policy, which some of his contemporaries advocated, would be to offer incentives to claim waste lands for agriculture through clearance, drainage, and other measures. While Hobbes makes no concrete proposals, a policymaker who wishes to take action to encourage these "useful arts" will find in Hobbes legitimation of, if not guidance for, his or her actions.

[II] gives us grounds for more concrete proposals, although not necessarily ones that a modern reader will find congenial. Laws against idleness are not generally regarded by modern economists as an effective means of increasing overall productivity, given that few societies can expect their private sector to provide jobs for all able-bodied workers. We might, again reading slightly more into the passage, find in Hobbes support for "workfare" schemes, whereby the public sector endeavors to employ all those who cannot otherwise find work. During Hobbes's time, experiments in so-called "indoor relief," which forced the idle to work in institutions created to employ them, had begun, and these were mandated in 1834. They invariably proved cruel and inefficient, and workfare is now generally out of favor in Western democracies – many people see them as uncomfortably close to slavery or indentured servitude – though experiments continue to be made in various jurisdictions to replace welfare with various kinds of mandatory workfare.

Whatever he would have made of such schemes, Hobbes has an additional measure to propose. "The multitude of poor, and yet strong people still encreasing," he says,

> …they are to be transplanted into Countries not sufficiently inhabited: where nevertheless, they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground, to snatch what they find; but to court each little Plot with art and labour, to give them their sustenance in due season.[14]

This solution is humane for its era in its explicit prohibition on "extermination" of the natives. From a purely economic perspective, Hobbes may be credited with realizing that settled agriculture is often a more productive use of land than reserving it for migrant, hunter-gatherer lifestyles – though the history of North America amply demonstrates that a culture's shift away from such

[13] *Leviathan*, III.30, p. 239.
[14] Ibid., II.30, p. 239.

lifestyles is a delicate one, which is not best accomplished through force at the hands of new migrants. His proposition depends on an optimistic view of immigrants' ability to integrate themselves with the original inhabitants of the various invaded territories, as well as of these inhabitants' willingness to "inhabit closer together." It also obviously depends on sufficient available territory. Hobbes considers the problem of what to do when the stock of such territory is exhausted, though we might question the wisdom of his solution. "When all the world is overcharged with Inhabitants," he says, "then the last remedy of all is Warre; which provideth for every man, by Victory, or Death."[15] If this is in fact the only alternative, keeping unemployed workers at home and subjecting them to a system of workfare may, for all its demonstrable faults, actually be preferable to such an all-out global conflagration.

Hobbes's suggestion that mechanical arts and mathematics be held in "due esteem and honour" is obscure but potentially more fruitful. We might find in it grounds for supporting state recognition and reward for various kinds of research and innovation.

[III] Hobbes here endorses sumptuary laws and other such restrictions on consumption, an endorsement that is apparently at odds with his general aim of defending people's private pursuit of material satisfaction through the market. There are two ways of interpreting this endorsement. We could see it as a sign that Hobbes adheres to the condemnation of "luxury" that was conventional during his era and that was often used to justify regulations on consumption. Christian writers attacked luxury as immoral and incompatible with Christian virtue, while civic republicans thought that it made citizens self-interested and effeminate, and thus unwilling to sacrifice themselves to the state. It would be surprising if Hobbes adopted either of these positions, since in other contexts he consistently criticizes both Christian moralists and civic republicans. He must have something different in mind here.

We can infer what is behind Hobbes's views on luxurious consumption based on his comments in other contexts. He thinks that people who are tempted to consume beyond their means – and given the generally hedonistic bent of human nature, many will be tempted to do so absent any regulation preventing them – risk becoming a source for social unrest. Discussing taxation, he says that "grief of mind arising from *want* [does] dispose the subjects to sedition, which want, although derived from their own luxury, and sloth, yet they impute it to those who govern the Realm, as though they were drained and oppressed by public Pensions."[16] He is specifically arguing here that taxes must be spread equally (a view that I examine later). But the same reasoning can be applied to the question of sumptuary laws: people will bear the necessary burden of taxes only if they possess sufficient discretionary income to be able to do so.

[15] Ibid., II.30, p. 239.
[16] *De Cive*, XIII.10; *English Works*, II, p. 173.

If they squander that income rather than saving it, they will come to resent the burden that taxes impose. It is therefore in the government's interest to restrict unnecessary consumption by the people and enforce an adequate level of savings.

STATE WELFARE

Hobbes's endorsement of sumptuary laws serves to remind us how we should interpret what I called his basic liberal conviction, that people should be left to pursue their own private ends. The ability to pursue these ends is not held by the people as any sort of absolute right; rather it is at all times subject to the demands of "publique security," and by extension to the needs of public welfare considered more broadly – since he thinks the latter contributes to the former. Hobbes makes this explicit in his *Elements of Law*, discussing "the causes of rebellion." He lists various seditious doctrines that can provoke people into rebellion, among them is the view "that subjects have their *meum*, *tuum*, and *suum*, in property, not only by virtue of the sovereign power over them all, distinct from one another, but also against the sovereign himself, by which they would pretend to contribute nothing to the public, but what they please."[17] This view, that private property is held by natural right, was a commonplace among medieval scholastics. The 13th-century writer Guido of Suzzara goes so far as to say: "the officials of the prince can be resisted by the people if they attempt to confiscate my property."[18] Hobbes says that this view is "confuted" by his proof of "the absoluteness of the sovereignty … and ariseth from this: that they understand not ordinarily, that before the institution of sovereign power *meum* and *tuum* implied no propriety, but a community, where every man had right to every thing, and was in state of war with every man."[19]

It is the aim of this volume to highlight aspects of Hobbes's philosophy that speak to our contemporary concerns. As we have seen, many of his economic doctrines would not be accepted by most 21st-century philosophers. However, in working through the implications of his rejection of an absolute right to property, we can see one area in which his insights are of lasting interest: the justification of the welfare state. Hobbes is sympathetic to the idea of using state action to alleviate the suffering of the most vulnerable. He says:

> Whereas many men, by accident unevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons, but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes of the

[17] *Elements of Law*, VIII.8; *English Works*, IV, p. 207.

[18] See Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), pp. 151–4, quote at 153; see also pp. 15–16.

[19] *Elements of Law*, XXVIII.8; *English Works*, IV, p. 207.

Common-wealth. For as it is Uncharitablenesse in any man, to neglect the impotent; so it is in the Soveraign of a Common-wealth, to expose them to the hazard of such uncertain Charity.[20]

By "accident inevitable" Hobbes clearly has in mind illness or disability. However, since the contrast is with those unemployed through deliberate idleness, we might plausibly extend this definition to include those left unemployed by larger economic forces beyond their control. Thus, the social programs on offer in Hobbes's ideal commonwealth can, I think, be extended about as broadly in their reach as those of modern welfare states.

Though Hobbes here appeals to the morality of the ruler – his "charitableness" –Hobbesian philosophy can offer another justification for social welfare policies, one that speaks to those who pay the taxes necessary to sustain these policies. I believe that Hobbes was the first modern philosopher to formulate what the Victorian-era British statesman Joseph Chamberlain called "the doctrine of ransom." Speaking at the time when the British government had begun to consider a number of schemes of social welfare, Chamberlain asked his Birmingham constituents in 1885: "What ransom will property pay for the security which it enjoys?" He went on: "Society is banded together in order to protect itself against the instincts of those of its members who would make very short work of private ownership if they were left alone. That is all very well, but I maintain that society owes to these men something more than mere toleration in return for the restrictions which it places upon their liberty of action."[21]

We can interpret the doctrine of ransom in two ways. First there is the way in which Chamberlain seems to use it, and that is implied by Hobbes's comments from *The Elements of Law*: that the wealthy have a normative duty to accept welfare state policies, and the resulting taxation, as the just price for the security of property on which their prosperity depends. But we can also, equally consistent with Hobbes's overall philosophy, make an argument based on purely prudential grounds, making reference to no motivation other than the self-interest of the rich: the poor, if they are not provided for, will become a threat to social stability. We can presume that Hobbes himself would have been sympathetic to this argument – we have only to look again at his comment, quoted above, that "the grief of mind arising from want [does] dispose the Subjects to Sedition." In the passage from which this quote is taken, he is speaking specifically of those who impoverish themselves by their own incontinence. However, it surely applies equally to those who are forced out of employment by broader economic forces.

[20] *Leviathan*, II.30, p. 239.

[21] Joseph Chamberlain, *Mr. Chamberlain's Speeches*, ed. Charles W. Boyd, 2 vols. (London: Constable, 1914), vol. 1, pp. 130–9. See also John W. Seaman, "Thomas Paine: Ransom, Civil Peace, and the Natural Right to Welfare," *Political Theory* 16 (1988): 120–42.

In crafting America's modern welfare state, Franklin Delano Roosevelt made an appeal based on just such prudential considerations. He argued, based on the precedents of Germany, Spain, and Italy, that large-scale unemployment threatened the nation's democratic social structure. He told a radio audience in 1934:

> Democracy has disappeared in several other great nations not because the people of those nations disliked democracy, but because they had grown tired of unemployment and insecurity, of seeing their children hungry while they sat helpless in the face of government confusion and government weakness.... The very soundness of our democratic institutions depends on the determination of our government to give employment to idle men."[22]

Examining the baleful course of events during the 1930s, a Hobbesian could legitimately view it as vindication of the view that provision for the poor is a necessary ingredient to social stability.

TAXATION

Hobbes thinks that taxes are a necessary part of any commonwealth. Security requires armed force, and this must be funded. And of course any form of social welfare also requires tax revenue to support it. Hobbes makes three propositions concerning taxes: first of all, that they should be accepted with equanimity; second, that they should be imposed progressively; and finally that they should be laid on consumption.

As we have seen, Hobbes asserts the sovereign's right to dispose of the subject's property as he or she sees fit, on account of the "absoluteness of sovereignty." He does, however, also provide a normative argument to reconcile subjects to their burden. "For the Impositions, that are layd on the People by the Soveraign Power," he says, "are nothing else but the Wages, due to them that hold the publique Sword, to defend private men in the exercise of severall Trades, and Callings."[23] This economic justification, by making explicit reference to the exercise of people's "trades and callings," supports the liberal interpretation of Hobbes I put forward earlier, according to which Hobbes sees the support of people's private market activities as a key role for government. Taxes allow it to accomplish this end, and should therefore be accepted by the people.

Hobbes asserts that the burden of taxes should be, at least in some sense, equal. "To remove ... all just complaint," he says, "its the interest of the public quiet, and by consequence it concernes the duty of the Magistrate, to see that

[22] Franklin D. Roosevelt, "Fireside Chat," April 14, 1934; Public Papers of the Presidents: Digital Collection of the American Presidency Project at the University of California, Santa Barbara (www.presidency.ucsb.edu).

[23] *Leviathan*, II.30, p. 238

the public burthens be equally born. Rulers are by the natural law obliged to lay the burthens of the commonweal equally on their Subjects."[24] This does not on its own answer Aristotle's famous question, however: equality of what? In other words, how should we assess the extent to which people are equal and are to be equally burdened? Hobbes does address this, however. "Now in this place," he says, "we understand an equality, not of money, but of burthen; that is to say, an equality of reason between the burthens and the benefits. For although all equally enjoy peace, yet the benefits springing from thence are not equal to all; for some get greater possessions, others less; and again, some consume less, others more."[25] As this makes clear, he favors some principle of progressive taxation, whereby certain people pay more than others according to their means.

This leaves yet another question unanswered, however: How is this means to be measured? Hobbes thinks we should assess people's tax burden according to their levels of consumption, or as he puts it: "the Equality of Imposition, consisteth rather in the Equality of that which is consumed, [than] of the riches of the persons that consume the same."[26] And he thinks the taxes themselves should be laid onto consumption. "When the Impositions, are layd upon those things which men consume," he says, "every man payeth Equally for what he useth: nor is the Common-wealth defrauded, by the luxurious waste of private men."[27] Hobbes's ideal commonwealth is, it would seem, a fairly joyless place in which to be a consumer. Her luxury consumption is, as we have seen, restricted by law. Now we see that those purchases of mostly necessary items that the state permits him or her are not only subject to taxes but are in fact forced to bear the state's entire tax burden, including its funding of social welfare programs.

It may surprise a modern reader, accustomed to funding the bulk of government programs through income taxes, to learn that economists continue to debate the relative merits of taxes on consumption versus those levied on income.[28] Arguably, the risk we face of a severe environmental crisis may ultimately vindicate both Hobbes's austere views on consumption and his willingness to see consumers bear the weight of the tax burden. If our supply of resources becomes constrained because of such a crisis, consumption taxes may come to be seen as the best way to reduce people's claims on those resources.

[24] *De Cive*, XIII.10; *English Works*, II, p. 173.

[25] Ibid., XIII.10; *English Works*, II, pp. 173–4.

[26] *Leviathan*, II.30, p. 238.

[27] Ibid., II.30, p. 239.

[28] This literature is too large to survey here. A recent entry, which contains extensive references to past literature, is Joseph Bankman and David A. Weisbach, "The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax," *Stanford Law Review* 58 (2006): 1413–56. Much of the recent literature debates the arguments of Anthony B. Atkinson and Joseph E. Stiglitz, "The Design of Tax Structure: Direct versus Indirect Taxation," *Journal of Public Economics* 6 (1976): 55–75.

And we may also have to revisit more drastic measures, such as sumptuary laws, to limit our depletion of those that remain.

CONCLUSION

Hobbes's comments on economics and fiscal policy are scattered throughout his work and are never presented as a fully worked-out theory of the state and the economy. By assembling these diverse references, however, I hope I have been able to show that he possesses a relatively coherent set of views on this topic. While I suspect that few modern readers would adopt all of these views as their own, nevertheless they should not all be dismissed out of hand. In particular, by anticipating "the doctrine of ransom" as a justification for modern welfare state policies, Hobbes vindicates his status as a philosopher who is unfailingly provocative and of relevance to modern debates.

9

The Imperfect Legitimacy of Punishment

Alice Ristroph

Thomas Hobbes was singularly concerned with obtaining peace and minimizing violent conflict. Perhaps, however, too little attention has been given to the status of his aversion to violence vis-à-vis his strong emphasis on self-preservation. In some circumstances, the two strands of his thought are compatible: violent conflict is (usually) to be avoided because it (usually) impedes the preservation of human life. In other situations, however, violence represents our best chance at survival, dismal though that chance may be. In the state of nature, reasonable efforts at self-preservation actually produce and exacerbate violent conflict. All this means that according to Hobbes, reason dictates not a categorical prohibition of violence but a qualified one: "That every man ought to endeavor peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war."[1] Seek peace, Hobbes admonishes, but also preserve yourself – by violence or war if necessary.[2] Seek peace, but what is a Hobbesian subject to do when the path most conducive to peace is inconsistent with his own self-preservation?

Hobbes answered this question several times, and he answered it consistently: for the endangered individual, the necessities of self-preservation trump the mandate to seek peace and stability.[3] Obviously, this prioritization could be disastrous to Hobbes's efforts to establish a stable political order if the conflict between self-preservation and social stability were to appear too often. Accordingly, much of Hobbes's political theory seeks to design a system in which self-preservation and political stability are mutually reinforcing rather

[1] Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Rev. student ed. (Cambridge: Cambridge University Press, 1996), XIV.92. References to *Leviathan* give chapter number followed by the page number.

[2] Ibid.

[3] Of particular interest in chapter XXI of *Leviathan*, where Hobbes explains that subjects are not obligated to obey several types of life-threatening commands: commands to kill, wound, or maim themselves; to confess to crimes; to engage in warfare; and of particular interest in this essay, to submit to punishment.

than mutually inconsistent. We should all prefer civil society, where we may enjoy both preservation and peace, to the state of nature, where our efforts at self-preservation are self-defeating and where we are unlikely to enjoy either long life or peace. Even after we have established civil society, however, there is one familiar and recurring circumstance in which the demands of social stability and the demands of individual self-preservation part ways: punishment.

In this context as elsewhere, Hobbes did not subordinate the individual interest in self-preservation to the societal interest in stability. Instead, he offered an account of punishment that recognizes both the sovereign's right to punish (as a necessary mechanism to guarantee political stability) and the individual subject's right to resist punishment. It is, in many ways, a tragic account. Crime creates a situation in which the sovereign cannot fulfill the task of preserving everyone. The sovereign may let the crime go unpunished and set a dangerous precedent that is likely to undermine the political order, or he (or she or it) may preserve order at the expense of preserving the criminal. Criminals, for their part, have authorized the sovereign and his system of punishment, but they do not consent to *their own* punishments, and they even have a right to resist the punisher. The curious right to resist is not limited to capital punishment: even imprisonment leaves the subject unable to protect himself, and so (according to Hobbes) no one consents to be imprisoned, and no one is obligated to submit to a prison sentence. It turns out that in a system in which political legitimacy is based on consent, punishment is at best imperfectly legitimate.

This Hobbesian account is almost completely ignored in contemporary punishment theory. And that oversight is itself tragic, for Hobbes offers us a way to conceptualize punishment superior to the mainstream contemporary theories. Indeed, this alternative account may be more likely to produce humane punishment practices than more ambitious justifications of punishment.

Close observers of criminal justice systems in contemporary liberal democracies tend to agree about two things. They agree that some form of punishment is normatively legitimate, and they agree that existing punishment practices are far from the normative ideal. The United States criminal justice system is the target of the greatest criticisms, but increasingly, the penal systems of Britain and continental Europe are also coming under fire. Most commentators argue that there is a right way for liberal constitutional democracies to punish – but no existing democracy is getting it right, and over time the failures are multiplying rather than decreasing. Thus scholars respond to the shortcomings of penal practices with new iterations of punishment theory. The assumption seems to be that with a new account of why punishment is justified – with an ideal theory of punishment – we will be better equipped to change practices to conform with the demands of theory.

An alternative account, suggested here and inspired by Hobbes, is that theorists should do less, rather than more, to justify punishment. Our constructed accounts of the justice of punishment exacerbate, rather than minimize, the

shortfalls of penal practices. A better approach might be to acknowledge the tragedy of punishment, and to undertake the practice of punishment with new humility.

To support the suggestion that Hobbes reveals the imperfect legitimacy of punishment, this essay begins with the concept of *legitimacy*. Hobbes is not known as a theorist of legitimacy; indeed, the term does not appear to have been widely used at the time Hobbes was writing. But legitimacy (more than terms such as justice or right) captures both empirical and normative dimensions of politics in ways important to Hobbes. After a brief section on Hobbes as a theorist of legitimacy, I turn to his account of *punishment* and the unfamiliar juxtaposition of a right to punish with a right to resist. On this account, punishment never fully satisfies the primary Hobbesian criterion of political legitimacy: the consent of the governed. Punishment is neither wholly illegitimate nor wholly legitimate; a better description of punishment's status is imperfect legitimacy. From that observation, I move to Hobbes as a theorist of *imperfection*. I examine what it means to acknowledge the inevitable failures of politics, and what such acknowledgment might mean for punishment practices in contemporary liberal democracies.

HOBBES AS A THEORIST OF LEGITIMACY

It has become commonplace to evaluate governments and their specific acts or policies in terms of legitimacy. As a normative term, legitimacy is closely related to (and sometimes equated with) concepts such as justice, right, or authority. In contemporary theory, the most common normative accounts of legitimacy rely on some form of consent – as Allen Buchanan has put it, consent is the "gold standard" for legitimacy.[4] The emphasis on consent in normative theory is reflected to some degree by the sociological concept of legitimacy. Sociological legitimacy is descriptive rather than normative, but it too is concerned with something like consent. To sociologists, legitimacy refers to the degree to which a ruler or government is actually accepted by its subjects. Sociological and normative legitimacy can coincide but need not: for example, a government may be accepted by its own citizens but judged by external observers (armed with a theory of legitimacy that requires more than mere consent of the subjects) to be normatively illegitimate.

If Hobbes gave an account of legitimacy, what would it be? The term legitimacy does not appear often in his works, but this is not surprising. As a description of rulers or governments, the word appears to have entered the English language roughly around the time that Hobbes was writing. Notably, the Oxford English Dictionary (OED) cites the 1651 *Philosophical Rudiments Concerning Government and Society* as one of the first appearances of the

[4] Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112 (2002): 689, 699.

word "legitimately."[5] This text is the English translation of Hobbes's *De Cive*, originally published in Latin in 1642.[6] The passage cited in the OED is instructive. In it, Hobbes questions the distinction between a king and a tyrant. He rejects the claim that the two rulers are distinguished by the scope of their respective powers, for a true king, like a tyrant, has supreme and unlimited power.[7] Nor can kings and tyrants be differentiated by the way each comes to power: "[F]or if in a democratical or aristocratical government some one citizen should, by force, possess himself of the supreme power, if he gain the consent of all the citizens, he becomes a legitimate monarch."[8] There, it seems, we have a possible key to legitimacy: the consent of all the citizens – much the same as the "gold standard" identified by contemporary scholars. Hobbes goes on to suggest that a legitimate king may displease his subjects, leading them to label him a tyrant.[9] Hobbes concludes that "kingdom and tyranny are not diverse forms of government," but different labels used depending on the subjects' approval of their ruler.[10]

There are several ways in which Hobbes, who barely used the term legitimacy, can illuminate our contemporary thought about the concept. First, Hobbes might encourage us not to draw too sharp a distinction between sociological and normative legitimacy. If we think that consent is normatively significant, we should take actual consent seriously; however much we may disdain a ruler as outside observers, we should not be too quick to label him illegitimate if he in fact enjoys the consent of his subjects. Those who insist on a strong distinction between sociological and normative legitimacy tend to characterize legitimacy as a fixed status, measured either by empirical measurements of popular opinion (sociological legitimacy) or by a moral evaluation (normative legitimacy). This static account may obscure the extent to which legitimacy is the shifting, never-completed product of a process of legitimation. In that

[5] *The Compact Edition of the Oxford English Dictionary* (London: Book Club Associates, 1979), p. 1600.

[6] It was long thought that Hobbes himself had translated the text, though some have questioned this claim. Compare Sterling P. Lamprecht, "Introduction to Thomas Hobbes", *De Cive*, xviii (New York: Appleton-Century-Crofts, 1949). ("Hobbes himself was the translator of the *De Cive*…") to Richard Tuck, "Warrander's *De Cive*," *Political Studies* 33 (1985): 308, 310–12 (marshalling historical evidence for the thesis that Hobbes did not translate *De Cive* into English himself). Whether *Government and Society* is Hobbes's own translation or not, the fact that it appeared during Hobbes's active writing years, and the fact that Hobbes used Latin forms of legitimate in the original *De Cive* and in the Latin version of *Leviathan*, suggests that at the very least, Hobbes did not deliberately avoid the language of legitimacy.

[7] *De Cive*, VII.88. References to *De Cive* give the chapter number followed by the page number.

[8] Ibid.

[9] "[A] king, legitimately constituted in his government, if he seem to his subjects to rule well and to their liking, they afford him the appellation of a king; if not, they count him a tyrant" (Ibid., VII.89).

[10] Ibid.

process, normative arguments may win empirical support, and actual empirical power may shape normative thinking. Hobbes was fond of argument by etymology, and it is helpful to remember that legitimate is derived from a verb – it is the past participle of the Latin *legitimare*, "to make lawful, to declare to be lawful."[11] Even as a status, legitimacy is a conferred or constructed status; to be legitimate is to have been legitimated.[12]

Since a Hobbesian account of legitimacy would give great normative weight to the empirical fact of present consent, it is distinguishable from more recent theories that view legitimacy as a historical question, as a question of origins.[13] Consistent with his claim that only the present "has a being,"[14] Hobbes's political theory focuses resolutely on the here and now. We should learn from the past, of course, and we should draw on past and present experiences to make predictions and prepare for the future. But, to return to Hobbes's central themes, we should not let the memory of past violence prevent us from appreciating the values of present peace. A violent usurper can become a legitimate sovereign; and conversely, a once-legitimate sovereign can lose his right to rule. We learn from the past, we look to the future, but we always live in the present.

To illustrate further that legitimacy is not simply a question of origins, consider the term's first English usage – the designation of a rightful heir with full filial rights. More or less contemporaneously with early references to legitimate children as those lawfully begotten, we see legiti*mate* also used as a verb: the king, or the Pope, may legitimate one who was born out of wedlock. On this account, legitimacy is a legal construct. As such, it may sometimes contain an element of contingency, and perhaps of arbitrariness.[15]

The contingent character of legitimacy derives, in part, from the fact that it is man-made. In that sense, legitimacy is a particularly appropriate concept for Hobbesian political theory. Stability was Hobbes's goal, but precariousness and contingency were the realities that captured his attention. The goal of the social contract was to create an immortal sovereign, but as a creation of men

[11] "Etymologies are no definitions, and yet when they are true they give much light toward the finding out of a definition." Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, ed. J. Cropsey (Chicago: University of Chicago Press, 1971), p. 103.

[12] "Etymologically, [legitimacy] expresses a status which has been conferred or ratified by some authority; = LEGITIMATED." *Oxford English Dictionary*, p. 1600.

[13] For example, Arendt, *On Violence*, *in Crises of the Republic* (New York: Harcourt Brace & Company, 1969), p. 151.
("Legitimacy, when challenged, bases itself on an appeal to the past, while justification relates to an end that lies in the future.").

[14] *Leviathan*, III.22.

[15] As expressed by Shakespeare's Edmund, the bastard son of the Earl of Gloucester who plots to displace his legitimate half-brother Edgar: why "stand in the plague of custom," Edmund wonders, and permit "the curiosity of nations to deprive" him of the throne? "Why bastard? Wherefore base? / When my dimensions are as well compact, / As honest madam's issue?" William Shakespeare, *King Lear*, Act I, scene ii.

the Leviathan is at best "a mortal God," a being "subject to decay, as all other earthly creatures are."[16]

And the man-made character of legitimacy helps us see what we get from this concept that we do not get from terms such as justice, right, or authority. We can and do sometimes speak of divine or natural justice, or divine or natural right. Legitimacy, in contrast, is distinctively human. It does not occur naturally, independent of human institutions. Moreover, legitimacy requires the participation of multiple persons – what Hannah Arendt called plurality. At the very minimum, there must be a ruler and a consenting subject for us to speak of legitimacy. Political legitimacy requires an act of authorization, and as Hanna Pitkin noted, on Hobbes's account it takes (at least) two to create a relationship of authority.[17] In short, legitimacy is made, and it is human-made, and it is made by humans plural rather than seized by a usurper over subjects' continuing objections.

Having emphasized that legitimacy standards are contingent and man-made, I want to be clear that Hobbes's own substantive standard for legitimacy was consistent: he never suggests that political legitimacy could turn on anything other than the consent of the governed.[18] In this context, what I am terming legitimacy dovetails with Hobbes's accounts of authority and obligation. A legitimate sovereign is an authorized one, and an authorized sovereign is one whom the subjects are obliged to obey. Only the subject's own authorship, or consent to be represented, can create obligation.[19] Importantly, consent as a criterion for legitimacy is a standard independent of any particular regime. That is, as the substantive standard, it precedes the sovereign. If this were not so, it would be impossible to escape the state of nature – we could never create a sovereign, because we could never agree on the criteria for a legitimate sovereign. On Hobbes's account, persons in the state of nature do in fact recognize consent as the basis on which a sovereign may be created. In this respect,

[16] *Leviathan*, XXVIII.221; see also ibid. at XVII.120 (Leviathan as "mortal God").

[17] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972), p. 23; see also Hobbes, *Leviathan*, XVI.113 (when there is only one person who is both actor and author, the authority is "feigned").

[18] There is a substantial literature which classifies Hobbes as a theorist of *hypothetical* consent. The usual argument is that the state of nature may never have existed as an actual historical moment, but the social contract is nonetheless binding if subjects would have consented in a hypothesized state of nature. I think the notion of "hypothetical consent" is the wrong way to address the worry that Hobbes's state of nature is not a historically accurate description. As I argue later, *states* of nature, properly understood, occur frequently. See footnotes 36–38. To exit these states of nature, Hobbes requires actual consent. Cf. David Gauthier, "Taming Leviathan," *Philosophy & Public Affairs* 16 (1987): 280, 294 (questioning the characterization of Hobbes as a theorist of hypothetical consent).

[19] "[N]o man is obliged by a covenant, whereof he is not the author" (*Leviathan*, XVI.112; see also ibid. at XXI.150 ("For in the act of our submission, consists both our obligation, and our liberty… there being no obligation on any man, which arises not from some act of his own.…")).

the criterion for legitimacy appears to be temporally prior to the criteria for justice.[20]

The substance of Hobbesian legitimacy may not seem especially surprising some four and half centuries after his life and work, in an age when we take for granted that the consent of the governed bears at least some normative significance. But let us not assume too quickly that Hobbes is simply a primitive forerunner to modern theories of legitimacy. Hobbes's attention to actual consent as a political standard was more consistent, and more principled, than the theories of hypothesized consent that appeared in later liberal theory. If we are to base accounts of legitimacy on what we think subjects *should* consent to, or what we think they have no reasonable grounds to reject, one wonders why we bother to speak of consent at all. If we already know what's good for others, then why bother with the attribution of consent? Why not proceed directly to the favored substantive standard? On the Hobbesian account, the choices people actually make are the ones that matter, not the choices that a would-be sovereign (with a guilty conscience, perhaps) might attribute to his subjects.

Notwithstanding his controversial claim that consent given out of fear was valid, Hobbes took consent seriously, far more seriously than do most subsequent liberal theories. He had a fairly extensive account of the kind of sovereign to which people should give their consent, but he never suggested that a sovereign who possessed the right leadership abilities but lacked actual consent could be called legitimate. To take consent seriously has profound implications for an account of crime and punishment. If legitimacy requires actual consent, what are we to think of – and to do with – disobedient subjects?

HOBBES AS A THEORIST OF PUNISHMENT

On the question of what to do with disobedient subjects, Hobbes is clear: they should be punished. But it is important to distinguish right away claims about the function of punishment and claims about its normative justification, or legitimacy.[21] Hobbes identified a few main functions of punishment: it provides both specific and general deterrence, and as or more importantly, it provides reassurances to those subjects already inclined to obey the law that they are not foolish to do so.[22] Punishment reinforces the social order and is key to the preservation of peace and stability. For those who equate legitimacy

[20] Ibid., XIII.90 (no justice without a common power). Cf. Arthur Ripstein, "Foundationalism in Political Theory," *Philosophy & Public Affairs* XVI (1987): 115, 119–20.

[21] Kyron Huigens, "On Commonplace Punishment Theory," *University of Chicago Legal F.* (205): 437, 439–41 (distinguishing between functions of punishment and theories of punishment).

[22] Hobbes says punishments are inflicted "to the end that the will of men may thereby the better be disposed to obedience" (*Leviathan*, XVIII.214; see also ibid., XVII.117 (fear of punishment as incentive to perform covenants)). Indeed, it is a violation of the laws of nature to punish for any other reason, including to avenge past wrongs (ibid., XV.106).

with utility – for utilitarians – these salutary functions of punishment may themselves establish its normative justification. For theories of legitimacy that turn on more than utility, however, identifying the functions of punishment leaves unanswered the question of whether punishment is legitimate.

As we have seen, Hobbes did not equate utility with legitimacy. A ruler could not establish himself as a legitimate sovereign simply by ensuring that his subjects were in fact better off under his rule. A subject's obligation to obey is not based on the facts about what would maximize his welfare, but on the fact of his consent.[23] Of course, Hobbes argued that consent would and should follow welfare – that is, he thought individuals would and should consent to the arrangements that were most conducive to their own well-being. *Seek peace*, we are told by the first law of nature, and a punishment-empowered sovereign seems essential to peace. Given the benefits that result from a system of punishment, might Hobbesian subjects consent to such a system? Could the social contract render punishment legitimate?

To investigate that possibility, it is helpful to consider in detail Hobbes's extended discussion of punishment in *Leviathan*. That discussion returns us to the two themes with which this essay began: the quest for self-preservation, and the quest for peace and political stability. After a crime, these two goals conflict: a failure to punish will threaten stability, but the imposition of punishment threatens the self-preservation of the criminal. This conflict will have profound consequences for the legitimacy of punishment.

Hobbes began his discussion of punishment with "a question to be answered, of much importance; which is, by what door the right, or authority of punishing in any case, came in."[24] As soon as he posed the question, Hobbes rejected the possible answer that any individual gives the sovereign the right to punish him as part of the social contract: "no man is supposed bound by covenant, not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person."[25] Accordingly, the commonwealth's right to punish "is not grounded on any concession … of the subjects."[26] In a system in which legitimacy is based on consent, punishment is already in trouble.

The robust quality of the right of self-preservation bears emphasis here. In other passages, Hobbes held that an individual *could not* renounce this right: "[T]here be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down

[23] *Leviathan*, XXI.150.

[24] Ibid., XXVIII.214. The following discussion draws upon and elaborates arguments I first advanced in Alice Ristroph, "Respect and Resistance in Punishment Theory," *California Law Review* 97 (2009): 601. Material is used here with permission from the *California Law Review*.

[25] *Leviathan*, XXVIII.214.

[26] Ibid., XVIII.214.

the right of resisting them, that assault him by force, to take away his life.…"[27] Hobbes's claim is not a prediction of what men will do (i.e., no one would renounce the right) or a word of advice (i.e., no one should renounce the right), but a claim of impossibility: no one can abandon the right of self-preservation. If one does promise to give up the right of self-preservation, the covenant is void.[28] This right is truly inalienable, on Hobbes's account.

Of course, it is not logically impossible to renounce a right of self-preservation, and as a matter of human psychology, it is far from clear that no one would renounce the right. I think Hobbes's assertion that a person "cannot" renounce the right to resist is best understood as a normative claim. It is helpful to think in terms of obligation. Hobbes's (normative) account of obligation is a voluntarist one: "[N]o man is obliged by a covenant, whereof he is not the author."[29] And the (normative) limits of obligation are defined by the strong interest in self-preservation: "No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body."[30]

The strong and inalienable right to self-preservation means that individuals contracting to create a sovereign do not grant the sovereign a right to punish them. So where does the right to punish come from? Hobbes depicted it as an expression of the *sovereign's own* right to self-preservation:

> [B]efore the institution of commonwealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him only.[31]

On this account, an individual's natural right to do violence as he judges necessary for his own security becomes, in civil society, the sovereign's right to punish. More precisely, the natural right to use violence preemptively, even against someone who does not pose an imminent threat, becomes the right to punish. Everyone but the sovereign renounces this right when they agree to the social contract. Only the sovereign – who is not a party to the social contract – retains the broad discretion to use force, and so only the sovereign may punish. Notice that Hobbes did not claim that every lawbreaker poses an immediate threat to the life or bodily well-being of the sovereign. Nevertheless, a ruler might judge that his own long-term security, and the security of society as a whole, requires him to use force against those who break the law.

[27] Ibid., XIV.93.
[28] Ibid., XIV.98.
[29] Ibid., 112.
[30] Hobbes, *De Cive*, pp. 39–40.
[31] *Leviathan*, XVIII.214.

The social contract does not itself create the right to punish, but neither is it irrelevant to that right. Though subjects do not give the sovereign the right to punish, they consent to a world in which he will have that right: the right is "not given, but left to [the sovereign], and to him only." Put differently, punishment may well cross the minds of Hobbes's contracting subjects. Each may contemplate, and agree to support, the punishment of *other* subjects. "In the making of a commonwealth, every man gives away the right of defending another, but not of defending himself. Also he obliges himself, to assist [the sovereign] in the punishing of another, but of himself not."[32] This clarification is important, for in many other passages, Hobbes described subjects as "authors" of all the sovereign's actions, including, presumably, acts of punishment.[33] If punishment is authorized, in some sense, the critical question will become the extent to which a subject can be said to authorize his own punishment, and the normative significance of any such authorization.

Hobbes has given us one way to understand the sovereign's right to punish: it is a distinctive manifestation of the right of self-preservation that belongs to all natural, mortal humans. The sovereign punishes to preserve himself (and his obedient subjects). But this produces a new puzzle. Even if the sovereign is also a natural person, as would be the case in Hobbes's preferred form of government (an absolute monarchy), the right to punish as a natural right could only belong to the natural person, the man who happens to be king, and not to the artificial person of the sovereign. The sovereign is a creation of the social contract, an artificial man springing into existence by fiat ("Let us make man") at the moment of covenant.[34] If no commonwealth, and thus no sovereign, exists in the state of nature, it makes little sense to say the sovereign keeps rights that he possessed in the state of nature.

This tension can be alleviated, if not entirely dispelled, by examining more closely Hobbes's state of nature. "State of nature" is a term of art that refers to neither a discrete historical moment nor a purely hypothetical construct. Instead, the state of nature is the always-possible situation in which political authority is absent. Because political authority might appear, disappear, and reappear, the state of nature is a recurrent circumstance. Indeed, one could identify various kinds of states of nature.[35] For example, one could distinguish between the state of nature in which no political authority has ever been established ("the original state of nature") and a state of nature in which political authority has been established but has failed or been destroyed ("a recurrent

[32] Ibid.; but note that a subject may refuse a command to *kill* another, ibid., XXI.151.

[33] See, for example, ibid., XVIII.120; XX.148 ("[N]othing the sovereign representative can do to a subject … can properly be called injustice, or injury; because every subject is author of every act the sovereign does.").

[34] Ibid., Introduction, at 10.

[35] Here again I follow Ristroph, "Respect and Resistance in Punishment Theory," pp. 601–32.

state of nature").[36] One could also distinguish between a state of nature in which political authority exists nowhere ("a universal state of nature") and a state of nature in which political authority, otherwise intact, has been rejected only by a single individual ("a specific state of nature").[37]

Conceptually, we could understand punishment as a distinctive species of violence that takes place in a recurrent, specific state of nature, not an original or universal one. Once a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other. The sovereign, a uniquely political and artificial construct, now exists in a version of the state of nature, and he possesses the broad right of mortal beings to do whatever seems necessary to preserve himself from imminent or future threats.[38] But if this is all punishment is – a conflict between two mere mortals in the state of nature – then both the sovereign and the criminal will have equal rights of self-preservation, and the criminal has as much right to resist punishment as the sovereign has to impose it. In fact, this is exactly Hobbes's claim. Hobbes's radical egalitarianism committed him to the claim that in the absence of a reciprocally recognized third party to adjudicate disputes, each individual has an *equal* claim to preserve himself by whatever means he believes necessary. This gives the sovereign a right to punish, but it also gives any individual facing punishment a right to resist.

According to Hobbes, the right to resist punishment belongs to the guilty as well as the innocent. Moreover, it is not limited to capital punishment; one may also resist "wounds, chains, and imprisonment."[39] Hobbes reasoned that once imprisoned, a person lost the capacity of self-defense and was at the mercy of his captor, so the right of self-preservation permitted resistance to imprisonment.[40] Even the prisoner who has explicitly consented to the criminal laws retains the right to resist the imposition of punishment.[41]

[36] Hobbes did not use these names for various states of nature, but he clearly contemplated the possibility that subjects could return to a state of nature after an established political authority collapsed. Ibid. at 154 ("If a monarch shall relinquish the sovereignty, both for himself, and his heirs; his subjects return to the absolute liberty of nature.…").

[37] Again, these are not Hobbes's phrases. But one may find support for this conceptualization in Hobbes's discussion of criminals who, having resisted the sovereign and drawn the threat of punishment, may band together to defend themselves collectively against the still-existing sovereign. The sovereign remains a sovereign for his law-abiding subjects, but vis-à-vis the band of criminals the sovereign is simply an aggressor in a state of nature. See ibid. at 152.

[38] Even with this elaboration of the states of nature, the claim that the right to punish is a manifestation of a natural right to self-preservation is perplexing. I noted earlier that Hobbes seems to view the fact of mortality, and the desire for self-preservation, to imply in humans a right to self-preservation. But it is not clear why sovereigns – who are not obviously mortal beings – would have a similar right.

[39] *Leviathan*, XCIII.152.

[40] Ibid. at 93.

[41] Ibid. at 98.

Hobbes referred to the right to resist punishment on several occasions, but he did not directly address the implications of such a right for the social contract, or for the legitimacy of punishment.[42] That task is left to us. I have suggested that for Hobbes the term *authorized* serves much the same function that the adjective *legitimate* serves in modern political discourse. Given the right to resist punishment, to what extent is punishment authorized?

When Hobbes imagined the general covenant by which individuals authorize the sovereign, he did not include any *explicit* reservations other than the condition that others also grant authority to the sovereign: "I authorize and give up my right of governing my self, to this man, or to this assembly of men, on this condition, that you give up your right to him, and authorize all his actions in like manner."[43] But there is a further, *implicit* reservation in this grant of authority: the right to defend one's body from immediate harm. And this inalienable right is the basis of the right to resist punishment.[44] Perhaps Hobbes considered this reservation so obvious that it did not need to be stated expressly, and perhaps he was correct. To state the reservation expressly, the subject would have to say, "I authorize you to do whatever you think necessary to preserve me, but I reserve the right to resist should you attempt to destroy me."[45]

On at least two occasions, Hobbes imagined a more specific authorization – the manner in which subjects would authorize punishment. Each time, he was explicit that this authorization must include a reserved right to resist. Hobbes states in the *Leviathan*, "For though a man may covenant thus, *unless I do so*, *or so*, *kill me*; he cannot covenant thus, *unless I do so*, *or so*, *I will not resist you*, *when you come to kill me*."[46] This right to resist belongs to the guilty as well as the innocent.[47] Hobbes makes the same point at greater length in *De Cive*: "No man is obliged by any contracts whatsoever not to resist him who shall offer to

[42] For example, ibid., at 93, 98, 151.

[43] Ibid. at 120.

[44] For a similar reading, and a detailed argument for the inalienability of the right to resist force, see Yves-Charles Zarka, "Hobbes and the Right to Punish", in ed. Hans Blom, *Hobbes – The Amsterdam Debate* (Hildesheim: Georg Olms Verlag, 2001), p. 71.

[45] Of course, Hobbes does not allow the subject to say to the sovereign, "I think your national security policy is lunacy and surely inadequate to protect me, so I am going to resist you violently," or "These tax rates are killing me; I am going to rebel." But we can distinguish between a strategy of long-term self-preservation on one hand and preservation of the body from immediate threats on the other hand. We give the sovereign complete authority over the former; we are not allowed to second-guess his strategy. Since protection from immediate threats is necessary to long-term preservation, we expect the sovereign to protect us from immediate threats as well. But if he fails to do so, we are free to do our best to ensure our own immediate self-preservation. Cf. Hobbes, *Leviathan*, XXVII.206 ("[N]o man is supposed at the making of a commonwealth to have abandoned the defense of his life, or limbs, where the law cannot arrive time enough to his assistance.").

[46] Ibid. at 98.

[47] Ibid. at 152.

kill, wound, or any other way hurt his body.... It is one thing, if I promise thus: if I do it not at the day appointed, kill me. Another thing, if thus: if I do it not, though you should offer to kill me, I will not resist."[48] If it seems impossible that one person should have a right to kill and the second should have a right to resist, note that this is exactly the situation of the state of nature. When an individual promises to obey a sovereign, he removes himself from the state of nature. If he later rejects the sovereign's authority and disobeys the sovereign's commands, all bets are off; the individual and the sovereign are in the state of nature again vis-à-vis each other – what I have called the "specific state of nature."

Two passages in *Leviathan* may seem to call into question the right to resist punishment. In rejecting a general right of revolution, Hobbes claimed that "if he that attempts to depose his sovereign be killed, or punished by him for such attempt, he is author of his own punishment, as being by the institution, author of all his sovereign shall do."[49] Hobbes later expanded this argument: "[B]ecause every subject is by this institution author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever [the sovereign] does, it can be no injury to any of his subjects."[50] The claim that punishment is no injury to the punished subject is easy to reconcile with the right to resist punishment if we remember that Hobbes defines "injury" as a breach of contract.[51] It is clear that the sovereign breaches no contract in imposing punishment. Hobbes distinguished between damage and injury; perhaps punishment damages the subject, but it does not injure him.[52]

But in the discussion of efforts to depose a sovereign, Hobbes clearly states that the rebellious subject is "author of his own punishment." And yet, elsewhere Hobbes makes clear that the rebellious subject has a right to resist his punishment – the punishment of which he is supposedly the author. Indeed, Hobbes – the great critic of civil war – holds that rebels may join forces to resist the sovereign more effectively. Here is Hobbes's claim:

> But in case a great many men together, have already resisted the sovereign power unjustly ... whether have they not the liberty to then join together and assist, and defend one another? Certainly they have: for they but defend their lives, which the guilty may do, as the innocent. There was indeed injustice in the first breach of their duty; their bearing of arms subsequent to it, though it be to maintain what they have done, is no new unjust act. And if it be only to defend their persons, it is not unjust at all.[53]

The act of rebellion is an unjust act. But once it has occurred, further resistance is no new injustice. Importantly, if the rebels resist not to establish a new ruler,

[48] Hobbes, *De Cive, or The Citizen* (Sterling P. Lamprecht ed., 1949[1651]), pp. 39–40.
[49] *Leviathan* at 122.
[50] Ibid. at 124.
[51] Ibid. at 104.
[52] Ibid. at 120.
[53] Ibid. at 152.

but only to defend themselves, they do not act unjustly at all. Hobbes goes on to say that if the sovereign offers pardon to the rebels, they should accept the offer and any further resistance is "unlawful."[54] In this passage, we see a critical distinction between (1) rebellion to unseat a sovereign and establish a new one and (2) mere resistance to punishment, and a second distinction between (3) resistance to a sovereign who promises not to punish and (4) resistance to a sovereign who is likely to punish. Hobbes differentiated refusals to submit to punishment from other acts of disobedience, and he differentiated impositions of punishment from other sovereign acts.

All of this suggests that punishment is a distinctive political act, one that cannot be equated with other exercises of sovereign power. A subject may be "author" of his own punishment, in a sense, but authoring this act is not like authoring the other acts of the sovereign. Authorship of punishment, whatever it does mean, clearly does not entail a duty to submit to punishment. Again, issues of timing are critical. As Hobbes directs us to focus on the present, and to accept an existing sovereign even if he came to power through violence, so the obligations of the subject are also oriented in the present. Before the crime, the subject is obligated to obey the law. But once the crime has been committed, the subject is not obligated to submit to punishment.

So in what sense, if any, is punishment authorized? Of the subject who is punished, I think we can say this much: *if* he authorizes his own punishment, that authorization does not have the same status as the authorization of other sovereign acts. I say *if*, for it is only in the context of the rebel who tries to unseat the sovereign that Hobbes describes a subject as "author of his own punishment." Even in that context, and certainly in the case of the ordinary criminal, the subject's authorization of the sovereign does not generate a duty to submit to punishment. But sovereign and disobedient subject are not, of course, the only persons with a stake in punishment. Recall that in forming the social contract, the subjects leave the sovereign his natural right to use violence in self-preservation "as he should think fit, *for the preservation of them all*."[55] Arguably, each subject contemplates, and accepts (or even actively desires), the possibility that the sovereign will exercise his natural right of self-preservation to punish *other* people. David Gauthier explained the status of punishment in these terms: "Each man authorizes, not his own punishment, but the punishment of every other man. The sovereign, in punishing one particular individual, does not act on the basis of his authorization from that individual, but on the basis of his authorization from all other individuals."[56]

[54] "But the offer of pardon takes from them, to whom it is offered, the plea of self-defense, and makes their perseverance in assisting, or defending the rest, unlawful." Ibid.

[55] *Leviathan*, XXVIII.214 (emphasis added).

[56] David Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Oxford University Press, 1969), p. 148.

Another angle from which to explain the peculiar status of punishment is Hobbes's distinction between right and authority. Rights are "blameless liberties" that can precede any agreement or political structure; everyone has rights in the state of nature.[57] Authority, in contrast, is an artificial construct that requires an agreement between two or more persons. Authority is "a right of doing any act … done by commission, or license from him whose right it is."[58] When Hobbes considers the sovereign's power to punish, he asks "by what door the right, or authority of punishing in any case, came in." Is punishment the sovereign's own right, or is it an act of authority? Who "owns" the act of punishment? As we have seen, Hobbes sometimes characterized punishment as an authorized act "owned" by the subjects. But when he focused directly on the sovereign's power to punish, he characterizes it as the sovereign's own right. Perhaps we could say that vis-à-vis the prisoner, the sovereign punishes by his right alone. Vis-à-vis everyone else, the sovereign acts by his own right and by authority.

And so, finally, back to legitimacy. If legitimacy turns on consent and authorization, punishment seems to be incompletely legitimate. The right to punish is not derived from the subject's consent; it is a manifestation of the natural right to do violence in self-preservation. Nor is punishment universally and unequivocally authorized. Each subject either fails to authorize his own punishment, or cabins the authorization so as to avoid a duty to submit. Punishment remains an act of violence that the condemned individual has a right to resist. Hobbes, the great champion of absolute sovereignty and political stability, seems to have left a chink in the sovereign's armor – an opportunity for the reemergence of the violent conflict of the state of nature.

Or is Hobbes himself to blame for this chink? Perhaps it was simply Hobbes's honesty that stopped him from claiming that people consent to be imprisoned or executed.[59] Perhaps the chink is the inevitable consequence of a theory of legitimacy that takes consent seriously. Though I do think ruthless honesty would have kept Hobbes from claiming that criminals willingly submit to punishment, we should not forget the normative dimension of the right to resist. I have suggested that the right to resist is not simply a descriptive claim about human psychology. To see this, imagine a world in which the condemned do submit: the criminal gives up and places his own head in the noose. What

[57] "[T]hat which is not against reason, men call RIGHT, or jus, or blameless liberty of using our own natural power and ability. It is … a right of nature, that every man may preserve his own life and limbs, with all the power he has." Hobbes, *Elements of Law Natural and Politic*, ed. J. C. A. Gaskin (Oxford: Oxford Univeristy Press 1994[1640]), p. 71.

[58] *Leviathan*, XVI.112; see also Pitkin, supra footnote 17.

[59] George Kateb has claimed that Hobbes offers a powerfully emancipatory theory notwithstanding his efforts to defend absolute sovereignty. "He emancipates, to some degree, in spite of himself, when his honesty gets in his way." George Kateb, "Hobbes and the Irrationality of Politics," *Political Theory* 17 (1987): 355, 356.

would Hobbes say of such a world? It might be more stable, but I suspect Hobbes would find it regrettable. Hobbes does not try to solve the problems of the state of nature by convincing anyone to give up on self-preservation, and indeed, he betrays great sympathy for those who seek to preserve themselves. In this, he is deeply egalitarian and deeply individualist. Every person – even the rebel who has attacked the sovereign – can and should seek to preserve himself. But to honor these egalitarian and individualist commitments within a voluntarist account of obligation, Hobbes must sacrifice an account of punishment as fully legitimate.

HOBBES AS A THEORIST OF IMPERFECTION

Punishment has not been a central focus of Hobbes scholarship, and those scholars that have focused on his theory of punishment have tended to dismiss the right to resist as an inconsequential curiosity or as a flaw that would, if taken seriously, unravel Hobbes's entire political theory.[60] In my view, the odd juxtaposition of the right to punish and the right to resist demonstrates the tremendous significance of Hobbes's contribution to political thought. In particular, the right to resist punishment is a manifestation of Hobbes's radical egalitarianism, his strong individualism, and his unyielding honesty. Each of these commitments cut against, and thereby undermined, his efforts to secure political stability with an intellectual defense of an absolute sovereign. There is little question that Hobbes wanted to close the door against rebellion or any other threat of civil unrest. But the very reason he hated civil unrest kept him from getting that door all the way shut. Specifically, Hobbes strove to minimize violence, and he could not fail to notice that punishment was itself an act of violence.[61]

And what, precisely, is so bad about violence? In Hobbes's works, the aversion to civil war is not simply a squeamishness about blood and guts and corpses. His aversion to civil war was aligned with his unrelenting insistence on rights of self-preservation – rights he preserved even at the expense of truly absolute power for the sovereign. Both the aversion to violence and the emphasis on self-preservation reflect great sympathy and respect for each human person, as a vulnerable creature and as a choosing agent.[62] It was not enough, on Hobbes's account, for a sovereign to guarantee preservation. We are creatures

[60] See, for example, Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), pp. 197–207.

[61] Michael Oakeshott suggested that for Hobbes, violence referred specifically to the physical overwhelming of one human by another, and that Hobbes understood the aversion to violence to be an aversion to being harmed by a fellow human. Michael Oakeshott, "Letter on Hobbes", reprinted in *Political Theory* 29 (2001): 835.

[62] As Samantha Frost has emphasized, Hobbes saw humans as not just animated bodies but "thinking-bodies." Samantha Frost, "Faking It: Hobbes's Thinking-Bodies and the Ethics of Dissimulation," *Political Theory* 29 (2001): 30.

who care about *self*-preservation. We are creatures, on his account, with a personal right to self-preservation, a right he would not allow any one of us to renounce. Hobbes kept in sight both the fact that humans are animals and the distinctiveness of the human animal.

Ultimately, these insights left Hobbes with an imperfect political theory. I do not mean that his theory is flawed, but that it is a theory of imperfection: it is a theory that reflects deep and unresolvable tensions between the goal of peace, on one hand, and respect for human individuals *qua* individuals, on the other. Hobbes made clear that when the sovereign has to choose between his own preservation (upon which depends the preservation of the society as a whole) and the preservation of an individual subject, the sovereign will and should sacrifice the subject.[63] But he did not impose an obligation on the subject to go down quietly. This is what separates him from most contemporary liberal theorists, and what makes his theory so radical and potentially disruptive today: he did not believe that a consent-based theory of government could produce a duty to submit to punishment.

Hobbes's theory of punishment combines deep individualism and egalitarianism, which produce the right to resist, with a consequentialist concern for security and safety. He has at times been compared to retributivists, at times to utilitarians. But his theory should not be confused with contemporary "hybrid theories" that seek to reconcile retributivism with utilitarianism. Hybrid theories draw upon multiple justifications of punishment to determine the appropriate distribution of penalties. A typical hybrid approach holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of the appropriate penalty within that range. Hobbes had little to say about the severity of punishments, and what he did say was explicitly consequentialist.[64] Desert plays no role in Hobbes's theory; indeed, he stated as a law of nature that "we are forbidden to inflict punishment with any other design, than for correction of the offender, or direction of others."[65]

More fundamentally, Hobbes's account of punishment is unusual in its modesty and its open acknowledgement of its own limitations. It does not claim that anyone consents to be on the receiving end of superior physical force. It does not claim to have transformed the exercise of such force into a cause for moral celebration or self-congratulation. It does not pretend that we punish prisoners for *their* benefit rather than our own. It does not claim, as some

[63] Here, I again draw from Ristroph, "Respect and Resistance in Punishment Theory," *California Law Review* 97 (2009): 601–32.

[64] Hobbes claimed that punishments must be sufficiently severe that they would deter illegal action: "If the harm inflicted be less than the benefit, or contentment that naturally follows from the crime committed, that harm is not within the definition [of punishment] and is rather the price, or redemption … because it is of the nature of punishment, to have for end, the disposing of men to obey the law.…" (*Leviathan*, at 215).

[65] Ibid. at 106; see also ibid. at 240 ("[T]he end of punishment is not revenge, and discharge of choler; but correction, either of the offender, or of others by his example.…").

retributive theories do, that when we incarcerate or execute prisoners, we act like God and "plant the flag of truth within the fortress of a rebel soul."[66] It does not claim that incarceration offers prisoners an education in virtue. It does not claim, as some utilitarian theories do, that harm to the interests of discrete individuals may be made to disappear into aggregate social benefits. The Hobbesian theory of punishment does not promise that we can punish "without remainder"; nor does it claim that the right punishment restores the balance, sets the world right, and leaves no place for regret.[67] In the Hobbesian view, the need for physical force demonstrates a failure of persuasion and consent. Persuasion and consent will fail on occasion, and force will be necessary, but we are all better off when consent succeeds and subjects obey.

In Hobbes's theory, punishment is at best incompletely authorized and imperfectly legitimate. The punishing sovereign acts with authority, but only with the authorization of those subjects who are not themselves punished. In relation to the condemned, the sovereign can claim only the natural right to use violence, so punishment is never fully representative. There is always a trace of the violence of the state of nature – and the rule of the stronger – in physical punishment. These considerations did not lead Hobbes to reject the practice of punishment, and they are hardly reason for us to raze the prisons. But they create a less tidy account of punishment than what is promised by most contemporary theories.

I have suggested that Hobbes's account, untidy as it is, is a more attractive and honest conceptualization than the theories that depict punishment as fully justified. Hobbes's account may also be more *strategically* valuable. There is, as noted at the outset of this essay, a significant theory-practice gap with respect to modern punishment. With rare exceptions, contemporary commentators claim that while punishment can be justified in theory, existing punishment practices fail to satisfy the conditions necessary for normative justification. Of

[66] The phrase comes from C. S. Lewis, who explains that God inflicts pain on humans not to be cruel, but to awaken them to their sins and to the truth. C. S. Lewis, *The Problem of Pain* (Macmillian 1965[1940], p. 95). Retributive theorists have adopted this phrase. See Jean Hampton, "An Expressive Theory of Retribution," in *Retributivism and Its Critics*, ed. Wesley Cragg (Wiesbaden: Franz Steiner Verlag, 1992), p. 1; Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press, 1981), p. 718 n. 80.

[67] The philosopher Bernard Williams argued that many situations present us with moral dilemmas in which it is not possible to satisfy every morally weighty claim. He used the phrase "remainders" to describe the "moral oughts" that remain unsatisfied. See Bernard Williams, *Problems of the Self* (Cambridge: Cambridge University Press, 1973), p. 179. These remainders are cause for regret – which is not to say that we would act differently if faced with the dilemma again. "Regret necessarily involves a wish that things had been otherwise, for instance that one had not had to act the way one did. But it does not necessarily involve the wish, all things taken together, that one had acted otherwise." Bernard Williams, *Moral Luck: Philosophical Papers 1973–1980* (Cambridge: Cambridge University Press, 1981), p. 31. For a somewhat broader understanding of the term "moral remainder," see Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), p. 213 n. 1.

particular interest are efforts to reform practice by reformulating theory. The most common criticism of current practices is simply that we punish too much, and scholars from a number of different theoretical perspectives have proposed new justifications of punishment with the explicit aim of reducing the number and length of prison sentences imposed. Not surprisingly, this strategy hasn't worked.

Perhaps reformers should pursue a different strategy. Justifications of punishment offer reasons to be confident in punishing. But we are more likely to reduce sentences if we are *less* confident in the legitimacy of punishment – if we approach the task with greater humility. To liberals committed to government by consent, Hobbes gives reasons for such humility.

10

In Harm's Way

Hobbes on the Duty to Fight for One's Country

Susanne Sreedhar

In November 2004, eighteen army reservists in Iraq were brought up on charges for disobeying a direct order. The members of the 343rd Quartermaster Company based out of Rock Hill, South Carolina, had refused to drive a fuel convoy from Tallil Air Base to Taji, complaining that inadequate equipment made the trip unsafe. The 207-mile route was widely known to be dangerous, and the unit's trucks were neither armored, nor were they scheduled to receive an armed escort. Unsurprisingly, army officials did not find this excuse convincing and, in light of their defiant behavior, the soldiers faced punishments ranging from demotion to court-martial.[1]

Though this story received relatively little reaction among the American public, from a philosophical perspective, it raises a number of intriguing but rarely asked questions. In the context of civil society, fear of death or serious physical harm serves as a legitimate – albeit prima facie – moral excuse for otherwise problematic actions; such fears often serve as grounds for a legal excuse as well. Actions motivated by self-preservation are generally judged to be neither morally impermissible nor the kinds of things that call for legal sanction. Thus, it seems puzzling that matters appear different in the case of military service, or at least this difference requires explanation. Why doesn't the fact that the members of the 343rd Quartermaster Company had a very reasonable fear of serious injury or death serve to excuse their actions – at least morally, if not legally? Why think that these soldiers have done something wrong or that they have violated a duty when we would not make the same judgment of a civilian

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[1] http://query.nytimes.com/gst/fullpage.html?res=9D06E4D7153FF935A25752C1A9629C8B63

who refused to carry out an action that she had good reason to think posed a serious threat to her life or well-being?

Certainly, complaints about the risk to one's personal safety seem strange, and perhaps inappropriate, coming from a soldier in the middle of a war. There seems to be a presumption that fear is simply not a viable excuse for those who are engaged in military service. But there are a number of further questions that we can ask about this presumption. What exactly are the nature, origin, scope, and limits of the duties of military service? When can a person be morally required to risk her life for the sake of her country? Does it matter if she believes the war to be a just war? Does it matter if the war really is just? Is it relevant whether or not the person entered the service voluntarily or involuntarily? Is the conscript more justified in disobeying, or even deserting, than the enlisted or voluntary soldier? Is serving in the military when called upon to do so part of the civic duty of members of a society? If so, on what grounds?

The "obligation to die for the state," as Michael Walzer calls it, is hard to justify as an aspect of political obligation. As A. John Simmons points out, the obligation to fight for one's country involves a number of serious costs, including not only the obvious immediate risk to life and limb but also the foreseeable loss of economic, career, and personal opportunities, not to mention the brute loss of months – and even years – of one's life.[2]

While questions about the justifiability of conscientious objection and the specter of just war theory have dominated much of the contemporary debates about the duties of military service, the role of fear in the context of military service and our obligations to serve have received far less consideration. In virtually all contemporary work on the subject, the fact that a person fears for her safety is simply not considered a legitimate justification for draft-dodging, dereliction of duty, or desertion; in fact, for most, it is not even considered to be a *possible candidate* for such justification. This view seems to be so taken for granted that most do not even bother to articulate it, much less explore it. Consider David Mapel's discussion of people's responsibility for military service, a representative example in this regard. He considers a person who is trying to decide whether to participate in a war she believes to be unjust and says, "In this context, fear does not seem to be very plausible as a general excuse. If we do not think that civilians can generally justify escaping military service by pleading personal cowardice, why should they be able to justify joining an army engaged in a criminal war on the grounds of personal cowardice?"[3] It is clear that Mapel simply assumes that fear is not a legitimate

[2] Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard University Press, 1970), chapter 4; A. John Simmons, *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 48.

[3] David R. Mapel, "Coerced Moral Agents? Individual Responsibility for Military Service" *The Journal of Political Philosophy* 6.2 (1998): 178.

excuse for evading military service; however, it is not clear whether – or on what grounds – such an assumption is justified.

For those of us to whom it is at least *plausible* that fear for one's life can give someone a legitimate reason not to do something – especially an act that, when viewed objectively, does pose a significant risk, the contemporary philosophical debate about the duties of military service may appear narrow, even frustrating. Such frustrations can perhaps be appeased by turning to the work of Thomas Hobbes, a philosopher who was primarily concerned with addressing what contemporary philosophers take for granted in their discussions of the "obligation to die for the state." First, unlike most contemporary political theorists, Hobbes took seriously the role of fear (or concern for one's personal safety) as a limit of political obligation. One might say that no philosopher has taken the issue *more* seriously than Hobbes. Second, and relatedly, one way to understand the goal of Hobbes's political philosophy is as an attempt to reconcile rational self-interest and political obligation.[4] The case of military service provides a test for any theory of political obligation that is grounded in considerations of self-preservation, as some citizens in any state will have to risk their lives for the protection and preservation of the whole. Finally, Hobbes's explicit comments about military obligations are incredibly brief – contained in only a few short paragraphs of text – but they are extremely puzzling and provocative. According to Hobbes, if a subject is conscripted, she is allowed to pay a substitute to take her place in battle, and the subject is excused if she flees the battlefield out of fear. Accepting money or volunteering for service takes away these excuses, as does the presence of a national emergency. Unfortunately, he does very little to explain or expand upon any of these claims let alone to *argue* for them or defend them against objections. Thus, it is uncontroversial to say that Hobbes's account of military service is vastly underdeveloped.

This aspect of Hobbes's political theory has not received much attention in the secondary literature, and those who do discuss it tend to be highly critical.[5]

[4] While I take this to be historically the dominant view in Hobbes scholarship, there is increasing disagreement about whether Hobbes should be read in this way. The most prominent dissenter is Sharon Lloyd, who argues that Hobbes was not making a claim about rational self-interest; rather, he was concerned with what she calls "transcendent interests," those interests that people are willing to die for. See S. A. Lloyd, *Ideals as Interests in Hobbes's* Leviathan*: The Power of Mind over Matter* (Cambridge: Cambridge University Press, 1992).

[5] While few delve into the details of Hobbes's arguments about military service, most who do are unconvinced. Not only do they think Hobbes fails to ground an obligation to defend the state, but some also draw catastrophic conclusions from this perceived failure, for example, Hobbes's commonwealth is likely to be short lived because people as Hobbes conceives of them will be unable or unwilling to defend it against attack by enemies, either domestic or foreign. Michael Walzer and Gregory Kavka make this claim explicitly, though Kavka attempts to modify Hobbes's arguments to deal with this objection (Walzer, pp. 77–98; Kavka, *Hobbesian Moral and Political Theory* [Princeton: Princeton University Press, 1986, pp. 424–33]). In a similar analysis, Richard Flathman claims, "It looks as if, for all of her authority, the Sovereign's power is mainly on paper, that the Leviathan is indeed a paper tiger" (Richard E. Flathman,

These critics are understandably puzzled; Hobbes's remarks about military service *do* seem to conflict with his well-known claims about the inalienability of the right of self-preservation and the natural fear of death.

The question of this chapter is: What is the best way to make sense of Hobbes's claims about what Walzer calls "the obligation to die for one's state"? Should they be interpreted simply as a series of strange and undefended assertions, about which Hobbes says so little because they are peripheral to his political theory? They certainly can appear this way on an initial reading: if you are scared you can run or pay someone to take your place, but if there is some special circumstance – a national emergency – then suddenly you are expected to get over your fear and fight to the death for your sovereign. Understood in this way, it seems that we should chalk Hobbes's assertions up to the almost charming idiosyncrasies common among historical figures; we need not pay attention to them either as important parts of Hobbes's political theory or as philosophical claims worth engaging in their own right. In this chapter, I argue that we should not dismiss these brief remarks so quickly, that despite the brevity and lack of clarity of the discussion, we can uncover a surprisingly coherent account, complete with *arguments* for the various claims that initially appear bizarre and ad hoc.

SOME PRELIMINARY OBSERVATIONS

> "It is useless for men to keep peace amongst themselves, if they cannot protect themselves against outsiders."[6]
>
> – *De Cive, 6.7*

There are a number of ways in which subjects of a state can be obligated to contribute to the provision for national defense that are completely unproblematic

Thomas Hobbes: Skepticism, Individuality, and Chastened Politics [London: SAGE, 1993, p. 124]). According to Flathman, Hobbesian subjects simply will not engage in the activities necessary to empower a genuine Leviathan. Sommerville, who discusses Hobbes's account of military service in a footnote, criticizes in passing saying, "It is unclear that these principles flow very naturally from Hobbes's premises" (Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context* [London: Palgrave Macmillan, 1992, p. 185]). Edwin Curley expresses similar skepticism about Hobbes's ability to explain and justify what he calls the "enforcement cadre" (Curley's Introduction to *Leviathan*, pp. xxxv–xxxvi). An important exception to this trend in the literature can be found in Baumgold's work on Hobbes, for example, Deborah Baumgold, *Hobbes's Political Theory* (Cambridge: Cambridge University Press, 1988).

[6] Hobbes's works are cited by chapter and paragraph number, using the following editions of his texts: Thomas Hobbes, *The Elements of Law: Natural and Politic*, ed. Ferdinand Tönnies (London, Frank Cass & Co, 1969); Thomas Hobbes, *On the Citizen* [*De cive*], eds. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1998); Thomas Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668*, ed. Edwin Curley (Indianapolis: Hackett, 1994); Thomas Hobbes, *Behemoth or the Long Parliament*, ed. Ferdinand Tönnies (London, Frank Cass & Co, 1969).

from the standpoint of Hobbes's theory. First, in most cases subjects support war efforts in ways other than fighting in battle. The primary way most subjects contribute to their collective defense is a financial one; that is, they pay taxes. In wartime, more specific kinds of assistance are possible – for example, quartering soldiers, rationing, participating in the production of the resources armies need to function (e.g., food, weapons, and uniforms). The obligation to make such "non-risky" contributions is actually over-determined in Hobbes's theory. The obligation of subjects to pay taxes is covered by their general obligation to obey the commands of the sovereign. It is also explicitly justified by the language of the social contract, which (at least in one of its incarnations) requires each person to agree "not to withhold the use of his wealth and strength" from the sovereign.[7] Moreover, according to Hobbes's notion of authorization, every subject is an owner of – and so responsible for – every action of the sovereign, including his declarations of war. Finally, the supplementary law of nature that Hobbes proposes in the "Review and Conclusion" states that "*every man is bound by nature*, *as much as in him lieth*, *to protect in war the authority by which he is himself protected in time of peace*," making it clear that the general obligation to contribute to the defense of one's country persists in wartime.[8]

It is clear that the obligation to fight battles does not exhaust the topic of the obligation to contribute to the defense of one's country – which in turn does not exhaust the topic of political obligation in general. While going to war involves inherently risky behaviors, most of the ways in which most members of a political community assist in defense require little to no personal risk.[9]

In present-day discussion of such matters, the basic right of governments to compel or draft citizens into warfare is rarely taken for granted; rather, it is taken to require explicit, and often extensive, justification. In contrast, the existence of such a right is simply not in question for Hobbes; instead, he is concerned to determine with whom, exactly, this right lies and how it gets exercised. As his discussion of the essential rights of sovereignty makes clear, Hobbes imparts total discretion to raise and control armies to his absolute sovereign: he "annexes" to the sovereign a general right to judge what constitutes a threat to the commonwealth and what to do about it, as well as a specific (and somewhat redundant) right "of making War, and Peace, as he shall think best." One of the key issues in Hobbes's time was a question about the division of rights and powers in the commonwealth: here he argues that all of the

[7] De cive, V.6.

[8] "Review and Conclusion," paragraph 5 in *Leviathan*.

[9] It is conceivable that being obligated to pay a tax could put a person's life at risk: if, for example, she was already living on the brink of survival; but this would happen only in the most exceptional circumstances. And Hobbes presumably would excuse her refusal to pay the tax under those circumstances. It is easier to see how other civilian war efforts might expose participants to personal risk; consider, for instance, the targeting of munitions factories by bombers (and the ensuing casualties to civilian labor therein).

relevant rights, including the right of deciding when and how armies need to be assembled and the attendant right of "levy[ing] money upon the subjects to defray the expenses thereof," belong to the sovereign.[10] Control over military forces is, for Hobbes, one of the most important rights of sovereignty; indeed, he suggests that having command over the army is itself a sufficient condition for being the sovereign.[11]

There is, however, a remarkable peculiarity to his account. That the sovereign has the right to issue any command that he sees fit does not entail that there is a corresponding obligation on the part of subjects to obey that command. Hobbes recognizes a range of cases (to which I will return later) in which subjects have rights to disobey even an absolute sovereign. This means that although conscription can be justified on Hobbes's view, this does not settle any of the interesting questions about the conditions under which subjects are obligated to comply with conscription orders. An independent account must still be provided for the sorts of obligations to engage and persevere in the kind of high-risk fighting that inevitably accompanies armed conflict.

The question of obligatory, high-risk military service brings two central aspects of Hobbes's political philosophy into conflict: (1) his claim that political obligation is grounded in, and limited by, rational self-interest and (2) his claim that subjects can be obligated to perform acts that are clearly *not* in their rational self-interest. Hobbes is commonly taken to ground political obligation (i.e., the obligation to obey the commands of the sovereign) in rational self-interest, for it is only in submiting to the authority of an absolute sovereign power that we can truly escape the horrors of the state of nature. Yet, Hobbes also makes it clear that one's obligation to obey the sovereign's commands is nullified whenever one's life is in danger. However, given that political obligation is grounded in the subject's interest in self-preservation, it is unclear how Hobbes can ever hope to justify an obligation to jeopardize one's life at the command of the sovereign. This raises a difficulty for the Hobbesian account of political obligation: How can there be a stable commonwealth if none of its subjects are obligated to undertake the necessary, but dangerous, duties required for the effective maintenance of that stability? On Hobbes's view, and indeed on any plausible view of a viable state-based society, law enforcement and military service play an essential role in the maintenance of domestic order and national security. If state security can be assured only at the expense of individual security, then the Hobbesian ground for political obligation is self-undermining. In short, whether, when, and where an individual has a duty to risk her life for her country are particularly difficult questions for Hobbes's moral and political theory.

[10] *Leviathan*, XVIII.8, XVIII.12.

[11] "The command of the *militia*, without other institution, maketh him that hath it sovereign. And therefore, whosoever is made general of an army, he that hath the sovereign power is always generalissimo [supreme commander]" (*Leviathan*, XVIII.12).

THE DUTY TO "EXECUTE A DANGEROUS OFFICE"

Hobbes addresses the question of dangerous duties in *Leviathan* by laying out a complex set of rights and duties. These specify the conditions under which a person is obligated to risk her life, as well as the conditions under which she is free to avoid the dangers of battle. He introduces the subject of military obligations in the context of his discussion of the "true liberties of subjects" in chapter XXI. The key passages are presented in their entirety as follows, and I refer to them in passing for the remainder of the chapter:

[15] No man is bound by the words themselves, either to kill himself 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. Then, therefore, our refusal to obey frustrates the end for which the sovereignty was ordained, then there is no liberty to refuse; otherwise there is.

[16] Upon this ground a man that is commanded as a soldier to fight against the enemy, though the sovereign have right enough to punish his refusal with death, may nevertheless in many cases refuse without injustice, as when he substituteth a sufficient soldier in his place; for in this case he deserteth not the service of the commonwealth. And there is allowance to be made for natural timorousness, not only to women (of whom no such dangerous duty is to be expected), but also to men of feminine courage. When armies fight, there is, on one side or both, a running away; yet, when they do it not out of treachery, but fear, they are not esteemed to do it unjustly, but dishonourably. For the same reason, to avoid battle is not injustice, but cowardice. But he that enrolleth himself a soldier, or taketh imprest money, taketh away the excuse of a timorous nature, and is obliged, not only to go to the battle, but also not to run from it without his captain's leave. And when the defence of the commonwealth requireth at once the help of all that are able to bear arms, every one is obliged, because otherwise the institution of the commonwealth, which they have not the purpose or courage to preserve, was in vain.

There are four main tenets of his account of the obligation to fight in battle against enemies of the commonwealth, or what he calls the "obligation a man may sometimes have, upon the command of the sovereign, to execute [a] dangerous … office."[12] In the order they are presented in the text, they are as follows:

[12] The "dangerous offices" Hobbes has in mind here likely include both defense against foreign enemies and keeping internal peace and order (see *Leviathan*, XXIII.10). This chapter deals exclusively with the former, though similar issues are likely to arise with the latter. It is difficult to know to what "dishonourable offices" are meant to refer, but it is plausible to assume that they are supposed to refer to a subset of law enforcement duties, namely, those whose job it is to actually carry out punishment sentences. In the "Review and Conclusion" of *Leviathan* (paragraph 10), Hobbes describes executioners as those "in whom want of means, contempt of honour, and hardness of heart concurred to make them sue for such an office." Hobbes seems to presume that there is something inherently dishonorable about being an executioner, but he does not explain what that might be.

1. If a subject can pay another to go in her place, she is free to refuse military service.[13]
2. Those who fear for their lives are excused when they avoid conscription or desert the force on the battlefield.
3. Those who volunteer for the army, unlike ordinary subjects who are conscripted, are obligated *not* to run from danger.
4. No able subject is exempt if the commonwealth itself is under attack and the help of all that are able is required to preserve the state.

At any given time, a particular person's obligation to fight will depend on (1) whether that person has voluntarily joined the armed forces (i.e., by enrolling or accepting money) and (2) whether there is a national emergency (i.e., whether or not the defense of the commonwealth requires the efforts of all who are capable of fighting). Where there is no national emergency, a (non-enlisted) subject who is ordered to fight has at least two specific excuses that she can invoke: provision of a substitute to fight in her stead, and fear (or what Hobbes calls "cowardice"). While the latter cases surely include some of the former, Hobbes treats them as conceptually separate. That is, while some may pay another because they are scared, presumably those who are scared but cannot or do not find a substitute are still excused; and it is plausible to think that some pay to get out of military service not primarily from fear for their lives but for other reasons.

One can describe these tenets as the rights that a subject retains in relation to the defense of the state. Hobbes invites the use of the language of rights in introducing the topic of the true liberties of subjects, saying "consider what rights we pass away, when we make a commonwealth, or (which is all one) what liberty we deny ourselves by owning all the actions (without exceptions) of the man or assembly we make our sovereign etc."[14] However, care is required in articulating the idiosyncratic notion of rights that Hobbes has in mind. Briefly stated, for Hobbes rights are understood as moral permissions, or what he calls "blameless liberties."[15] They do not imply correlative duties on the part of others to respect their exercise. If a person has a right to Φ, then she is at liberty to Φ; and if she does Φ, she has not committed any injustice. According to this theoretical framework, the true liberties of subjects – "the things which, though commanded by the sovereign, he [a subject] may nonetheless without injustice refuse to do"[16] – can be understood not only as liberties, but also as rights in this special Hobbesian sense.

The true liberties of subjects are remnants of the expansive right of nature that people must give up when they enter into civil society. They are the rights

[13] I have taken the liberty of using the female pronoun here, though Hobbes specifically excludes women from this discussion.

[14] *Leviathan*, XXI.10.

[15] *Elements of Law*, I.14.6.

[16] *Leviathan*, XXI.10.

that a subject cannot reasonably be expected to give up even though she has entered into a civil society. Accordingly, in the case of military service, we can say a conscripted subject has the right to refuse to go to battle, and even a right to flee the battlefield, unless the commonwealth itself is threatened – in which case no one who is able to fight has a right to refuse. At least where ordinary subjects are concerned, Hobbes presumes a separation between the questions of obligation and questions of motivation. He emphasizes that refusal to fight – even when that refusal is "without injustice" – is punishable by death, but he clearly thinks that some will nonetheless refuse. The presumption seems to be that even in the face of the most severe sanction possible, some will inevitably retreat from battle. (As he says, "When armies fight, there is, on one side or both, a running away.") At the same time, the implication of Hobbes's claims is that those who have already voluntarily enlisted or accepted a monetary advance for serving in the military never have a right to refuse to fight, or to flee from battle. Indeed, whenever enlisted soldiers do so – even in the face of grave personal danger – they commit an injustice.

We are thus faced with three questions. First, what are the grounds for these exemptions? Second, why does voluntary enlistment eliminate fear as an excuse? Finally, what obligations do national emergencies generate for every subject in a commonwealth?

Understandably, many readers have wondered how people, as Hobbes describes them, can *ever* be obligated to take on serious risks, enlisted or not, national emergency or not. Kavka worries that Hobbes's claims about the dangerous duties of military service do not "jibe with Hobbes's claim that the right of self-preservation cannot be surrendered."[17] Walzer sees grounds for a devastating criticism:

> An individual can sell his labor to another, and a soldier can also, but he can neither sell nor give away his right of self-defense. That is an inalienable right, and it must include the right, under certain circumstances, to run away. Individual bodily security is the only ultimate in Hobbes's system and the search for that security can never be forsaken or transcended. In fact, then, for Hobbes there can be no obligation to die of any sort.[18]

I argue that a coherent account of these obligations can be recovered from the text, but only if we distinguish the role of the subject, as structured by the social contract, from the role of the soldier, as structured by a more local "soldier contract." This local contract would make clear that voluntary enlistment requires, among other things, undertaking the obligation to risk one's life. In an important sense, signing such a contract involves the renunciation of the right of self-preservation. Moreover, I argue that careful consideration of Hobbes's social contract provides a systematic justification for the general exemptions

[17] Kavka, pp. 431–2.
[18] Walzer, p. 85.

that subjects enjoy, and an explanation of Hobbes's apparently puzzling claim that all are obliged in cases of national emergency.

My discussion of these points follows broadly the logic of the key chapter XXI passage in the preceding text. I begin with the general exemptions from military service on the basis of "substitute soldiers" and considerations of fear. I then turn to the special obligations incurred by those who voluntarily enlist for military service, and finally to the obligation of all to fight in cases of national emergency.

THE GENERAL EXEMPTIONS

There is an initial interpretive question about the scope of Hobbes's claim that "a man that is commanded as a soldier to fight against the enemy, though the sovereign have right enough to punish his refusal with death, may nevertheless in many cases refuse without injustice." It is not immediately clear whether he intends a strong presumptive obligation to fight when ordered to do so and that there are certain exceptions to this obligation, or that there is a strong presumptive excuse from fighting, and that specific circumstances provide an exception from this excuse. Some readers, for example Johann Sommerville and Deborah Baumgold, have assumed that the former reading is correct[19]; however, I am inclined to adopt the latter reading for the following two reasons. First, the corresponding paragraph note makes it clear that subjects are not bound "to warfare unless they voluntarily undertake it." Moreover, there are a number of other comments that support this latter reading as a general tenet in his overall theory of political obligation. For example, in the chapter on "Punishments and Rewards," Hobbes claims "though men have no lawful remedy when they be commanded to quit their private business to serve the public without reward or salary, yet they are not bound thereto by the law of nature, nor by the institution of the commonwealth, unless the service cannot otherwise be done."[20] It is clear that Hobbes's emphasis is on subjects' exemptions

[19] Specifically, Sommerville says, "Moreover, the end or purpose of the covenant, though not necessarily its express words, requires that subjects aid the sovereign by performing dangerous and dishonourable offices, or even by risking their lives as soldiers, when the preservation of the peace demands such a course" (Sommerville, pp. 58–9). See Baumgold, "Subjects and Soldiers: Hobbes on Military Service," p. 57.

[20] *Leviathan*, XXVIII.24. In the 1668 Latin edition, the import of this sentence is even clearer. Here it reads "for although all subjects are obliged to quit their private business to serve the commonwealth, even without wages, if there is need, nevertheless this is not [an obligation imposed] by the law of nature or by the institution of the commonwealth unless the commonwealth cannot otherwise be defended. For it is supposed that the sovereign can fairly use the resources of all subjects, and that from those resources those who defend the commonwealth, having set aside their own affairs, ought to be compensated, so that the lowest of soldiers can demand the wages of his service as a thing owed by right" (Curley, p. 209). The assumption seems clear: ordinary subjects are expected to contribute by paying taxes. They are responsible for the wars but not for fighting those wars themselves.

from service rather than on any sort of broad obligation for service. And, of course, in the primary passages under consideration, the points he is concerned to make are that a person is bound to undertake the risk of battle only if she has "voluntarily undertaken it" or on those rare occasions that "the help of all" is needed.

Given that this first clause is best understood in terms of a general exemption from service, we now come to the intriguing claim that a subject can refuse to serve without injustice "as when he substituteth a sufficient soldier in his place; for in this case he deserteth not the service of the commonwealth." This claim follows directly from the decision procedure with which Hobbes has introduced the discussion of military service: if "our refusal to obey frustrates the end for which the sovereignty was ordained, then there is no liberty to refuse; otherwise there is." The reasoning in favor of the substitute soldier clause seems to be as follows: subjects are at liberty to refuse if their refusal does not undermine the sovereign's ability to do the job for which he was instituted, namely, provide for the maintenance of internal peace and defense from external enemies. In cases where a subject refuses to fight, but provides the sovereign with a substitute soldier, her refusal in no way undermines the sovereign's ability to provide for the common defense.

In the absence of a standing army, although there would be some mercenaries employed at any given time, there also would be conditions in which this mercenary force was insufficient to carry out the military actions desired by those in power. In these cases, ordinary subjects could be conscripted to carry out these military actions. The Hobbesian sovereign, of course, has the right to raise an army of whatever size he wants, and this means he can issue conscription orders for a certain number of men. So, suppose that the conscription orders issued by the king require your locality to provide 1,000 soldiers for the king's service; further, suppose that you are one of the thousand subjects who has been chosen to serve. If you have the means to pay another (who presumably was not so ordered), the 1,000 men who are required by the conscription orders will still be provided. Regardless of what your reasons happen to be for refusing to fight, be it fear or something else, by providing an equally capable substitute to serve in your place you have not deserted the service of the commonwealth. In fact, your action constitutes a sort of service by proxy. Hobbes seems to think that subjects are fungible (maybe because they are all equally untrained); your refusal then is *of no consequence at all* to the sovereign's ability to raise whatever forces he deems necessary to provide for the common defense.

Such reasoning is reminiscent of other places Hobbes discusses the circumstances under which subjects have the right to refuse certain of their sovereign's commands. For example, we find an almost identical argument being made in *De Cive*. Here, Hobbes claims that "if I am told to kill myself, I have no obligation to do so. For if I refuse, the right of government is not frustrated, since others may be found who will not refuse to carry out the order … Nor is

he obliged to kill a parent, whether innocent or guilty and rightly condemned; since there are others who will do it, if ordered to do so."[21] In these cases, a subject's refusal to obey a command of the sovereign is justified (though she can still be punished with death) because someone else can be found to do the job. Notice how the language and the reasoning that is used in this case mirrors the language and reasoning used to explain why someone can refuse to undertake military service.

In addressing military service, Hobbes is clearly invoking a line of argument that he uses regularly. Moreover, the essential commitment in the substitute soldier condition is that it is universally applicable. Hobbes is adamant that people retain only rights that everyone can retain without posing a threat to the sovereign: "Nor doth the law of nature command any divesting of other rights, than those only which cannot be retained without the loss of peace." [22] Hobbes seems to adopt a principle like the following: *a right can be retained if its retention (by everyone) does not affect the absolute power of the sovereign*. So, *everyone* has the right to serve by proxy in non-emergencies. Of course, in practice this right can be exercised only by those with a certain amount of economic privilege. Nonetheless, it is, at least in theory, an option available to any who receive conscription orders. The sovereign is still able to raise the army he desires even if many, or perhaps even all, of the subjects initially commanded into battle find others to go in their stead. On Hobbes's account this is not the kind of disobedience that is destructive to the sovereign power.

The sorts of exceptions that Hobbes wishes to allow are far broader than this. Recall that Hobbes thinks that an allowance must be "made for natural timorousness, not only to women (of whom no such dangerous duty is to be expected), but also to men of feminine courage." Hobbes acknowledges that there will always be those who will run away from battle. But he concedes that "when they do it not out of treachery, but fear, they are not esteemed to do it unjustly, but dishonourably. For the same reason, to avoid battle is not injustice, but cowardice." While it is clear how the provision of a substitute soldier can be accommodated within Hobbes's overall framework, the claim that avoiding battle out of fear is not unjust sits far less easily with the sovereign's ability to raise and maintain whatever forces he deems necessary. In fact, Hobbes admits that "something is to be subtracted from the supreme right because of the

[21] *De cive*, VI.13.

[22] *Elements of Law*, I.17.2. The requirement that retained rights be universally retained is actually a law of nature: "Just as it was necessary for each man's preservation that he should relinquish certain of his *rights*, so it is no less necessary to his preservation that he retain certain *rights*, namely the *Right* of protecting his person, the right of enjoying the open air, water, and all other things necessary for life. Since therefore men entering into *peace* retain any common *rights* and acquire many personal *rights*, the ninth dictate of natural *law* arises, namely: *whatever rights each claims for himself, he must also allow to everyone else"* (*De cive*, III.14; see also *Leviathan*, XV.22).

natural timidity of certain men."[23] I am inclined to read the "allowance" here as indicating that the sovereign should prepare and compensate for the foreseeable and inevitable losses that are likely to come about because of the natural fear of death. On the assumption that the sovereign will compensate for this natural timorousness of men, the fact that some people are likely to defect on the battlefield does not *necessarily* or even *likely* "frustrate the end for which the sovereignty was ordained."

However, I suggest that the fear excuse might be better understood in the context of Hobbes's claim that considerations of self-preservation provide a justification for disobedience more broadly. Before I turn to discussion of the obligations that are incurred in voluntarily enlisting for military service, I pause to discuss briefly Hobbes's understanding of the right that all subjects retain to disobey the law where considerations of self-preservation are at issue.

For all his posturing about the absolute power of the sovereign, Hobbes is almost equally adamant about the inalienability of the subject's general right of self-preservation. Most generally, Hobbes asserts that "No man in the institution of sovereign power can be supposed to give away the right of preserving his own body, for the safety whereof all sovereignty was ordained."[24] This retained right is a right to resist or disobey the sovereign only under a narrow range of circumstances. A subject is always *at liberty* to "preserve his own body," and when he so acts, he acts *without injustice*. Hobbes justifies these acts of resistance by appeal to a right that was not given up in the social contract (though he sometimes speaks as though it is never possible to alienate the right in *any* contract).

The paradigmatic example of this right, as it is usually discussed, is the subject's right to resist the sovereign (or more likely, an officer of the sovereign) when he comes to kill, wound, or imprison her.[25] And indeed, Hobbes's emphasis is usually on the permissibility of refusing or resisting the sovereign when a subject is the potential target of punishment. He justifies what we would now think of as the excuse of self-defense on the grounds that "no man is supposed at the making of a commonwealth to have abandoned the defence of his life or limbs where the law cannot arrive time enough to his assistance."[26] However,

[23] See the Latin version of the chapter XXI passage.

[24] *Leviathan*, XXVII.3.

[25] For example, *Leviathan*, XIV.8, XIV.18, XIV.28, XIV.30, XXI.11, XXVIII.2; *De cive*, II.18, V.7. While Hobbes does not use the term himself, most in the secondary literature refer to it as the "right of self-defense." For representative examples, see Claire Finkelstein, "A Puzzle about Hobbes on Self-Defense," *Pacific Philosophical Quarterly* 82.3–4 (2001): 332–61; Susanne Sreedhar, "Defending Hobbes's Right of Self-Defense," *Political Theory* 36.6 (2008): 781–802; and Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1992). Self-defense is a slightly misleading term not only because not all of the cases in which this right can be exercised fall under what we would now call self-defense, but also because the notion of self-defense fails to capture the complexities involved in the discussion of military service.

[26] *Leviathan*, XXVII.20.

Hobbes's discussion of the right of self-preservation is not exhausted by these sorts of cases. For example, when Hobbes sets out the conditions under which a person who has broken the law is "totally excused," he says:

> If a man, by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation. And supposing such a law were obligatory, yet a man would reason thus: *If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained*. Nature therefore compels him to the fact.[27]

The illustration that Hobbes offers is of not a person who defends him- or herself from attack by an agent of the sovereign, but a starving person who steals food and is thereby totally excused for her action.[28] So we can think of the right of self-preservation (or that basic right retained by each subject in the commonwealth) as *the right to do what one judges necessary to preserve oneself or to save oneself from death and serious harm*. As a subject of a commonwealth, you retain a right of self-preservation on the grounds that self-preservation was the reason you had for entering into the social contract in the first place. We can extrapolate from this point a more fundamental principle for deciding how the obligations that a person incurs as a result of her roles are to be individuated. Briefly stated, the obligations that a person incurs in entering into any particular contractual relationship must cohere with (at least in the sense of not contradicting) the reasons she agreed to enter into the contract (and thus, incur the obligation) in the first place. Hobbes explains that a person cannot lay down her right to protect herself from death, wounds, chains, and imprisonment:

> … [because] the motive and end for which this renouncing and transferring of right is introduced, is nothing else but the security of a man's person, in his life and in the means of so preserving life as not to be weary of it. And therefore if a man by words or other signs seem to despoil himself of the end for which those signs were intended, he is not to be understood as if he meant it, or that it was his will, but that he was ignorant of how such words and actions were to be interpreted.[29]

He makes a similar point a few pages later: "no man can lay down his rights to save himself from death, wounds, and imprisonment (the avoiding whereof is the only end of laying down any right)."[30] So while refusing to fight in battle out of fear likely meets the requirement that "refusal does not frustrate the end for which the sovereignty was ordained," the excuse of fear is more plausibly interpreted as following from his general notion that people retain the right to self-preservation.

[27] Ibid., XXVII.25.
[28] Ibid., XXVII.26.
[29] Ibid., XIV.8.
[30] Ibid., XIV.29.

Thus, the various options available to the conscripted person can be explained in a manner consistent with Hobbes's broader political commitments and project. But the condition of the person who voluntarily enlists – the person who "enrolleth himself a soldier, or taketh imprest money" and so loses "the excuse of a timorous nature, and is obliged, not only to go to the battle, but also not to run from it without his captain's leave" – still requires explanation. As I noted earlier, this introduces a further worry: How can it be the case that the enlisted soldier, as such, gives up her right of self-preservation? I suggest this puzzle can be solved by making a distinction between the social contract and a soldier contract, that is, between "him that hath no obligation to his former sovereign but that of an ordinary subject" and "a man, besides the obligation of a subject, [who] hath taken upon him a new obligation of a soldier".[31] While subjects have the right to flee from battle, adopting the role of the soldier brings with it the further obligation not to flee the battlefield.

THE OBLIGATIONS OF THE SOLDIER

Unfortunately, Hobbes provides us with little help in understanding what, precisely, the soldier contract is supposed to be. His discussion of enlisted soldiers is confined to the remarks just quoted about the obligation not to flee in battle. However, by building upon the theoretical framework that I introduced earlier, there is a way to make sense of the sort of contractual relationship that Hobbes has in mind. Briefly stated, we must understand the Hobbesian soldier as someone who has, in an important sense, voluntarily given up her right of self-preservation in entering into a contractual obligation to serve the state in battle. Note, however, that this is not to claim that the soldier gives up the right of self-preservation *simpliciter*. The soldier retains the right to defend herself against attacks *by the enemy*. Moreover, she retains the right of self-preservation in any case that is not explicitly covered by the contract that she has made to serve the state in battle. However, *qua* soldier, she has obligated herself to abandon her preservation upon command.

Consider an example from Locke, who takes it for granted that a sergeant "could command a Souldier to march up to the mouth of a Cannon, or stand in a Breach, where he is almost sure to perish."[32] Hobbes seems committed to saying that soldiers do not have the right to disobey this command, though

[31] From "Review and Conclusion" paragraph 6. I borrow the term "soldier contract" from Deborah Baumgold (1988). Baumgold takes it for granted that the "soldier contract" involves the renunciation of the right of self-defense. But the point is not as obvious as she seems to think, and part of the project of the current paper is to expound and defend this interpretation of Hobbes's claims about the duties of "soldiers" (i.e., those who voluntarily enter the service) versus the duties of conscripts.

[32] John Locke, *Second Treatise of Government*, chapter 11, section 139. Hobbes does not give specific examples like this but there is no doubt he saw military service as involving great risks. In the Latin edition he uses the phrase "duties of such great danger."

ordinary subjects – as discussed earlier – do. Hobbes's conception of the predicament of the subject in the middle of a dangerous battle can be understood on the model of the case of the starving subject discussed previously. A person is permitted to steal food if she is starving, because she reasons thus: "If I do not do this I will die." A person might very well reason in the same way on the battlefield: If I do not get out of here right now, I am a dead person. Of course, as a practical matter it is sometimes safer to remain with one's fellow soldiers. But this does not bear on the philosophical point, since her duty as a soldier and her desire for self-preservation are only contingently directed toward the same action. The soldier is obligated to stay whether or not she judges staying is or is not most conducive to her safety. This shows that the soldier contract must involve an agreement *not* to do what one judges necessary to protect oneself from mortal danger, or in Hobbes's terminology, a transfer of the right of self-preservation.

Consider the soldier who agrees to stay on the battlefield when she judges it to be the greater danger and in circumstances an ordinary subject would be justified in fleeing. Such a soldier agrees to *refrain from doing* whatever she thinks necessary to avoid death, wounds, and chains. Indeed, these are exactly the risks of the battlefield: you can be killed, wounded, or taken prisoner.[33] The "new" obligation that Hobbes attributes to the enlisted soldier must be understood to include the renunciation of the right of self-preservation, that is, the obligation not to do what one judges necessary to preserve one's own life. While Hobbes does insist that the right of self-preservation is inalienable, his claim is indexed to the social contract. In the context of political obligation more broadly (i.e., the obligations of subjects *qua* subjects), the right of self-preservation cannot be transferred. But it can be transferred in the soldier contract because it violates neither of the fundamental principles that are used to establish the right of self-preservation in the context of the social contract. Retaining a right of self-preservation in the context of a soldier contract would obviously affect the ability of the sovereign to maintain an effective army. Recalling the limits placed on the obligations of contractual relationships in the previous section, a person who enters into a soldier contract does not contradict the reasoning for so doing in giving up the right of self-preservation, for presumably she did not enter into the soldier contract in order to better her chances at survival.

Recognizing that the obligations a person incurs, and the rights that she retains, in entering into a contractual relationship are dependent upon the particular features of that contractual relationship, encourages us to challenge two dominant beliefs about Hobbes's political theory. First, the right of self-preservation can and indeed must in some cases be alienated. Second,

[33] Of course, even the duties of the soldier are not without limit. If her side has been defeated or she has been taken prisoner of war, the soldier is allowed to submit to the enemy.

some people are able to overcome the fear of violent death; in fact, they must be relied upon to do so if the commonwealth is to remain secure. As the soldier contract demonstrates, Hobbes *must* think people are able to risk their lives and can obligate themselves to do so. Moreover, this reading coheres with other parts of Hobbes's corpus where he alludes to such a possibility in a variety of other contexts. Consider Hobbes's claim that "Fortitude is a royal virtue; and though it may be necessary in such private men as shall be soldiers, yet, for other men, the less they dare, the better it is both for the Commonwealth and for themselves."[34] Hobbes is typically read as claiming that people are fundamentally averse to death – everyone fears (or should fear) death above all and that death is so bad that even if some people take irrational risks no one can be depended upon to do so. However, those people who exhibit the virtue of fortitude are a clear counterexample to this presumption about human nature.

Fortitude among people who are natural risk-takers or who value honor, competition, and material gain more than they value their own lives can be a real source of danger in the commonwealth. Such people are not as likely as the rest of us to be moved by the terrible sanctions that are entrenched in the state's punishment power; therefore, they will also be more likely to break laws, attempt to gain power for themselves, and so forth. As Hobbes notes, it is preferable to have as few such people in the general public as possible. Military service is thus able to serve an additional function in Hobbes's account. Not only is it a necessary function of the commonwealth, but it also provides an outlet for these behaviors and dispositions that would be dangerous if left unchecked in civil society. Channeling these risk-takers into military service neutralizes them as a threat to the commonwealth, turning what would be a vice into a benefit for the common good. These people earn honors at war while serving the protective function for their fellow citizens.

NATIONAL EMERGENCIES

Thus far, this story seems to hang together quite nicely. However, there is one additional worry. There is a final claim advanced in Hobbes's discussion of military service, one that does not – or at least does not obviously – sit well with the picture I have painted thus far. As Hobbes notes, "when the defence of the commonwealth requireth at once the help of all that are able to bear arms, every one is obliged, because otherwise the institution of the commonwealth, which they have not the purpose or courage to preserve, was in vain."[35] He appears to claim that if the defense of the commonwealth requires the help of all, then everyone is obliged to abandon their right to self-preservation at the sovereign's command. It seems as though, in conditions of national

[34] *Behemoth*, 45.
[35] *Leviathan*, XXI.16.

emergency, ordinary subjects incur the obligations of soldiers. For this to be possible, they would have had to agree to it as part of the social contract.[36] But, if the picture that I have sketched thus far is correct, the obligation to abandon self-preservation makes sense only relative to the role of the soldier. Hobbes explicitly claims that "no law can oblige a man to abandon his preservation," but if this were true, then even in the context of a national emergency, the command of the sovereign cannot obligate subjects to give up this right.

Fortunately, there is an alternative interpretation of this obligation in the case of national emergencies. In the case of a national emergency, people are obligated to *attempt*, insofar as they can possibly do so, to defend the country; in this case they do not have the same right to simply refuse as they would in cases where there was no national emergency. No substitutes can be found because every person is already required to fight. More importantly, those who are by nature timorous cannot refuse to fight out of fear; for if they do so, this will "frustrate the end for which the sovereignty was ordained." The purpose of the social contract is to create an institution that can provide for the common defense, and can ensure the security of the subjects. But the social contract cannot create such an institution if everyone retains the right to abandon it in its time of need.

But this leaves us with a further question: What, precisely, is the obligation that subjects have in the case of a national emergency if it is not the same obligation of soldiers, that is, the obligation to obey commands no matter how risky such obedience is. How can we construe the obligation of citizens in a national emergency, if not in terms of the obligation soldiers have to obey even the most dangerous commands? I suggest we read the obligation weakly: as an obligation to do as much as one can to protect the commonwealth in times of need. I offer two pieces of textual evidence in support of this reading. First, in the Latin edition, the relevant sentence reads "all citizens, each person who either can bear arms or contribute something, however little, to victory, is obliged to military service." When he revised this discussion of military service, he added the clause "contribute something, however little"; Hobbes's reflective view is that the obligation that every person has in cases of national emergency is not *necessarily* the obligation to pick up a weapon and join the fight. Even more tellingly, recall that the supplementary law of nature in the "Review and Conclusion" states that "*every man is bound by nature*, *as much as in him lieth*, *to protect in war the authority by which he is himself protected in time of peace*." Even the naturally timorous can be obligated to protect the state, *inasmuch as they are capable*. The precise extent of the obligations that are incurred in cases of national emergency will, thus, vary from person to person depending on exactly what it is that she can contribute.

[36] I take it that this is how Gauthier reads Hobbes on this point. See David Gauthier, "Hobbes's Social Contract," *Nous* 22 (1988): 71–82.

CONCLUSION

Hobbes's account of military service thus offers two recommendations for how ruling sovereigns should wage war. First, given the general human tendency toward "natural timorousness," there is always the possibility for conflict between the "execution of dangerous offices" that the state requires and the levels of risks subjects are willing to accept. Thus, the sovereign has reason to inculcate values which go beyond the narrow self-interest of the members of the general public, for example, patriotic or religious duties. For example, if subjects believe in the divine sanction of a particular war or that salvation demands acting in accordance with the demands of one's king, we can expect them to make every attempt to obey commands to help defend the commonwealth. In line with this suggestion, Sharon Lloyd, who argues that Hobbes grounds political obligation in subjects' transcendent interests, says, "…in cases where the sovereign has commanded him to bear arms to defend the commonwealth [the demands of salvation] give [subjects] a transcendent interest in defending the commonwealth."[37] Second, a wise sovereign will wage war only when absolutely necessary (i.e., in self-defense) and will maintain only the forces needed for these purposes. In general, ordinary subjects are unlikely to make particularly good soldiers: not only are they untrained but (if the law is doing its job!) they will be unaccustomed both to the use of violence and to overcoming their natural fear of violent death. Their lives as peaceful subjects will ill prepare them for the kinds of dispositions and behaviors characteristic of good warriors. The wise Hobbesian sovereign will call on Hobbesian subjects to execute dangerous offices as little as possible.

The picture that I have painted shows a more sophisticated and philosophically richer side of Hobbes's understanding of military obligation than one would presume, given the incredible brevity and obscurity of his claims on the issue. However, Hobbes's view has a troubling side in that it seems to depend, at least in part, on a class of poor people who are driven by necessity to perform the dangerous duties necessary to keep everyone else safe. If the social contract is to fulfill its purpose of preserving life and security for the general public, this will require that some people be willing to lay down their lives for the security of the political community. This, in turn, seems likely to yield a system of private transactions where those who are economically better off will be able to buy their way out of military service. So there must exist economic inequalities and vulnerabilities in order for some to be induced to accept a wage in exchange for a willingness to risk serious emotional and physical harm (on the presumption that natural risk-takers won't make up the whole of the armed forces). Of course, this is not a unique problem for Hobbes; indeed, I would argue that it is a problem for any modern state, ours being no exception.

[37] Lloyd, p. 154.

Let me close by returning to the case with which I started this chapter. I can now give a Hobbesian perspective on the army reservists' refusal to obey a direct order because of the perceived danger inherent in that order. I am inclined to think that Hobbes would say that if they voluntarily enlisted in the armed forces, then their refusal counts as an injustice. Interestingly, if those soldiers had been "stop-lossed," and if stop-loss is a kind of "backdoor draft," then on Hobbes's account, they are likely excused. That is not to say that punishment for refusal would not have been justified (Hobbes even suggests punishment by death). But for Hobbes, the question of the appropriateness of punishment is separate from the question of the moral status of their refusal.

These Hobbesian reflections draw our attention to two intriguing – and at least potentially compelling – claims. First, the obligation to help in cases of national defense required to have a functioning commonwealth *is* universally applicable; however, this obligation will vary in terms of the capacity to contribute that each individual actually has. Hobbes does not think that everyone must fight in battle, but it does not follow from this that anyone has the right to be a free-rider. Even those who are unable to contribute by fighting in battle have an obligation, in cases of national emergency, to contribute with some sort of personal sacrifice – even if this is not a sacrifice of life. Second, Hobbes's analysis invites us to take seriously the notion that fear for one's safety may well be a legitimate excuse for evading battle. If the joining of the armed forces is genuinely voluntary (and we will surely disagree with Hobbes about what this entails), then it seems reasonable to expect the voluntary soldier to follow through on her commitment to risk her life when necessary. However, in the absence of genuine consent, fear of death perhaps should serve a prima facie exculpatory role at least from the standpoint of morality, even if not from the standpoint of the law. There are, of course, further worries about justice of and in wars; however, Hobbes at least provides us with a viable account of how self-interest and political obligation might be reconciled in the context of military service.

11

Confronting *Jihad*

A Defect in the Hobbesian Educational Strategy

Maryam Qudrat

Hobbes wrote *Leviathan* in response to the horrifying prospect of a civil war rooted largely in factions' differing conceptions of religious duty. His proposed absolutist, authoritarian remedy and prophylactic for such disorders seeks to cause subjects, through extensive education, to defer to the judgment of a single sovereign arbitrator on all disputed matters. The rise of the Taliban in Afghanistan in the mid-1990s may appear to model Hobbes's recommendation. However, the fall of the Taliban, unseated by the United States government in partnership with several European nations in 2001, reveals a serious fault in Hobbes's recommended strategy for building a stable state. Hobbes insisted that only pervasive and uniform education – we might rather think of it as indoctrination – could force the internalization of attitudes of willing deference needed to ensure stability. But mere deference is not a principled commitment, and sheepish followers beaten down by an "educational system" that compels them uncritically to parrot whatever they are told will not have the wherewithal to defend their regime against serious threats, whether external or internal. The very sort of charismatic "seducers of the people" that so exercised Hobbes find easy prey in a society of sheepish Hobbesian followers. Hobbes's educational system proves self-defeating.

Hobbes's concern is with the subjects or citizens of the state who hold transcendent interests, that is, interests for the sake of which they are willing to risk or even accept temporal death, activated by religious ideals.[1] I argue that Hobbes renders citizens susceptible to holding misguided conceptions of their interests in requiring uniformity of thought and judgment by censoring private judgment. I argue that this feature of his argument undermines his own goal of maintaining sovereign control and civil peace. He would be better served by

[1] See S. A. Lloyd, *Ideals as Interests in Hobbes's Leviathan: The Power of Mind over Matter*, (New York: Cambridge University Press, 1992), pp. 301–5; also, see S. A. Lloyd, Morality *in the Philosophy of Thomas Hobbes: Cases in the Law of Nature*, (New York: Cambridge University Press, 2009), pp. 30, 70.

developing intellectually sophisticated citizens who can be less susceptible to dysfunction, and less easily mobilized by misguided characterizations of their transcendent interests. Charismatic leaders who emerge from this pool of persons who hold misguided religious transcendent interests could well espouse a political project aimed at undermining the sovereign, and gain full support from equally narrowly focused followers among their peers. These charismatic leaders may position themselves to destroy the authority of the sovereign by interrupting civil institutions via a destabilization of security, especially because their interests being transcendent, this group is willing to die in pursuit of its religious ideals. In sum, the very group that the sovereign would rely on for upholding the state could organize under one or more charismatic leaders, who have an agenda to create instability, wage a civil war, and overthrow the sovereign to install their own regime.

In conformity with Hobbes's theory, I contend that Afghanistan's civil war led to a state of nature,[2] showing what the state of nature is like "by the manner of life, which men that have formerly lived under a peaceful government, used to denegrate into, in a civil war."[3] Hobbes held that life outside of civil society is brutish, and a sovereign is necessary for the maintenance of civil obedience and thus a secure, healthy state. The alternative described to this sovereign system is a precise depiction of the condition of Afghanistan during its civil war, which looked much like this:

> Whatsoever therefore is a consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition, there is no place for industry, because the fruit thereof is uncertain, and consequently, no culture of the earth, no navigation nor use of the commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.[4]

Because the price of forgoing a sovereign ruler is the state of nature, a condition that is to be avoided at all costs, Hobbes endows the sovereign with the authority to ensure civil obedience, even though such an arrangement may entail individual personal loss.

This exemplification of a state of nature was followed by a political regime, the Taliban, that maintained security throughout the nation by a synthesis of terrororizing its citizens into submission and stripping individuals of their use

[2] A state of nature for Hobbes is a state of unbridled private judgment in which "everyone is governed by his own reason." That "every private man is judge of good and evil actions"…"is true in the condition of meer nature." Hobbes, *Leviathan*, XXIX.6.

[3] *Leviathan*, XIII.11.

[4] Ibid., XIII.9.

of private judgment since they either closed schools or espoused their own system of indoctrination whether at the school or mosque where all men and boys were required to appear during the five daily prayers. Also, by appointing itself as the supreme religious authority, questioning the Taliban's laws or practices would be akin to casting doubt on the word of God itself. However, it only served the short-run ends of the seated regime, instead of the perpetual stability of the state at which Hobbes was aiming. Afghan citizens willingly cooperated with the United States and its allies when they realized that there was hope of success to overturn the strict authoritarian Taliban regime in favour of a moderate and democratic form of government. However, the Taliban continued to indoctrinate the uncritically thinking Afghans, terrorized them and offered them eternal sanctity in exchange for joining their *jihadi* cause of overthrowing Afghanistan's Central Government. Their view of defending Afghanistan's territorial integrity against foreign invaders who have set up a puppet regime is taught to the Afghan citizenry as a duty to God and they are prompted to de-stabilize the country, disrupting the ability of the Afghan Government to properly function as a result of relentless attacks, murders, killing, and bombings. Once individuals have been cultivated into sheepish followers, the *directionality* of their loyalty clearly cannot be guaranteed by the sovereign. As a result, the lack of understanding defeated much of the democratic and development projects in Afghanistan, leading to the Taliban being officially invited to join the political peace process by the United States Government and its allies in 2011.

In his time, Hobbes was concerned that the church gained loyalty from subjects and thereby gained power over the sovereign; but in Afghanistan, the sovereign has redescribed the religious and moral principles of duty to God, making defense of territorial integrity paramount. Hobbes may have thought desirable an arrangement in which individual interests are aligned with the will of a sovereign, who exercises his authority to protect his people against internal and external attack. And though this alignment has held true in Afghanistan, it has now arrived at a series of problems resulting from closed-minded individuals who possess transcendent interests to uphold their state through violent *jihad*, interests that the state itself can no longer control. The inherent problem with depriving citizens of the use of their private judgment is manifested in their eventual loss of rational abilities, where they become obstacles to their own interests. The alignment of the will of the sovereign and its citizens is thus feeble and inadequate since the people are highly susceptible to misguided views and are easily persuaded to organize under leaders (whether warlords or otherwise) who convince them that they are in fact upholding the defense of the state as ordained by God.

EDUCATION-BASED SECURITY

I think it [reformation of the universities] a very good course, and perhaps the only one that can make our peace amongst ourselves constant. For if men know not their duty, what is there that can force them to obey the laws? I am therefore of your

opinion… that we never shall have a lasting peace, till the Universities themselves be in such manner, as you have said, reformed.[5]

Hobbes is often thought to have viewed force as a simple solution that will, if adequately exercised by the sovereign, establish perpetual civil order. But this standard interpretation does not take into account the realistic view that Hobbes holds in dealing with citizens, which acknowledges that mere force will often not suffice to cause them to fulfill their duties of obedience to the state: "For if men know not their duty, what is there that can force them to obey the laws? An army, you will say. But what shall force the army?…"[6] Hobbes correlates proper, or "right," education with the peace and stability of the state since he believes that passion coupled with wrong opinion can lead to rebellion. For Hobbes there are three ingredients or necessary conditions for rebellion: discontent, the hope of success, and a belief of just cause.[7] On my proposal, a principled commitment to the state should arrest the emergence of the three conditions for rebellion. Open debate may best foster allegiance and a principled attachment to the state, as J. S. Mill argues here in his *On Liberty*:

> Even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension of feeling of its rational grounds … the meaning of the doctrine itself will be in danger of being lost… the dogma becoming a mere formal profession, inefficacious for good…and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[8]

It is at the universities in particular that Hobbes believed that this right education can begin or erroneous views be cultivated; he blamed the universities in large measure for the English Civil War and urged their reformation as of great importance to the stability of the state. Hobbes believed that humans are malleable and begin as *tabula rasa*, forming their opinions and judgments through education and socialization. Common people's minds, he wrote, "unless they be tainted with dependence on the potent, or scribbled over with the opinions of their doctors, are like clean paper, fit to receive whatsoever by public authority shall be imprinted in them."[9] Once a person's opinions are formed, they become very difficult to change unless the person is reeducated. Accordingly, Hobbes suggests gaining control of the universities so that they realign their course of studies to include the grounds for obedience to the sovereign. Hobbes held this to be necessary for seeing internal tranquility in the state.

[5] *Behemoth*, ed. Sir William Molesworth. Source Works Series No. 38 (New York: Burt Franklin Research, 1962), p. 211.
[6] *Behemoth*, p. 75.
[7] *Elements of Law*, II.8.I.
[8] J. S. Mill, *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), p. 59.
[9] Leviathan, XXX.6.

If the universities can train the teachers who teach the generality of citizens that it is their duty to defend the state against external aggression, and to not retreat in the face of opposition, citizens are much more likely to obey the state's requirement for allegiance. Hobbes asks, "What good is it to promise allegiance and then by and by to cry out, as some ministers did in the pulpit, To your tents, O Israel!?"[10] Allegiance must be seen as a duty; the university thus plays a paramount role in generating this principled support for the state, with Hobbes noting:

> I despair of any lasting peace amongst ourselves, till the Universities here shall bend and direct their studies…to the teaching of absolute obedience to the laws of the King, and to his public edicts under the Great Seal of England. For I make no doubt, but that solid reason, backed with the authority of so many learned men, will more prevail for the keeping of us in peace within ourselves, than any victory can do over the rebels.[11]

Conversely, if the universities do not provide an avenue for right education and instead churn out preachers and parliamentarians who misdirect the population to hold loyalties to other beliefs that would override loyalty to the sovereign, the peace and stability of the state will be threatened. Misguided education is the root of social instability and the disease that leads to the destructive symptom of civil disorder, and "yet the fault," Hobbes insists, "may be easily mended, by mending the universities."[12]

Hobbes realized that people must be persuaded that they have a duty to obey the sovereign, since they will not otherwise act on a principle that they do not hold to be in their personal interest in cases when that interest and their duties to the sovereign diverge. Specifically, it is through a process of education that all of the citizens of the state must be publicly instructed in a proper conception of their interests, and those interests must include securing the goods that their deference to the will of the sovereign makes possible. Hobbes does not believe that sovereign control of education would overstep the government's boundaries. In fact, he believes that it is the duty of the sovereign to protect citizens from the peril of misguided education by providing rightly guided instruction:

> [I]t is against his duty to let the people be ignorant, or misinformed of the grounds, and reasons of those essential rights, because thereby men are easie to be seduced, and drawn to resist him, when the commonwealth shall require their use and exercise. And the grounds of these rights, have the rather need to be diligently, and truly taught, because they cannot be maintained by any civill law, or terrour of legal punishment.[13]

[10] *Behemoth*, p. 181.
[11] Ibid., p. 71.
[12] Ibid., p. 90.
[13] *Leviathan*, XXX. 3, 4.

Hobbes contends that religious education should occur at the university but that it should also be sovereign controlled. In other words, it is obedience to the sovereign that should be taught at the universities, and religious education should reinforce this behavior by showing that God requires such obedience. In so doing, Hobbes shifts authority away from the religious authorities and toward the head of state. This feature of his argument is particularly problematic since religious interpretation becomes carefully crafted to serve political goals of rulers and is subject to each regime's interpretation of what will best serve to preserve it rather than the state. Hobbes places too much trust in rulers to re-describe scriptures for the benefit of the state rather than their own political power.

Unless citizens can think critically about the regime, the regime will melt easily, since those who do not think critically cannot develop the principled commitments needed for stability. The mechanism that is needed for real, principled, positive opinion and stability is the open university. The Taliban was doomed to fall because it did not attract a principled commitment to itself. Hobbes traces the root of faulty reasoning and opinions to a variety of causes and errors, including flawed private judgment.

"As for the means and conduits," Hobbes wrote,

> … by which the people may receive this instruction, we are to search by what means so many opinions contrary to the peace of mankind, upon weak and false principles, have nevertheless been so deeply rooted in them…that men shall judge of what is lawful and unlawful…by their own private judgments; that subjects sin in obeying the commands of the commonwealth; unless they themselves have first judged them to be lawful.[14]

REDESCRIPTION OF RELIGIOUS IDEALS TO ADVANCE *JIHAD*

How did Muslims manage to redescribe *jihad* to legitimize preemptive strikes against noncombatants, and even other Muslims? The medieval Sunni scholar Taqi ad-Din Ahmad ibn Taymiyya (1263–1328) needed an argument that would rally Muslims behind the Mamluke rulers of Egypt in their struggle against the advancing Mongols. Many objected that there could be no *jihad* against the Mongols because the Mongol rulers had converted to Islam. Ibn Taymiyya reasoned that because the Mongol ruler permitted some aspects of Mongol tribal law to persist alongside the Islamic Sharia'a code, the Mongols were apostates to Islam and therefore legitimate targets of *jihad*.[15] In alignment with this religious redescription, the Taliban managed to persuade people that efforts at the annihilation of those who opposed their political regime

[14] Ibid., XXX.14.

[15] Daniel Benjamin and Steven Simon, *The Age of Sacred Terrorism: Radical Islam's War Against America* (New York: Random House, 2003), pp. 43–52.

merited a great religious stature, making them worthy of the highest of eternal and mortal rewards. Conversely, challenging the state deserved the strictest of punishment, which would be carried out in public for all to observe.

Citizens of the state who are willing to die in the service of their mistaken religious beliefs pose a special challenge for Hobbes. This sort of challenge can be seen today among Muslims who are enthusiastic to join *jihadi* movements, because they are not motivated by the secular sovereign's reasonable appeals, or promises of worldly reward or threats of punishment. The sovereign that has failed to gain total civil obedience leaves its leadership challenged since it cannot deliver security to the entire citizenry by its command. The expected reward for a person who dies in *jihad* is eternal dwelling in heaven, where the highest degree of bliss is perpetually enjoyed. This promise of paradise prompts some Muslims in some cases to embrace the opportunity to become martyrs in the ways defined by the Muslim rulers and the *Qur'an*. How does one persuade such individuals, who actually seek death on the basis of religious promises, to be obedient to civil authority?

The *Qur'an*, understood as revelations to the Prophet Muhammad revealed as the word of God through the Angel Gabriel, and *hadith*, a compilation of the sayings of the Prophet Muhammad that were recorded by his companions and those who knew him and heard him speak, are the two main sources of knowledge in Islam that are relied upon for scholarship in areas that require debate. The *Qur'an* and *hadith* both have referred to *jihad*, martyrdom, and the treatment of non-Muslims.

Despite the Islamic code of conduct in war, which forbids the killing of all innocents including plant and animal life, the redescription of Islamic ideals to propel political agendas, coupled with the attachment of political interests to the educational system, led to the eventual downfall of the Afghan state and toppling of the sovereign. In other words, the redescription strategy did not serve the long-term interests of the state. *Jihadists* have gotten around this by redescribing verses from the *Qur'an* to legitimize violence against native and foreign noncombatants, on the grounds that they are citizens who have willfully consented to being members of a state that upholds wrong principles. Muslims deemed to be hypocrites can be even higher value targets of *jihad* because they are thought to claim to be Muslim but in fact practice the ways of the nonbelievers, or side with enemy nations by accepting citizenship and enjoying the benefits of their form of governments. The Taliban currently operate under this conception of *jihad* to wage war against Afghanistan's current sovereign, launching suicide bombings in government offices, and orchestrating sophisticated assassination attempts upon the sovereign himself and his government ministers.

RECOMMENDATIONS AND CONCLUSION

A more functional educational system than the one Hobbes advocated would support nongovernmentally controlled universities that are publicly funded to

advance a scholarly, critical, and analytical approach to the study of religion. I propose that an official system of religious education be housed at the universities such that the only religious scholars who practice would be those who are certified through the university. Open and uninhibited inquiry, religious and otherwise, at the state's university must be advanced rather than abolished to ensure the preservation of the state's long-term stability. Study of religion must be limited to this level of scholarly, academic engagement, not placed in the mullah structure, where religious leaders are trained in indoctrination camps called madrasas that are funded by political movements. Religious authority should instead be gained through university education in religious studies. This method replaces mullahs, priests, and other self-proclaimed religious leaders with religious scholars who would not appease the interests of political leaders.

I recommend that the sovereign should allow the variety of scholarly private judgment and disallow the formation of a single religious authority that can corrupt, manipulate, or eventually become a self-serving, destructive institution. Some individual religious scholars may gain popularity if their writings and opinions are embraced to a greater degree in society. But, they should be understood to be scholars only, and not mediators between man and God. Final religious judgment should reside in the hearts of religious followers in possession of the literacy and reasoning skills required to grapple with arguments and arrive at sound conclusions. I believe Hobbes would have done better to limit his criticism to the Church, rather than religious scriptures and their underlying principles, since it was the Church that posed a real threat to the state. Hobbes could then perhaps have gained support for dismantling that problematic institution.The university will turn out religious scholars and leaders, but those leaders must rise to power through elections by local communities, who can decide which leader best represents the religious interpretation that they express in their daily lives. Rather than undereducated mullahs who promote a dogmatic view of religion, mosques would be led by religious scholars espousing a brand of religion in line with the preferences of local communities. Critical religious education could also be introduced in grade school, as preparation for university education. Of course, this level of religious understanding presupposes literacy and a basic understanding of how to think critically.

In conclusion, Hobbes perceived a serious danger in the clash between religious institutions, which offer eternal rewards/punishments, and the state, which can motivate only with promises of worldly reward or punishment. Citizens swayed by the possibility of eternal reward or damnation who see their religious and civil obligation as incompatible might obey religious orders, rather than those of the civil sovereign, leading to loss of civil liberty and the erosion of the state. In order to re-align loyalty and civil obedience with the sovereign, Hobbes used scriptural interpretation to ground a redescription of Christian religious ideals, requiring deference to the judgment of the sovereign even in matters of religion. He wrote that

It is true that the law of God receives no evidence from the laws of men. But because men can never by their own wisdom come to the knowledge of what God hath spoken and commanded to be observed, nor be obliged to obey the laws whose author they know not, they are to acquiesce in some human authority or other. So that the question will be, whether a man ought in matter of religion, that is to say, when there is question of his duty to God and the King, to rely upon the preaching of his fellow-subjects or of a stranger, or upon the voice of the law?[16]

It is precisely this arrangement that has taken place in the Islamic context of Afghanistan. The redescription of religion that the sovereign Taliban has created leads to two main problems: first, the permissibility of acts of terrorism, which in fact harm the long-term interests of the state; and second, their control of education, which prevented its citizens from developing their private judgment. This resulted in a population of narrowly focused followers who became easily activated toward misguided characterizations of their interests. Dying for religious ideals, which is thought to protect the state, is defined as martyrdom under the redescription of religion and encouraged, even if innocents must be killed in the process. Such a citizenry may serve to preserve the seated ruler's short-term goals, but may as well lead to the long-term annihilation of the state. Eventually, these narrowly focused followers' transcendent interests will create a loss of security due to a constant threat of attack. Hobbes's strategy of using the sovereign to redescribe religious ideals fails in practice because he places religious interpretation into the hands of the seated sovereign, rather than shaping it through free dialogue and intellectual discourse at the universities. If religious interpretation rested with the universities, citizens, after receiving an open and intellectually rigorous education, could be expected to pursue their religion free from manipulation by the desires of political leaders to occupy positions of authority by shrouding their agendas in religious cloaks. Further, a citizenry that has a principled commitment to the form of government will have the wherewithal to defend it against those who will protect their seats in government at the cost of the sanctity of the state.

A system of religious education based in the independent authority of universities that is free from the political platforms of governments is necessary to create a marketplace of ideas. Were such a marketplace to replace Afghanistan's politically affiliated, mullah-based system of religious education, a system that stunts the development of private judgment, the state's prospects for long-term stability would be greatly enhanced.

[16] *Behemoth*, p. 59.

PART III

APPLICATION TO PROBLEMS OF GLOBAL SCOPE

12

Hobbesian Realism in International Relations

A Reappraisal

Chris Naticchia

Blunt, frank, and direct, Stanley Hoffman perhaps best summarizes the realist position in international relations when he claims:

> The model from which a theory of international relations must start is that of a decentralized milieu divided into separate units. It is not a Community, but at best it is a society with limited and conditional cooperation among its members, whose primary allegiance is to the constituent parts and not to the body formed by their sum total; at worst, it is a battlefield. It has no central Power – hence, resort to violence by each unit is legitimate.[1]

If this sounds a bit like a war of all against all in a Hobbesian state of nature, using states in place of individuals as actors, Hoffman adds, lest there be any doubt from whom he draws his inspiration: "The 'Hobbesian situation' must be our starting point."[2]

Call this view *the celebration of power politics*, which claims that states may legitimately act only in pursuit of, and do whatever will advance, their national interests.[3] In addition to embracing the celebration of power politics, realists also tend to assert *moral skepticism about international affairs*. Thus, another realist, Hans Morgenthau, writes: "The political realist is not unaware of the existence and relevance of standards of thought other than political ones. As political realist, he cannot but subordinate these other standards to those of politics." Similarly, George Kennan insists:

> Morality, then, as the channel to individual self-fulfillment – yes. Morality as the foundation of civic virtue, and accordingly as a condition precedent to successful

[1] Stanley Hoffman, *The State of War* (New York: Praeger, 1965), p. 14.

[2] Ibid., p. 27.

[3] Hans Morgenthau also appears to embrace the celebration of power politics when he argues, "The essence of international politics is identical with its domestic counterpart. Both domestic and international politics are a struggle for power, modified only by the different conditions under which this struggle takes place in the domestic and in the international spheres." *Politics Among Nations* (New York: Knopf, 1948), p. 31.

democracy – yes. Morality in governmental method, as a matter of conscience and preference on the part of our people – yes. But morality as a general criterion for the determination of the behavior of states and above all as a criterion for measuring and comparing the behavior of different states – no. Here other criteria, sadder, more limited, more practical, must be allowed to prevail.[4]

Whether moral criteria apply elsewhere, Morgenthau and Kennan seem to suggest, they do not apply to international affairs – a claim reminiscent of Hobbes's infamous dictum that, "To this warre of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in warre the two cardinall vertues."[5] If, as Hobbes suggests, the international realm is a state of nature, then moral criteria will not apply.[6]

Call the combination of these views *Hobbesian realism in international relations*. Hobbesian realism has been subjected to withering attack. This attack comes in three varieties:

1. Moral skepticism about international affairs is false, or else incoherent if one rejects global moral skepticism.[7]
2. The celebration of power politics presupposes a moral view incompatible with moral skepticism about international affairs.[8]
3. The moral view that it presupposes is implausible.[9]

[4] George Kennan, *Realities of American Foreign Policy* (New York: Norton, 1966), p. 49. Another towering contemporary figure in the realist tradition (not quoted here) is E. H. Carr, author of *The Twenty Years' Crisis 1919–1939* (London: Macmillan, 1939).

[5] *Leviathan*, XIII.13. 1651, ed. C. B. Macpherson (Penguin Books: New York, 1985). References to *Leviathan* are given by chapter and paragraph number.

[6] "[Y]et in all times, Kings, and persons of soveraigne authority, because of their independency, are in continuall jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another" (*Leviathan*, XIII.12).

[7] See, for example, Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 15–63; and Marshall Cohen, "Moral Skepticism and International Relations," *Philosophy & Public Affairs* 13.4 (1984): 302–11.

[8] See, for example, Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 3–20; Marshall Cohen, "Moral Skepticism and International Relations," *Philosophy & Public Affairs* 13.4 (1984): 306–7; 309; 317–18; and Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986), chapter 9, esp. pp. 365–8 (arguing that Hobbes's theory presupposes ethical egoism, which meets the formal conditions for being a moral theory). Although Kavka charges Hobbes with "basically [ignoring] international relations," he also believes that this aspect of Hobbes's thought is in principle modifiable, in which case the theory presupposed would apply internationally too (ibid., 438–9). Also see Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (New York: Oxford University Press, 2002), pp. 35–7.

[9] See, for example, Marshall Cohen, "Moral Skepticism and International Relations," *Philosophy & Public Affairs* 13.4 (1984): 319–25; and Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (New York: Oxford University Press, 2002), pp. 35–7, 106–17. Alternatively, assuming that the celebration of power politics ultimately rests on ethical egoism, anyone who

As a result, Hobbesian realism has fallen into apparent disrepute as a normative theory of international relations.

Anyone seeking to rehabilitate Hobbes against this attack has two options. One is simply to deny that Hobbes is a realist – rejecting the attribution of moral skepticism in international relations and taming his alleged commitment to power politics.[10] The other is to defend at least a qualified realism, undercutting the motivation to reject one or both attributions.

My aim here is to rehabilitate Hobbes using this second strategy. Hobbesian realism, I shall argue, contains an insight that is important, valuable, and instructive, not only for contemporary political philosophy, but for contemporary politics as well. This insight is that when leaders of state deviate from advancing their national interests, they do so illegitimately, and at a moral cost.[11] For contemporary political philosophy, what is valuable and instructive about this is that it forces us to acknowledge that the actions of leaders of state are not rendered legitimate simply by being in conformity with (what we might regard as) the demands of international justice. Such actions will still be illegitimate, and incur a moral cost, if they involve sacrificing their national interests. For contemporary politics, the value of Hobbes's insight is that it should remind us that, even if we are willing to bear sacrifices in our nation's security or economic well-being for the sake of (what we might regard as) international justice, it is important to acknowledge their moral costs too. For even if we fail in the end to convince those who are reluctant to bear them that the costs are indeed worth bearing, our position is likelier to be regarded as more plausible and principled than one that minimizes their responses as mere selfish resistance.

While I will be largely defending Hobbes, however, my defense will be qualified in several respects. First, I bracket the question of whether Hobbes is committed to moral skepticism in international relations, assuming instead that a position is sufficiently deserving of the name *realist* if it rests on the celebration of power politics alone.[12] But then I go on to defend the celebration

affirms any moral theory other than ethical egoism is implicitly committed to endorsing this third attack.

[10] See, for example, L. M. Johnson, *Thucydides*, *Hobbes*, *and the Interpretation of Realism* (DeKalb: Northern Illinois University Press, 1993), esp. p. 91; Noel Malcolm, "Hobbes's Theory of International Relations," in ed. Noel Malcolm, *Aspects of Hobbes* (New York: Oxford University Press, 2002), pp. 432–56, esp. pp. 436–43, 449; and David Armitage, "Hobbes and the Foundations of Modern International Thought," in eds. Annabel Brett and James Tully, *Rethinking the Foundations of Modern Political Thought* (New York: Cambridge University Press, 2006), pp. 219–35.

[11] I mostly use the phrase *leaders of state* rather than *sovereign* – even though Hobbes himself uses the latter to emphasize his view that undivided sovereignty is the best remedy for the ills of the state of nature – since my focus in this chapter is on the (un)limited nature of such sovereignty.

[12] For evidence against attributing moral skepticism in international relations (and more generally, in the state of nature) to Hobbes, see: (1) "If a Covenant be made, wherein neither of the

of power politics. As I shall argue, the celebration of power politics need not rest on psychological or ethical egoism (if it rests on any moral view at all). Instead, it may rely on a plausible and attractive view regarding how leaders of state acquire their powers and responsibilities: that is, through the consent of their subjects. Second, while I will be defending the celebration of power politics, the version of it that I will defend is more modest than the version that Hobbes himself accepted. Finally, I also explore the limits of this view, arguing that what limits there are derive from the limits of consent theory generally and are not unique to Hobbes's particular version of it. The result, I hope, is that, in combination, my defense and these qualifications will establish a best-Hobbes*ian* position that will lead to a better appreciation of both Hobbes's contributions and his limitations.

THE CELEBRATION OF POWER POLITICS

The celebration of power politics claims that states may legitimately act only in pursuit of, and do whatever will advance, their national interests. Distinguish two versions of this view. The strong version claims that leaders of state act legitimately *if and only if* they pursue their national interests. The weak version modifies that claim, insisting that leaders of state act legitimately *only if* they pursue their national interests. No doubt Hoffman, Morgenthau, and Kennan want to assert the stronger claim. Both versions construe the national interest broadly – as neorealist Robert Gilpin puts it, "not [the interests] of a particular dynasty or political party [but rather] … in the interest of the whole nation and not just in the selfish interests of the ruling elite" – not just what

parties performe presently, but trust one another; in the condition of meer Nature … upon any reasonable suspition, it is Voyd" (suggesting (but not implying) that first-parties are morally bound to fulfill their agreements in the absence of later evidence that second-parties will fail to perform their end) (*Leviathan*, XIV.18); (2) "if a weaker Prince, make a disadvantageous peace with a stronger, for feare; he is bound to keep it" (implying that in the international state of nature such agreements are morally binding) (*Leviathan*, XIV.27); (3) "when there is no Civill Power … where one of the parties has performed already … it is not against reason" for the other party to the agreement to perform what he or she agreed to (implying that in the state of nature second-party performance is required when the first-party performs) (*Leviathan*, XV.5); (4) "The Lawes of Nature are Immutable and Eternall" (implying that the laws of nature apply both in the state of nature and within the state, and hence that morality applies in the state of nature too, under the assumption that the laws of nature – which Hobbes sums up (at *Leviathan*, XV.35) as *Do not that to another, which thou wouldest not have done to they selfe* – require moral behavior) (*Leviathan*, XV.38); (5) "[T]he law of nations, and the law of nature, is the same thing" (again implying that in the international state of nature, as in the state of nature generally, morality applies) (*Leviathan*, XXX.30). See generally, Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986), pp. 349–57; L. M. Johnson, *Thucydides, Hobbes, and the Interpretation of Realism* (DeKalb: Northern Illinois University Press, 1993); Noel Malcolm, "Hobbes's Theory of International Relations," in ed. Noel Malcolm, *Aspects of Hobbes* (New York: Oxford University Press, 2002), pp. 432–56.

the public wants at the moment, but what it needs taking the long view.[13] Both versions find their roots in Hobbes's political philosophy.

To claim something about the scope of leaders' legitimate authority is to claim something about its content. To claim something about its content presupposes something about its origin or ground. For Hobbes, such authority originates when

> A Multitude of men, are made one person, when they are by one man, or one person, represented; so that it be done with the *consent* of every one of that multitude in particular … Every man giving their common representer, authority from himselfe in particular; and owning all the actions the representer doth (emphasis added).[14]

Through the consent of each individual to be represented by one "Artificiall person,"[15] claims Hobbes, that person receives authority to act on behalf of the consenter.[16] The scope of this authority, moreover, is determined by the content of the transaction. For Hobbes, the content of this transaction is determined by the consenter's express words, or else "from the end of the institution of soveraignty; namely, the peace of the subjects within themselves, and their defence against a common enemy."[17] Hence, the sovereign "may use the strength and means of them all, as he shall think expedient, for their *peace and common defence*" (emphasis added).[18]

Now in this brief sketch, I leave aside certain aspects of Hobbes's view – like his notorious claim that binding consent can be given at the point of a gun, both in the state of nature[19] and in commonwealths,[20] and his problematic derivative claim that tacit consent to obey can be given through mere residence[21] – since my present concern is to explicate Hobbes's view of the scope

[13] Robert G. Gilpin, "The Richness of the Tradition of Political Realism," in ed. Robert Keohane, *Neorealism and Its Critics* (New York: Columbia University Press, 1986), p. 320.

[14] *Leviathan*, XVI.13–14.

[15] Ibid., XVI.2.

[16] At one point, Hobbes claims that sovereigns are not a party to the social contracts that authorize their powers. "[T]he Right of bearing the Person of them all, is given to him they make Soveraigne, by Covenant onely of one to another, and not of him to any of them" (*Leviathan*, XVIII.4). Instead, Hobbes suggests, sovereigns simply retain their unlimited liberty right in the state of nature, whereas subjects lay down theirs by mutual covenant. See *Leviathan*, XIV.6. I say more about these claims momentarily.

[17] *Leviathan*, XXI.10.

[18] Ibid., XVII.13.

[19] "For example, if I Covenant to pay a ransome, or service for my life, to an enemy; I am bound by it" (Ibid., XIV.27).

[20] "And even in Commonwealths, if I be forced to redeem my selfe from a Theefe by promising him mony, I am bound to pay it, till the Civill Law discharge me" (*Leviathan*, XIV.27).

[21] "[B]ecause preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him … [thus] the Soveraign of each Country hath Dominion over all that reside therein" (*Leviathan*, XX.5, 7).

or content of legitimate authority. With this initial formulation of its content, Hobbes proceeds to do two things.

First, he expands its scope. Consent specifies an *end* that is to govern leaders' action: "peace and common defence." In specifying such an end, however, such consent also implies granting rights to the means for pursuing it. "[W]hosoever has right to the end," Hobbes writes, "has right to the means; it belongeth of right, to whatsoever man, or assembly that hath the sovereignty, to be judge both of the means of peace and defence."[22] So what leaders actually acquire through consent is a *package* of rights: "[T]hey that give to a man the right of government in sovereignty, are understood to give him the right of levying mony to maintain souldiers; and of appointing magistrates for the administration of justice."[23] This is the first way that Hobbes expands the scope of leaders' legitimate authority. The second way is by construing the end in question – "peace and common defence" – broadly:

> The office of the soveraign, consisteth in the end, for which he was trusted with the soveraign power, namely the procuration of the safety of the people … But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawfull industry, without danger, or hurt to the commonwealth, shall acquire to himselfe.[24]

So the initial authorization to pursue peace and common defense gets expanded to include "contentments" of life, and permits taxation, the appointment of officials, and whatever else leaders believe will facilitate these ends.

Second, although he does not state it, he *implies* that there are limits to the authority. Hobbes of course famously maintains that leaders' authority is absolute.[25] But in context this must mean that their authority is absolute when determining *whether* their actions are pursuant to the authorized ends – peace, the common defense, and the "contentments" of life – and when deciding which *means* to take. Any actions pursuant to other ends (and acknowledged by them as such) would presumably fall outside the scope of their (otherwise) absolute authority. For example, if leaders ever were to adopt or support an international institution or policy, acknowledging that it sacrifices their national interests (in peace, the common defense, or the contentments of life), but insisting that it advances the cause of international justice, then in principle they would be acting outside the scope of their legitimate authority.[26] Admittedly, they could always cover up this illegitimacy by falsely claiming that they believe

[22] Ibid., XVIII.8.
[23] Ibid., XIV.20.
[24] Ibid., XXX.1.
[25] See generally, *Leviathan*, XVIII.
[26] Hobbes, though, would deny that there even could be a conflict with international justice, since justice on his view does not exist in the (domestic or international) state of nature. I say more about this later.

their actions will promote their national interests in the long run. But they would still be exceeding their authority.

Hobbes himself recognizes limits on any actor's authority. Presumably, these limits apply to leaders of state as well.[27] "[H]e that maketh a covenant with the actor, or representer, not knowing the authority he hath, doth it at his own peril," he argues. "For no man is obliged by a covenant, whereof he is not author [principal]; nor consequently by a covenant made against, or beside the authority he gave."[28] This seems to imply that, unless leaders are expressly granted authority to pursue *sacrifices* of their national interests, pursuing such sacrifices falls outside the scope of their authority.[29] Similarly, when Hobbes claims that "when the authority is evident, the covenant obligeth the author [principal], not the actor [agent]; so when the authority is feigned, it obligeth the actor onely; there being no author but himselfe," he seems to imply that leaders would bind themselves only, not their subjects, were they to consent to any arrangements not acknowledged by them to promote their national interests.[30]

So the ends of peace and common defense (and contentments) seem to limit leaders' authority. Against this, however, one might maintain that, if, on Hobbes's view, leaders of state are not parties to the social contract that authorizes their powers, then in principle they retain their unlimited liberty rights in the state of nature, in which case their freedom of action really is absolute, and not just absolute with respect to certain ends. And Hobbes does appear to claim that they are not parties to the social contract. "[T]he Right of bearing the Person of them all," he argues, "is given to him they make Soveraigne, by Covenant onely of one to another, and not of him to any of them."[31] The covenant occurs "as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe*, *to this Man*, *or to this Assembly of men*, *on this condition*, *that thou give up thy Right to him*, *and Authorise all his Actions in like manner*."[32] The sovereign appears left out of the agreement.

[27] Hobbes's famous doctrine of the inalienability of the right to resist attack is of course consistent with the state's right to punish (even with death) individuals who threaten the peace and common defense by their actions. So the inalienability of *this* right does not issue in a limit of the (general) sort to be described next. For Hobbes's inalienability doctrine, see *Leviathan*, XIV.8: "[A] man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to ayme thereby, at any good to himselfe… And therefore if a man by words, or other signes, seem to despoyle himselfe of the end, for which those signes were intended; he is not to be understood as if he meant it."

[28] *Leviathan*, XVI.6.

[29] Hobbes himself finds the prospect of such an express grant dubious. "Whensoever a man Transferreth his Right, or Renounceth it; it is either in consideration of some Right reciprocally transferred to himselfe; or for some other good he hopeth for thereby" (*Leviathan*, XIV.8).

[30] *Leviathan*, XVI.8.

[31] Ibid., XVIII.4.

[32] Ibid., XVII.13.

Whatever Hobbes's direct statements on the matter, though, individuals cannot be drafted against their will into the role of sovereign, which would be inconsistent with their absolute liberty in the state of nature. So at some point sovereigns must be parties to the social contract, if only as individuals who agree to take on that role. But then the limits on their authority hold based on the content of their agreement.[33]

These remarks strongly suggest Hobbes's embrace of the weak version of the celebration of power politics: that leaders of state act legitimately *only if* they pursue their national interests. However, there is reason for attributing the strong version to Hobbes, too. As Hobbes argues, "In states, and commonwealths not dependent on one another, every commonwealth, not every man, has an absolute liberty, to do what it shall judge, that is to say, what that man, or assembly that representeth it, shall judge most conducing to their benefit."[34] And this seems to license the attribution that, not only must leaders of state solely pursue their national interests, but *whatever* they deem to be in that interest, they are undeniably justified in pursuing – just as individuals would be in the state of nature. As he later puts it,

> Concerning the offices of one soveraign to another, which are comprehended in that law, which is commonly called the law of nations, I need not say any thing in this place; because the law of nations, and the law of nature, is the same thing. And every soveraign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoyd in regard of one another, dictateth the same to commonwealths, that is to the consciences of soveraign princes, and soveraign assemblies; there being no court of naturall justice, but in the conscience onely.[35]

Given, then, that in the state of nature, "the condition of man … is a condition of warre of every one against every one … [and thus] every man has a right to every thing; even to one anothers body,"[36] it would seem to follow that, internationally, leaders of state too would possess the right of nature to pursue whatever they believe will best promote their national interests.

THE CELEBRATION REVISITED: PART ONE

However, the celebration of power politics, and with it, the Hobbesian rationale that purportedly underlies it, have come under heavy attack. For instance, in considering the view that "Leaders should follow the national interest … because that is their obligation as holders of the people's trust," Charles Beitz counters:

[33] Furthermore, sovereigns cannot receive a totally blank check from their subjects. Their subjects must expect some good for themselves in exchange. See *Leviathan*, XIV.8.

[34] Ibid., 21.8.

[35] Ibid., XXX.30.

[36] Ibid., XIV.4.

[T]he difficulty with this approach is that it involves an assumption that the people have a right to have done for them anything that can be described as in the national interest … It seems that what leaders may rightfully do for their people, internationally or domestically, is limited by what the people may rightfully do for themselves. But if this is true, then the responsibility of leaders to their constituents is not necessarily to follow the national interest wherever it leads.[37]

Similarly, Allen Buchanan, arguing against a position that he calls *fiduciary realism*, maintains:

When a person becomes an agent of some other individual or of a collectivity, she does not thereby wipe the moral slate clean … The most basic general obligations – including those that are the correlatives of human rights – are not swamped by any fiduciary obligation that a state official could have. One cannot contract out of one's basic moral obligations.[38]

Accordingly he concludes that fiduciary realism cannot plausibly maintain that one's fiduciary obligation to promote the state's interests is absolute. Marshall Cohen perhaps best sums up the worry with this stinging observation:

[T]he suggestion that the statesman has a moral obligation to do for his constituency whatever he has implicitly undertaken to do (on a contract, or as trustee or agent) is no better than the argument that the corporation president has an overriding obligation to sell thalidomide for the benefit of his shareholders, or that the Mafia hitman has an overriding obligation to kill for his employers.[39]

For these reasons, they argue, we ought to reject the celebration of power politics.

However, these objections, notice, are to the strong version, not the weak one. They essentially deny that leaders of state may do anything that is in their national interests; they do not deny that leaders of state may pursue only such interests. Defenders of Hobbes therefore have two options. One is to meet the challenge directly and to show how it is mistaken. The other is to concede the point but to deny that it fails to undermine the weak version, even if the challenge is recast.

In his well-known defense of Hobbes, Gregory Kavka pursues the first strategy.[40] He attributes ethical egoism to Hobbes,[41] and though he laments that Hobbes has little to say about international relations, he believes that

[37] Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 23–4.

[38] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (New York: Oxford University Press, 2004), p. 37.

[39] Marshall Cohen, "Moral Skepticism and International Relations," *Philosophy & Public Affairs* 13.4 (1984): 300.

[40] Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986).

[41] Ibid., pp. 365–8.

Hobbes's view may be extended to cover it.[42] Presumably, the extension would go like this. Ethical egoism holds that agents should perform the act (or follow the set of rules) that promotes the best outcome for the agent.[43] The extension would regard the state as a corporate agent, with leaders of state delegated authority to act on its behalf. The strong version of the celebration of power politics would follow.

Whether ethical egoism is defensible is a large issue, and my remarks to follow by no means try to settle it. However, I believe that ethical egoism faces enormous obstacles. Accordingly, in the next section, I pursue the second strategy.

Among the obstacles it faces are:

1. When conjoined with actual and counterfactual circumstances, ethical egoism produces scores of counterintuitive implications, leaving us more likely to reject the theory than to revise our intuitions about the particular cases.
2. Even if one replies that ethical egoism is meant to be a revisionist moral theory, and hence that conflicts (no matter how numerous) with our intuitions (no matter how firmly held) do not suffice to reject it, one may counter that, in many actual and counterfactual circumstances, it produces logically contradictory directives – not merely counterintuitive ones – that cannot be accepted in deference to theory.[44]
3. Even if one concedes that these objections suffice for rejecting act egoism but insists that they do not apply to rule egoism (because the rules that produce the best outcome for each individual agent are the same and accord with common sense), one may counter that this commits the

[42] Ibid., pp. 438–9.

[43] Ethical egoism must be distinguished from psychological egoism. The former is a normative thesis, the latter a psychological thesis claiming that the only thing that agents ever do, and can do, is pursue their own interests. If psychological egoism is true, then ethical egoism would follow (with the addition of a premise claiming that ought implies can). However, it is possible to maintain ethical egoism while rejecting psychological egoism, as in fact Kavka himself does. For his argument against psychological egoism (but in favor of a view he calls *predominant* egoism); see ibid., chapter 2.

[44] It would therefore fail what Rawls calls the *ordering* condition. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 134. An example: Suppose that S's obtaining item x produces the best outcome for S and that T's obtaining x produces the best outcome for T. It will follow both that S should obtain x and that T should obtain x. Suppose further that, S's obtaining x implies that T does not obtain x; and T's obtaining x implies that S does not obtain x. If S and T cannot both obtain x, and ought implies can, it will follow that they should not both obtain x. Thus, if S should obtain x, T should not obtain x, and if T should obtain x, S should not obtain x. But given that S should obtain x, it follows that T should not obtain x; and given that T should obtain x, it follows that S should not obtain x. Therefore, it follows that (1) S should obtain x and S should not obtain x; and (2) T should obtain x and T should not obtain x. Even a self-described revisionist moral theory cannot accept self-contradictory implications like these.

theory to irrational rule-worship in cases where violating the rule would produce the best outcome for the agent.

4. Even if one claims that agents are permitted to engage in defensive violations of egoistic rules to protect themselves from the bad effects of others' noncompliance, but not permitted to engage in offensive violations of such rules to benefit themselves from the good effects of others' compliance, one may counter that, while this enables the theory to avoid the irrational rule-worship objection in the first type of case, it fails to do so in the second type of case.[45]
5. If one responds by permitting both offensive and defensive violations of rules, then the rules are merely rules of thumb, to be disregarded in particular cases whenever doing so will produce the best outcome for the agent. But then the theory is act, not rule, egoistic – in which case it is vulnerable to the first two objections.
6. If one relies on contingent empirical (psychological, sociological, political) generalizations to reduce both (a) the frequency with which offensive violations of rules will in fact produce the best outcome for the agent in the long run and (b) discrepancies between the rules of a rule egoistic system and those of common sense morality, one may counter that neither entirely eliminates occasions in which offensive violations produce the best outcome for the agent, in which case the irrational rule-worship objection still obtains. This will occur either when the generalizations do not hold in particular cases or when considering counterfactual circumstances that seem relevant to testing moral theories.

Although these objections do not conclusively demonstrate that ethical egoism is indefensible, they do establish a strong enough presumption against it to shift the burden of proof onto its proponents. When the celebration of power politics, in its strong version, rests on ethical egoism, its plausibility depends on the strength of the case for overcoming this presumption. Later, I consider an argument for the strong version that does not rest on ethical egoism. But first let us examine the weak version.

THE CELEBRATION REVISITED: PART TWO

If we feel that the celebration of power politics, in its strong version, is indefensible, it is because we hold strong intuitions that moral limits apply to the pursuit of one's national interests. These intuitions are not easily revised. In

[45] For Kavka, strictly speaking, there is no violation of egoistic rules in the first type of case, since the (Hobbesian) rules contain qualifying clauses exempting agents from complying with their main clauses when a sufficient number of others fail to comply with the main clauses as well. See Kavka, *Hobbesian Moral and Political Theory* (Princeton, NJ: Princeton University Press, 1986), pp. 370–1, 378–84.

its weak version, however, the celebration of power politics can in principle accept such limits, since it claims that the pursuit of one's national interests is only a necessary condition, not a sufficient one, for legitimating the actions of leaders of state. This more modest version, I believe, is defensible. Yet it still retains much of the sting of the realist view. For instance, it would designate as illegitimate any actions by leaders of state that would sacrifice their national interests in order to realize some loftier moral goal, like satisfying the requirements of international justice. Thus, actions to ameliorate global economic inequality, reduce one's own state's pollution, accept jurisdiction of an International Criminal Court – if they are believed by leaders of state to satisfy such requirements but sacrifice such interests – would fall outside the scope of their legitimate authority.

The weak version recognizes two types of moral limits: it restricts leaders' authority to the pursuit of their national interests alone, and it insists that such pursuit is only a necessary condition for legitimating their actions. Notice that both limits come from their subjects' *consent*. In setting limits through consent, however, Hobbesian theory relies on a plausible and attractive view of their ground.

First, acts of consent are deliberate acts. They are meant to convey an intentional undertaking of obligations and alienation of rights. Absent such a clear, deliberate, intentional undertaking of obligations and alienation of rights, subjects retain their natural freedom. This establishes a strong and attractive presumption: a presumption in favor of subjects' natural freedom. If there are to be limits to their individual, natural freedom, they must be accepted by them through such a deliberate act, "there being no obligation on any man, which ariseth not from some act of his own; for all men equally, are by nature free."[46] Rather than acquiring obligations, say, accidentally or unintentionally, subjects acquire them through an act of self-government on their part, an act that exercises their autonomy and natural freedom and that requires both an awareness and knowledge of the significance of their act. Acts of consent are arguably the clearest such acts. Rights alienated to the sovereign through consent are by hypothesis *conferred* by the subjects, deliberately and intentionally; obligations acquired through consent are by hypothesis *undertaken* by subjects in like manner. A sovereign is not even constituted, let alone disabled, without such consent. With it, a sovereign receives authorization to act on subjects' behalf to the extent defined by the content of their consent – no further. The attractiveness of consent-based authorization seems clear.[47]

Second, although subjects confer enormous responsibility and discretion upon their leaders, they also set an end for them to pursue (their national

[46] *Leviathan*, XXI.10.

[47] For similar thoughts in a different context, see generally, A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), pp. 73–4.

interests) and grant rights to pursue it only. In this respect, their consent establishes a trust between them and their leaders.[48] For Hobbes, admittedly, it is an unusual trust, insofar as the discretion conferred is absolute, unlimited, and irrevocable. Nonetheless, as a trust, it is in principle limited to the ends set by the content of the consent given by subjects. Once again, the sovereign receives authorization to act on their behalf, but *only* to the extent defined by their consent. The attractiveness of consent-based limitations also seems clear.

In face-to-face situations, consent is typically given expressly and its content reasonably clear: agents have occasion to clarify terms and opportunity costs are low. In less direct situations, things often are less clear. Hobbes recognizes this fact and offers a plausible understanding of *inexplicit* consent. Distinguishing express contracts from "signs by inference," the former consisting in "words spoken with understanding of what they signifie," the latter by "consequence of Words … Silence … [or] Actions,"[49] he claims that when consent is not given by express words (like when founding a commonwealth), its content is to be determined by "the end of the institution of soveraignty; namely, the peace of the subjects within themselves, and their defence against a common enemy" – or, as we have been calling it, the national interests.[50] Therefore, even if we reject the attribution of psychological egoism to Hobbes's consenting subjects, it would still be reasonable, in situations involving inexplicit consent, to interpret their consent as involving, initially, an insistence that their individual interests be promoted, and then, subsequently, in recognition of the fact that their individual interests must be aggregated collectively, authorization

[48] Hobbes himself speaks of a trust existing between subjects and sovereign in at least two places, *Leviathan*, XXX.1 (quoted at text accompanying footnote 24) and also at *De Cive* (1642), XIII.4, where, as in the previous quote, he argues for extending the scope of the trust to include provision of the contentments of life: "Those who have taken it upon themselves to exercise power in this kind of commonwealth, would be acting contrary to the law of nature (because in contravention of the trust of those who put the sovereign power into their hands) if they did not do whatever can be done by laws to ensure that the citizens are abundantly provided with all the good things necessary not just for life but for the enjoyment of life." Malcolm objects to Hobbes's reference to a trust since in Malcolm's view that would imply a contract with the Hobbesian sovereign, whereas subjects are not strictly speaking parties to such a contract but only to one that exists among themselves, one in which they renounce their universal liberty right, leaving the sovereign alone in possession of hers. See Noel Malcolm, "Hobbes's Theory of International Relations," in ed. Noel Malcolm, *Aspects of Hobbes* (New York: Oxford University Press, 2002), p. 447. However, as I argue in the first section, the Hobbesian sovereign cannot be drafted against her will into that role, as that would be inconsistent with her natural freedom. A different type of objection is given by Simmons, for whom a trust implies revocability when, in the sole judgment of the trust's settlor (the subjects), the trust has been violated (hence my reference to the "unusual" nature of the Hobbesian trust). See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), pp. 71–2.

[49] *Leviathan*, XIV.13–14.

[50] Ibid., XXI.10.

to pursue their national interests.[51] Put another way, in situations involving inexplicit consent, the holders of a trust are always to favor advancing over sacrificing their trustees' interests – a reasonable proposition.

Now as mentioned before, because the weak version claims that pursuit of one's national interests is only a necessary condition, not a sufficient one, for legitimating the actions of leaders of state, it can in principle accept moral limits on their actions. This gives the weak version a decided advantage over its stronger cousin. However, we might wonder whether this is advantage enough. After all, besides moral limits, there are moral requirements, too. Intuitively, moral requirements sometimes demand of us, individually, to sacrifice our interests. Likewise, they may sometimes demand of us, collectively, to sacrifice our national interests. If our national interests are served by having a higher per capita standard of living, for example, they are sacrificed when we offer economic assistance to impoverished countries (that is, unless we believe it to be a smart investment). The weak version appears unable to accommodate such requirements.

This last concern confronts us with at least three separate questions. Is there anything that can be said on Hobbes's behalf in response to this objection? Indeed, we can even collect the two concerns – the inability to accommodate moral limits on the one hand, moral requirements on the other – combine them under the heading of international justice, and ask what sense (if any) can we make of a conflict between norms of international justice and the celebration of power politics, if not on Hobbes's own view then on the best Hobbesian view? Is such a conflict even possible? Answers to these questions challenge us to explore the limitations of Hobbesian theory.[52]

LIMITATIONS OF HOBBESIAN THEORY

As we will see, there are plausible replies that one can provide on Hobbes's behalf, replies that highlight its resourcefulness and utility. By the same token, there are problems that will remain despite our best efforts to solve them, problems that cannot be easily minimized. Despite these problems, however, Hobbes's theory, taken as a whole, I will suggest, offers us important lessons, both philosophically and politically.

[51] See Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986), chapter 2 (rejecting the attribution of psychological egoism to Hobbes on the grounds that the text is ambiguous on this point and its independent plausibility is doubtful).

[52] I leave aside the much-discussed question of whether the consent condition is even satisfied and proceed under the assumption that it is satisfied, if only to highlight other limitations of Hobbes's theory. My own view is that, if suitably construed, the consent condition is (generally) unsatisfied, and that if left to include consent given at the point of a gun, it is implausible as a ground of obligation. But this question has already received much treatment in the literature and I do not add to it here.

We can begin by examining the most obvious reply that one can give Hobbes: that if leaders of state actually were to solicit, and receive, the express consent of their subjects to fulfill requirements of international justice – to assist impoverished nations, for example, or submit to the authority of an International Criminal Court, or curtail their state's pollution, even when these involve sacrificing their national interests – then they would not be acting illegitimately in binding their subjects to international agreements that fulfill them. Lest this seem a bit disingenuous given the political and practical difficulties involved, its possibility should remind us that, even for leaders in large-scale political societies, there is value in seeking ongoing clarification of the terms of consent, and in obtaining permission to proceed. Despite its political impracticality, therefore, the suggestion actually helps highlight a normative virtue of consent theory.

Nonetheless, the unlikelihood of securing such consent should prompt us to consider alternatives. One alternative involves establishing the proper expectations for what Hobbes's theory should deliver. If it fails to deliver what we expect, the problem may be with our expectations rather than with the theory.

We frequently use terms like *legitimate* or *just* to describe some of the virtues of states – indeed, often interchangeably. Sometimes, though, we mean something different by them. When we speak of a state as being legitimate, for instance, we sometimes mean that there exists a special moral relationship between that particular state and each of its subjects, a relationship in which the state acquires the exclusive right to enforce legal rules on each subject, and in which each subject acquires an obligation of obedience to that particular state. What creates this special relationship is some sort of morally significant interaction between them.[53] In Hobbes's theory, this morally significant interaction occurs through consent. The legitimacy of a state, then, on this view, consists not in some feature of states, such as their moral quality – the goodness, efficiency, or justice of their institutions – but rather in some feature traceable to personal individual histories (like consent).

If this is correct, then at the level of our concepts, there is no incoherence in speaking of states as being legitimate but unjust, or as being just but illegitimate. There is no incoherence provided that it is worth preserving (as it seems worth preserving) the distinction between impersonal, generic, institutional evaluations, which may be conducted in terms of justice, and personal, transactional, institutional evaluations, which may be conducted in terms of legitimacy.[54] Of course, we may wish to rule out one of these possibilities, such as

[53] For similar remarks in a different context, see Chris Naticchia, "Recognition and Legitimacy: A Reply to Buchanan," *Philosophy & Public Affairs* 28.3 (Summer 1999): 242–57, at 253–4.

[54] For more on this point, see the elaboration by A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (New York: Cambridge University Press, 2001), pp. 148–50.

the possibility that a state can be legitimate despite being unjust. But that will require substantive moral argument.

Now just as we can speak of states as being legitimate or just, so too can we speak of leaders of state as acting legitimately, that is, within the scope of their consent-based authority, or as acting justly, that is, so as to satisfy demands of justice, whether domestic or international. And if that is the case, then there should be no more problem in asserting that leaders of state act illegitimately, because outside the scope of their authority, though justly, in fulfilling some requirement of international justice, than there is in claiming that managers of our assets act illegitimately, because outside the scope of their authority, if they donate some of our money to Oxfam without permission. It should come as no surprise, therefore, that the weak version – which makes a claim only about the legitimacy of leaders' actions, not their justice – implies that leaders act illegitimately but justly were they (say) to accept the jurisdiction of an International Criminal Court, or legitimately but unjustly were they to refuse it.[55] If we were expecting more (or better) than that, we were expecting too much.

However, this reply may seem to render Hobbes vulnerable to another objection. If leaders of state act illegitimately, because outside the scope of their consent-based authority, whenever they fail to promote their national interests, then this will include not only acts that deliberately sacrifice those interests, but also acts they mistakenly believe to advance them. Isn't it too strong to regard these acts as illegitimate, rather than unwise or inexpedient?

While it does not strike me as strange to regard such acts as illegitimate, there does appear to be some merit in the idea that the moral costs are greater when leaders of state deliberately sacrifice their national interests than when they inadvertently sacrifice them, and one plausible way of capturing this distinction is to regard the former as illegitimate and the latter as inexpedient (but not illegitimate). If this is correct, then it seems that Hobbesians can insist that Hobbes does appreciate the difference. When he claims that "whosoever has right to the end, has right to the means; it belongeth of right, to whatsoever man, or assembly that hath the sovereignty, to be judge both of the means of peace and defence," he seems to imply that the scope of leaders' consent-based authority requires them to act on the (sincere, subjective) *belief* that their chosen means will promote their national interests.[56] If so, then leaders do not act illegitimately if they mistakenly believe that their actions will promote their national interests. Their acts will still be open to criticism, but the criticism will be in terms of inexpedience rather than illegitimacy.[57]

[55] More precisely, the weak version is silent on the justice of actions, which opens up the possibilities mentioned even if it does not technically imply them.

[56] *Leviathan*, XVIII.8.

[57] One worry here is that Hobbes may be deviating from traditional realism if he relies on this subjective interpretation of the content of citizens' consent. I am indebted to Jacques DeLisle for this point.

If we still suspect that a problem remains here, we may perhaps take some solace in the fact that it is not unique to Hobbes's version of consent theory. Even if we begin, as in Locke's state of nature, with individuals possessing claim rights not to be harmed in their "life, health, liberty, or possessions,"[58] rather than Hobbes's weaker premise that they possess (competitive) liberty rights "to every thing; even to one anothers body,"[59] the content of their consent (and hence the authorization their leaders receive) is strikingly similar when it comes to fulfilling moral requirements internationally. Domestically, Locke's stronger premise enables him to counter Hobbes's case for absolute monarchy, "For no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another."[60] Yet the stronger premise does not produce any greater authorization to act internationally in ways that may involve sacrificing one's national interests. The "great and chief end … of Mens uniting into Commonwealths, and putting themselves under Government," Locke argues, "is the Preservation of their Property,"[61] by which he means "their Lives, Liberties, and Estates."[62] "Men when they enter Society," he claims, "give up the … Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as *the good of the Society shall require* … to be directed to no other end, but the *Peace*, *Safety*, *and publick good of the People*" (emphasis added).[63] But the "Peace, Safety, and publick good of the People," and their "lives, Liberties, and Estates," are just what we have been calling their national interests. Nor are these claims entirely unmotivated either, since they provide a reasonable way of understanding inexplicit consent parallel to that in Hobbes. "[N]o rational Creature," writes Locke, "can be supposed to change his condition with an intention to be worse."[64] Any actions that (deliberately) sacrifice their national interests, therefore, will fall outside the scope of leaders' legitimate authority, and thus be illegitimate, even if directed toward fulfilling requirements of international justice.[65]

[58] John Locke, *Two Treatises of Government* (1690), Book II, paragraph 6. S has a liberty right to *x* just in case S has no duty not to do *x* and others have no duty not to interfere with S's doing *x*. S has a claim right to *x* just in case S has no duty not to do *x* and others do have such a duty not to interfere.

[59] *Leviathan*, XIV.4.

[60] John Locke, *Two Treatises of Government*, Book II, para. 135.

[61] Ibid., para. 124.

[62] Ibid., para. 123.

[63] Ibid., para. 131. See also Book II, para. 129, where Locke maintains that a man's power "of doing whatsoever he thought fit for the Preservation of himself, and the rest of Mankind" (provided he does not harm others in their life, health, liberty, or possessions) "he gives up to be regulated by Laws made by the Society, so far forth as the preservation of himself, and the rest of *that* Society shall require" (emphasis added).

[64] Ibid., para. 131.

[65] Jeff McMahan has pointed out to me that this claim may rest on the false assumption that, necessarily, the content of the (tacit) inexplicit consent that leaders receive is to advance

That Locke's quite different starting premise produces no greater authorization to sacrifice one's national interests in the name of international justice may lead us to conclude that this problem is not unique to Hobbes's particular version of consent theory but may instead be an inherent feature of consent theory more generally (at least when consent is inexplicit). But even if it does not, there is another reply that one can give on Hobbes's behalf: it is not always morally impermissible to act in ways that exceed one's authority. A rescue performed by a bystander, a lie told on the witness stand to prevent a miscarriage of justice, a protest march held without a permit – these and others are (sometimes) ways of acting permissibly without agents possessing the authority to do so. Of course, we are rightly concerned about abuses of authority, as well as the self-deception and moral arrogance that can result when agents believe that exceeding their authority is a moral necessity. But not all excesses of authority are abuses of it, and if it ever is morally permissible to exceed one's authority, then perhaps it is also morally permissible sometimes for leaders of state to exceed theirs, too.

In the next section, I explore the implications of this reply more fully. In the meantime, I want to consider a claim that it presupposes: that there exist competing moral reasons that may potentially tip the moral balance (as it were) against acting within one's legitimate authority, and for acting outside of it. For Hobbes, do such competing moral reasons even exist? As we will discover, matters here are not so promising for Hobbes, and the problem that it leaves cannot be easily minimized.

Recall that in Hobbes's state of nature, individuals possess no claim rights, only liberty rights to all things, even to one another's bodies. In the international state of nature, it seems to follow, states would possess no claim rights against one another, only liberty rights to all things, even to one another's resources. That states possess liberty rights to all things implies minimally that it is morally permissible for them to exercise such rights, given that with liberty rights there is no duty to refrain from doing what the right is a right to.[66] Hence, although we have bracketed the question whether Hobbes himself accepts

rather than to sacrifice their national interests, whereas a more nuanced assessment of their public's mood may reveal a willingness to accept some such sacrifices for the sake of fulfilling some moral requirements. This point raises a large issue that I cannot pursue here (such as whether inexplicit consent is consent to advance the trustees' interests or whether instead it is to do that which the trustees would agree to if asked). But even if this point is correct, the claim above can be weakened to assert that some (rather than all) of leaders' actions that (deliberately) sacrifice their national interests would be illegitimate: those that deliberately sacrifice their national interests when the public mood is unwilling to accept them. In that case, the task of justifying that position would remain. Since it follows from the stronger position that I attempt to justify, for ease of exposition I retain the stronger formulation in the text. I am indebeted to McMahan for both the objection and the reply. I would only add that I am assuming, counterfactually, that there is consent to begin with (see footnote 52).

[66] See footnote 58.

moral skepticism about international affairs, we see here that such skepticism probably overstates Hobbes's own moral commitments. While he denies that notions of justice and injustice, right and wrong, apply in the state of nature, he must mean by this that our ordinary notions of these do not apply, or more precisely, that the prohibitions and requirements that we intuitively accept in the name of justice and morality do not apply, leaving only moral permissions. If this is correct, it follows that there are in principle no competing requirements of justice or morality that could possibly tip the balance against acting within the scope of one's legitimate authority. For Hobbes, the dilemma whether to heed or exceed one's authority as leader of state simply does not exist.

What seems to follow from this (if we accept Hobbes's reasoning) is that the weak version of the celebration of power politics faces no special obstacles. Leaders of state will act legitimately only if they pursue their national interests, and it will never be morally permissible for them to deviate from such pursuit for the sake of fulfilling some requirement of international justice. In the international state of nature, there are none.

If this strikes us like trying to solve a problem by wishing it away, we should note that even if it does solve the problem, it creates another for the argument presented so far. For the reply assumes that, just as there are no moral requirements in the Hobbesian state of nature, neither are there moral prohibitions (what we have been calling moral *limits*). But if there are no moral prohibitions or limits, then the strong version, not just the weak version, of the celebration of power politics will be defensible after all.

Stated more fully, the argument would go like this. Rather than defending the strong version by appealing to ethical egoism, as we did before, we can defend it by appealing to Hobbes's consent theory, as we did for the weak version. Provided that the content of the consensual transaction is the strong version (as we argued before), the strong version will be just as well grounded. Then, employing the distinction between the legitimacy of leaders' actions and their justice, we can acknowledge that, although the strong version implies that leaders will always be acting legitimately when pursuing their national interests, they may sometimes be acting unjustly. However, since it is not always impermissible for them to fail to exercise their full authority, we can even claim that, in heeding some prohibition for the sake of justice or morality, they act permissibly even if it involves a sacrifice in their national interests. But then, if there are no moral prohibitions or limits in the Hobbesian state of nature, there is nothing for them to heed. Leaders of state will act legitimately if they pursue their national interests, and it will never be morally permissible for them to refrain from such pursuit for the sake of observing some prohibition of international justice. In the international state of nature, there are none.

So it appears that, if we accept Hobbes's claim that, in the state of nature, individuals possess only liberty rights to all things (and its implication, that in the international state of nature, states possess only liberty rights to all things), the dilemma between acting legitimately and acting justly cannot even

arise – not just on the weak version, but on the strong one as well. The reply proves too much.

We seem to be caught in a dilemma between rejecting Hobbes's claim that individuals in the state of nature possess only liberty rights to all things (what Kavka calls a *postulate* of Hobbes's moral theory[67]) and accepting the celebration of power politics in its strong version. Still, our intuitions rebel strongly against the notion that there is no injustice in, say, prosecuting unprovoked wars of aggression (even those that are in a country's national interests). And we seem to have no firm convictions either way about how to characterize our moral relations in a hypothetical state of nature. It seems that the postulate must lose out.

However, our intuitions also rebel strongly against the notion that leaders of state act *legitimately* in prosecuting unprovoked wars of aggression – against the notion that they possess *authority* to do so. They certainly would lack such authority were they unable to receive it through the consent of their subjects in the first place. "[N]o Body can transfer to another," Locke writes, "more power than he has in himself."[68] Consent cannot have just any content, Locke seems to be saying. If consent is an exercise of one's right of self-government, and must be consistent with others' exercise of that right, then it seems reasonable to exclude from its scope any right to commit unprovoked aggression against others. So if individuals in the domestic state of nature were to lack liberty rights to commit unprovoked aggression against others that was nonetheless in their interests, leaders of state could never legitimately exercise such a right on their behalf in the international state of nature against other states. They would be acting *both* illegitimately and unjustly.

But notice that this too seems to require at least some individual claim rights in the state of nature (like a right against unprovoked aggression). [69] Either way we turn, then – whether we want to be able to say that leaders act unjustly in prosecuting unprovoked wars of aggression, or that they act both unjustly and illegitimately in doing so – requires us to import some individual claim rights into the state of nature.

[67] Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986), p. 315.

[68] John Locke, *Two Treatises of Government*, Book II, para. 135.

[69] Stated more fully, the argument would go like this. If S has no liberty right to commit unprovoked aggression against others, then S has a duty not to commit such aggression. But S's duty not to commit such aggression correlates with others' rights not to be victimized by such aggression. This latter right, however, is not a mere liberty right. It is a claim right. Others have no duty not to *x* (no duty not to not be victimized, which, with the double-negative removed, asserts that they have no duty to (let themselves) *be* victims of such aggression). And with respect to them, others have duties not to interfere with their not being victims (or, more perspicuously, not to interfere with (at minimum) their physical integrity). Since T has a claim right to *x* just in case T has no duty not to do *x* and others have a duty not to interfere with T's doing *x*, T's right will be a claim right.

Individual claim rights place additional limits on the authorization that leaders may receive. Thus, leaders will either act legitimately and justly in heeding those limits, or illegitimately and unjustly in failing to heed them. They will be unable to act both legitimately and unjustly. As a result, the dilemma between acting legitimately and acting justly cannot arise on Locke's view either – at least when it comes to heeding *limits*. However, the dilemma can arise, on Locke's view, when it comes to fulfilling *requirements*. For there can be situations in which leaders of state may have to sacrifice their national (economic) interests in order to fulfill, in the international state of nature, the requirement of Locke's proviso to leave enough and as good for others – both for individuals and for states. Thus, if they sacrifice their national interests for the sake of satisfying the proviso, they will act illegitimately in exceeding their authority but justly in helping to satisfy the proviso; if they refuse to sacrifice their national interests for the sake of satisfying the proviso, they will act legitimately in heeding their authority but unjustly in refusing to satisfy the proviso.

Whereas Locke's view, then, can make sense of the dilemma, on Hobbes's view it appears to be a complete illusion. As we have seen, this is a direct result of Hobbes's exclusion of claim rights in his state of nature. If we want to preserve the idea that the dilemma makes sense, therefore, we must reject Hobbes's state of nature.

Is there anything else that can we can say on Hobbes's behalf? One response may be to retreat to the narrower claim that, in the Hobbesian state of nature, one's liberty right to all things, and hence to any thing, holds only when it is necessary for self-preservation.[70] In that case, there would no longer be blanket license, in the international state of nature, to initiate unprovoked wars of aggression (although there would be permission to do so when necessary for the state's self-preservation). Introducing this prohibition into the state of nature may help make sense of the dilemma.

A virtue of this suggestion is that it would show the realists to be making a stronger claim than Hobbes himself, for Hobbes would no longer be committed to the strong version of the celebration of power politics. However, the suggestion faces (at least) two difficulties (even setting aside the vagueness of what constitutes a state's "self-preservation").[71] On the one hand, it appears inconsistent with the text. Hobbes insists that individuals in the state of nature have the liberty "of doing any thing, which in his own judgment, and reason, he shall conceive to be the *aptest means*" for preserving himself (emphasis added).[72] But the aptest means of preserving oneself may well be to

[70] Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986), p. 300.

[71] Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 52–5.

[72] *Leviathan*, XIV.1.

wrest control by force of another's possessions even if doing so is not strictly necessary for survival. So Hobbes appears to endorse the stronger claim. On the other hand, even if we accept the suggestion – not as Hobbes's own, but as part of a modified Hobbes*ian* view – it implicitly smuggles claim rights into the state of nature anyway. In the state of nature, I no longer possess the liberty right to invade your homestead to increase my contentments (unless it is necessary for my survival). Hence, you now have a claim right not to be "robbed" (unless it is necessary for my survival). Once we have crossed that threshold, though, and introduced claim rights into the state of nature, we are either rejecting Hobbes's state of nature, or at best modifying a fundamental feature of his theory in a fundamental way.

CLOSING ARGUMENTS

If the argument presented here is sound, then leaders of state act legitimately only if they pursue their national interests. Although this claim is more modest than most realist pronouncements, it still possesses much of the sting of the realist view. If leaders of state act legitimately only if they pursue their national interests, they act illegitimately if they sacrifice such interests for the sake of many of the things we feel international justice requires and that they are uniquely positioned to achieve – to assist impoverished nations, for example, or submit to the authority of an International Criminal Court, or curtail their state's pollution. Realism insists that they stick to their authority and take care of their own. If ever they deviate from this, they incur a moral cost. Actions of leaders of state are not rendered legitimate simply by being in conformity with demands of international justice.

It does not follow from this that it is never morally permissible for leaders of state to sacrifice their national interests for the sake of fulfilling a requirement of international justice. It does not follow, that is, that they never ought to commit an illegitimate act that exceeds their authority. By the same token, neither does it follow that those who protest such acts must be giving voice to mere selfish resistance (or indifference). A genuine moral concern is involved that their protest challenges us to acknowledge. Reasonable persons may reach different conclusions in balancing the moral considerations for and against complying with it.[73]

What should leaders of state do, then, when faced with an opportunity to advance the cause of international justice that involves a sacrifice to their national interests? Obviously everything depends on whether they *would* in fact be justified in exceeding their authority, which depends heavily on the

[73] Of course, while it is not *necessarily* the case that those who protest such acts have selfish motivations, this is not to deny that such motivation is possible, and obviously, in many actual cases, it is selfish.

facts of any specific case. Sometimes they will be justified, sometimes not. But supposing they would be justified in a specific case, we can perhaps draw a lesson from Mill, who reminds us that:

> [T]he occasions on which any person (except one in a thousand) has it in his power to do this on an extended scale – in other words, to be a public benefactor – are but exceptional; and on these occasions alone is he called on to consider public utility; in every other case, private utility, the interest or happiness of some few persons, is all he has to attend to.[74]

While Mill speaks on behalf of utilitarianism, his point applies more broadly: leaders of state are uniquely positioned to make substantial advances toward international justice (positioned in ways that ordinary citizens are not). If they do not seize the opportunity, few others will – because so few others *can*.

This fact seems to give leaders of state an enormous responsibility to seize such opportunities when they can. The question then becomes how to exercise it. Now the considerations become largely political. Truth-telling will often be politically unrealistic ("Although the treaty is opposed to our national interests, this administration believes that, in the interest of justice for peoples everywhere, we must become a signatory"). Explicitly soliciting permission from the public (with full disclosure) most likely dooms the measure to failure. Resigning on principle and then attempting to rally the public merely passes the buck to the next set of leaders (and often is futile anyway). Fortunately, there is another, time-honored, political tradition: lying. Leaders of state can always cover up the illegitimacy of these actions by falsely claiming that they believe they will promote the national interests in the long run. The timeframe is inherently elastic. Typically, it will be controversial whether the actions are against their national interests. So they can usually get away with it. Under the circumstances, this may be the best option, morally.

If this is correct, then Hobbesian realism in international relations teaches us not just two lessons, but three. It teaches us that when leaders of state deviate from pursuing their national interests, they do so illegitimately, and at a moral cost. It reminds us of the plausibility and attractiveness of the view that leaders of state acquire their powers and responsibilities through the consent of their subjects. Finally, when they violate their trust, our morally best politicians will be the most skillful Fooles.

[74] John Stuart Mill, *Utilitarianism* (1861), II.19.

13

Hobbesian Assurance Problems and Global Justice

Aaron James

There is much in Thomas Hobbes's political theory that contemporary political philosophy cannot readily accept – including Hobbes's egoism, his unconditional right of self-defense, and his insistence that peace is possible only under absolute sovereign rule.[1] Nevertheless, we can and should embrace one of Hobbes's central insights: that problems of assurance are of fundamental importance for questions of social justice, even, or especially, justice questions of global scale.

In general, agents face normatively significant problems of assurance because they have imperfect knowledge about the conduct of others and must therefore weigh consequent risks of action. The basic human device for their resolution, practically speaking, is for agents to form "agreements" – promises, conventions, social practices, or institutions – that reduce uncertainty and thus "assure" the parties involved. None of this necessarily bears on basic *principles* of morality or justice, at least not without further argument.[2] Hobbes's dramatic assurance problem – the state of nature – makes this further step. It shows vividly how agreement-making may be not simply a useful device but a *condition* for the applicability of basic principles. In the absence of an agreed upon common power to assure compliance, Hobbes explains, basic principles of conduct – including considerations of justice and injustice – are simply out

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[1] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996).

[2] G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), argues that such contingencies cannot bear on *basic* principles, which must be "fact-insensitive" — of which more later.

of place. The resulting uncertainty about what others will do in the name of self-preservation gives us sweeping liberty to defend ourselves.

Contemporary political philosophy is concerned with substantive political morality and "ideal theory," so it may seem that Hobbes's problem of assurance – a matter of amoral self-preservation – can be simply set aside. At best, it may be said, assurance and other coordination problems bear, not on the fundamental nature of justice, but on its practical implementation. This is to underestimate the depth of Hobbes's insight. As I will explain, assurance problems can take specifically moral forms, arising even among morally motivated agents, in a way that bears on the very applicability of fundamental moral principles. In central cases of normative political philosophy, justification of basic principles, even in "ideal theory," must be tailored to the circumstances that give rise to assurance problems and the available human means for their resolution. While this reflects general aspects of the human condition, the point becomes especially clear in the global context. When large numbers of very different people must relate over great distances with limited knowledge, familiar uncertainties of coordination become especially acute. I would not say, with Hobbes, that an assurance-providing global sovereign is therefore needed for justice to apply. But I will argue that assurance problems shape how the question of global justice must be understood. For reasons of moral assurance, questions of global justice must take an essentially international rather than "cosmopolitan" form.

THE ASSURANCE GAME

As a point of departure, we can regard Hobbes's dilemma as the game theorist's *assurance game*, instead, say, of a prisoner's dilemma.[3] Assurance games present two or more players ("you" and "I") with a sharp tension between mutual benefit and risk. In Rousseau's stag hunt, for example, we can each either hunt hare or hunt stag. Though we will each eat something if we separately hunt hare, we eat best if we work together to hunt stag. Cooperation is thus a (Nash) equilibrium: hunting stag is best for me if you also hunt stag, and hunting stag is best for you if I also hunt stag. Yet because neither of us knows what the other will do, we each face certain risks. If you decide to hunt hare, and I am left hunting stag on my own, I'll get nothing, eating less than I would if I simply hunted hare from the start. And the same goes for you as regards

[3] For general discussion, see Brian Skyrms, *The Stag Hunt and the Evolution of Social Structure* (Cambridge: Cambridge University Press, 2003). I do not deny the usefulness of the prisoner's dilemma for modeling certain aspects of Hobbes's thought. I claim only that the assurance game usefully models central Hobbesian insights which I aim to develop and apply for contemporary purposes. For uses of the prisoner's dilemma in interpreting Hobbes, see Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1988) and G. S. Kavka, *Hobbesian Moral and Political Theory* (Princeton, NJ: Princeton University Press, 1986). But see Michael Moehler, "Why Hobbes' State of Nature Is Best Modeled by an Assurance Game," *Utilitas* 21.03 (2009): 297–326.

me. Thus noncooperation is also an equilibrium option: hunting hare is best for me if you hunt hare, and hunting hare is best for you if I hunt hare. Given our uncertainty, the noncooperation equilibrium becomes the "risk dominant" choice. The risk-averse won't miss out on the easy gains of hunting hare. But even the moderately cautious will forgo greater, risky cooperative gains for the sake of the smaller, safer benefits of acting alone.

Leaving Hobbes's state of nature is analogous to the stag hunt. We each do best if we both seek peace; we each then enjoy the benefits of commodious living, instead of constantly defending ourselves and struggling to survive. Yet we are each uncertain about what the other will do. If I seek peace while you conspire against me, I'll not only fail to see the benefits of commodious living but also miss a chance of protecting myself. And the same goes for you as regards me. So both cooperation and noncooperation are equilibrium outcomes. Given our uncertainty about what the other will do, however, noncooperation is the prudent, "risk-dominant" course.

A prisoner's dilemma, by contrast, is not a matter of weighing risks given uncertainty about the conduct of others. It makes no difference if the other player's choice is known. The self-interestedly rational choice for both players is to defect *whatever* the other chooses: if you defect, defection is best for me, and if you cooperate, defection is still best for me. And the same goes for you as regards me. Thus defection is the *sole* equilibrium outcome. What distinguishes an assurance game is that there is also a stable *cooperative* equilibrium: cooperation is best for me if you cooperate, and cooperation is best for you if I cooperate. Accordingly, Hobbes makes only passing comments on the Foole: he'll suffer reputational costs, and he can't reasonably expect to cheat for long. So we can assume there to be few Fooles once a covenant gets made. The issue is rather one of risk in "performing first": each of us needs to know that the uncertain gains of cooperation are sufficiently likely for it to be wise to pass up the lesser but surer gains of acting alone.

FUNDAMENTAL RELEVANCE

If Hobbes introduced the assurance problem to political philosophy, paving the way for Hume's rowers and Rousseau's stag hunt, he also showed with particular clarity how it could be of fundamental normative significance. The state of nature scenario shows how assurance and its lack could bear not just on the *implementation* of an independently justified and applicable principle or ideal, but also on what basic principles of conduct could be said to apply in the first place. The essential thought, I suggest, is that any basic *normative* principles – principles concerned with what agents have sufficient reason to do[4] – depend

[4] One could also call these "strongly normative" principles, if one prefers to use the term "normative" for less-than-sufficient reasons for action as well. I use the stated terminology merely for ease of exposition.

on the *epistemic* circumstances agents are in (*in foro interno*, at least in a certain general sense). What agents have sufficient reason to do thus depends as much on the risks of action, given uncertainty, as on the size of potential or actual losses or gains. As a result, sufficient uncertainty about the conduct of others can justify what would be unacceptable given better knowledge.

Hobbes's position gains plausibility if we are assumed to be relatively certain that others will be coming after us. It may be said that they, like us, cannot but preserve themselves, doing whatever they happen to judge necessary for that end. Thus prudence not only counsels but also commands – and perhaps compels – anticipatory self-defense. Whether or not this is Hobbes's view, it overstates his case. It is quite enough for principled self-defense that each agent is sufficiently *uncertain* about what others will decide they must do to preserve themselves. Even if you are *in fact* no threat to me, so long as there is good enough (albeit misleading) evidence that you will attack me, I have some reason to strike first. And if you are in the same uncertain situation as regards me, then you of course have the same reason to try to get the jump on me. When the stakes are high, time short, and the options few, war can break out between us even if we are in fact both peace-loving people, just by stroke of bad evidentiary luck: signals got crossed, one of us "looked at the other wrong," one or both of us happened to have a gun – and we lacked a common language or set of communicative signs by which to clear things up. Most important, though the result may be mutual destruction, we cannot necessarily conclude that the agents involved have failed to fulfill an independently justified principle of peaceful coexistence. Rather, no one may have been at fault, because there was, under the uncertain circumstances, no normative principle that tells those involved to do otherwise than they in fact did. (Consider, for example, a case in which we encounter but cannot communicate with alien beings.[5])

This point about epistemic sensitivity does not depend on Hobbes's unconditional view of self-defense. Contrary to the Right of Nature, evidentiary standards surely must inform one's judgment of what counts as a threat; the threat must be *highly credible*, quite aside from how one happens to judge one's own fears. Moreover, the evidence must be agent specific: even if it is true in a state of nature that people mostly break their promises, I cannot reasonably cite this general fact as grounds why I don't have to keep an appointment I made with you; I need evidence that *you* won't show. (This perhaps stands behind the rule of international law that preemptive self-defense requires a "credible and imminent" threat of attack. A country cannot preventively strike against threats "before they are fully formed," as the Bush Doctrine puts it, because they are not manifest to a degree required for them to be credibly attributed to the specific country or population attacked.) Still, our present point holds:

[5] As, for example, in Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics," *International Organization* 46.2 (Spring 1992): 405.

if, simply by bad evidentiary luck, you or I present a credible and imminent threat to one another – even if we are *in fact* no threat at all – war may break out between us through no fault of our own. We may not, that is, have failed any principle of peaceful coexistence; under the uncertain circumstances, there may have been *no applicable principle that tells either of us to do otherwise than we did*.

These amendments represent a substantively moral conception of self-defense. We therefore have a specifically *moral* (rather than purely self-interested) assurance problem: what moral principles apply depends on circumstances of uncertainty and risk which can equally arise among morally motivated agents – in the present case, agents who are committed to act in self-defense only when it is strictly morally allowed. We cannot decide what normative principles apply in the imagined case by simply selecting an ideal outcome – peace for all involved. Even basic normative principles are epistemic sensitive; they have to take into account the uncertainty and risk that the agents in question actually face.

MORAL RISKS

Vivid as self-defense cases are, assurance problems have fundamental significance for what principles of conduct apply even among morally motivated, *nondefensive* agents. Such agents assess risks of action not in terms of expected self-interested costs, but in terms of *opportunity costs to moral aims* they might have otherwise advanced.

To illustrate, consider global warming. Suppose I have limited my total greenhouse gas emissions to a degree my conscience accepts. Shall I go farther still? I could spend all of my discretionary income to minimize carbon output by buying new energy-saving appliances and cars, first for myself, then for my friends, and then for my neighbors – until my money runs out. One reason *not* to do so is moral. For any money I spend on the fight against warming is money I will not be spending on direct poverty relief. And this opportunity cost may not be justifiable if I cannot expect the money I spend on warming to make a difference, while I *can* expect to help some poor person (if not the foreign distant poor, then perhaps someone down the street). But whether the proposed warming expenditure will indeed contribute something depends entirely on what others do. If global consumption and production proceeds unabated, at recent rates, my conservation efforts will make little difference. Unless I can be assured that I am *acting within a scheme of cooperation* that, in conjunction with similar choices of others, makes a dent in the warming problem, I'll have little justification for passing up the more certain chance of doing something for poverty relief.

Here it makes little difference if I assume that most everyone is morally motivated. We are each still balancing complex moral risks as best we each can, and there is no necessary reason why our various uncoordinated judgment

calls should combine in a way that steers humanity off of its present course toward ecological ruin. Nor then is the problem that Fooles may "free ride" on the conservation efforts of others, or even that expectations of free riders may unravel or prevent an effective conservation scheme. Insofar as all parties involved are morally motivated, we can suppose this means each will do his or her fair share in any established scheme, whatever it happens to be. We can even imagine that everyone knows that everyone else will so comply. Yet the crucial form of uncertainty remains. Each may ask: Is any reasonably effective scheme in fact being jointly followed? The risk of action (e.g., the opportunity cost to poverty relief) can derive entirely from uncertainty about whether the various choices of morally motivated agents in fact combine into a common scheme that addresses the warming problem to some extent. They may or may not so combine. If people simply act from their own sense of what will help, from within their particular limited perspective, the combined effect of all such choices may still make no or little difference. The various choices will need to be combined in the right ways, into a common, more or less effective scheme, and everyone will need to know well enough that this is the case.[6]

For example, let us assume that global-sized environmental cooperation is a real possibility today. We can feasibly adopt an aggressive multilateral carbon tax or cap and trade system. If everyone were morally motivated, a stable more or less effective international agreement would arguably have already emerged. (Though of course no one really knows how effective an agreement might be; we may already be beyond an ecological "tipping point.") However, any such solution could only be of an *international* kind, a solution in which the citizens of each country will have their respective legally or socially mandated roles to play. The solution is available to us, that is, only because there already exists an international system, in which governments can work out and jointly follow an effective scheme, acting on behalf of their respective citizens, drawing their cooperation along in tow. It is hard to see, by contrast, how all or most of the individuals of the world could somehow *directly* establish an effective,

[6] While I mean to leave the scope of relevant "moral aims" open-ended, I do here assume we are not considering cases in which a wrong against someone is done regardless of what other people are doing or how many people are cooperating (e.g., needless murder). It is not a wrong against someone to admit carbon, per se, for example, because any consequences for people (e.g., the dispossessed on the Bangladeshi flood plains) result as cumulative effects of many, many acts of carbon emission. Such particular acts are not properly conceptualized as wrongfully harmful unless they are part of larger consequential patterns of emissions choices. In other, "step-good" cases, when social production of the good (or relevant bad) requires only a critical mass of participants, one may lack sufficient reasons to cooperate when the number of assured cooperators is insufficiently low *or* sufficiently high. I generally focus on the first variation. The latter version invites familiar questions about self-interested free-riders which do not come up under our idealization of moral motivation. I leave open whether moral opportunity costs might equally justify "moral free-riding" in such cases. I thank Gerald Gaus for discussion of these complexities.

publically recognized and mutually assured warming arrangement, without the help of international relations. One reason for this is each person's sheer lack of reliable information about what millions or billions of other people are doing in places both far and near. Another is that any arrangement would have to make reference to each person's contribution to the problem, telling him or her in some sort of regulable terms what emissions to forgo, and at what cost to other important goals. Yet our respective emissions *as individuals* just cannot be conceptualized as contributions to the warming problem at that fine-grained level; it is only when we consider larger-scale collective emissions output (for the United States, or for California) that consequential patterns emerge (which is not of course to say that smaller groups such as cities or families, or even individuals, would not do well to *try* to make some contribution). Any solution to the contemporary global warming assurance problem therefore cannot take a purely "cosmopolitan" form.

HOBBES'S BASIC INSIGHT

We should pause to specify the class of *cosmopolitan* views. Here we mean not simply views that take individuals as the basic unit of moral concern – we fully embrace that much – but rather views about the nature of proposed *principles*: fully general, globally applicable principles of distribution are said to apply to all the individuals of the world. The principles may so apply either to individuals as such, or in virtue of social relations characterized independently of the broadly international relationship that now organizes the people of the world.[7] Such views can grant that moral and other assurance problems present important practical problems, which bear on how best to *implement* the independent requirements of justice. We will be arguing that this is a mistake, because assurance problems have deeper, more fundamental importance. (Our aim is less to refute cosmopolitan views, however, than to motivate a plausible alternative.)

To that end, suppose for the moment that the self-defense and warming cases are representative of the basic issues of normative political philosophy – that is, political philosophy concerned with normative principles. In that case Hobbes and the social contract tradition he influenced is essentially right about the basic circumstances of justification. Any justification of principle would have to be addressed specifically to the conditions of human agency that give

[7] See, for example, Charles R. Beitz, *Political Theory and International Relations*, Revised (Princeton, NJ: Princeton University Press, 1999); Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 1st ed. (Cambridge: Polity, 2002); Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview Press, 2002); Simon Caney, *Justice beyond Borders: A Global Political Theory* (New York: Oxford University Press, 2006); and "Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance," *Social Theory and Practice* 32.4 (2006): 725–56.; Gillian Brock, *Global Justice: A Cosmopolitan Account* (New York: Oxford University Press, 2009).

rise to uncertainty about the conduct of others and the agreement-forming devices we have for managing associated risks.

These circumstances cannot be readily set aside or abstracted away, at least not without compromising certain very basic features of human life. The basic conditions of agency in question arise for a single reason: human agents are distinct individuals. Part of what makes us distinct agents is that we lack the sort of direct knowledge of or control over the minds of others that we (as minimally rational, morally competent agents) have over ourselves. Having neither direct control nor direct knowledge of the minds of others, we are left to interact in uncertainty about what those others will do. And so we often cannot be expected to be or act in agreement unless this becomes established in a public, jointly available way.

This is not to say "agreement" need always have the same form, notwithstanding Hobbes's insistence on sovereign rule. In person-to-person cases, being in agreement may be as easy as exchanging a kind word, gesture, or other commonly known indicator of good will (unless, say, the alien beings we are encountering share no such signaling conventions, which is then a less straightforward kind of case). Our respective evidential circumstances then change, removing grounds of self-defense, allowing us take basic expectations of interpersonal morality for granted.[8] Cases involving large numbers of people and uncertain patterns of conduct are more complicated and so still more uncertain, much as Hume explained. Even if morally motivated people will not require the strong assurance of a sovereign power, they cannot be expected to converge automatically on a common scheme by themselves. Matters of large scale are often too uncertain for that. There are too many cases like the global warming case, in which well-motivated and basically competent moral agents reach different moral judgments, and are known to reach different judgments, as a result of differences in position, complex information, and how situations are interpreted or principles applied. Thus even an assumption of universal moral motivation will not provide sufficient assurance in and of itself. It is only provided a public agreement, which selects, and is commonly known to select, certain large-scale patterns of conduct over others, that the moral and other risks of action become justifiable.

The source of the problem is in part that moral reasoning, though not necessarily irredeemably fragmented, does often need the help of social

[8] Although this is still not necessarily to grant Lockean natural rights. The necessary forms of agreement are not a matter of removing so many "inconveniences" to the fulfillment of an interpersonal expectation, but rather of changing the underlying circumstances for their applicability. This is crucial for John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), for example, who assumes that we cannot properly determine a person's rights *in* society by asking about his or her rights in a state of nature (as in Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1977); the conditions of society change the relevant underlying circumstances and so must be taken as a fresh occasion of justification.

circumstances to be unified in the form of principles suitable for the governance of collective life.[9] Justification of basic moral principles must, in those cases, take the nature of the relevant social circumstances and its implicit understandings into account. Otherwise, we have little assurance that proposed principles will be consistent with a stable cooperative equilibrium, as any properly normative principles for collective life must be.

Accordingly, Rawls, for example, justifies principles of "ideal theory" for independently identified and interpreted social practices and institutions, drawing bases for social agreement in part from the practices or institutions themselves.[10] His idealizations are modest, being limited to assumptions of (1) the normal, "favorable conditions" under which a mutually assured practice has in fact emerged, and of (2) "full compliance" with its terms, so that no participant can cite free-riding Fooles as an excuse for noncompliance. In addition, Rawls imagines people as willing (to a normal degree) to abide by whatever governing principles are ultimately justified, lest sheer lack of concern for justice itself limit what justice could require. Otherwise, however, the basic features of the practice in question are assumed to hold sway over the question of what principles should govern the joint enterprise.

To illustrate, consider this social contract approach in the global economy. Much as in the global warming case, there is no clearly tractable way for each market actor to regulate his or her choices with assurance that this will be of any consequence for the large-scale patterns of distribution that the global economy in fact produces. Even transnational cooperatives (e.g., the "fair trade coffee" movement) have at most a marginal impact on the relative fates of rich and poor countries. There is, however, significant *international* structure at the global level. The global marketplace is constituted and organized by an *international social practice of market reliance*, a practice whereby countries mutually rely on common markets, for the sake of "the gains of trade."[11] The terms on which countries integrate into the larger global economy, as set by this practice and its various specific institutions of money, finance, and trade, significantly contribute to the wealth and poverty of nations (along with other factors, such as geography and quality of domestic institutions). Even without the strong assurances of global sovereign rule, all parties can be amply assured that the practice will continue for the foreseeable future in roughly its present form. The multilateral trading system has already proven its stability over half a century, and historical developments such as the likely end of

[9] For a related argument, see Gregory S. Kavka, "Why Even Morally Perfect People Would Need Government," *Social Philosophy and Policy* 12.01 (1995): 1–18.

[10] Aaron James, "Constructing Justice for Existing Practice: Rawls and the Status Quo," *Philosophy & Public Affairs* 33.3 (2005): 281–316.

[11] I develop this view in Aaron James, *Fairness in Practice: a Social Contract for a Global Economy* (New York: Oxford University Press, 2012) and James, "Distributive Justice without Sovereign Rule: The Case of Trade," *Social Theory and Practice* 31.4 (2005): 533–59.

world war strongly suggest that it will endure. If further assurances are wanted, the system is now formally governed within the World Trade Organization, a rules-based system in which negotiated agreements are interpreted by dispute resolution bodies and enforced by a reciprocal sanctioning mechanism.

What might the limited Rawlsian conception of "ideal theory" say about the system of trade? Assume that all officials (e.g., trade negotiators, panel judges, tariff schedulers, etc.) are morally motivated, and thus moved to ensure that the terms of cooperation are fair to all. The question then is: What principles of fairness – principles for how the system's burdens and gains are to be distributed, within and across societies – would they uphold? On the present conception, our answer will not abstract away from the underlying conditions of mutual benefit and risk that mark the multilateral trading system as the distinctive social order it is. These shape what is required for participation to be both worthwhile and fair. Indeed, the global economy only exists in its current robust form because countries learned to cooperate in the wake of two world wars and the mutually destructive interwar years, being willing to forgo short-term "relative gains" for the sake of the ongoing mutually beneficial trade relationship. Crucial for this was the mutual trust borne of both routine compliance and shared moral values. The organizing "embedded liberalism compromise" depended on emergent mutual assurance that the multilateral system would leave adequate room for domestic concerns of justice, including the growth of social safety nets.[12] Accordingly, one ongoing issue of fairness is what prerogatives of market protection different countries should have. Whatever else we say about how the gains of trade should be distributed, countries often need to limit or mitigate vulnerabilities resulting from market exposure (e.g., worker displacement, or susceptibility to foreign financial crises) if the trade relationship is to have any chance of being beneficial to all. To be fair to each, trade has to be worthwhile to each. And assurances of general net benefit do seem necessary if the opportunity cost of autarky is to be justified in a given country's eyes. Otherwise, why not choose the safer if smaller gains possible under autarky instead of the uncertain gains of trade?[13]

[12] John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," *International Organization* 36.2 (Spring 1982): 379–415; Robert Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime," *The American Journal of International Law* 96.1 (2002): 94–117.

[13] Economists sometimes claim that the argument for free trade is purely unilateral. In fact, it has been clear since J. S. Mill settled the terms-of-trade debate that free trade is founded on reciprocity. The possibility of mutual "beggar-thy-neighbor" policies (or terms-of-trade externalities) will often mean that prudent governments require assurances of mutual forbearance, that gains will be large enough to compensate losers, that the trade relationship will last, and so on. In *Fairness in Practice*, chapter 2, I develop this point in detail with reference to the standard economic for free trade. This is part of a larger argument for seeing the global economy (as suggested above in the text) as constituted by an "international social practice of market reliance."

THE QUESTION OF GLOBAL JUSTICE

What import, if any, does any of this have for global justice? We have discussed global-sized examples in order to illustrate Hobbes's basic insight: any justification of normative principles, concerned with what agents ought to do, must be sensitive to the conditions of human agency that give rise to uncertainty about the conduct of others and the agreement-forming devices we have for managing associated risks. Nothing follows from this, by itself, about how questions of global justice should be understood, or whether they even arise. Still, Hobbes's insight may set the stage for general conclusions of this kind. Hobbes himself famously claims that there can be no question of global justice given the absence of global centralized legal authority: the only condition for adequately assuring nations then goes unmet. Others have followed Hobbes's lead. For reasons of assurance, Kant held that a coercive political authority is necessary for people in a common world to "enter a rightful condition."[14] Coercion-based theorists, in our own day, argue that questions of socioeconomic distributive justice cannot come up on the politically decentralized international scene, at least not in the same significant way, or for the same reasons, as they do come up under the centralized domestic state.[15]

I recommend against these views, though I will not make a case for that here.[16] For present purposes, the curial point is that they do not follow very directly from the basic insight we have ascribed to Hobbes. Once we moralize motivation, it is not clear why formal legal rule should be the *only* way for nations to establish the necessary forms of public agreement. The assurances provided by established, reasonably well-defined *informal* social practice will often suffice. Assuming that nations are morally motivated, and known to be so motivated, we could expect each country to be more willing to take risks for

[14] Immanuel Kant, *The Metaphysics of Morals*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), chapter 1. See also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009). Ripstein takes decentralized international law to be consistent with the required determinate, coercively assured political authority, given the possibility of domestic enforcement.

[15] Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33.2 (2005): 113–47, explicitly mentions moral assurance problems, though his argument turns on the authorizability of legal authority rather than problems of assurance per se. Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs* 30.3 (2001): 257–96, focuses on the special threat to individual autonomy, with little emphasis on problems of assurance. Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012) further relaxes Blake's approach, suggesting only that the special "immediacy" of the state explains its "normative peculiarity." This leaves the international scene open to similar (if relevantly different) moral questions.

[16] Coercion-based views have been criticized by James, "Distributive Justice without Sovereign Rule: the Case of Trade"; Joshua Cohen and Charles Sabel, "Extra Rempublicam Nulla Justitia?," *Philosophy & Public Affairs* 34.2 (2006): 147–75; A. J. Julius, "Nagel's Atlas," *Philosophy & Public Affairs* 34.2 (2006): 176–92.

expected moral gains as compared to our world of mixed national motives. The cost of failing to act together for the sake of shared moral ends then weighs more heavily on all than the smaller moral improvements a country might achieve acting alone. Even if nations are averse to action under uncertainty, they would arguably take a chance on publicly established arrangements or understandings that advance clearly worthy moral aims better than unilateral action (as with climate change or poverty relief). This may be so even if informal regulative expectations are not fully specified, and known to require good faith judgment to apply in practice. Morally motivated nations who have established a modicum of trust and common social purpose will tolerate divergence in the interpretation of expectations, especially when they are roughly consistent with common values or open to informal mutual accountability and adjustment on an ongoing basis. A case in point is the highly successful postwar "embedded liberalism compromise," or even just its trade-specific component, the General Agreement on Tariffs in Trade. (The examples are apt despite the fact that the nations involved presumably had mixed rather than morally pure motives.)

I suggest, instead, that Hobbes's insight about assurance supports a quite different conclusion about how questions of global justice are best understood: such questions must take a specifically international rather than cosmopolitan form. That hardly follows directly from Hobbes's views, but it can be motivated by further reflection on the Hobbesian insights explicated above. Specifically, Hobbes's insight suggests limits on *abstraction* even within "ideal theory." There are general facts of global social life that idealization should not abstract away from, even as a matter of basic principle. Specifically, the general question, What type of *global social order* is justifiable to all?, must be read as the more specific question, What type of *international* order is justifiable to all?, given certain principled demands of *epistemic availability*, which I now explain.

Let us assume for the moment that questions of global justice are questions of normative political philosophy, about what agents (conclusively) ought to do. In general, normative principles of justice cannot be justified by pointing to desirable states of the world, even if it is logically or physically possible for them to come about. Such principles are addressed as normative demands *to* specified agents, and can require only forms of action or social cooperation that are "available" to them, given their regulatory powers. We can in theory address hypothetical normative principles to hypothetically situated and empowered agents (e.g., in a world of easy material abundance, rather than our world of moderate scarcity). But such hypothetical principles will not necessarily tell us anything about what justice requires in the circumstances of actual social and political life. Insofar as normative political philosophy seeks to address *us* – as it presumably should – it must specifically address our actual world regulatory position. Otherwise, it tells us nothing about what justice requires of us.

This is a modest conclusion by itself. One can still argue that any physically and biologically possible states of affairs *are* "available" to us, in the relevant sense.[17] It is here, however, that the Hobbesian insight enters with particular force: availability, properly understood, is *epistemic* availability, in a sense that limits the basic form of human cooperation that justice could require. As we will explain presently, there are reasons why our collective epistemic position leaves us without a viable alternative to an international system, even if in a deeply revised form.

Again, it is a basic fact of the human condition that we are distinct individuals who lack direct knowledge of or control over the minds of others and therefore must interact in uncertainty about what those others will do. Given the unavoidable risks of cooperation (or what we hope will be cooperation), any principles must address this basic epistemic predicament. None of us can be expected to be or act in agreement with others unless some expectations of regulation become established in a public, jointly available way. There may then be no question of "global justice," beyond the question of what each individual is separately morally required to do, simply for bad evidentiary luck: unfortunate epistemic conditions may leave even morally motivated agents in an unorganized, global "state of nature."

When cooperation of certain kinds has been achieved, as in domestic society and in international relations, this is to *partially address*, rather than wholly overcome, our fundamental epistemic predicament. Established, mutually assured cooperation on one issue-area may leave other, localized "states of nature," where cooperative relations are not underway. In any cooperative practice, expectations of regulation are for a specified *type* of activity, which participants distinguish from other activity types, track over time, and associate with attached regulatory expectations in both momentary action and cross-temporal planning. Assurances that regulatory expectations are widely understood and complied with in one area do not then imply that adequate assurances are available in other areas. Even morally motivated agents require not just assurance, but assurance of certain specific sorts.

What goes for individuals also goes for the collectives that individuals form. Just as normative principles for the regulation of conduct must be sensitive to the regulatory position of individuals, including their respective epistemic situations, normative principles must be sensitive to the regulatory position of any collectives those individuals form, including their respective, collective epistemic circumstances. For one thing, any significant change in the structure of cooperation in a group will equally be a change in the regulatory expectations of (many of) its members. The wrong kind of change can destabilize or destroy assured public understandings. This was Hobbes's chief concern with

[17] See, for example, Jon Elster, *Making Sense of Marx* (Cambridge University Press, 1985), p. 201, who also argues that perceived obligations can contribute to their historical feasibility.

the English Civil War, but the concern can equally arise among the morally motivated: as assurance declines, the moral opportunity cost of unilateral action increases, potentially undermining a going cooperative equilibrium. Most important, even when no such "constitutive threat" is in the cards, the scope of reasonable change will generally be subject to the common epistemic environment. A move toward a new (perhaps rough) cooperative equilibrium within an ongoing practice is equally sensitive to the general epistemic conditions that shape not only the risk assessments of particular agents, but also what general regulatory expectations could be jointly established and maintained.[18]

It follows from all of this that normative principles of global justice can require only cooperative arrangements that we can know – with reasonable confidence – that we can jointly establish and maintain, starting from our current agential situation. "Ideal theory" can happily abstract away from lack of concern for justice. But it cannot ignore our current, collective regulatory position without simply changing the subject from normative principles of justice for us to something else.

What, then, is our regulatory position in contemporary global political life? Nothing in our world of substantial domestic, transnational, and international cooperation changes our fundamental epistemic predicament. We have already noted that epistemic problems become particularly acute at global scale. Matters of large scale are highly uncertain, because even well-motivated and basically competent moral agents reach different moral judgments, and are known to reach different judgments, as a result of differences in position, complex information, and how situations are interpreted or rules or principles applied. But notice, now, that these problems become especially sharp when we are considering very basic, ground floor forms of cooperation, rather than mere adjustments within a more general framework of largely assured cooperative background. Much as we might see even the French Revolution as deep change within a continuous roughly shared conception of what a nation-state is, we might clearly and credibly envisage deep international reform, say, of the trading system and its relation to the systems of finance or money, while leaving a basic international system intact. But the situation is quite different when we are considering revolution of the international order itself, even if by a stepwise and gradual route. As I will now suggest, our basic epistemic situation is

[18] Ken Binmore, *Game Theory and the Social Contract*, vol. 1: *Playing Fair* (Cambridge, MA: The MIT Press, 1994) treats institutional reform as an assurance game, with the status quo as the relevant "state of nature" and the reformed state as a new potential cooperative equilibrium. I note this because it is of interest, but will not assume that this is an appropriate use of the assurance game as it is best understood. The standard cases, as discussed above, involve not institutional change but rather agents who need uncertainty-reducing assurances in order for cooperation to be established or maintained. I am suggesting that the individual and collective cases are similar in important respects, even if the same model isn't appropriate.

that we simply do not know well enough what fundamental revolution might mean and how it might work. Even if it is logically or physically possible, it is presently unavailable to us.

It is a basic fact of global political life that the international order is the central publically understood means for managing global-sized affairs. For all of its many flaws, it has, and is known to have, significant capacity to effectively address issues of global size (global security, the global economy, humanitarian aid and intervention, the environment, and so on). It does so, moreover, in a way that can in principle draw along the compliance of almost everyone, seen as citizens of one or another national government. By contrast, as the case of global warming suggested, it is hard to see how the individuals of the world could ever *directly* arrange a coordinated response to global-sized problems, given the scale of the problems and the difficulties of coordination and communication. Transnational movements do have an important and growing influence on national and international policy, but this is still to say that specifically international relations have an indispensable role in world affairs. (Even if direct global coordination is indeed somehow possible, the difficulty of *readily conceptualizing* it would itself disable it as a generally understandable solution to an assurance problem. People feeling confused would expect that others are likewise confused, and so lack assurance. Even those who felt clear might expect that enough others are confused (if clear about the general confusion) and likewise lack adequate assurance).

None of this implies that the international order is justifiable in anything like its present form, or that concerns of assurance must stand in the way of deep structural change. Because morally motivated governments and their publics will be amenable to cooperation, numerous substantial reforms are arguably available to us within the near and relatively near future. These might include adopting an aggressive carbon tax or cap and trade system along with large investments in green technology and mitigation efforts for those adversely affected by climate change; eliminating the international borrowing and resource privileges that incentivize poverty-creating corruption and civil unrest in developing countries[19]; reorganizing the trading system to optimize terms of economic integration for developing countries[20]; excepting developing countries from the emerging, development-inhibiting system of global intellectual property[21]; strengthening international labor standards, for instance, by rewarding compliance with trade privileges[22]; establishing maximally effective

[19] Pogge, *World Poverty and Human Rights*; Leif Wenar, "Property Rights and the Resource Curse," *Philosophy & Public Affairs* 36.1 (2008): 2–32.

[20] Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (New York: Oxford University Press, 2006).

[21] Aaron James, *Fairness in Practice*, chapter 9.

[22] Sanjay Reddy and Christian Barry, *International Trade and Labor Standards: A Proposal for Linkage* (New York: Columbia University Press, 2008).

agencies for humanitarian aid and intervention; improving coordination between international organizations; strengthening the ability of civil society to hold national and international governments publicly accountable for applicable human rights standards; increasing international labor mobility; improving public deliberation, accountability, and administrative functioning[23]; establishing a true global lender of last resort, international bankruptcy institutions, and more effective use of international money[24]; and so on. Such reforms might cumulatively cut deeply into the current international order without changing its basic international outline. It may retain, say, territorial borders and the presumption that each government has a default, special responsibility for the lives of people within its jurisdiction. A deeply reformed international order could still have the basic assurance-providing roles it currently has.

What is less clear, and indeed completely unknown, is whether any *fundamentally* distinct alternative global social form – a world state, or system of vertically dispersed agencies[25] – could provide the necessary assurances. The answer is at best unclear, a highly speculative empirical matter. Nor can we confidently expect our weak conceptual and epistemic situation to change in the foreseeable future. It might change, but also might not. We cannot be sure, or even confidently expect substantially greater certainty on the matter.[26]

The issue is not simply the current descriptive state of empirical knowledge, which is, after all, subject to deliberate alteration (e.g., by public investment in research). Moreover, what level of certainty and what kinds of assurances are adequate are normative questions. According to a very low standard of "adequacy," highly speculative arrangements might qualify as "available to us." Why then think the appropriate standard of adequacy should be high enough to limit our available institutional future to a fundamentally international system?

As we have already suggested, our answer appeals to both practical limitations of understanding and reasonable uncertainty-aversion. A fundamental alternative would have to be of a kind that people can generally understand,

[23] Joshua Cohen and Charles Sable, "Directly Deliberative Polyarchy," in Joshua Cohen, *Philosophy*, *Politics*, *Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2009).

[24] Joseph E. Stiglitz, *Making Globalization Work*, 1st ed. (New York: W. W. Norton, 2006).

[25] Thomas W. Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103.1 (October 1992): 48–75. For suggestive accounts of radical (if gradual) global transformation, see also David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, 1st ed. (Stanford: Stanford University Press, 1995); Robert E. Goodin, "Global Democracy: In the Beginning," *International Theory* 2.2 (2010): 175–209. I do not mean to suggest that such proposals are clearly implausible or deny that they are of deep interest. I merely point out their speculative nature.

[26] This part of my argument is similar to Risse's epistemological argument in *On Global Justice*. He also suggests the stronger thesis that a fundamental alternative is *unintelligible* and not simply insufficiently credible.

see the point of, and know how to uphold in their various social roles, despite the enormous difficulties of coordination at a global scale. And we would have to have evidence that most everyone in the world could actually be expected to come to this understanding in practice, over some appropriate time frame (again, assuming the good faith efforts available to morally motivated agents). More significant, the proposed arrangements would have to be known with reasonable confidence to be just as good, or indeed better, than any international order we have or could have. Otherwise, why risk the safer moral benefits of the existing or reformed international system for the sake of gains that may or may not be greater, and may or may not even be reaped? What is morally valuable about that?

The appropriate evidentiary standard is, I am suggesting, "reasonable confidence," where that is understood to reflect familiar and reasonable *uncertainty-aversion*. At the very least, that implies a substantial burden of evidentiary justification. Mere plausible speculation is insufficient. The issue is not, moreover, one of rational risk-taking when expected outcomes have known probabilities; our point is precisely that fundamental revolution is deeply uncertain even about probabilities, in which case still greater caution is required.[27] This is also not to suggest the familiar conservative idea that social change is likely worse than the status quo (because, say, of inevitably worse unintended consequences). That would foreclose changes about which we can often have reasonable confidence. While our argument is at best suggestive without a fuller specification of the appropriate burden of justification, I do not offer such specification here. I simply suggest how we might press the case against global revolution on several ways of assessing the stakes.

On one Hobbesian version of the argument, it would have to become clear that any radical alternative would leave people just as secure. A reformed international order arguably would do that; as suggested previously, if the international borrowing and resources privileges were abolished, removing powerful perverse incentives for military coups, millions of people in underdeveloped African countries would be less likely to face the hell of civil war, with no security loss to advanced countries. But it is far from clear that global *revolution* would do better or even equally as well as a deeply reformed international security system. We have little basis now for reasonable confidence that this would be so. Indeed, there is cause for serious concern, as Rawls, following

[27] Uncertainty-aversion contrasts with mere risk-aversion, which involves preferences over outcomes with known probabilities. When even probabilities are unknown or very difficult to assign, people are generally cautious, especially when the stakes are high. John Maynard Keynes, *A Treatise on Probability* (London: Macmillan, 1921); Daniel Ellsberg, "Risk, Ambiguity, and the Savage Axioms," *Quarterly Journal of Economics* 75.4 (1961): 643–69; and n. 32; Craig R. Fox and Amos Tversky, "Ambiguity Aversion and Comparative Ignorance," *Quarterly Journal of Economics* 110.3 (1995): 585–603. I am suggesting that this difference carries over for moral preferences, when prudential prospects are not the issue.

Kant, claims when he explains why he takes "international law and practice" largely for granted. Just before specifying his principles for international relations, Rawls says:

> These principles will …, I assume, make room for various forms of cooperative associations and federations among peoples, but will not affirm a world-state. Here I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government – by which I mean a unified political regime with the legal powers normally exercised by central governments – would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.[28]

Notice that Rawls's worry of inducing either despotism or civil strife would be puzzling if "ideal theory" could *thoroughly* idealize circumstances and motivation. In that case, we could simply assume all will happily comply with whatever global social order we think justice requires. Since this assumption is clearly not being made, the argument is best read as instead placing *limitations* on ideal theory according to what we know, and can be expected to learn, about how global politics will, or will not, work. It is fine to abstract away from the fact that agents often (but not always) have morally irrelevant motives (e.g., they are selfishly self-interested). Given the present and expected state of human knowledge, however, we cannot expect even morally motivated agents to have security assurances comparable to those they have under a reformed international order. Even if there were a feasible transitional route to a revolutionary order, it would not be worth the security opportunity cost.

The same kind of argument can take a more clearly moralized form in terms of the opportunity cost to moral goals such as poverty relief. Not only are security and stable property rights conducive to economic development, but also the international system combined with regulated markets is the most successful engine for broad-based poverty reduction we know of. The point is not that global capitalism in its present form is justified because it has in fact reduced poverty on an unprecedented scale. The justifiability of global capitalism still depends on whether there are arrangements that are better still. And, as I've suggested, there is every reason to think that significant moral improvements are indeed possible. Beyond deep reform, however, we simply do not know that any fundamentally different alternative to the international system will do better or even just as well in terms of economic development. Economic

[28] J. Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press, 2001), p. 36. In footnote 40, Rawls quotes Kant. "Kant says in Ak: VIII: 367: 'The idea of international law presupposes the separate existence of independent neighboring states. Although this condition is itself a state of war (unless federative union prevents the outbreak of hostilities), this is rationally preferable to the amalgamation of state under one superior power, as this would end in one universal monarchy, and laws always lose in vigor what government gains in extent; hence a condition of soulless despotism falls into anarchy after stifling seeds of good.'"

science is too limited to supply such knowledge. And, if anything, the major recent mistakes in development economics result from excessive idealization and a corresponding failure to take given institutional context seriously.[29]

This argument depends on claims about the current and foreseeable state of human knowledge about the possibilities of global-sized social coordination. The state of such knowledge might of course change. Our argument is that, even if it eventually did become clear that a fundamental alternative will provide the needed assurances, normative political philosophy cannot assume that possibility until that time.

It bears emphasizing that none of this is to deny the importance of utopian speculation and even localized institutional experimentation. Such intellectual and practical projects may expose going assumptions about social possibility as false or weakly supported. And when such assumptions are fairly well grounded, speculation or experimentation may change our epistemic circumstances, widen the scope of available arrangements, and so change what justice requires of us. Justice is not then discovered, but rather specified, or further constructed. But neither compelling speculation nor local institutional success make such a difference in and of themselves; they imply a change within justice only when the appropriate evidentiary and organizational standards have been met. Our claim is that they are not met, and cannot now be expected to be fulfilled, at least for our most basic international social forms.

COSMOPOLITANISM

Our argument for internationalism is so far largely suggestive, and we will leave it at that.[30] We can, however, both clarify and strengthen the argument by showing that it can absorb many of the main concerns of "cosmopolitan" positions. In particular, our argument is fully consistent with what might be called *bare individualism*: justice can at bottom be a matter of justifiability to all the individuals of the world, and not, at bottom, a matter of justifiability to nations or other groups. The argument can accept this and yet insist that our basic need for assurance shapes not the basic unit of justification but rather the distinct issue of how we should understand the normative *principles* that apply to actual political life.

Bare individualism settles neither the domain of application of such principles nor their general form in central politically important cases. As for domain of application, the Hobbesian will say that normative principles apply within societies but not at the global level. But even views that apply normative principles across societies can disagree about the form that such cross-societal

[29] Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton, NJ: Princeton University Press, 2007).

[30] Risse's argument in *On Global Justice* plausibly addresses a range of further relevant historical and contemporary positions and objections.

principles take. The standard cosmopolitan position is that principles are addressed to all the individuals of the world (and to any collectives individuals set up). On a more pluralistic view, by contrast, principles are addressed specifically to the independently identified agents they are supposed to govern, and so vary according to the (individual or collective) agent and activity type in question. Principles for collectives may not be for individuals, and vice versa. Thus, principles applicable across societies may count as specifically for societies and their relations, and for persons only insofar as those persons belong to a country that acts on their behalf. The principles are for the regulation of state conduct and institutions, international organizations, as well as transnational organizations or individuals that seek to hold states accountable (according to the relevant international standards). Insofar as such principles nevertheless *bear* on individual action, they do so indirectly – not, that is, without further principles, for individuals, which indicate how they are to relate to the collectives in question.[31]

This pluralistic conception of principle is consistent with bare individualism because, when we ask what principles should govern conduct in a given case, we consider what would be justifiable to all the individuals affected. In the collective case, we ask: How should the organized group in question (a society, a set of nations, an international organization) be expected to arrange its affairs if its structure is to be reasonably acceptable to each person it affects? It is a further question whether the interests that ground reasonable objections must be purely individualistic – concerning only a particular person, him- or herself – or whether they can also be partially social, as when an individual has a stake in the character of collective life.[32] For present purposes, we can leave the matter open. Our argument for internationalism can assume purely individualistic concerns, with no reference to collectivist values of national identity or national self-determination that cosmopolitans often deemphasize or reject. As we have suggested, the case can turn on individualistic values such as security and poverty relief.

A stronger line of cosmopolitan objection might be as follows. It may be granted that we should take the broadly Hobbesian point that that *some* sort

[31] For example, Rawls's "natural duty of justice" (*A Theory of Justice*, pp. 115, 334), tells individuals not to support justice in institutions as such, but to support justice in institutions that exist and "apply" to them, and only at a "reasonable cost" to themselves. How individuals are to relate to institutions that do not so "apply" (e.g., a foreign, newly discovered society) is a further question, which may admit of different answers from institutional and individual agents. Here I take it that a full explication of the issues requires an ethics of complicity that is sensitive to assurance problems.

[32] For instance, a person might have a security interest in living in a society free from external threats, or an economic interest in living a society that sees steadily rising standards of living. One might *also* have individualistic interests in how one fares in such societies, with respect to relative security or economic prospects. But this is not to deny the further interests of a more collective nature.

of mutually assured, large-scale, global-sized institutional relationship(s) must mediate relations between the individuals of the world. It is a further question, however, whether the relationship must be of a specifically international kind. But suppose we can justify a global version of Rawls's difference principle when we take the global order as such, without considering its specifically international nature. In that case, it might well turn out that the global difference principle can be feasibly implemented only by an international system,[33] perhaps for the reasons of assurance I have provided. But this shows only that an international system is required for the *implementation* of justice, not that the very question of global justice must take an international form.

So stated, this argument largely ignores the basic challenge that my argument poses, which is intended to challenge its initial supposition (that we can justify a global version of Rawls's difference principle when we take the global order as such, without considering its specifically international nature). In that case, cosmopolitan objection needs to be elaborated further. On one version, justification is not subject to any epistemic constraints – a possibility we return to later. Another version accepts epistemic constraints upon justification, but claims that they do not limit the type of regulative principles that express the conditions of justifiability to all principles for international relations.

This is still precisely what is at issue, so the cosmopolitan objection, as stated, does not yet rise to our challenge. If the objection is to address actual global political life, any applicable regulative principles must be suitable for the international order that now organizes global politics. If a global difference principle is justifiable, it must be justifiable as a specifically international responsibility, given any limits our current regulatory position places upon fundamental institutional change. Again, it will not be enough to describe suggestively an alternative social order, or even a gradual, stepwise route to it. We have to see that it is really available to us, according to the appropriate evidentiary standards, in order for us to be required to move in its direction. One might ease the burden of argument by defending a relaxed standard of evidentiary "adequacy" or "reasonable confidence." Even so, we would need to see the argument that the proposed arrangements support reasonable confidence. And to say that the case for this must be made is just my basic thesis: we cannot properly idealize away the basic international nature of the global scene. It cannot be relegated to a mere "non-ideal theory" question of implementation. It is part of the basic question of global justice, even within "ideal theory."

Note also that we in any case cannot assume that "global" principles are superior to specifically international principles. Assuming we will have an international system for a good long while, we might ask: Would a global difference principle regulate international distribution without unacceptable results? For

[33] Beitz, *Political Theory and International Relations*, defends a global difference principle but grants this point about implementation.

instance, will gains to the globally worst off come *only* at the expense of the worst off in rich countries, rather than those far better off? It is common to worry that global trade liberalization would imply just this: the poorest of the world would gain, the richest of the world would gain, but the worst off in rich countries would lose. Specifically international principles might foreclose that distributive pattern: if the claim of poor country A falls to rich country B, then B might pay from its total income, and not (directly) from gains to its poorest members. (In the trade case, rich countries might both give favorable trade to poor countries *and* protect their own worst off with social safety nets.) Would a global difference principle also have this crucial implication? It might, or it might not; again, the case must be made.

THE NATURE OF JUSTICE

We have stipulated that questions of global justice are questions of normative political philosophy. This is hardly trivial, since one might distinguish these questions. It may be said that normative principles are important from a practical point of view, but irrelevant to the nature of *justice*: justice, and principles of justice, are not constrained by contingent problems of uncertainty and assurance in the way I have suggested.

Understood one way, I am happy to concede the objection. My argument is limited to what I am calling "normative political philosophy." By definition, it deals with basic "normative principles" concerned with what agents have sufficient reason to do. If there is a different kind of political philosophy, whose principles are not so concerned and consequently unconstrained by circumstances of uncertainty, I happily admit that my argument does not apply. I insist only that normative political philosophy is a central and important part of political philosophy, if not also political life, and that its normative principles are *fundamental* within the general moral kind to which they belong.

Matters of justice, or global justice, surely cannot be wholly divorced from matters of what agents have sufficient reason to do. It would be odd to say that certain conditions are not merely good but *required of us by justice* and yet admit that no one will ever in fact have sufficient reason to do anything about them. Some philosophers do seem to hold that even certain unachievable ideals deserve the name "justice."[34] Even if that is so, one might hope political philosophy would be *centrally* concerned with what agents have sufficient reason to do, if not in the short run, when political will may be lacking, then at least over the medium to longer term. In that case, the Hobbesian problematique is unavoidable. A political philosophy of global justice must deal with basic facts of the human condition, including the reality of uncertainty and the feasible scope of assurance-providing agreements.

[34] G. A. Cohen, *Rescuing Justice and Equality*.

G. A. Cohen would press a version of the present objection even on these terms. According to Cohen, normative principles cannot be *fundamental* principles of justice, because they are not "fact-insensitive," that is, they are not valid whatever the facts (including facts about levels of uncertainty and assurance).[35] According to Cohen, assurance problems would at most bear on "principles of regulation" for social life, which are properly "fact-sensitive" but *not* fundamental. Such principles concern matters of wise social technology, including the implementation of justice, but not the fundamental nature of justice itself.

Elsewhere I argue in detail that Cohen's argument fails: principles justified for or in the light of factual circumstances (e.g., of uncertainty or assurance) are trivially "fact-insensitive."[36] Any principled P justified for facts F trivially entails a conditionalized principle "If F, then P," which is valid whatever the actual world facts – that is, whether or not facts F actually obtain. Cohen nowhere explains why such trivially "fact-sensitive" principles cannot be fundamental principles of justice.

Moreover, it is not hard to see how certain "principles of regulation" might be basic principles of justice. This follows straightforwardly if we regard justice as part of "what we owe to each other" in T. M. Scanlon's sense.[37] The basic concern of morality, in that sense, is with whether agents govern themselves in ways that are justifiable to all, according to regulative principles that are essentially sensitive to the agent's contingent self-governance capacities. Such capacities include epistemic limitations and expected costs of action. So conditions of uncertainty and lack of assurance can shape what basic regulative moral principles apply, in just the way our preceding examples suggest.

Although Scanlon's concern is interpersonal morality, all of this equally applies in collective life. Collectively sustained and governed social practices and institutions may have their own regulative principles, which need to be justified in the light of underlying conditions of uncertainty and the established and available forms of agreement that address them.[38] Yet such principles *can* be fundamental, at least on the pluralistic view outlined in the preceding text, in the sense that they may not depend on any other principles of that same kind. They depend only on the independent moral reasoning that justifies them (reasoning about what collective regulative principles no one could reasonably reject, given various grounds for personal objection).[39]

[35] Ibid.

[36] "Deflating Fact-Insensitivity," available from my UC Irvine Philosophy Department website, at http://www.faculty.uci.edu/profile.cfm?faculty_id=4884.

[37] T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 2000).

[38] I take this to provide a general rationale for Rawls's limited conception of "ideal theory," as specified above, and as explicated in James, "Constructing Justice for Existing Practice."

[39] In Cohen's terms, justified principles *would* depend on any "methodological principles" which inform the justifying reasoning. But they might remain fundamental principles, because they depend on no further principles of the same kind.

CONCLUSION

I have explained how Hobbesian insights into the fundamental significance of assurance might shape normative political philosophy, even within "ideal theory." In closing, I simply summarize the several ways uncertainty and the feasibility of assurance shape what moral principles apply. (1) Assurance can be required to undermine evidence of a threat, to remove grounds for rightful self-protection. (2) Assurance can be required to justify contribution to a cooperative scheme, given the opportunity cost to worthy moral goals. (3) Assurance of benefit in a cooperative practice can be required if participation is to be worthwhile and fair, in which case assurance is presupposed by fairness principles. And (4) assurance can be required in order to justify the moral risks of a joint change in cooperative scheme. Lack of assurance can limit the justifiability of revolution rather than mere reform, especially as regards basic, global-sized cooperation.

14

International Relations, World Government, and the Ethics of War

A Hobbesian Perspective

S. A. Lloyd

In *Leviathan*, Hobbes offered three examples of a state of nature: the savage people in many parts of the America of his day, civil war in the wake of a collapse of effective government, and the situation of states within an international setting.[1] Although Hobbes insisted that the vital interests of individuals require that they join and maintain stable commonwealths, he did not suggest that any essential interests of either individuals or commonwealths depend on nations' exiting the international state of nature.

Hobbes did not foresee the possibility that international conflicts could have any serious, let alone catastrophic, impact on the quality of life of civilians within the warring states, as World War II did in much of Europe and Asia. Hobbes assumed that nations remain in a state of nature with respect to one another, but that this does not cause any major problems for citizens within states, for their development and maintenance of a civilized, sociable, comfortable, and secure life. One reason for this assumption was that Hobbes thought of warfare as carried out by a small segment of the population, the military, on relatively remote battlefields, with victory decided by the outcomes of those battles. Unlike civil war, which takes place on home turf, catches civilians in the crossfire, devastates crops, disrupts economic activity, and ultimately forces everyone back onto their private judgment to decide which side to support (making it an instance of the state of nature understood as a state of universal private judgment), international wars let most people's lives go on as usual. Hobbes writes that although sovereigns adopt the "posture of gladiators" toward foreign states in an international state of nature, "because they uphold thereby, the industry of their subjects; there does not follow from it, that misery, which accompanies the liberty of particular men."[2] Hobbes recognized

[1] *Leviathan*, XIII.11–12. *Hobbes Leviathan; with selected variants from the Latin edition of 1688*, ed. Edwin Curley (Indianapolis: Hackett, 1994). References to *Leviathan* are given by chapter and paragraph.

[2] Ibid., XIII.12.

that taxation to support foreign wars does impose some burden on subjects (as was argued during the ship money debate), but so does every tax needed to secure the commonwealth.

Another reason Hobbes assumed that remaining in an international state of nature will be unproblematic is that having *defined* a commonwealth as a union of sufficient size and strength that outsiders would be deterred from aggressing against it, for fear of undertaking a difficult war, Hobbes could suppose that wars between commonwealths would be rare. He writes that "the multitude sufficient to confide in for our security is … then sufficient, when the odds of the enemy is not of so visible and conspicuous moment, to determine the event of war, as to move him to attempt."[3] And in the very rare event that international warfare escalates to a foreign invasion that dominates citizens generally, Hobbes's theory releases them of their obligation to obey their former government and allows as morally permissible that they preserve themselves by transferring allegiance to the conqueror, again enjoying the benefits of commonwealth.

To us, this reasoning may seem hopelessly naïve. With standing armies, universal drafts and modern weapons, urban fire-bombings and A-bomb droppings, blockades, embargoes, and economic sanctions, not to mention cyber-warfare and failed states that provide terrorist havens, remaining in an international state of nature looks a whole lot less benign than Hobbes thought it to be. In fairness to Hobbes, his claim is just that an international state of nature is less disabling than the individual state of nature of universal private judgment. This might well be true. But our present concern is not to make a choice between different states of nature, but to inquire whether the same considerations that speak in favor of exiting the individual state of nature speak as strongly in favor of exiting the international state of nature.

WORLD GOVERNMENT

Does Hobbes's theory possess the resources to deal with the new reality of the modern international world-scape? One possibility would be to try to extend the logic of his state of nature argument to argue for the establishment of a world government, or universal sovereign. Hobbes had considered the possibility of supranational sovereigns, for instance, that the Pope might be regarded as the universal sovereign of Christendom, and national Christian kings as his deputies exercising delegated powers.

However, Hobbes was highly concerned about instability arising from the emergence of *factions*[4]; and when subgroups of a subject population are distinguished by differences in language, ethnicity, culture, religion, and shared

[3] Ibid., XVII.3.

[4] *De Cive*, XIII; *Leviathan*, XXII.31–2.

history, factions reflecting these differences are bound to arise. This fact speaks against the prospect for a stable world state, as does the difficulty of enforcing laws across vast distances, and the corresponding increase in the "hope of success" in rebelling that results from weak law enforcement.

Most importantly, people's "transcendent interests" are likely to be activated by attempts to impose a universal culture from above. Transcendent interests are interests in the service of which a person is willing to die, if need be.[5] Interests in the welfare of one's children, in securing justice or human rights, in liberty, in fulfilling religious duties or achieving salvation – any of these may operate as transcendent for some people and groups. Because people are willing to die if necessary to advance their transcendent interests, action on them cannot be suppressed by mere coercive force. A global government that imposed universal norms of culture or religion on everyone, even liberal norms requiring toleration of differences, would be apt to frustrate the deeply historically rooted sectarian ends of formerly national populations, engaging transcendent interests and unleashing rebellions that force cannot easily put down. A global super-sovereign threatens to be, in Rawls's memorable phrase, following Kant, "either a soulless despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy."[6]

A more promising Hobbesian strategy for addressing the realities of modern international conflict is to apply Hobbes's laws of nature to the behavior of interacting states. Hobbes tells us that the law of nature is the law of nations.[7] This is sometimes taken for the claim that there is no law of nations, that the international arena is an anomic war of all against all. In fact, reason discovers a set of moral norms that bind even in the absence of any policing authority or set of social conventions. Many of these can be applied quite directly to relations among states. Allowing safe conduct to negotiators mediating disputes, submission to arbitration of disputes, and keeping of covenants or treaties are all reasonable means of avoiding international war. In particular, the second law of nature requiring that we be willing to lay down rights whose retention by others threatens our safety along with others who are *also* willing to lay down those rights provides a framework for the design of international treaties and

[5] See Lloyd, *Ideals as Interests in Hobbes's Leviathan: The Power of Mind over Matter* (Cambridge: Cambridge University Press, 1992), for discussion of the role of transcendent interests in Hobbes's political philosophy.

[6] Rawls, John. *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 36. Of course we can *imagine* all the peoples of the world voluntarily uniting under a global government in the face of an existential threat to humanity from extraterrestrials, as science fiction often does, for as long as it took to vanquish them. But absent such a state of emergency, world government is less compelling.

[7] "Concerning the offices of one sovereign to another, which are comprehended in that law which is commonly called the law of nations, I need not say anything in this place, because the law of nations and the law of nature is the same thing" (*Leviathan*, XXX.30).

international institutions. If trade disputes are a source of contention, nations should develop and defer to something like a World Trade Organization together with other willing nations. For the adjudication of potentially dangerous political disputes or criminal complaints, joint submission to bodies in the vein of the United Nations and the International Criminal Court will be required under the second law of nature.

Not just international institutions, but also topical treaties may also be required under the law of nature. If a nation wants to require other nations to refrain from overfishing, or to burn fewer fossil fuels, then it must itself observe the same restrictions; these sorts of reciprocal arrangements are usually established by treaty. We can even see how the law of nature justifies international rules of war and constraints on the treatment of prisoners of war, for warfare beyond these limits invites visceral hatred, retaliation, and revenge that make the resumption of peaceful relations much more difficult, and so, requiring that our enemies observe limits, we must do so as well. Even in a state of nature, treaties are morally binding under the third law of nature requiring the keeping of covenants, so long as no new cause for doubting that our partners will perform arises after the treaty is made.

Of course, Hobbes famously held that a covenant without an enforcement mechanism is "mere words"; but enforcement need not require a global super-sovereign. What is needed is assurance that others will fulfill their obligations under treaty, and this assurance may be provided by a system of reciprocal sanctions imposed by varying coalitions of national actors, without a centralized sovereign enforcement body.

Taken as a whole, the scheme of international treaties and institutions required under the laws of nature falls far short of constituting a global sovereign. Because Hobbes's normative system aims to secure optimal agency,[8] international treaties can be expected to preserve a large degree of national sovereignty. They would likely license restrictions in the first instance only on actions affecting other states, and not matters internal to foreign states. But, nothing in Hobbes's theory precludes mutually acceptable conventions licensing intervention in the internal affairs of foreign states. Hobbes's eternal and immutable laws of nature, with the requirement of reciprocity at their core, operate to secure peace at every level, domestic and international, among parties willing to observe them.

WAR AND DEFENSIVE FORCE

Hobbes himself identified some duties in the treatment of foreign entities owed by sovereigns under the laws of nature *to their own subjects*. These include

[8] For discussion of Hobbes's system as aimed at securing optimal agency, see Lloyd, *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (New York: Cambridge University Press, 2009), chapter 1.

avoiding unnecessary wars, "for," as Hobbes writes in the *Elements of Law*, "such commonwealths, or such monarchs, as affect war for itself, that is to say, out of ambition, or of vain-glory, or that make account to revenge every little injury, or disgrace done by their neighbors, if they ruin not themselves, their fortune must be better than they have reason to expect."[9] Yet the primary duty of sovereigns under the law of nature is to do their utmost to secure *salus populi*.

Wars of *self-defense* are always morally permissible, and each nation is the ultimate judge of whether its preservation is threatened. But the reciprocity requirement of the law of nature implies that wars to *improve* other peoples, when their improvement is not necessary for our defense, will be morally impermissible just insofar as we would judge it unreasonable of them to wage war on our state in order to improve us. Further, Hobbes offers the example of sending religious missionaries abroad to convert foreigners to our national religion as the sort of cultural interference prohibited by the reciprocity requirement of the law of nature, for we would not approve their doing the same to us.[10]

The fifth law of nature, requiring mutual accommodation, forbids depriving others of their necessities for the sake of providing ourselves with superfluous goods, Hobbes writing that because others can be expected to fight for their necessities (and rightfully so) "he that shall oppose himself against it, for things superfluous, is guilty of the war that thereupon is to follow."[11] Notice too that a war to gain superfluities is, *by definition*, an unnecessary war. Hobbes insists in *De Cive* that increasing national wealth by preying on other nations "is not to be brought into rule and fashion,"[12] and in *Leviathan* that should the pressure of a growing population compel a nation to colonize foreign territories, it must, under the law of nature, restrain colonial settlements so that they do not extinguish native populations or deprive them of their means of preservation.[13] It is easy to see the reciprocity requirement at work in these constraints on the treatment of foreign peoples.

Although not every cause for war is justified under the law of nature, Hobbes is nevertheless able to provide a philosophical basis for traditional just war theory's principle of the permissibility of defensive force (PDF). According to that principle, if attacked, one is morally permitted to use force to defend oneself. Even troops fighting an objectively unjust war (judged, in the case of Hobbes's theory, by the standard of the law of nature) are morally permitted to forcefully repulse attacks on themselves. The grounding for this principle in Hobbes's theory is the inalienable liberty of self-defense against immediate threats to one's preservation. This moral permission obtains not only in a state

[9] *Elements of Law*, IX.9.
[10] *Leviathan*, XXVII.4.
[11] Ibid., XV.17.
[12] *Philosophical Rudiments*, XIII.14.
[13] *Leviathan*, XXX.19.

of nature, and in the international state of war that, absent an international sovereign, is a form of state of nature, but also within sovereign nations as a right held *against the sovereign*. What Hobbes terms the "true liberties of subjects" includes the liberty of a subject to *refuse* "not to resist those that assault him," even if he has been found judicially guilty of a crime.[14] Criminal conspirators may even join together to resist capture and capital punishment, "for they but defend their lives, which the guilty man may do as well as the innocent.... And if it be only to defend their persons, it is not unjust at all."[15] This universal permission for self-defense against attackers applies as well to enlisted troops, for although in undertaking what scholars call "the soldier contract" they give up the right to run from battle without permission from their superior officers, they do not lose the right to fight back when under attack.

The Hobbesian right of self-defense that authorizes PDF is established through an application of the reciprocity requirement of the law of nature. We ought not to require of others what we would judge unreasonable of them to require of us. But for others to fault us for trying to defend our lives when attacked, especially because we may not be able to resist our impulse to do so, seems to us unreasonable; thus we must not require their passivity in the face of mortal threats to themselves.

Jeff McMahan rejects the PDF of traditional just war theory.[16] He argues that the tenets of just war theory cannot plausibly be grounded in the permissibility of defensive force because it is not true that all defensive force is permissible: "A culpable attacker has no right of self-defense against the defensive force of his victim."[17] To show this he offers the following thought-example:

> Suppose a villain attacks you, entirely without justification or excuse, but that the initial attack fails to overcome you. Rightly believing that he will otherwise kill you, you justifiably attack him in self-defense. If defensive force is permissible, the fact that you now pose a threat to your attacker makes it permissible for him to attack you – even to kill you if your defensive counterattack threatens his life.

McMahan continues, "Hobbes accepted this conclusion, but he was one of the last people to accept it. Most find it impossible to believe that, by unjustifiably attacking you and thereby making it justifiable for you to engage in self-defense, your attacker can create the conditions in which it becomes permissible for him to attack you. Most of us believe that, in these circumstances, your attacker has no right not to be attacked by you, that your attack would not wrong him in any way, *and that he therefore has no right of self-defense* against your justified, defensive attack."[18]

[14] Ibid., XXI.12.
[15] Ibid., XXI.17.
[16] McMahan, Jefferson. *Killing in War* (New York: Oxford University Press, 2009).
[17] Op. cit., p. 717.
[18] Op. cit., pp. 698–9 (emphasis added).

Recall, however, that Hobbes was concerned with the pervasiveness of *disagreement* in people's judgments of justifiability, and McMahan's tale neatly sidesteps the concern that motivated Hobbes's willingness to permit self-defense. You may think that my initial attack was unjustifiable, but you may well be wrong, and when we disagree about this, why should I defer to your judgment rather than rely on my own? You occupy no privileged moral position. I owe you no special obligation that could impose on me a duty to defer to your judgment, any more than you reciprocally owe deference to mine. Who then is to judge whether the initial attack was justified?

Where there is no common arbitrator of disputes, it is only fair that each be permitted to judge for himself. That, at any rate, is Hobbes's contention. In contested cases, rights of judgment must be allowed equally to all; and if you get to judge the correctness of my claims, then in fairness, I am reciprocally permitted to judge the correctness of your claims, including your claims about the correctness of my claims. To insist that I may not permissibly defend myself against your reactive violence in response to what I regard as a justified attack on you is to beg the question in favor of your judgment in this contested case, or to assume there can be no grievance capable of justifying any initial attack, a conclusion rejected both by ordinary intuition and just war theory. This kind of symmetrical fairness consideration is required by the reciprocity requirement of Hobbes's Law of Nature.

Indeed McMahan himself appears to acknowledge Hobbes's fairness consideration in his insistence that "most obviously, the fact that most combatants believe that their cause is just means that the laws of war must be neutral between combatants and unjust combatants."[19] He takes the requisite neutrality to prohibit punishing ordinary soldiers merely for their participation in an unjust war; but it would seem that one of the primary ways in which soldiers participate is by attempting to defend themselves from counterattack. No policy that faulted unjust combatants for defending themselves would be neutral. But neutrality is said to be required because of the fact that most combatants believe their cause is just. Hobbes offers a generalized version of this conclusion.

Hobbes's point was that, absent an agreed upon public arbitrator of all disputes, we are each and every one of us morally permitted to rely upon our own private (conscientious) judgment of right and wrong, good and bad. In "the condition of mere nature" before the establishment of a public common authoritative arbiter of disputes (a sovereign), individual government by private judgment is universally allowed under the Law of Nature. This is because each of us would judge it unreasonable of others to fault us for relying on our own judgment in such a condition, and the core principle of the Law of Nature – the *reciprocity requirement* – prohibits our treating others in ways we

[19] Op. cit., p. 730.

would think it unreasonable for them to treat us. This entails that none of us "may reserve to himself any right he is not content should be reserved to all the rest."

Famously, the problem Hobbes sees is that a universal right of private judgment in the face of pervasive disagreement – disagreement over property claims, positions of honor, the requirements of true religion, the requirements of morality, what is good and bad, reasonable and unreasonable – leads to irresoluble contention that threatens to interfere with everyone's ability to carry out our life plans. When widespread disagreement exists, as is likely given differences in people's bodily constitutions, experiences, education, and tastes and judgments, a condition of self-government by universal private judgment undermines effective agency. This condition must be judged undesirable by anyone who would make her agency effective, no matter her particular ends. In such a condition we cannot effectively build, farm, trade, sail, learn, rear children to maturity; there is "no knowledge of the face of the earth, no account of time, no arts, no letters, no society." Human life will be solitary, poor, nasty, and brutish. When by an exercise of reason we come to understand this problem, we grasp the Law of Nature's requirement that as rational would-be effective agents, we must jointly submit to political authority.[20]

So McMahan's thought experiment concerning the known villain reveals less about the impermissibility of exercising defensive force, and is certainly a less effective indictment of Hobbes's position in support of PDF, than one might have thought. However, he introduces a seemingly similar case by Michael Walzer to undermine claims to a general right to self-defense. Walzer's case goes like this:

> In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders… [in pursuit of]… a criminal activity."[21]

Walzer notes that "the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place," but argues that serving in war is different because personal choice

> … effectively disappears as soon as fighting becomes a legal obligation and a patriotic duty … For the state decrees that an army of a certain size be raised, and it sets out to find the necessary men, using all the techniques of coercion and persuasion at its disposal.[22]

For this reason, even soldiers are not responsible, for "their war is not their crime."[23]

[20] This thumbnail sketch of the central requirement of reciprocity in Hobbes's moral and political philosophy is developed and defended in Lloyd (2009).

[21] McMahan (2009), p. 699.

[22] Op. cit., p. 699.

[23] Op. cit., p. 700.

What should Hobbes make of a case like this? This is a case within civil society rather than a state of nature. In Hobbes's civil society, each may still exercise private judgment in the use of defensive force against immediate physical threats, but with the understanding that the state will review his claim to justification, and if it finds his judgment erroneous, will seek to convict and punish him for wrongful action. The force responding to his wrongdoing may be excessive and require self-defense; or the action may not actually have been a crime, or the criminalized action may not be wrong at all. To disallow defensive force is to prejudge substantive matters at issue. In civil society, where the state can enforce an ultimate judgment, it is not reasonable to fault subjects for relying on their own judgment in what they see as matters of imminent life and death. Continuous with this position, Hobbes argued that it is unreasonable to fault a person for relying on his own judgment as to the requirements of salvation, rather than hazard so important a decision on "the judgment of any other man that is unconcerned in his own damnation."[24]

It may be that ordinary moral intuition departs from Hobbes on this point about criminal activity within civil society. The interesting point is that Walzer and Hobbes meet company in their impulse to distinguish cases of ordinary criminal activity from participation in (even what turns out to be) an unjust aggressive war. They agree that actions done in the state's service and at its command have different moral status from those done at the private will of the subject or citizen.

McMahan's own view is that posing an unjust threat is *neither necessary nor sufficient for liability to being attacked*. "It is possible," he writes, "to pose an unjust threat without being liable to attack, and possible to be liable to attack without posing an unjust threat and, indeed without posing any threat at all."[25] What matters is *moral responsibility* for the existence of an unjust threat. He concludes that "what makes a person a legitimate target in war is moral responsibility for an unjust threat or, more generally, *for a grievance that provides a just cause for war*."[26] He therefore rejects PDF and Hobbes's compatible liberty right of self-defense in favor of what I will call the *responsibility principle*, according to which *one is a legitimate target of violence only if she or he bears moral responsibility for a grievance that provides a just cause for war*.

WAR AND CIVILIAN IMMUNITY

Traditional just war theory includes a principle of noncombatant immunity (PNI) according to which combatants are permitted intentionally to attack only opposing combatants. The usual justification for this discriminatory principle is that only by threatening others does a person lose his or her moral

[24] *Leviathan*, XLVI.37.
[25] Op. cit., p. 719.
[26] Op. cit., p. 722.

immunity to attack. This *jus in bello* principle has application in traditional warfare, as, for instance, prohibiting nuclear and conventional bombings of cities. According to PNI, it will usually be morally impermissible to target most subjects or civilians of any nation.

In contrast, McMahan's responsibility criterion for the requirement of discrimination allows that some noncombatants are permissible targets. (He offers the example of the executives of the United Fruit Company as instigators of the United States' support for an unjust coup in Guatemala in 1954 as an example of noncombatant liability to defensive force.) He recognizes that "in an unjust war, many voters and perhaps all taxpayers must surely bear some degree of responsibility for their country's action."[27] One might go further to include all those who accept the legitimacy of their system of majority rule, accepting its benefits of protection, rule of law, opportunities, and public goods. However, McMahan responds that while "many civilians are permissible targets in principle, in the vast majority of cases a civilian's degree of liability will be so low that to attack him or her militarily would be wholly disproportionate." [28] McMahan asserts that "even morally responsible noncombatants normally make only a very slight causal contribution to their country's unjust war, so that attacking them would do little to diminish the threat their country poses or to advance the just cause" and that "one cannot normally distinguish among the highly responsible, the minimally responsible, and those who are not responsible at all … [and so] combatants should in general err on the side of caution by acting on the presumption that noncombatants are innocent."[29]

I find this response overly sanguine. Surely it is stated too strongly, for the civilian leadership of a democracy, say its chief executive who declares an unjust aggression and its legislators who authorize funds for that aggression, can be distinguished as highly responsible, and also to a large degree physically isolated for targeting.

Walzer offered a potential escape from this problem, by suggesting that citizen action in response to government demand is not to be held subject to the same moral standard as citizen action not mandated by the state. His idea was that because cooperation in state action is somehow necessitated, we are not to be blamed for such cooperation, and hence cannot be legitimately targeted in response to it. Walzer thought the relevant kind of necessitation involved coercion, deception, manipulation of beliefs, and inculcation of a sense of duty to obey. But, as McMahan points out, Walzer fails to develop any systematic argument to explain why we should regard citizens (or subjects) as less responsible for what they do through their participation in and cooperation with their governments than they are for what they do otherwise.

[27] Op. cit., p. 726.
[28] Op. cit., p. 727.
[29] Op. cit., p. 728.

It is just here that Hobbes has an interesting thesis to fill the gap. This is what I have elsewhere termed Hobbes's "hierarchy of responsibility," and he uses it to explain how it can be that although every citizen or subject of any commonwealth of any form has equally "owned and authorized" the actions of the sovereign, it is still the case that only the sovereign is morally liable for its *wrongful* actions. According to Hobbes's view, democratic citizens are no more responsible for their government's wrongful policies than are the subjects of autocracies or authoritarian regimes, because *neither are responsible at all* for their government's wrongful policies. Not having any right under the law of nature to act wrongfully, none can transfer that right to their sovereign. And being *required* under the law of nature to submit to sovereign authority, each would act wrongfully to refuse its commands.[30] A sovereign is the public judgment to which we are required by the law of nature to defer. What we do wrongfully according to our own private judgment is our own responsibility, and leaves us open to moral liability to force. But when morality itself requires us to submit our private judgment to a public judgment, the actions we do (not because we want to do them, but only) because the public authority commands them, are actions for which the blame belongs to it, not us.

We find textual evidence that Hobbes intends a hierarchy of responsibility in this passage:

> [A Christian king] cannot oblige men to believe; though as a civil sovereign he may make laws suitable to his doctrine, which may oblige men to certain actions, and sometimes to such as they would not otherwise do, and which he ought not to command; and yet when they are commanded, they are laws; and the external actions done in obedience to them, without the inward approbation, are the actions of the sovereign, and not of the subject, which is in that case but as an instrument, without any motion of his own at all; because God hath commanded to obey them.[31]

And:

> [I]f I wage war at the commandment of my prince, conceiving the war to be unjustly undertaken, I do not therefore do unjustly; but rather if I refuse to do it, arrogating to myself the knowledge of what is just and unjust, which pertains only to my prince.[32]

Once subjects bind themselves to obey a sovereign, the sovereign becomes the author of its commands, and the obedient (if unwilling) subject a mere actor. Reading "subject" for "actor" and "sovereign" for "author," we see a

[30] Excepting, as earlier noted, commands engaging the "true liberties of subjects" that directly and immediately threaten our preservation, including, importantly, commands that would result in our punishment by international courts rejecting a Nuremberg defense for our war crimes.

[31] *Leviathan*, XLII. 106.

[32] *Philosophical Rudiments*, XII.2. Hobbes speaks here of knowledge, but what he intends is judgment of what is to be counted as just and unjust.

categorical statement of Hobbes's hierarchical picture of responsibility in his systematic discussion of authorization in chapter XVI of *Leviathan*:

> When the [subject] doth anything against the law of nature by command of the [sovereign], if he be obliged by former covenant to obey him, not he, but the [sovereign] breaketh the law of nature; for though the action be against the law of nature; yet it is not his: but contrarily, to refuse to do it, is against the law of nature, that forbiddeth breach of covenant.[33]

The substitution of "subject" for "actor" and "sovereign" for "author" is licensed not only by Hobbes's text, but also by the logic of this passage: because sovereigns have made no covenant to obey anyone, the referent of "he" (which stands in for "actor") in "if he be obliged by former covenant to obey him" can only be the subject. And because only sovereigns command, "by the command of the author" cannot mean by command of the subject. This squares with Hobbes's position in *De Homine* that: "If someone sins at another's command, both sin, since neither did right; *unless*, by chance, the *state* commanded it to be done, *so that the actor ought not to refuse*."[34] That the subject is not author of actions commanded by his sovereign in violation of natural law is clearly Hobbes's position, but we might wonder how this can be consistent with his view in chapters XVII and XVIII of *Leviathan* that subjects "own and authorize" the actions of their sovereigns. Authorization must be *transitive*: if subjects authorize their sovereign to defend them, and their sovereign commands an action as a means to their defense that is unjust, iniquitous, or otherwise contrary to the Laws of Nature, then surely the subjects must have authorized that unjust or iniquitous action.

This inconsistency turns out to be merely apparent for the simple reason that subjects *cannot* authorize the sovereign to violate the Laws of Nature because *they have themselves no right* to violate the Laws of Nature: "they that vow anything contrary to any law of nature, vow in vain; as being a thing unjust to pay such vow."[35] Subjects cannot authorize the sovereign to act iniquitously "[f]or unless he that is the author hath the right of acting himself, the actor hath no authority to act."[36]

The precise sense then, in which the sovereign's command is to be thought of as the subject's own, lies in Hobbes's distinction between public conscience and private conscience. My sovereign's wrongful command both is and isn't mine, as it both accords with my public conscience and fails to accord with my private conscience. Hobbes's view here is no more inconsistent than our own view that the will of the majority is (in one sense) our will even though we willed (in another sense, by our vote for the minority position) a defeated

[33] *Leviathan*, XVI.7.
[34] *De Homine*, XV.2.
[35] *Leviathan*, XIV. 23.
[36] *De Homine*, XV.2.

course. Hobbes holds this position even when it comes to erroneous commands about how to worship God:

> For though this kind of commands may be sometimes contrary to right reason, and therefore sins in them who command them; yet are they not against right reason, nor sins in subjects; whose right reason, in points of controversy, is that which submits itself to the reason of the city.[37]

We see then that Hobbes establishes a hierarchical structure of responsibility. We can think of such a system on the model of parents' directives to their young children. Parents, who recognize that their children's own judgment will be inadequate to keep them from harming themselves and each other, direct them first and foremost to obey a responsible (though of course fallible) adult, for example, their babysitter. The children are responsible for obeying the babysitter, and are to be faulted for failing to do so; but the babysitter is responsible for the content of his or her directives and is to be faulted for issuing a wrongful directive. The alternative of letting the children decide whether the babysitter is to be obeyed (and hence how to act) is rejected as more dangerous than subjecting them to the babysitter's authority, even though he or she is fallible.[38]

Notice that nothing in Hobbes's argument for a hierarchy of responsibility depends on assuming that sovereigns enjoy epistemic superiority to their subjects. Citizens should assume, Hobbes holds, that sovereigns will sometimes err in judgment – possibly grievously – and citizens should certainly assume that they will often believe that their sovereign has erred. But their duty under the Law of Nature is to defer to that judgment nonetheless. In the same way that because we see the need for a mechanism for the authoritative resolution of disputes, we treat the judgment of the U.S. Supreme Court as authoritative, even while noting the fallibility of its judgment, and sometimes even suspecting its members' motives, so we can reconcile ourselves to deferring to the judgment of a public political authority.

Hobbes provides an elaborate argument that might sustain Michael Walzer's under-argued position that responsibility for personal wrongdoing and responsibility for wrongful actions done only in response to the government's command have a different moral status, *pace* McMahan. To target citizens or subjects for the wrongful actions of their sovereigns, absent the command of one's own

[37] *Philosophical Rudiments*, XV.18.

[38] Here the babysitting analogy can even support Hobbes's insistence that subjects retain the right to resist force used against them, since parents will of course not require that children passively submit to life-threatening abuse by their babysitter. Note though, that we need not assume a paternalistic stance in order to make sense of Hobbes's position that we ought to submit to authoritative impartial arbitration of disputes; that is a requirement of reciprocity or fairness in the face of disagreement, and does not depend on any attribution of childlike incompetence.

sovereign to do so, would be wrong, even accepting McMahan's responsibility principle. It follows that attacking conscripted enemy troops, absent a sovereign command to do so, would also be wrong; but this does not imply that attackers under wrongful commands lose the moral liberty to defend their lives against enemy combatants. No one ever loses that moral liberty.

Hobbes's account further implies that nonstate terrorist groups, as what he would term "unlawful irregular systems,"[39] have no lawful sovereign whose commands could relieve their members of personal responsibility for their wrongful actions.

DEMOCRATIC SOVEREIGNTY AND MORAL LIABILITY

Even if Hobbes's argument for civilian immunity is generally sound, it may seem that it won't apply to contemporary representative democracies with universal adult suffrage. Democratic electorates express pride in their conception of themselves as self-governing, and claim that they are ultimately responsible for their government's policies. Indeed, one commonly offered justification for terrorist attacks on Western nations is that citizens of a democracy are in fact the sovereign government of that state, and bear collective responsibility for its policies. If their elected government pursues an unjust policy that creates a grievance giving rise to a just cause for war – and if the electorate persists in reelecting those who campaign on the platform of pursuing that policy – and if they all refuse to withhold their taxes and do not emigrate or seek to overthrow the government or to impeach it for malfeasance, or take to the streets in mass protest – why not hold the citizenry responsible? It will be true that the average voting citizen can have little causal contribution to his or her country's unjust aggressions if only because the citizen's individual vote is so unlikely to affect the outcome of those elections that place in power the direct perpetrators of those policies. But considered as a whole, the electorate would seem to bear a very high degree of responsibility. So while it might be disproportionate to target any single voter, to target them all may not be. The disturbingly counterintuitive implication would seem to be that the more widespread the attack on a democratic electorate, the more justifiable it is under McMahan's responsibility principle. Maybe only the use of weapons of mass destruction against democracies will be morally justifiable. (!?!)

As for discrimination, if the country divides narrowly into red states and blue states, into country and urban centers, with systematically different demographic votes, what justifies the claim that no discrimination can be made to justify targeting some areas in some states? Of course, innocents such as children are present in all populations likely to be harmed by any attack anywhere; but this is true of any attack anywhere, including the venues in which almost all modern

[39] *Leviathan*, XXII.28.

wars are fought, and does not deter nations from pursuing what they regard as just wars. Targeting adults in the chambers of the House and Senate during a presidential State of the Union address is not a clear violation of the responsibility principle; targeting a Breslan school during the school day is a clear violation of that principle. It is simple enough to make these sorts of discriminations.

Were we to think of a democratic people as sovereign, Hobbes's hierarchy of responsibility would not insulate ordinary citizens from moral liability for the wrongful actions that, in their role as government, they command themselves to undertake. However, Hobbes took the idea that citizens remain sovereign to be *strictly incoherent*, and there is something to his reasoning for this conclusion. Each individual is self-governing in a state of nature, but in order for many individuals to become a unified entity – "the people" – they must combine themselves into an "artificial person," or commonwealth, which is done by authorizing a representative (which could be an assembly or even a system of bodies) to act on their behalf. Once this is done, individuals are members of a commonwealth, which has sovereign authority.[40] Until it is done, groups of individuals, each individual acting on private judgment, are just a "concourse of people," each responsible solely for her individual actions. A sovereign is the authorized representative of a commonwealth; but a bunch of people is not a commonwealth until they have authorized a common representative. A number of individuals may mutually agree to take the judgment of the majority of themselves on any question as the will of the body, and binding on each member of society; but then sovereignty rests in that majority group, which alone is responsible for any wrongful commands or policies it issues, no one having any authority to authorize its actions contrary to the law of nature.

Hobbes also argues against the coherence of the position (later embraced by Locke though not Rousseau) that citizens retain private authority to judge the justice of, and to refuse to comply with what they think to be, the unjust laws or commands of the sovereign. Hobbes held that the only alternatives consistent with the reciprocity requirement of the law of nature are universal submission of all private judgment to authority, or universal retention of all private judgment. Although in practice many areas of decision within commonwealths are left to the discretion of citizens, citizens cannot in principle limit the authority of their sovereign representative. Were the authority of the sovereign to be limited, disagreements could well arise as to whether or not the sovereign had overstepped those limits. In such cases, who is entitled to decide whether the limits have been overstepped? If that decision is up to the sovereign, the limits won't justify action against the sovereign's judgment. If the decision belongs to

[40] Hobbes defines a commonwealth as "one person, of whose acts a great multitude … have made themselves every one the author, to the end he [the representative] may use the strength and means of them all as he shall think expedient for their peace and common defense. And he that carryeth this person is called SOVEREIGN, and said to have *sovereign power*, and everyone besides, his SUBJECT" (*Leviathan*, XVII.13–14.)

individuals, they effectively remain in a state of nature, for a condition in which each judges for him- or herself whether to defer to the judgment of another remains a condition of universal private judgment, which is just what a state of nature is. If the ultimate decision belongs to some other body, that body is actually sovereign, and the issuing authority merely a subordinate functionary.

We may be unwilling to accept Hobbes's conceptual arguments, but nevertheless make use of his more general point to preserve just war theory's principle of noncombatant immunity.[41] Political society and government are necessary in order to make productive social cooperation possible, and to create and enforce the just terms of such cooperation. But to do this, society's members need to comply with their government's laws and policies, despite the fact that they may believe some of those to be unjust. In a democratic society, people have good reason to comply with the laws of their elected government, because, being a just form of government, its laws are legitimate when duly enacted. If so, democratic citizens would be wrong to withhold obedience from legitimate laws, and so to target them with aggressive violence for failing to do what it would have been wrong for them to do will be unjustified.

CONCLUSION

Hobbes's political theory provides a way of accepting something like McMahan's responsibility principle, without thereby making noncombatant democratic citizens (or subjects of any regime) potentially legitimate targets of aggressive violence, whether by terrorist groups or states. Hobbes's hierarchy of responsibility relieves ordinary citizens of moral liability for the iniquitous actions of their government, actions that they could not have authorized under the law of nature. Moreover, because they are required under the law of nature to defer to even the wrongful judgments of their government, and anyone will find it unreasonable to be assaulted for doing what it would have been wrong of him not to do, it is contrary to the reciprocity requirement of the law of nature to target them with aggressive violence. This provides support for just war theory's PNI. However, because the use of defensive force is always permissible under the law of nature, all combatants under attack, whether rightfully or wrongfully, may defend themselves with force, as traditional just war theory's PDF allows. This implies that troops do no wrong in following sovereign orders to unjustly aggress, but are nonetheless permissible targets of self-defensive force by enemy troops. Whether it is morally permissible, or morally preferable, to target enemy sovereigns directly is an open question, whose answer depends on application of the reciprocity requirement of the law of nature and any international treaties that result from that application.

[41] I owe this application of Hobbesian reasoning to Sam Freeman, who presented it in comments on an earlier version of this paper given at the Law and Philosophy conference at the University of Pennsylvania, organized by Claire Finkelstein, in May 2009.

15

Hobbesian Defenses of Orthodox Just War Theory

Jeff McMahan

ORTHODOX JUST WAR THEORY

Most of us accept that all persons have a right not to be killed unless by their action they have forfeited it, and that there is thus a strong constraint against killing people unless they have forfeited or waived that right. According to the currently dominant understanding of the just war, civilians retain the protection of this right in conditions of war but combatants do not. On one view, combatants forfeit the right by posing a threat to others; on another, they waive it when they accept combatant status, which requires that they identify themselves visually and in other ways as legitimate targets. Yet people who fight in a just war ("just combatants") and fight only by permissible means, are simply defending themselves and other innocent people against a wrongful attack or some other serious wrong. There seems to be no reason to suppose that they thereby either forfeit their right not to be killed or grant their enemies permission to try to kill them.

It seems, therefore, that the permission that those who fight without a just cause ("unjust combatants") have to kill just combatants is a *legal* permission only, not a moral permission. If so, the law of war diverges quite radically on this issue from the morality of war. Although just combatants retain their moral right not to be killed, and although their right is seldom overridden, it is nonetheless best, for a variety of contingent and largely pragmatic reasons, not to hold unjust combatants legally liable for killing them. The moral right of just combatants not to be killed is not and, at least in current conditions, should not be protected by a legal right. The killing of just combatants in war should not be treated as murder.

I am very grateful to Jerry Gaus for written comments on an earlier draft of this chapter, and to Sharon Lloyd and Claire Finkelstein for much illuminating discussion. All three have just cause to lament my obtuseness in Hobbes scholarship.

This is, however, not the common view of the permissibility of killing just combatants in war. Most people, including most contemporary moral theorists writing in the just war tradition, believe that the morality of war and the law of war coincide on this point. They believe, as I noted, that all combatants lose their moral right not to be killed by enemy combatants in conditions of war. But what is the reason for thinking that the right they have in peacetime no longer protects them in war?

I have argued at length elsewhere against the view that just combatants forfeit their right not to be killed by posing a lethal threat to others, as well as against the view that they waive their right not to be killed.[1] If my arguments are right, we must, if we wish to preserve the traditional view, explore other possible ways of defending it. Perhaps the most promising line of argument is to be found in the commonly held view that the moral principles that govern the practice of war are different from those that govern other areas of life, including those that govern lesser forms of violent conflict, such as individual self-defense. According to this view, when war occurs, some people lose some of the rights they had in peacetime, though they may gain certain others. Yet it is hard to see why this should be so. And this view also introduces rather odd problems that would otherwise not arise. For example, it entails that it is of great moral significance to be able to distinguish accurately between wars and other forms of conflict that do not count as wars, since whether a conflict is a war determines which set of moral principles apply to it and thus which acts are morally permissible and which are impermissible.

It is, nonetheless, possible to find a basis in moral theory for such a view. It is arguable the most plausible basis can be found in the work of Hobbes. It is widely believed that Hobbesian moral theory entails political realism, at least about war – that is, that it entails that the practice of war is not governed by morality at all, that it is outside the scope of morality altogether. This is because war occurs between states that confront one another in a state of nature, in which there is no higher authority that can coerce them to comply with rules of mutual restraint. And according to Hobbes, morality arises only when people contract to place themselves under a sovereign, and thus has no application in a state of nature. (The collectivist assumption that war is a relation between states is not essential to the derivation of political realism, for individual citizens of different states at war are also in a state of nature vis-à-vis one another.)

Although political realism was influential in the United States for a few decades following World War II, it is now widely repudiated, and rightly so. Whether the full set of Hobbesian assumptions entails political realism is an issue I do not consider. What does seem plausible is that a weakened or relaxed set of Hobbesian assumptions can support the weaker view that the moral

[1] Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), sections 1.2 and 2.2.

principles governing the practice of war are quite different from those that apply in other areas of life. It seems, in particular, that a suitably weakened set of Hobbesian assumptions supports the view that the best understanding of the morality of war is closely congruent with the rules of war in the form in which we now have them, including the rules that entail the moral permissibility of the killing of just combatants by unjust combatants.

A HOBBESIAN CASE FOR COMBATANT LIABILITY AND CIVILIAN IMMUNITY

Here is a sketch of how a Hobbesian argument for the current rules of war might be developed. Although Hobbes embraced psychological egoism and his political realist followers have assumed that states as well as individuals act only out of self-interest, we know that neither of these views is true. People generally care about whether what they do is morally permissible and are sometimes willing to sacrifice their interests in order to bring their action into conformity with their beliefs about what morality requires. This is true even of some political leaders. Most people also believe that moral constraints apply to the action of states and are concerned that their own state and its political leaders should act within those constraints.[2] The pressure on political leaders to act with moral restraint, even in war, tends therefore to be stronger in democratic states. But even the worst leaders in the worst states sometimes act according to certain constraints, and not always for reasons of mere prudence. The Nazis, for example, exercised restraint in the treatment of British prisoners of war, though not in the treatment of prisoners of nationalities they considered inferior, such as Russians.

People do, however, believe that their political leadership has a duty to protect and advance their interests, and they also tend to think either that the moral constraints on states are relatively weak – weaker, for example, than those that apply to the acts of individuals – or that those constraints are overridden by the national interest when the stakes become high. But even though the morally motivated demand for restraint is comparatively weak, it is reinforced by prudential concerns. People know that wars will continue to be fought and that their own state may be attacked, or start a war, or be drawn into a war by pressures from allies or for other reasons. They are aware that if their state does become embroiled in war, there will be disagreements about whether its participation is just, and that it is possible that its participation will in fact be unjust. Knowing this, people will want to be treated with restraint if war

[2] This apparent fact challenges Chris Naticchia's claim that citizens may be presumed to have authorized the sovereign to pursue only the national interest, and that its pursuit of goals that conflict with the national interest must therefore constitute violations of the authority granted to it by the citizens. See Chris Naticchia, "Hobbesian Realism in International Relations: A Reappraisal," Chapter 12, this volume.

does occur and to be shielded from harsh penalties if their state's participation turns out to be unjust. They therefore have an interest, in advance, in securing arrangements that will serve these goals.

One might doubt whether Hobbesian theory can even recognize the distinction presupposed in these remarks between wars that are just and those that are unjust. For Hobbes notoriously argues that "where there is no common Power, there is no Law: where no Law, no Injustice. Force and Fraud, are in warre the two Cardinall vertues."[3] Although this is of comparatively little significance for our purposes, since the prudential reasons that people have to try to ensure that they will be treated with restraint if war occurs do not depend on there being a distinction between just and unjust wars, it is nevertheless worth noting that there are at least two ways in which Hobbesian theory can recognize that wars can be either just or unjust. First, even if morality in domestic society is best understood, explained, and justified as a product of a Hobbesian contract, it is nevertheless a fact that many people are not Hobbesians and thus might insist that at least some of the constraints that limit what they may do to their fellow citizens also constrain what they may permissibly do to the citizens of other states, even in war. In Hobbesian terms, the social contract may commit citizens to observe certain constraints on the resort to and conduct of war even if conformity to those constraints is not *owed to* the adversaries who benefit from their observance. Second, one might argue that at least some types of war that are now widely regarded as unjust actually contravene certain Hobbesian laws of nature. An example might be a war fought for mere gain rather than to defend or preserve the state or its citizens. In *The Elements of Law*, Hobbes writes that "thus much the law of nature commandeth in war: that men satiate not the cruelty of their present passions, whereby in their own conscience they foresee no benefit to come." This, of course, is only a very weak constraint, since it insists only that war must be sufficient for *some* good. But this passage is followed a few lines later by the broader claim that while "the want of security otherwise to maintain themselves" can justify people in harming others, nevertheless "nothing but fear can justify taking away another's life."[4] To be justified, therefore, a war must at least be motivated by the desire to avoid some serious harm, not just by a desire to increase a state's wealth or to secure other benefits or advantages.

It is rational, then, for people to want to achieve agreement with potential adversaries on rules of mutual restraint in war, and perhaps required by the laws of nature to seeks such agreements. Yet international society, while not anarchic, still has no effective means of enforcing compliance with such an agreement. An effective agreement, therefore, must contain its own incentives

[3] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), p. 74.

[4] Thomas Hobbes, *The Elements of Law National and Politic: Human Nature and De Corpore Politico*, ed. J. C. A. Gaskin (Oxford University Press, 1994), p. 104.

for compliance.[5] These are in fact not hard to supply, though like all such incentives, they are inevitably imperfect, in ways that I explore later. What is necessary is for the members of two opposing groups to find rules of restraint that satisfy the following three conditions:

1. It is knowable by all to be better over time for *each* group if both comply with the rules than if neither does.
2. There can be no reasonable expectation that one group will continue to comply indefinitely in the absence of reciprocal compliance by the other.
3. It is not fatal for either group to comply for at least a limited period in the absence of immediate compliance by the other.

In these conditions, people should be able to see that their own side's defection, or continued defection, from an agreement would eventually prompt reciprocal defection by the adversary, which would be worse for the initial violator than continued compliance would be. Even a single instance of defection would risk the collapse of the agreement. So people's moral motives to comply would be supplemented by strong prudential incentives. (The rationality for long-term relations of this kind of strategy – that is, cooperate initially but refuse to continue to cooperate if the other does not reciprocate – has been vindicated in Robert Axelrod's well-known series of experiments with iterated Prisoners' Dilemmas.[6])

There are various possible codes for the regulation of war that might satisfy these three conditions. Yet there are reasons why it might be rational for people to agree to accept and abide by the current rules of war rather than some alternative set of rules. And if it would be rational for potential adversaries to agree in advance to the acceptance of these rules in the reasonable expectation of reciprocal compliance, that might be sufficient, in Hobbesian terms, to justify them as *moral* rules governing the practice of war.

The central principle that requires justification is that to which I referred at the outset: the requirement of discrimination, which holds, in its conventional formulation, that whereas all combatants are legitimate targets in war, all civilians are morally immune from intentional attack. This principle seems uniquely qualified to attract agreement as a means of reducing the destructiveness of war in current conditions. This is so for a variety of reasons.

First, for any principle to have a chance of universal acceptance, it must be neutral in the sense of giving no advantage, or at least no foreseeable advantage, to any party. It cannot, therefore, discriminate between the side (if any)

[5] Since drafting this chapter, I have become aware of a much more detailed and sophisticated argument along similar lines in Claire Finkelstein, "Rational Contractarianism and International Law," which is chapter 11 in her *Hobbesian Theory of Law* (Oxford: Oxford University Press, 2013).

[6] Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

that fights with justification and that which does not. Any principle that sought to incorporate that distinction would in any case be doomed to ineffectiveness unless the law can provide both precisely determinate and authoritative guidance that would enable states to determine in advance and with assurance whether or not their war would be just. Otherwise the situation will continue as it is now, in which all parties to war either believe or profess to believe that they fight with justification, and in which there is no "common Power" that can authoritatively demonstrate a contrary judgment, much less enforce it. The traditional requirement of discrimination, understood as asserting universal liability to attack among combatants and universal immunity from attack among civilians, satisfies this currently necessary condition of neutrality.

Second, an acceptable principle must be not only prudentially acceptable to all parties but also morally acceptable. Potential adversaries may have developed divergent views about the morality of war within their different societies. Principles justifiable in Hobbesian terms, which are acceptable to and binding on all parties to which they apply, must abstract from those local principles. They might be formed from points of convergence, or they might constitute mutually acceptable compromises. The requirement of discrimination that has been promulgated for centuries by theorists in the just war tradition is also enshrined in international law, and seems to constitute a point of overlap among the teachings about the morality of war of the major religions. It is therefore now about as uncontentious among the peoples of the world as any principle for the limitation of violence in war could be.

The requirement of discrimination contains both a permission and a prohibition. It permits the combatants of all parties to a war to kill combatants on the opposing side, or sides. It must do this to have any chance of acceptance. For no people with a concern for their own interests could accept a principle for the conduct of war that might forbid them to fight at all, particularly when they believe, though wrongly, that fighting is justified. Yet the permission to kill opposing combatants is a highly significant permission: it exempts those who fight without justification from any liability for what might otherwise count as murder, provided that they adhere to the rules of *jus in bello*. The permission is, moreover, logically related to another benefit that the current rules of war confer on combatants on all sides – namely, prisoner of war status in the event of capture. When all parties accept that it is permissible for all combatants, including their own enemies, to kill combatants on the opposing side, they have no grounds for punishing captured enemy combatants who have fought by the rules or for doing any more to them than detaining them until the war is concluded.

The permission granted by the requirement of discrimination may, indeed, be seen as a reward offered to combatants on both sides for respecting the prohibition. It is as if combatants are offered immunity from any of the ordinary penalties for killing other people, as well as the benefits of prisoner of war status, in exchange for refraining from attacking and killing civilians.

The advantages that the prohibition of the intentional killing of civilians offers to all belligerents are numerous and obvious. Perhaps most importantly, general respect for civilian immunity has the effect of insulating ordinary life from the direct effects of war, thereby enabling civilized life to continue even in the midst of war. Some just war theorists have, indeed, understood the importance of civilian immunity primarily in collectivist terms. Michael Walzer, for example, contends that "the deepest meaning of noncombatant immunity" is that "it doesn't only protect individual noncombatants; it also protects the group to which they belong."[7]

A third advantage of the principle of civilian immunity is that the protected category is definable with comparative precision. Although there are gray-area cases, the distinction between combatants and noncombatants (and the closely related but not identical category of civilians) is perhaps as precise and unambiguous a distinction as one can hope for in this area.[8] It is certainly easier to apply than, for example, the distinction between those who are and those who are not responsible for threats of wrongful harm, which some philosophers have argued corresponds to the distinction between morally legitimate and illegitimate targets in war.

Two other virtues of the principle of civilian immunity are worth mentioning. One is that, unlike any constraint on attacking enemy combatants, it does not restrict a state's capacity for self-defense. This is because civilians generally, and almost by definition, do not pose a threat and therefore in general cannot be a target of action that is in the literal sense defensive. The killing of civilians can of course serve certain purposes in war – for example, it can bring pressure on a government to surrender, as the American nuclear bombings of Japanese cities were intended to do at the close of World War II. But because this sort of terrorist action does not operate directly, the way defensive action does, but must operate through the wills of people other than those attacked, it is of notoriously uncertain effectiveness, as Osama bin Laden and his confederates discovered when they sought to eliminate the American military presence in the Middle East by attacking the World Trade Center towers in Manhattan. Hence it is reasonable for a state to expect that compliance with the principle will not threaten its security.

Finally, because the principle of civilian immunity has long been hallowed by tradition, a considerable motive for compliance with it already exists: namely, conformity with tradition.

That there are these many reasons for rational convergence on the requirement of discrimination, with its constituent principle of civilian immunity, strongly supports the Hobbesian argument for the claim that this centerpiece

[7] Michael Walzer, "Terrorism and Just War," *Philosophia* 34 (2006): 3–12, at 4.

[8] For a recent challenge to traditional assumptions about the distinction between combatants and noncombatants, see Cécile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120 (2009): 36–63.

of the current rules of war is indeed a requirement of morality, not just an artifact of positive law. The worry about this Hobbesian argument, however, is that it presupposes the Hobbesian understanding of moral justification, which grounds morality in what largely self-interested people as they actually are (that is, without any restrictions, such as Rawls's "veil of ignorance," on what they can know) could rationally agree to. On this view, we have to understand the moral reasons we have not to kill people as the products of rational agreement motivated largely by self-interest. That the moral constraints on killing have this foundation is essential to the Hobbesian explanation of why the reason we have not to kill innocent people within our own society does not extend to the killing of just combatants in war, however innocent they may be; for in those altered conditions, a different kind of agreement becomes rational.

This worry is not merely theoretical. We can make the implications of the Hobbesian argument vivid by reflecting that the conditions I have described in which it seems rational for states to agree to adhere to the requirement of discrimination as traditionally interpreted do not necessarily characterize the situation of conspicuously weak states, much less that of even weaker nonstate groups with political grievances. In current conditions, it would *not* be self-interestedly rational for a weak, nonstate group to agree to be bound by the principle of civilian immunity. This is so for two familiar reasons. First, such groups have no chance of achieving their aims by conventional military means against the more numerous and heavily armed forces of an adversary state. The killing of civilians may be their only effective possibility for the use of violence in achieving their aims. Second, they generally need not fear retaliation in kind, in part because they can generally rely on moral pressures, and pressures of public relations, to deter states from engaging in terrorism, but even more because they tend not to be representative of any precisely identifiable group that could be discriminatingly targeted in a terrorist reprisal. When these conditions obtain, it would not be rational in Hobbesian terms for a small group to agree to abide by the principle of civilian immunity; therefore the group has no moral reason, again in Hobbesian terms, not to pursue their ends by terrorist means.

I find this a fatal defect in this Hobbesian argument for the claim that the rules of war as we have them today are constitutive of the morality of war in current conditions. But one might, I suppose, continue to hope that it can be shown that the argument does not in fact imply that the requirement of discrimination is not binding on small, nonstate political groups. There is, however, a further problem, which is that this Hobbesian argument for the current rules of war seems incompatible with other central elements of Hobbes's moral and political philosophy – elements that are identified and elaborated in S. A. Lloyd's contribution to *Hobbes Today*. Lloyd appeals to these other elements in an effort to provide a different Hobbesian vindication of the requirement of discrimination as traditionally understood. I explain at the end of the chapter why, if Lloyd's understanding of Hobbes is right, it undercuts the argument I have given.

LLOYD'S ARGUMENTS

Lloyd argues that Hobbesian moral and political theory has the resources to justify both the prohibition and the permission that together constitute the requirement of discrimination as it is traditionally and almost universally understood.[9] Her Hobbesian case for the prohibition of the intentional killing of civilians – the principle of civilian immunity – takes the form of a response to those who have argued that some civilians can be liable to suffer certain harms in war if they share responsibility for the wrong that the war is fought to prevent or correct. Although she is sympathetic to the idea that responsibility for a wrong is a basis of liability to be harmed by action that would prevent that wrong, Lloyd argues that civilians are not responsible for threats of wrongful harm that their country may pose in war. One might think that Hobbes would find them responsible because their sovereign acts on their authorization. But in fact the civilian citizens cannot authorize their government to fight an unjustified war of aggression because no citizen has the right to contribute to such a war, since it is prohibited by the law of nature, and one cannot authorize another to do on one's behalf what one has no right to do oneself. If the sovereign initiates such a war, it acts without the citizens' authorization. They are, nonetheless, obligated to obey its command to support the war. And because they are morally obligated to support the war, they cannot be morally responsible for doing so. Responsibility for the war is the sovereign's alone. Hence only the sovereign, not the citizens, can be liable to suffer the effects of defensive or corrective action.

The crucial claim here is of course that the citizens are morally required to obey the command of a legitimate authority to support an unjust war. Lloyd identifies three Hobbesian bases for this requirement. First, the law of nature "that forbiddeth breach of covenant" overrides other laws of nature, including laws that prohibit supporting or contributing to an unjust war.[10] Second, given the pervasiveness of disagreement about the morality of any particular war as well as the vagaries and general unreliability of private judgment about such matters, citizens will be more likely to act in conformity with the laws of nature on more occasions over time if they defer to the authority of the sovereign than if they act on the basis of private judgment. As an analogy, Lloyd cites the fact that children are more likely to remain unharmed if they obey a responsible, though fallible, babysitter than if they are guided by their own judgment. Third, Lloyd claims that "the only alternative to joint submission to a public authority consistent with the reciprocity requirement of the Law of Nature is a state of universal private judgment." If this is right, it seems

[9] S. A. Lloyd, "International Relations, World Government, and the Ethics of War: A Hobbesian Perspective," Chapter 14, this volume.

[10] See the passage that Lloyd quotes, with some substitution of terms, from chapter XVI of *Leviathan*.

that universal submission is necessary for coordinated collective action, which would be largely impossible if everyone acted on the basis of his or her private judgment.

The most important objection to this defense of civilian immunity is related to Lloyd's case for the permissibility of fighting even on the unjust side in war and I therefore reserve this objection until near the end of the chapter. There are, however, other objections. One is that there *are* ways in which civilians could bear responsibility for an unjust war even on Hobbesian assumptions. Suppose, for example, that the question of whether to go to war has to be addressed and the sovereign authority decides to resolve the question by plebiscite. It announces that the state will resort to war if, but only if, a majority of the citizens votes in favor of that option. Suppose that a majority then votes to go to war and an unjustified war of aggression ensues. Even if the citizens cannot validly authorize the sovereign to pursue an unjust war, and even if they are obligated to support the war once it is declared by the sovereign, it is hard to deny that those who voted for it bear some moral responsibility for it, given that it would not have been fought had they not freely voted for it. This is not, however, a significant objection in practice, since unjust wars are in fact never initiated in this way.

A second objection is that it seems implausible to suppose that the prohibition of violating covenants (that is, of breaking promises or breaching contracts) always overrides other prohibitions, such as the prohibition of intentionally killing innocent people. And the claim that people will do better over time in conforming their conduct to the laws of nature if they obey the sovereign rather than acting on their private judgment seems equally implausible as a universal claim. It may be true of most people in relation to a particularly trustworthy sovereign, or political authority, but false of most people in relation to a sovereign, such as the Nazi government in Germany, that is either blind or indifferent to the laws of nature. (In these latter cases, the relation between the sovereign and the citizens is less like the relation between a conscientious babysitter and the children in his or her charge and more like that between Fagin, in *Oliver Twist*, and the children he controls.) And even in the case of a morally scrupulous sovereign, there may be many citizens whose private judgments are generally more reliable in discerning the demands of the laws of nature than the sovereign is. Of course, if it is true, as Lloyd claims, that the only alternatives consistent with the requirement of reciprocity are universal submission and universal reliance on private judgment, then there cannot be a rule that binds the morally unenlightened to universal submission while allowing the morally enlightened an occasional license to act on private judgment. But it seems consistent with the requirement of reciprocity to require general though not exceptionless submission by everyone while also allowing everyone a restricted right of reliance on private judgment in certain cases. This might be more likely to promote maximal compliance with the laws of nature, even under a conscientious sovereign, than universal submission to

the sovereign, and could also be compatible with the possibility of coordinated collective action. That there can be a limited right of epistemic self-reliance even in opposition to the commands of the sovereign seems implied by Lloyd's understanding of why Hobbes asserts that a judicially guilty person may defend his life when threatened with execution. According to Lloyd, the explanation is not that the law of nature grants an exceptionless right of self-preservation but because the convicted criminal is not obliged to accept the judgment of the sovereign, expressed through the judicial system, that he is guilty. (Her further claim that the criminal is blameless for acting in a way "that we may not reliably be able to resist" asserts only an excuse rather than a right or permission.)

A further reason for doubting that citizens are more likely to obey the laws of nature, and therefore to flourish to a greater degree, if they consistently defer to the judgment of their sovereign is that, at least with respect to war, their sovereign's judgment will be contradicted by that of the enemy sovereign. Unless they have good reason to believe that their own sovereign is epistemically more reliable than the enemy sovereign, it seems arbitrary for them to defer to the judgment of their own sovereign. But if their epistemic deference to their own sovereign is based on their belief that their sovereign is more reliable epistemically than the enemy sovereign (and than they are), it seems that they are ultimately relying on private judgment after all – not their judgment about individual cases but their judgment of comparative epistemic reliability. If, however, they have no good reason to believe that their own sovereign is a more reliable source of judgment than the enemy sovereign, it seems that they might do just as well in conforming to the laws of nature by universally and consistently submitting to the judgment of the enemy sovereign as by submitting to the judgment of their own. They might thereby even do *better* if, for example, they are citizens of a totalitarian state while the enemy state is a democracy with a free press. Unless citizens have good reason to believe that some sovereign is worthy of epistemic deference, the most they can confidently expect to achieve through universal submission to *any* sovereign is not enhanced *reliability* of judgment, and therefore a higher probability of conformity with the laws of nature, but mere epistemic *coordination* and therefore *uniformity* of judgment – no doubt an advantage of sorts but not the one advertised.

Consider now Lloyd's Hobbesian case for the permissive component of the requirement of discrimination: the right of combatants, including unjust combatants, to attack and kill enemy combatants. One suggestion is that the permission that unjust combatants allegedly have to kill just combatants is entailed by the right of epistemic self-reliance in cases of factual or normative disagreement. If there is such a right, it may indeed make it permissible in what Parfit called the "belief-relative" sense, or even the "evidence-relative" sense, for *some* unjust combatants to kill just combatants.[11] That is, some

[11] See Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011), pp. 150–64.

unjust combatants' action will be permissible *relative to* their beliefs or to the evidence accessible to them. If, however, their beliefs are unreasonable, they may be culpable even though there is a sense in which their action is permissible. And even if their false beliefs are reasonable, so that their action is not culpable, that action can nevertheless, on some views, be a basis of liability if it is objectively wrong and they are aware, or ought to be aware, of the risk that it might be so. But if many unjust combatants are liable to attack while just combatants are not, that is a significant moral asymmetry.

While Lloyd is thus correct to say that some unjust combatants are permitted to kill just combatants, this is true only in the belief-relative or evidence-relative sense of permissible. And this may not be sufficient to shield them from liability. There are, moreover, some unjust combatants who lack even the belief-relative permission to kill just combatants – namely, those who know or strongly suspect that their war is unjust in the sense that it contravenes the laws of nature. The argument from the right of epistemic self-reliance does nothing to justify their action or to relieve them of liability.

One may also question whether unjust combatants actually do have a right of epistemic self-reliance. While the Hobbesian view clearly implies that persons involved in individual conflicts have that right, it seems that soldiers are under a requirement of epistemic *deference* to the sovereign. But, as we have just seen, the principal reason that Lloyd cites for epistemic deference to the sovereign may in some cases support deference to the judgments of the enemy sovereign rather than to those of one's own.

It might be better, therefore, to rest the Hobbesian case for the permission that unjust combatants allegedly have to kill just combatants on the same ground to which Lloyd appeals in rejecting civilian liability: namely, the duty of obedience to the sovereign. Recall that according to Lloyd's reading of Hobbes, this duty of obedience, based on the prohibition of the breach of covenants, overrides other laws of nature. Thus it is compatible with its being otherwise wrong for unjust combatants to kill just combatants for it to become obligatory for them to do so under command of their sovereign. As with civilians who support an unjust war, the fact that unjust combatants act under an obligation when they kill just combatants frees them of responsibility, which lies only with the sovereign. Yet, as Lloyd points out, if they are not responsible and liability is grounded in responsibility, they cannot be liable to attack. And the same is true of just combatants. This leaves us with a view of war according to which *no* combatants are morally liable to attack, so that the justification for killing in war might have to derive simply from the duty of obedience to the sovereign.

There is, however, a problem with the idea that combatants, and in particular unjust combatants, are obligated to kill in war by the command of their sovereign. Assume, as Lloyd suggests, that some wars are contrary to the laws of nature and that participation in them is thus forbidden by those same laws. Yet Lloyd claims that participation in such wars is nevertheless obligatory if

commanded by the sovereign. Yet it is questionable whether there is actually an obligation of obedience in these cases. The problem is Hobbes's claim, quoted by Lloyd, that "unless he that is the author hath the right of acting himself, the actor hath no authority to act." I know of no ground for supposing that the sovereign has a right to violate the laws of nature. He cannot have it in his own person independently of the powers he acquires as sovereign, and he cannot derive it by transfer from his subjects, since they too lack it. But if the sovereign has no right to violate the laws of nature, the claim just quoted implies that he has no power to authorize citizens to violate them. The command of the sovereign, therefore, cannot authorize combatants to fight in a war that is in violation of the laws of nature. The laws of nature seem not to be self-effacing in the way that Lloyd suggests they are.

It may well be, however, that Hobbes or contemporary Hobbesians have the resources to avoid this apparent inconsistency. So assume for the sake of argument that the sovereign does have the power to make it obligatory for its citizens to fight in or otherwise support a war that is in violation of the laws of nature – an assumption that is also necessary for the success of Lloyd's argument against civilian liability. On this assumption, combatants who fight at the command of their sovereign cannot be liable for doing so, for all responsibility for their action lies with the sovereign. Lloyd then locates a source of the permission to attack them that is independent of liability and also, perhaps, rebuts the charge that they act in violation of the laws of nature, even when they fight in a war that we would identify as unjust. This is what Lloyd and others refer to as the Hobbesian "soldier contract," according to which soldiers who enlist in the military consent to accept "an obligation to be the target of enemy hostilities." This confers a permission on enemy combatants to attack them, so that the permissibility of attacking combatants in war derives not from their liability but from their consent.

There are four problems with this view. One is that it provides no basis for the permissibility of attacking conscripts, who, as Lloyd concedes, have not voluntarily accepted an obligation to be objects of attack. Thus, on Lloyd's view, an army composed entirely of conscripts that fights for a just cause would be permitted to attack enemy volunteers, but those volunteers would have no moral basis for fighting either in the liability or the consent of their conscript adversaries. The moral equality of combatants cannot, then, be defended as a *universal* moral doctrine on the basis of an appeal to the soldier contract.

The second problem with the soldier contract is that it is a contract *within* the soldier's own political community that commits him to his fellow citizens to assume the risks of combat. But from the fact that volunteer soldiers have taken on "an obligation to be the target of enemy hostilities" it does not follow that "it becomes morally permissible to target them." A contract with one's fellow citizens to assume the risks of combat does not confer any sort of permission on one's adversaries.

But suppose that it did involve granting such a permission. Suppose that the soldier contract somehow involves consenting to be a *legitimate* target of attack. The third problem is that, even on that assumption, it is doubtful that such a free expression of consent could actually succeed, *on its own*, in making an attack legitimate. I might, for example, freely grant you permission to kill me now, yet few would accept that that alone could make it permissible for you to kill me.

Finally, even if unjust combatants were permitted to kill just combatants because of the latter's consent, it still would not follow that it is permissible for them to fight in an unjust war. For participation in an unjust war might be wrong because of what it involves doing to enemy people generally, and not just to enemy combatants. It might be wrong because it would, in Lloyd's words, "violate the fundamental reciprocity requirement of the Law of Nature, that they not behave in a way that they would condemn in others."

It seems, therefore, that Hobbesian theory fails to ground the independent moral permissibility of the killing of just combatants by unjust combatants. The only justification seems to derive from the obligation of obedience to the sovereign, which overrides any law of nature that prohibits participation in an unjust war. So the case for the claim that unjust combatants are justified in killing just combatants seems to depend, in the end, on the claim that the sovereign can effectively authorize citizens to act contrary to the laws of nature and that this authorization can create an overriding obligation that exempts citizens, whether combatants or civilians, from responsibility and therefore from liability for their contribution to a war that violates the laws of nature.

But if the sovereign can obligate citizens to act in ways that violate the laws of nature, thereby relieving them of liability for doing so, this ultimately vitiates the practical significance of Lloyd's argument against civilian liability and, more importantly, subverts the rationality of a contract among states, of the sort I described earlier, to adhere to a principle of civilian immunity as a constraint on the destructiveness of war. To see why this is so, consider what the overriding duty of obedience to the sovereign implies about the terrorist killing of civilians. If the sovereign political authority commands its soldiers to conduct terrorist attacks against innocent civilians, the soldiers are obligated to obey. According to Lloyd, the reciprocity requirement forbids us to hold the soldiers liable for merely fulfilling their obligation to submit to their sovereign. Soldiers – even unjust combatants – who engage in terrorist action against innocent civilians under the command of their sovereign are not, therefore, liable to defensive action for doing so.

If the soldier contract actually made all volunteer soldiers legitimate targets, there would be no need for a doctrine of combatant liability to justify defensive action against volunteer soldiers engaged in terrorism, for killing them would be justified by their having consented to be killed. (Note, however, that the justification for the defensive killing of volunteer unjust combatants who engage in terrorism would be just the same as the justification for killing

volunteer just combatants who scrupulously confine their attacks to military targets, and this seems implausible.) But the soldier contract does not legitimize the killing of volunteers and, even if it did, there would be no permission grounded in Hobbesian assumptions for defensive action against *conscripts* engaged in terrorist action under command of their sovereign.

Lloyd's argument for civilian immunity in war is thus in an important sense self-undermining. The obligation of obedience to the sovereign may exempt civilians from liability to attack, but the same obligation of obedience justifies combatants in killing civilians if they are commanded to do so by the sovereign. The civilians' moral immunity is no barrier to the combatants' action, since the obligation of obedience overrides other laws of nature, including any that might require respect for civilian immunity.

The problems do not end here. The categorical nature of the obligation of obedience not only undermines the practical significance of civilian immunity but also threatens the Hobbesian argument I gave earlier for the rationality among potential belligerents (except for members of weak and unrepresentative political groups) of agreeing to abide by the principle of civilian immunity even in the absence of a global sovereign who could enforce such an agreement. That argument was premised on the assumption that people on all sides can reliably expect their potential adversaries to be motivated by the recognition that compliance with the principle will serve their own interests better than noncompliance. But if the obligation of obedience is absolute and it is reasonable to expect combatants to fulfill that obligation (as in fact they almost invariably do), then whether enemy combatants will comply with the principle of civilian immunity will be largely unaffected by their *own* perception of what it would be rational for their side to do. Their action will instead be guided by the commands of their sovereign political authority, particularly when obedience exempts them from liability. But this makes the expectation of compliance by one's adversaries much more precarious. For whether they will comply depends almost exclusively on the beliefs and motives of their political leaders. And their leaders may not be rational, or may have interests that conflict with those of the citizens. They might, for example, mistakenly believe that their adversaries will persist in adhering to the principle of civilian immunity unilaterally. Or a more likely possibility is that even if the leaders are rational, they may be willing to gamble with the lives of their civilian citizens in an effort to reap certain benefits for themselves. History is littered with political leaders who have cared very little, other than for instrumental reasons, about the lives of the great mass of their citizens. Witness Saddam Hussein's persistent refusal to comply with the United Nations' demand for verification that Iraq did not possess weapons of mass destruction, even when it did not in fact possess them and the refusal to permit verification resulted in the continued imposition of economic sanctions that were disastrous for ordinary Iraqi citizens. Another possibility is that political leaders may believe that the breakdown of reciprocity will not be worse for their own citizens, either because the adversary

lacks the capacity to inflict significant harm on their civilians (as was the case with U.S. leaders when they ordered the obliteration of the cities of Tokyo, Hiroshima, and Nagasaki), or, perhaps, because they believe that martyrdom will actually be good for their citizens, who will be rewarded in an afterlife.

Given that some political leaders are more likely to take irrational risks with the lives of their citizens than those citizens themselves would be, and that some political leaders are willing to sacrifice their citizens' lives for their own personal gain, it becomes less reasonable to expect all parties to comply with the principle of civilian immunity when the decision about compliance will be made by political leaders rather than by citizens themselves. Political leaders may simply be less sensitive than their citizens to the fact that it is better for the citizens of each state if their own state complies with the principle of civilian immunity. And the less reason one has to expect compliance by one's adversary, the less reason one has, on Hobbesian assumptions, to comply oneself.

The dilemma here is that the contract within each society that establishes an overriding obligation of obedience to the commands of the political authority may undermine the rationality of agreeing to a contract among societies to accept the principle of civilian immunity as a constraint on the destructiveness of war. The domestic contract subverts the international contract. It may simply not be rational to bind oneself to adhere to the principle of civilian immunity when the only ground that one can have to expect that one's adversaries will reciprocate is the hope that their political leaders will be sufficiently rational and sufficiently concerned to protect their own civilian populations to do so.

It seems, therefore, that despite Lloyd's valiant, ingenious, and resourceful efforts, even Hobbes may be unable to rescue the central elements of the orthodox account of the just war.

16

Hobbes and Human Rights

Michael Green

While Thomas Hobbes occupies an important place in the history of human rights, it is natural to have conflicted feelings about him. Hobbes's individualism and emphasis on consent to political hierarchy are congenial to our understandings of human rights while his views on natural rights and political absolutism are not. If the friends of human rights are willing to see Hobbes as belonging to their family at all, it is as a distant, and somewhat eccentric, relation. This chapter is about the extent to which that attitude is justified.

I discuss Hobbes's views in the light of three challenges to human rights that have been especially prominent since September 11, 2001. The first two challenges take the form of arguments against the universality of human rights. According to the first of these, human rights were imposed by the imperial powers and their successors. Once this history is understood, we will see that they are merely a tool used by the strong to oppress the weak. And once we have understood that, we will see that there is little reason to respect to them. According to the second challenge, human rights reflect the values and interests of a bygone era, before terrorism and weapons of mass destruction. In the present day, they are at best a quaint reminder of a distant time. If wise leaders understand this history, they will not feel overly bound by them. Those who accept the first challenge see themselves as rejecting the existing world order while those who are attracted to the second see themselves as its stalwart defenders. Although the two challengers are bitter enemies, they share the notion that human rights are the products of human history and not the timeless standards that they are widely thought to be. They both hold that human rights are not what they seem to be and that if we understand their true history, we will see that we would be better off without them.

The third challenge concerns the influence of human rights. We have learned that the understanding of human rights is shallow even in countries where they are an accepted part of the political culture. This is most striking in the revival of torture. It is not that the violence involved is so shocking; that hardly stands out against the terrorist attacks and the wars they provoked. Rather,

it is that hard-won lessons seem to have had little bearing on the decision to employ torture. The prohibition on torture stems from centuries of experience. Evidence obtained by torture is excluded from legal proceedings, torture is prohibited by the laws of war, and it is widely condemned as a tool of political control. Yet officials in the United States quickly adopted torture and paid no political price for doing so.

I argue that Hobbes can help us to meet these challenges. I first present an interpretation of Hobbes that gives central place to his arguments for a set of rights with many of the features of human rights. Hobbes's vindication of these rights offers a model for how we can accept the historical contingency of human rights while resisting the conclusion that they are fraudulent. After discussing some ways of developing Hobbes's basic approach to better fit our understanding of human rights, I consider his views on the use of torture. I both note the limitations of his approach and argue that he has an indispensable argument against the practice.

Hobbes is not an obvious ally for those concerned about human rights because human rights are thought to have two features that he seems to have rejected. First, human rights are regarded as independent of human institutions. They are held simply as a consequence of being human and not by virtue of belonging to any state or other social group. Because this is so, they are often described as natural rights or as products of natural law. This means, at a minimum, that their existence is independent of the social institutions that people create. Second, human rights are thought of as protecting fundamental interests, such as our interests in physical security, personal liberty, and material necessities, by imposing duties on all other people. My right not to be tortured imposes duties on everyone not to torture me; my right to free movement imposes duties not to impede me; and so on.

Hobbes denied that there are any rights with both of these features. His famous right of nature has the first feature since it precedes social institutions. But it lacks the second feature, of protecting interests through obligations. The right of nature is only a liberty, meaning that those who have the right lack obligations; it does not impose obligations itself. Furthermore, he used the right of nature to deny that there are any obligations to protect the fundamental interests of people living outside the state. Hobbes thought there were laws of nature that would serve as the means of peace if they were generally followed. But they offer little protection in the anarchic state of nature, where, he argued, the right of nature entails "a right to everything, even to one another's body."[1] That is obviously incompatible with obligations to respect others' personal safety, liberty, or material needs.

[1] *Leviathan*, 14.4. References to *Leviathan* are given by chapter and paragraph number as found in *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin Curley (Indianapolis, IN: Hackett, 1994).

While the right of nature has the first feature of human rights but not the second, what Hobbes called "proprietary rights" have the second feature but not the first. To have a proprietary right to something is to have an exclusive right to it that all others are obliged to respect. Hobbes's examples make the concept clear enough. For Hobbes, "things held in propriety" include one's life and limbs, "conjugal affection," and material goods.[2] Proprietary rights have the second feature of human rights since they protect important interests by imposing obligations on all others. But Hobbes insisted that these rights are the product of the state and so they lack the first feature of human rights, their independence from social institutions.

Proprietary rights are less familiar than the right of nature but they played an important role in Hobbes's project. They are what the theory was supposed to explain. Hobbes laid out what he was trying to do in the Dedicatory Epistle of *De Cive*. He identified the investigation of natural justice as his starting point. By "justice" he meant "giving every one his own," and, as we have seen, having something as one's own involves having a proprietary right to it, a right to use the thing that no one else has.[3] Hobbes reasoned that since nature leaves everything in common the origin of justice must be artificial. This led him to ask why, "when all was equally every man's in common, men did rather think it fitting that every man should have his own inclosure."[4]

Hobbes's answer to the question of why people who lacked proprietary rights would create them was that doing so is necessary to prevent "all kind of Calamities" that arise "from a Community of Goods."[5] Specifically, he proposed that "Nature hath given to every one a right to all." By this, he meant that it is lawful for people in the "bare state of nature," before they "had engaged themselves by any covenants or bonds," to do whatever they thought fit.[6] This right to all, however, is a source of conflict. It gives one person the right to invade and the other the right to resist, "whence arise perpetual jealousies and suspicions on all hands." The result is that "the natural state of men, before they entered into society," was "a war of all men against all men."[7] The solution lies in replacing the common right to all things with exclusive proprietary rights. Thus he claimed that the second law of nature requires everyone "to lay down this right to all things," on the grounds that the condition of war persists "as long as every man holdeth this right of doing anything he liketh."[8] Replacing the absence of duties with duties to respect proprietary rights to life, limbs, and property is a necessary condition of peaceful life.

[2] Ibid., XXX.12.
[3] For more detail, see Green (2003).
[4] *De Cive*, Dedicatory Epistle.
[5] Ibid.
[6] Ibid., I.10.
[7] Ibid., I.12.
[8] *Leviathan*, XIV.5.

Proprietary rights are necessary for security, but they cannot be created without the state. It is necessary for two reasons. First, we cannot realistically assemble everyone to agree on who owns what. Instead, the rules must come from a central source. Second, even if we could assemble everyone, our agreement would collapse due to the distrust that Hobbes famously described as pervasive in the state of nature. Only the state has enough power to establish trust among those who are willing to comply with the rules and to deter or incapacitate those who are not. Could the state solve the problem of conflict without proprietary rights? Perhaps it is possible to leave goods in common while effectively discouraging violence. But this is not the sort of society that Hobbes envisaged. As he described it, the community of goods is a cause of conflict and the state solves this problem by instituting proprietary rights. Hobbes's theory, in short, holds that there is a mutual relationship between rights and security. My security depends on others recognizing my rights as establishing boundaries that they may not cross. But others are willing to respect those boundaries only if they are secure themselves. Both the state and the system of rights are necessary for this to work.

Hobbes's account was revisionary. Proprietary rights are commonly thought of as part of natural justice and independent of social institutions but Hobbes denied that this is so. He thought they had to be an artificial product of the state. If so, proprietary rights and natural justice are not what they seem to be. To that extent, his project resembles the attempts to debunk human rights by exposing their historical origins. But Hobbes's aims were quite different. For him, the point of showing that proprietary rights are human creations was not to expose them as fraudulent. On the contrary, the aim was to show their value. Hobbes thought that the way to understand these rights was to ask why they would be created if they did not exist. The idea is that if we understand the needs that would be served by creating rights, we understand something about their value that would otherwise be obscured from view.

Hobbes's treatment of proprietary rights can be profitably applied to human rights. That is, we can ask why people who lacked human rights would create them. Hobbes's kind of answer is that they would create them to remove a source of conflict and make productive social life possible. That, in turn, tells us something significant about the value of human rights.

Whether this kind of moral philosophy is satisfying depends on the questions we have about human rights. It addresses the person who wonders if there is anything to be said about our system of human rights beyond the unhelpful observation that they protect human rights. It will not do as well with other questions that moral theories are sometimes asked to answer. For example, we may ask whether human rights can be derived from values or methods of reasoning that are better grounded than human rights themselves are. Hobbes's moral philosophy can only give a partial answer to that sort of question. It holds that rights to the means of living, such as rights to personal security and access to material necessities, are necessary. No other rules will

matter if these rights are not established because without them rules will be ignored in the familiar cycle of insecurity and conflict. However, quite different understandings of human rights are compatible with Hobbes's observations about the needs that they serve. So there is little prospect of using Hobbes's kind of theory to derive a specific account of what human rights there are or what our reasons for respecting them might be. Whether that is an important defect depends on why such a derivation is thought to be necessary and which questions about human rights are genuinely pressing ones.

I do not pursue the question of what would be gained by deriving human rights in some other way. Instead, I argue for the significance of the questions that Hobbes can help us answer. The first concerns our lack of agreement about the point of the enterprise. It is well known that while we have a broadly shared understanding of what human rights there are, we do not agree on their philosophical foundations. The point was expressed succinctly by Jacques Maritain in the course of his advocacy for the Universal Declaration of Human Rights. "Yes, we agree about rights," Maritain wrote, "but on the condition that no one asks us why."[9] John Locke, rather than Hobbes, is the early modern source of inspiration for most of the philosophical literature on rights. Locke's account of self-defense, for instance, notably includes obligations to respect the rights of others and thus seems to be a significant improvement on Hobbes's right of nature. But Locke's account of rights relies on a theological story that cannot fit our needs.[10] Hobbes's account, by contrast, is not controversial for what it says. Human rights really do perform the function that it singles out. It is largely controversial for what it denies, namely, that human rights are products of divine revelation, the natural order of things, a special moral point of view, or what have you. But it is possible to find its denials unsatisfactory while still agreeing with its positive case for human rights. We might even find that it provides all the foundation we really need. Either result would be a significant step in addressing Maritain's point.

A second advantage of Hobbes's approach is that it acknowledges the historical contingency of human rights without debunking them. As I said earlier, two of the prominent challenges to human rights stem from their historical contingency: one reads their history as a part of the history of imperialism, the other reads their history as showing that they are confined to the past. Hobbes offers an alternative. For Hobbes, the core function of human rights is to provide security. But the move beyond this core is historical rather than a matter of philosophical derivation. For example, one historical path may lead to a society whose members value the benevolent, caring attitude toward humanity suggested by the injunction in the Universal Declaration of Human Rights that we should "act towards one another in a spirit of brotherhood." But a

[9] Maritain (1949, p. 9).
[10] *Second Treatise of Government*, chapter 2.

different historical trajectory might produce a society whose members do not prize benevolence as highly but who could also see the point of human rights as Hobbes described them. The story of how we came to understand human rights as we do is historical. But it vindicates human rights rather than exposing them as deceitful.

There are interesting questions about whether the distinction between core rights and historically contingent, peripheral ones means that the rights closer to the core are more important than the others. That inference is not an obvious one. The relationship between human rights and our other values, or even the list of human rights itself, may well be historically contingent. But the values and rights in question will still be ours and the fact that they might have been different does not give us any reason to abandon them. At the same time, if Hobbes is correct about the primacy of security, it will have to take precedence over the rest. To see why this might matter, consider the proposition that democracy is a human right. This is asserted in the Universal Declaration's twenty-first article but it is hard to understand this in the timeless way it seems to have been intended given the relatively recent emergence of electoral democracy. It is also a dangerous claim. A stable, broadly legitimate non-democracy can play an important role in guaranteeing security while, as we have seen, the drive to impose democracy can simply lead to civil war and military occupation. If the right to democracy and the right to security are on equal footing, perhaps these costs are worth bearing for the chance of bringing democracy about. By contrast, if our understanding of human rights reflects Hobbes's insights, the relative value of democracy would be much lower and the chance of successfully establishing it would have to be very high.

Hobbes will not give us a theory of human rights appropriate for our time. This is partly due to its commendable modesty. But it is also due to the fact that elements of Hobbes's theory have to be extended or modified to meet our requirements. Most of these derive from the tight connections in Hobbes's theory between the kinds of rights we are interested in and the state. These will have to be loosened for us.

The first major revision concerns rights held by individuals against governments. Hobbes made a case for good government, but he resisted the idea that individuals should think of themselves as having rights that could be asserted against their governments. His case for good government turned on the observation that an abusive state risks rebellion.[11] Hobbes was under no illusions about political power and those who wished to hold it. He granted that subjects could be vulnerable to "the lusts and other irregular passions of him or them that have so unlimited a power in their hands."[12] He did not hope that those with power would behave in an especially public-spirited way. Rather,

[11] *Leviathan*, XXX.
[12] Ibid., XVIII.20.

he thought that the best form of state would select sovereigns whose private interests were closely aligned with those of the public.[13] In short, Hobbes had no special love for the state or those who occupied positions in it. He simply thought the state was a better bet than anarchy. Despite this jaundiced view, he also insisted that it would be undesirable for people to think that they had rights the state was obliged to respect. This would fatally weaken the state, he believed, because there is no third party to judge their claims. Since this is so, people could only defend what they take to be their rights through violence. To avoid this, he thought that subjects would have to abandon any potential claims against the state as part of the social contract.[14]

Hobbes's position on this point is no longer acceptable. We now view rights against governments as among the most important human rights and it is not hard to see why. We have a history of successful states that have recognized these rights and the horrific examples of what the state can do are fresh in our minds. Of course, as Jared Diamond points out, 20th-century states broke "historical records for violent deaths" in part because they sustained the largest populations in human history. In fact, according to Diamond, "the actual percentage of the population that died violently was on the average higher in traditional pre-state societies than it was even in Poland during the Second World War or Cambodia under Pol Pot."[15] Hobbes was right: the state really is better than the alternatives. Nonetheless, in light of our recent history, we hope to do much better, and the Universal Declaration is certainly part of the effort. We now insist that individuals have significant rights against the state and this expectation has become part of the environment in which states must operate. It is too late to return to a world where Hobbes's vision of an absolute state is a genuine alternative. Hobbes and his contemporaries faced a question that we no longer do, in no small part because of how pervasive human rights are in our political consciousness. Governments can no longer assert absolute authority over the individual. No state that did could meet the condition of legitimacy that Hobbes himself set, that of enjoying the consent of the people it governs. For practical purposes, and perhaps historical reasons, that question is closed.

Friends of human rights will also want to extend Hobbes's argument beyond the boundaries of the state. After all, the mutual relationship between rights and security is a general proposition that holds true on the international level as well as among people who share a state. The state plays two roles in Hobbes's theory of proprietary rights: it specifies what the rights are and it ensures that people can respect them without putting their own security at risk. The establishment of a broadly accepted list of human rights in our own time without a world state shows that a central authority is not necessary for determining what the rights are. Whether it is necessary to guarantee security

[13] Ibid., XIX.4.
[14] Ibid., XVIII.3–8.
[15] Diamond (2008, p. 84).

depends on whether there are significant risks from showing restraint in international affairs. Hobbes is sometimes portrayed as advocating an amoral, extremely aggressive foreign policy. But, as Noel Malcolm has noted, that stands at odds with his claims about the importance of protecting diplomatic mediators, the usefulness of alliances and treaties, and the undesirability of wars of conquest.[16] The explanation is simple. Hobbes thought that aggression is provocative, that violence should be used only for defensive reasons, and that it is frequently, though not always, possible to manage international relations without using it.

But while Hobbes certainly advocated restraint in diplomatic relations, that is not the same thing as establishing the global system of rights that interests us. Proprietary rights are used to establish security among individuals. But why are they only established within societies? Why does the anarchic international order of states persist while the individual state of nature is so abruptly abandoned? Hobbes's answer was that international anarchy is not as bad as a state of nature among individuals.[17] States can protect individuals from one another, permitting productive activity to flourish. Threats across borders largely come from other states, not from other individuals. These can be met with the standard tools of diplomacy: military defense, alliances among states, treaties, and so on. Social life can carry on within the state's boundaries, largely insulated from this activity. So the need that gave rise to proprietary rights within the state is not present across state boundaries.

One of the questions raised by Al Qaeda's attacks on the United States and other countries is whether it is still true that this system is adequate for security. There is nothing novel about the ability of individuals to kill across state boundaries. What is new, though, is the destructive technology available to them. We have seen that a small band can destroy significant parts of a city using jet airplanes. It is obvious that a similar group with a nuclear weapon could do much more damage. States with nuclear weapons can be deterred with the threat of retaliation. But private groups are not geographically rooted like states are. Their members can avoid retaliation or, if they seek martyrdom, they may embrace it. In our time, it is not obvious that the state can provide adequate security for its members with the tools of diplomacy alone.

The risks from new technology cut two ways for human rights. On the one hand, they mean that states will try to do more to regulate and coerce people outside of their borders than they would otherwise do. On the other hand, it means that there is greater reason for states to respect the rights of noncitizens. Without modern destructive technology, people could hide behind the protective walls of their states and not worry about the hostility of those outside those walls. With that technology, this is no longer possible. So it is much more

[16] Malcolm (2002).
[17] *Leviathan*, XIII.12.

important that others not have a reason for hostility in the first place. And as Hobbes rightly emphasized, fear is the most basic reason for hostility.

This might be beside the point if, as Hobbes suggested, we should think of everyone outside of our states as "enemies" unless they have specifically proven otherwise.[18] But this is inaccurate. The United States, for example, has genuine enemies: the members of Al Qaeda will be hostile no matter what it does in the future. But the overwhelming majority of people are not like this. They are at most only potential enemies, people who might or might not be motivated to join a group like Al Qaeda. The crucial question is how to influence their behavior. The natural conclusion of Hobbes's argument is that the safest course is not to threaten them; this is done by respecting their rights.

If it can be extended in these ways, Hobbes's approach can tell us something informative and helpful about human rights. Nonetheless, the possibility of exceptions will always be a concern. Hobbes can tell us why it is desirable to have the broad system of human rights that we do. But this does not give a satisfying answer to questions about violating rights in isolated rather than indiscriminate ways. Hobbes's approach does not obviously have the resources to explain why rights should be respected when individuals can be sacrified without threatening the broader peace. This is a serious difficulty for other moral philosophies as well, of course, and none has a fully satisfactory answer. I will take up a specific example, torture, to see how far Hobbes might go in addressing this kind of problem.

Every state in our time claims the power to kill but almost all have foresworn torture. Nonetheless, torture is widely practiced, sometimes by countries that put themselves forward as the champions of democracy and human rights. For example, the International Committee of the Red Cross has documented at least fourteen cases of torture committed by one agency of the United States government over about five years.[19] Given the way abusive interrogation techniques spread through the government there are surely many more cases than that.[20] Although it is widely known that the United States has used torture, either on its own or through intermediaries, the practice has never been forthrightly acknowledged. We have clearly crossed important lines without admitting that we have done so or paying heed to the reasons for drawing the lines in the first place.

Hobbes came from a political culture that was more tolerant of torture, or, perhaps, much more honest about its tolerance, than ours. While he was more open to the practice than we are willing to admit we are, Hobbes had a two-pronged argument against its use. According to the first prong, torture, like any other use of force, risks provoking hostility and thereby upsetting the peace. According to the second prong, it is ineffective in most of its

[18] Ibid., XXVIII.23.
[19] Danner (2009).
[20] See Mayer (2008).

applications. We have seen illustrations of both points in our own time. For example, according to Lawrence Wright, many Egyptian human-rights advocates believe the attacks of September 11, 2001 were "born in the prisons of Egypt" where such figures as Sayyid Qutb and Ayman al-Zawahiri were tortured. Both emerged with hardened views about the differences between true believers and the rest of humanity and an "all-consuming" desire for revenge against the Egyptian state and its foreign sponsors.[21] There is no telling how many people who feared similar treatment drew the same basic conclusions. As an illustration of the second prong, consider the case of Ali Abdul Aziz al-Fakhiri, also known as Ibn al-Shaykh al-Libi. According to Jane Mayer, immediately after his capture al-Libi was treated as a normal witness and gave the FBI "actionable intelligence" about a plot to blow up the U.S. embassy in Yemen.[22] Then he was taken by the CIA, sent to Egypt, tortured, and asked repeatedly about connections between Al Qaeda and Iraq. He told his torturers what they wanted to hear. Secretary of State Powell, in turn, was convinced by his fabrication and repeated it in his infamous speech to the United Nations making the case for war against Iraq.[23] As these examples suggest, when taken together, the two-pronged argument maintains that torture is pointless cruelty that threatens the broader peace.

The 1985 Convention Against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The Convention's language is terse, but torture is well enough understood not to require a precise definition. This is an important feature of torture, as it would not have the power to intimidate if it were not easy to understand what it is.

As the Convention notes, torture can be used for a variety of reasons. Hobbes discussed a longer list of cases. These include:

1. Salvational. Torture can be used for conversions and confessions of sin. The motivation for doing so, oddly, may be a kind of benevolence: concern for the soul of the victim.
2. Destructive. The aim of torture might be simply to harm the victim. For instance, it may be used as a retributive punishment. Or it may have sadistic uses if, for example, the torturer enjoys cruelty.

[21] Wright (2006, p. 52).
[22] Mayer (2008, p. 105).
[23] Ibid., pp. 134–8.

3. Corrective or deterrent. Torture could be used to change the future behavior of criminals or to dissuade those who might otherwise commit crimes.
4. Political. It can be used to intimidate opponents, who might fear that they will receive it. Or it can be used to force confessions or recantations. These can give the impression of legitimacy to a regime or undermine the standing of the opposition.
5. Legal. Torture may be used to extract legal confessions or admissible evidence against others.
6. Informational. Finally, it may be used to gather information from those who are unwilling to share it.

Hobbes rejected salvational uses of torture (1) on the grounds that belief cannot be coerced. Faith is something that "man can neither give, nor take away by promise of rewards, or menaces of torture."[24] Try as they might, salvational torturers cannot achieve their goals.

The seventh law of nature prohibits torture for the sake of harming the victim (2). Punishment is permitted only "for correction of the offender, or direction of others" while punishments motivated by "revenge" or "discharge of choler" are ruled out.[25] The reason for this prohibition stems from the first prong of Hobbes's argument. Inflicting harm for its own sake risks reprisals, upsetting the prospects for peace that the laws of nature aim to create and preserve. Obviously, the risk to peace can be counterbalanced: a state that never used punishment would simply invite abuse. The Convention Against Torture distinguishes between torture and punishment, the "pain or suffering arising only from, inherent in or incidental to lawful sanctions." Hobbes might have accepted such a distinction but he gave no indication that he thought it was significant. Thus he noted without comment that capital punishment can be administered with or without "torment."[26] So Hobbes was probably willing to consider torture for corrective or deterrent reasons (3), provided that the gains to public order outweigh the losses.

The failure of salvational torture turns on one limit of human power. The argument against the destructive uses of torture points to another: the human tendency to respond to fear with hostility means that the exercise of power can be counterproductive. For the same reason, there are significant limits on the political uses of torture (4). The lesson of the state of nature is that political society cannot be established by force alone. Slave owners can rule a limited number of slaves, and God could rule all of humanity, with brute force.[27] But Hobbes insisted that political relations must be consensual. John Locke

[24] *Leviathan*, XLII.11.
[25] Ibid., XV.19; XXX.23.
[26] Ibid., XXVIII.17.
[27] Ibid., XX.10–12; XXXI.5–6.

famously argued that Hobbes's sovereign remained at war with its subjects.[28] But if the state were to replicate the fear and uncertainty of the state of nature, its subjects' reasons for compliance would lapse and, along with them, the state's power.[29] A state has to have enough power to secure the peace, but this power will be lost if it is exercised too capriciously.

This argument raises two problems, one for Hobbes's theory and the other for an account of human rights based on his ideas. The problem for Hobbes's theory is that he did not do an adequate job of drawing the line between brute force and consensual political relations. He notoriously described a government arising from consent given to avoid "the present stroke of death."[30] If that is all it takes to establish consent, it is hard to see why the ongoing use of coercion and intimidation would cross the line into mere force. Since that is very much a government by brute force rather than consent, Hobbes's account of consent cannot do the work his theory requires. The problem for human rights is that Hobbes's argument is overly optimistic. We know that abusive states can survive for an appallingly long time. Hobbes's arguments show that it is generally unwise to use torture for political reasons. That is fine, as far as it goes. But we aspire to a stronger conclusion.

Hobbes treated the legal (5) and informational (6) uses of torture together. He argued that testimony under torture "ought not to have the credit of a sufficient testimony" because it "tendeth to the ease of him that is tortured, not to the informing of the torturers." He also thought it was significant that the right of self-preservation gave the victim the right to issue "false accusation."[31] Francis Bacon had advised James I that "By the laws of England no man is bound to accuse himself."[32] Hobbes, in effect, converted this legal point to his own system. Oaths to speak truthfully are not obligatory because the right of nature gives us permission to ignore them in the face of torture or other kinds of duress. The obvious correlate is that torture is an unreliable source of information. So it is surprising to see that Hobbes contrasted the legal use of torture with the informational kind. He allowed that torture could be used as "means of conjecture, and light, in the further examination, and search of truth" or as "helps for the searching out of truth."[33] So while he was opposed to the legal uses of torture (5), he was not opposed to the informational uses (6). This is so despite the fact that the argument against the former seems to cut equally against the latter.

Hobbes did not go into detail about how helpful he thought torture might be in discovering the truth. It is certainly true that it can, conceivably, be helpful.

[28] *Second Treatise of Government*, §§20–1, §93.
[29] *Leviathan*, XXI.21.
[30] Ibid., XX.10–12.
[31] Ibid., XIV.30.
[32] Bacon (1868, p. 114).
[33] *Leviathan*, XIV.30; *De Cive*, 2.19.

But his two pronged argument strongly suggests that it rarely is helpful enough to justify the cost of using it. In any event, I end this chapter with a short discussion of the second prong, that torture yields unreliable information. While I concede that it is not fully satisfying on its own, I claim that it is nonetheless an indispensable part of the case against torture.

The argument about the efficacy of informational torture is familiar but not often put as forcefully as it might be. The argument is not merely that torture does not work. It is that the use of torture borders on the deeply irrational. When used as an interrogation tactic, the aim is to force the victim to conform to the torturer's will. The torturer wants the victim to reveal something that the victim wants to conceal; what the victim reveals, in turn, is supposed to inform the torturer's beliefs. This brings the torturer's will and the evidence for the torturer's beliefs perilously close to one another. As Hobbes observed, victims will say almost anything to get the torture to stop. Torturers, notoriously, tend not to stop until they hear what they believe or suspect to be true. If they had independent sources of information, they would not need to employ torture. It is obviously irrational to believe things at will. But that is not far from what the process of torture involves. The fact that the torturer's beliefs seem to be verified by another person, the victim, helps to obscure this fact, making the possibility of self-deception even greater.

There is a natural objection to this kind of argument against torture, that it fails to identify a deep problem in the relationship between torturers and their victims. The torturer is not just doing something useless but something wrong; and the wrong is done to a particular person, the victim. Of course, Hobbes had an explanation of why torture is wrong. The argument is that it violates the laws of nature, thereby threatening peace. But it is difficult to express the thought that it wrongs the victim with the resources in Hobbes's philosophy. There is nothing like Humean sympathy or Kantian respect for persons in Hobbes to capture that connection between torturer and victim. The closest thing we will find is the relationship among parties to a contract, but that is clearly inappropriate in this case.

I do not pursue the validity of this complaint. I am concerned with a further point that seems to follow from it. It is that Hobbes's kind of argument is dispensable to the case against torture. Suppose it is established that torture is morally wrong, presumably through some other kind of moral philosophy that is more sensitive to the victim's point of view. Then, someone might think, the question of the efficacy of torture is irrelevant. It is ruled out and that is that. I think that this is mistaken for two reasons.

First, the prospects for establishing an absolute prohibition on torture are dim. I cannot see how any abstract moral argument about torture could be more convincing than a case like Jakob von Metzler's.

> …a Frankfurt law student kidnapped an eleven-year-old boy named Jakob von Metzler.… The kidnapper had covered Jakob's mouth and nose with duct tape,

wrapped the boy in plastic, and hidden him in a wooded area near a lake. The police captured the suspect when he tried to pick up ransom money, but the suspect wouldn't reveal where he had left the boy, who the police thought might still be alive. So the deputy police chief … told his subordinates to threaten the suspect with torture. According to the suspect, he was told that a 'specialist' was being flown in who would 'inflict pain on me of the sort I had never experienced.' The suspect promptly told the police where he'd hidden Jakob, who, sadly, was found dead.[34]

This clearly falls under the Convention's prohibition on intimidation and coercion. But, taken in isolation, it is very difficult to think that the police did the wrong thing. While torture is abominable, the Metzler case reminds us that it may be needed to prevent something much worse. Furthermore, in a case like this, the irrationality of torture is less compelling as an objection. Here, torture is the last resort. There is an urgent need for information, there is no good information to be crowded out by the bad, and there is no harm to being misinformed. There are, of course, objections to permitting such tactics as a general policy. But once we have moved to them, we will have left the claim that torture is simply prohibited behind. Having done so, we will have to consider Hobbes's argument, among others.

The second reason why arguments about the irrationality of torture are indispensable turns on the nature of moral conclusions: establishing that something would be morally wrong is not the same thing as establishing that it is the wrong thing to do. There are familiar conflicts among duties that illustrate the point. Public officials have to weigh their responsibilities to the people they have to protect against the rights of those who would do them harm, for example. So they may find themselves in situations where they will violate their duties to someone, no matter what they choose. There is a less familiar possibility that also deserves mention. The fact that torture would cross a moral line can, oddly enough, be a reason to do it. To see how this might happen, consider less dramatic examples. Suppose I wish to demonstrate how important something is to me and so I cancel my appointments, breaking my obligations, in order to attend to it. The fact that I am breaking my obligations helps to communicate how seriously I take the person or project that I have chosen to focus on. This sort of behavior can, of course, be merely self-indulgent or excessively dramatic. But it can also be appropriate in a way that anyone would recognize, despite the fact that it is morally wrong. Public officials can demonstrate how seriously they take their responsibilities by crossing moral lines as well. The willingness to do so shows that they have genuinely done everything in their power to stave off disaster, either to the public they serve or to themselves. There are very good reasons why we should discourage this kind of thinking by public officials. But I do not know how to show that it is always incorrect in public life any more than I know how to show that there is always a gross error

[34] Bowden (2003, p. 70).

in the private behavior I described. The broader point is that while morality is important, moral conclusions will not settle all practical questions. Since that is so, we will need to have recourse to other kinds of considerations if we wish to make sense of the very strong prohibition on torture that is at the center of our system of human rights.

Human rights are moral rights, but that does not mean that they are best understood by focusing exclusively on moral considerations. What we are most concerned with is establishing a nearly absolute priority for the basic list of human rights. The considerations and values that we use to establish this can be drawn from a variety of sources. It may be surprising to find that some of those reasons are more matters of policy than moral principle. But surprising arguments should be just as welcome as familiar ones.

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