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ON THOMAS HOBBES'S FALLIBLE NATURAL LAW THEORY

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It is not clear, on the face of it, whether Thomas Hobbes's legal philosophy should be considered to be an early example of legal positivism or continuous with the natural-law tradition.[1] On the one hand, Hobbes's command theory of law seems characteristically positivistic. On the other hand, his conception of the "law of nature," as binding on both sovereign and subject, seems to point more naturally toward a natural-law reading of his philosophy. Yet despite this seeming ambiguity, Hobbes scholars, for the most part, have placed him within the legal-positivist tradition. Indeed, Hobbes is usually regarded as the father of legal positivism. Recently, however, a growing number of commentators has begun to question this traditional classification. Although it is clear that Hobbes is not a natural lawyer of the same mold as Thomas Aquinas, it is, nevertheless, increasingly becoming evident that the traditional characterization of Hobbes as a positivist in the same vein as Jeremy Bentham or John Austin is also incorrect. There are important natural-law aspects of Hobbes's view that one ignores only at the cost of a proper understanding of his theory of law.

In what follows, I will attempt to show that Hobbes's philosophy is actually closer to the natural-law tradition than it is to legal positivism. I will highlight two aspects of Hobbes's view that have, thus far, not been considered in the debate over his classification. The first aspect is brought to light when Hobbes's philosophy is viewed through the lens of Ronald Dworkin's analysis of the difference between legal positivism and natural-law theory with respect to the role assigned to principles in judicial decision making. I will make the case that Hobbes's view of principles accords better with the natural-law conception of their role than it does with the positivist, i.e., that, on Hobbes's view, the principles (i.e., the natural law) that are appealed to in court are binding, in the sense that they *must* be taken into consideration by judges deciding cases at court. Since the sovereign is the ultimate interpreter of the

laws of nature, however, this seems, at first glance, to amount to nothing more than an empty shell of a natural-law theory—a "for-all-practical-purposes" legal-positivist view that allows for gross and systematic abuses of power by the sovereign. I will argue that this is not the case, in lieu of the second aspect of Hobbes's view that I intend to highlight: the fact that, according to Hobbes, the laws of nature must always remain *unwritten*—a requirement that, while it does not preclude occasional errors or abuses of power by the sovereign, all but guarantees that permanent and systematic abuses are impossible.

A First Look at Hobbes

Legal positivism is the doctrine that "[t]he existence of law is one thing; its merit or demerit is another" (Austin 1965 [1861], 184). For the legal positivist, it is undoubtedly true that "the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism . . . "; nevertheless, for the legal positivist, "it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice" (Hart 1961, 181). This, the so-called separation thesis, is the heart of the legal-positivist view. Note, however, that this thesis does not say that discussing the merits of law, distinguishing good from bad law, or even maintaining that law is necessarily subject to moral considerations is illegitimate (Gardner 2001, 210). The thesis maintains only that the *validity* of law does not depend on its merits.

Also characteristic of legal positivism is the so-called sources thesis, the view that law's validity comes from its source, i.e., from the fact that "at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it" (Gardner 2001, 200). In order to determine whether a particular norm, or what is called a "first-order rule," issues from a legitimate source and, hence, should be considered as a valid law for a society, one appeals to a "second-order" rule: a rule of recognition whereby the first-order rule is recognized to be binding. For example, a simple rule of recognition may specify that, in order for a rule to qualify as a law for a society, it must be one of the rules enumerated in a particular document, e.g., the "constitution" for that society (Hart 1961, 92).

Opposed to the legal-positivist conception of law is the older natural-law theory. On a natural-law view, the validity of positive law depends not just on its source; to be considered a valid law, a norm must cohere with a set of objective background standards and principles—themselves

thought of as a part of the law—as well. On the classical natural-law view, these are moral standards: they place *substantive* constraints on law (i.e., on the content of law).[2] On Aquinas's view, for instance, a rule whose content does not cohere with the natural law is, properly speaking, not a law at all: "every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law" (1925 [1274], Pt. 2, Q. 95.2).

There is textual evidence in *Leviathan* that seems clearly to support regarding Hobbes as a legal positivist. For Hobbes, as for the positivist, law's validity is derived from its source. He writes, "[N]or can any Law be made, till they have agreed upon the Person that shall make it" (1985 [1651], chap. 13, 62). And a little later, he writes, "Where there is no common Power, there is no Law: where no Law, no Injustice" (ibid., 63). Hobbes's definition of law as command also seems straightforwardly positivistic:[3]

> [I]t is manifest, that Law in generall, is not Counsell, but Command; not a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to obey him. And as for Civill Law, it addeth only the name of the person Commanding, which is *Persona Civitatis*, the Person of the Commonwealth. (1985 [1651], chap. 26, 137)

Compare Hobbes's definition with Austin's: "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." And also, "Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*" (1965 [1861], Lec. 1, 10, 13). This leads Jean Hampton to write, "[Hobbes's] is a positivist position, because law is understood to depend on the sovereign's will. No matter what a law's content, no matter how unjust it seems, if it has been commanded by the sovereign, then and only then is it a law" (1986, 107).

But note that, while it is clearly the case, for Hobbes, that a law must be commanded by the sovereign in order to be legitimate, it does not follow from this that all law must actually be *posited* by the sovereign, and it also does not follow that we may not place a further restriction on law: that it cohere with a set of background standards and principles—with the "natural law," if you will. Hobbes indeed adds this restriction. For Hobbes, a law of nature 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 best be preserved" (1985 [1651], chap.

14, 64). It includes more abstract commands such as that (the first law of nature) one should endeavor peace (where peace is possible), that (the second law of nature) one should be willing to lay down one's right to all things where others are also willing, and that (the third law of nature) one should keep one's covenants. It also includes more determinate commands such as that (the fifteenth law of nature) mediators are to be granted safe passage throughout the realm (ibid., 64–65; chap. 15, 78).

The natural law, unlike the civil law that binds only subjects, "ought to be Obeyed, both by King and Subjects" (Hobbes 1971 [1681], 10). Interestingly, Hobbes sometimes speaks as though the sovereign's very capacity to enact positive law is constrained by natural law. He writes, "If the Sovereign command a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine . . . yet hath that man the Liberty to disobey" (1985 [1651], chap. 21, 111–12).

Now, it is not clear whether it follows, on Hobbes's view, from the fact that I am not obligated to obey a command, that it is not a law all the same. I will come back to this question shortly. For now, the more pressing question is how can the natural law be *law* if law (as a necessary condition) depends for its validity on the sovereign's will? The solution to this riddle is Hobbes's so-called "mutual containment thesis," the first part of which is this:

> The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature, which consist in Equity, Justice, Gratitude, and other morall Vertues on these depending, in the condition of meer Nature . . . are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before; as being then the commands of the Common-wealth; and therefore also Civill Lawes: For it is the Soveraign Power that obliges men to obey them. (Hobbes 1985 [1651], chap. 26, 138)

To clarify this, consider the way Hobbes formulates the first and fundamental law of nature (to endeavor peace):

> [I]t 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 Fundamentall 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 our selves*. (1985 [1651], chap. 14, 64)

Now the *right* of nature can, and *should* (according to the second law of nature), be laid down when others are also willing to do so. But if oth-

ers are not willing to lay down this right, then the antecedent clause in what Hobbes calls the "precept, or generall rule" of reason is false, and, therefore, the law of nature—the consequent of the conditional—is not in force.[4] Now, the very existence of a commonwealth implies that others have covenanted to lay down this right, and the existence of a sovereign with the authority to punish transgressors is a guarantee that others will keep their covenant. In such a situation, the antecedent of the conditional is satisfied, and one *is* bound to observe the law of nature. But note that to say that the laws of nature are valid insofar as they have been commanded by the sovereign is not to say that the sovereign is the *author* of the laws of nature. The "precept, or general rule" exists, with or without the sovereign.

But coming back to our previous question, recall that we have established that, for Hobbes, there are some commands of the sovereign that the subject is not obligated to obey, and the question is whether the sovereign has failed to make law in issuing such commands. On a legal-positivist view of law, it does not follow from the fact that I am not obligated to obey a command that such a command is not a law. For a legal positivist, the question of whether I am obligated to obey a command—a question that must be informed by moral or ethical considerations—has no bearing on the question of whether that command is a law. This is not to say that one should not ask the former question; it is only to say that these are two separate questions. Thus, we cannot infer that Hobbes is not a legal positivist from the fact that, for him, there are certain commands of the sovereign that we are not obligated to obey. To do so would beg the question with regard to Hobbes's legal positivism. We need some further evidence. It seems as though a more detailed examination of Hobbes's definition of law gives us the evidence we need: "Law in generall, is not Counsell, but Command; not a Command of any man to any man; but only of him, whose Command is addressed to one *formerly obliged to obey him*" (1985 [1651], chap. 26, 137, emphasis mine). On this definition, it seems, if one is not obligated[5] to obey a command, then that command is not law.[6]

Counting against this interpretation, however, we should note that the "formerly" clause in Hobbes's definition seems to imply that the subject is not at liberty to choose which commands she will and which commands she will not be obligated to obey. What seems implied here, on the contrary, is that the subject is under an *existing* obligation to obey *whatever* commands the sovereign issues. On this interpretation, it is simply not the case that the subject may consider each command as it comes in order to determine whether to obey it. As evidence for this interpretation, note that, in the very section in which he speaks of subjects' liberty to disobey, Hobbes writes that "we are not to under-

stand, that by such Liberty, the Soveraign Power of life, and death, is either abolished, or limited. For it has been already shewn, that nothing the Soveraign Representative can doe to a Subject, on what pretence soever, can properly be called Injustice, or Injury" (1985 [1651], chap. 21, 109). Further, the subject has covenanted, with her fellows, to obey the commands of the civil sovereign, and it is a law of nature to keep one's covenants. This is, in fact, the *second part* of the mutual containment thesis:

> Reciprocally also, the Civill Law is a part of the Dictates of Nature. For Justice, that is to say, Performance of Covenant, and giving to every man his own, is a Dictate of the Law of Nature. But every subject in a Common-wealth, hath covenanted to obey the Civill Law. . . . And therefore Obedience to the Civill Law is part also of the Law of Nature. Civill, and Naturall Law are not different kinds, but different parts of Law. (Hobbes 1985 [1651], chap. 26, 138)

Now one might object that a subject could not possibly place himself under a prior obligation to obey a command whose express intention is to do him harm; indeed, this is the reason that the subject does not commit injustice by refusing to obey such commands. However, it is for the sovereign, the issuer of the command, to determine what the intention of that command is. The subject is not granted the liberty of interpreting the commands of the sovereign for himself. Hobbes is clear on this point: "the Interpretation of all Lawes dependeth on the Authority Soveraign; and the Interpreters can be none but those, which the Soveraign, (to whom only the Subject oweth obedience) shall appoint" (1985 [1651], chap. 26, 143). Thus, anything short of an *explicit* command to kill oneself or to inflict direct harm on oneself, for instance, could be interpreted by the sovereign as a command that the subject antecedently consented to obey. All that is needed on the sovereign's part is a little imagination. For all practical purposes, then, it seems as though the sovereign is unconstrained in its power to legislate.

Hobbes's positivism seems clear. As Hampton puts it,

> It is quite clear why Hobbes does not endorse the natural-law view. To do so would be to say that the ruler's power is limited by a set of natural and seemingly deontological rules, which would make them the source of law, rather than the sovereign's will. But, in Hobbes's view, human beings cannot establish a state in which the ruler is supposedly bound by moral laws that command him irrespective of his desires, not only because such laws do not exist but also because no law can rule human beings without interpretation by a human judge. (1986, 107)

The Role of Natural Law in Hobbes's Philosophy

These considerations do indicate, I think, that it is a mistake to construe Hobbes as a natural lawyer in the classical (i.e., medieval) sense. On the classical natural-law conception of law, the positive law (when valid) is literally deducible from the natural law. Thus, if a subject determines the positive law to be fundamentally in conflict with the natural law, then as long as she has not made a mistake in reasoning, she must view the positive law as no law at all, and she has the right—indeed, the moral duty—to disobey the positive law.[7,8] But on Hobbes's view, as we have seen, it is the sovereign alone who has the authority to interpret both the civil and natural law.

Nevertheless, from the fact that Hobbes is not a natural lawyer in this sense, it still does not follow that he is a legal positivist. The sense in which we can say that Hobbes is a natural-law theorist can be made clear if we recall Ronald Dworkin's analysis of the distinction between legal positivism and natural-law theory with respect to the role assigned to principles in judicial decision making. Dworkin famously makes a distinction between principles and rules. Rules (like the rules of a game) explicitly lay out a finite set of conditions that make their application necessary when those conditions obtain. If a rule is not applied in a situation for which it is relevant, we say that this is because the rule is invalid. Thus, the *old* offside rule in soccer is invalid: it is no longer applied when the relevant conditions obtain; it has been replaced by the *new* offside rule. Principles, such as the principle that no one should be permitted to gain from her own fraud, on the other hand, are often vague and give no explicit list of the circumstances to which they apply. And, unlike rules, they may remain valid even though they are not applied in cases to which they are deemed applicable. When two or more principles are relevant to a case but pull in different directions, we "weigh" these principles against one another and choose the principle that carries more weight in the situation at hand. But the principles we choose not to apply in particular cases do not, for all that, lose their validity for future cases.

Dworkin distinguishes different ways that we might conceive of the role of principles in judges' decisions at court. He makes this distinction in the context of the famous case of *Riggs v. Palmer*, where the New York Court of Appeals was called on to decide whether a man, Elmer Palmer, was qualified to inherit the estate left to him in his grandfather's will. Elmer, fearful that his grandfather might change the will, had murdered his grandfather and was convicted of the crime (there was then no statute on the books forbidding inheritance in such circumstances). In

its decision not to award the inheritance money to Palmer, the majority opinion of the court appealed to the "fundamental maxims" of the common law that "[n]o 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 (*Riggs v. Palmer*, 115 N.Y. 506, 1889, 511).

According to Dworkin, there are two ways we might conceive of the role that principles play in cases like these:

(a) We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation. If we took this tack, we should say that in the United States, at least, the "law" includes principles as well as rules.

(b) We might, on the other hand, deny that principles can be binding the way some rules are. We would say, instead, that in cases like *Riggs* . . . the judge reaches beyond the rules that he is bound to apply (reaches, that is, beyond the "law") for extra-legal principles he is free to follow if he wishes. (1977, 29).

According to Dworkin, a legal positivist must interpret the role of principles in the second way.[9] Thus, when a judge presides over a case that cannot be subsumed under an existing rule, she must be understood as having been granted the authority to exercise her discretion. In exercising discretion, she must be understood as not being bound to consider any legal standard other than the relevant legal rules. She may (if she deems it appropriate) appeal to principles in her decision, but in doing so, she must be understood as making new law; she is using these principles, which are outside the law, to formulate a new rule.[10]

In contrast, a natural-law position with regard to the choice between (a) and (b) will choose (a). On a natural-law position, principles that one appeals to in cases such as *Riggs* are *a part of law*. But they do not function as rules do. When a principle is relevant to a case, one is not bound to apply it. But one is bound to take it into consideration in one's decision.

What is Hobbes's position in this debate? For Hobbes, the laws of nature are clearly not rules but principles. Statements such as "seek peace, and follow it," "perform covenants made," and even those more determinate statements such as that "all men that mediate peace, be allowed safe conduct" are vague and give us no clear list of the circumstances to which they are applicable; we are not told, for instance, precisely what constitutes a valid covenant or precisely what constitutes a breach. And, clearly, there will be cases in which at least the more determinate laws of nature may need to be weighed against one another. The question now is whether, on Hobbes's conception of judicial decision making, the

judge is or is not *bound* to take these laws of nature into consideration when deciding cases at court.

First, note that a subordinate judge, for Hobbes, must "have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto" (1985 [1651], chap. 26, 140). Further note that the judge is bound to assume that the intention of the sovereign is consonant with equity: "The Judge is to take notice, that his Sentence ought to be according to the reason of his Soveraign, which being alwaies understood to be Equity, he is bound to it by the Law of Nature" (ibid., 141).[11] To suppose that the sovereign's intention is not equity is "a great contumely," or insult, on the part of the judge; in a difficult case, rather than suppose the intention of the sovereign to be iniquity, the judge is directed to send the statute back to his sovereign for clarification: "He ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply it with the Law of Nature; or if the case be difficult, to respit Judgement till he have received more ample authority" (ibid., 145).[12] Thus, given Dworkin's dichotomy, it indeed seems as though Hobbes's view fits more comfortably within a natural-law framework.

With respect to Dworkin's analysis of the difference between natural-law theory and legal positivism, one may object that it is flawed; for, in fact, on an *inclusive* legal-positivist view, (moral) principles *can* be considered to be part of the law and binding in just the sense that Dworkin requires (cf. Coleman and Leiter 1996, 250; Waluchow 1994, 174–82). The distinction between an inclusive legal-positivist view and a natural-law view comes down not to whether such principles *can* be binding for a particular society but whether they *must* be binding for every society. On an inclusive legal-positivist view, whether such principles are binding is a matter of convention: it depends on the rule of recognition adopted by that particular society. On a natural-law view, on the other hand, such principles are binding for all societies, regardless of their particular conventions.

As for Hobbes, it should be clear that his laws of nature are not contingent in this way. They are contingent only in the sense that their status as laws depends on the existence of a commonwealth *as such*. But this is not to say that their status as laws depends on the existence of a particular rule of recognition. On the contrary, the laws of nature are the laws of every commonwealth: "The Lawes on Nature are Immutable and Eternall; For Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acceptation of persons, and the rest, can never be made lawfull" (1985 [1651], chap. 15, 79). Thus, even if we turn Dworkin's dichotomy into a trichotomy—even if we grant that inclusive legal positivism is a live

option—it should be clear that Hobbes's view is not that of an inclusive legal positivist.

Here is a second objection: even if it is true that subordinate judges are bound to consider the natural law in their judgments, it is not clear, even from this point of view, that we have addressed the concern that I mentioned in the previous section: i.e., it is still the case that the sovereign is the only authorized interpreter of the natural law. And it is still the case that we have all made a covenant, to which we are bound by the natural law, to obey the judgment of the sovereign. This is what S. A. Lloyd calls Hobbes's "self-effacing natural law theory":

> Natural law commits us to regarding the judgement of the sovereign judge as authoritatively and properly adjudicating *all* disputes, including those over what does or does not conflict with natural law. If this is what the [law of nature] requires, there is no legitimate position or perspective from which we can criticize or resist the sovereign's decisions. . . . It would thus seem that Hobbes's position contains a strongly positivistic element. Natural law has supreme authority; but it directs us, first and foremost, to act as if legal positivism were true. Natural law is thus self-effacing. (2001, 295)

This conclusion is hasty, however. To see why, note that, for Hobbes, one important difference between the natural and civil parts of law is that "whereof one part being written, is called Civill, the other unwritten, Naturall" (1985 [1651], chap. 26, 138). The law of nature is the unwritten law of the commonwealth, and it has no need of being written down, according to Hobbes, for it is accessible to any person who uses his own natural reason in an unbiased way:

> [W]hatsoever men are to take knowledge of for Law, not upon other mens words, but every one from his own reason, must be such as is agreeable to the reason of all men; which no Law can be, but the Law of Nature. The Lawes of Nature therefore need not any publishing, nor Proclamation; as being contained in this one Sentence, approved by all the world, *Do not that to another, which thou thinkest unreasonable to be done by another to thy selfe*." (1985 [1651], chap. 26, 140)

Indeed, of the qualities that make a good judge, Hobbes tells us, the foremost of these is "*[a] right understanding* of that principall Law of Nature called *Equity*." Hobbes tells us that this depends "not on the reading of other mens Writings, but on the goodnesse of a mans own naturall Reason" (1985 [1651], chap. 26, 146–47).

In presiding over a case at court, since the law of nature remains unwritten, a judge is called on to interpret the natural law to the best of his ability. But he cannot, for all that, encode *his own particular interpretation* of the law of nature into law *as if this were the law of*

nature itself. Neither, for that matter, can the sovereign. It is not that the judge or sovereign is prohibited from so doing. There is no need for such a prohibition. For as long as human reason remains, the unwritten law of nature remains; it remains regardless of the content of the written positive law, and it remains even when it is contradicted by the written positive law. Recall that, in cases at court, the subordinate judge is *always* enjoined to judge according to equity *by means of his own natural reason*. And if he is unable to reconcile the civil law with his own understanding of the natural law, he is not to assume that his sovereign's intention is iniquitous; he is required to send it back to the sovereign for clarification.

The sovereign is the authorized *interpreter* of the unwritten law of nature in *every* particular case to which it is applied:

> The Interpretation of the Law of Nature, is the Sentence of the Judge constituted by the Soveraign Authority . . . and consisteth in the application of the Law to the present case. . . . and the Sentence he giveth, is therefore the Interpretation of the Law of Nature; which Interpretation is Authentique; not because it is his private Sentence; but because he giveth it by Authority of the Soveraign, whereby it becomes the Soveraigns Sentence; which is Law *for that time, to the parties pleading*. (Hobbes 1985 [1651], chap. 26, 143, emphasis mine).

But the sovereign is not the *author* of the law of nature. She cannot commit her interpretation of the law of nature to writing and thus determine how it is to be applied in *all* cases. Similarly for subordinate judges: they cannot turn their interpretation of the natural law in a particular case, on Hobbes's view, into a precedent to be followed by judges in all similar cases. For no matter the decisions of precedent judges and no matter the content of the civil law, natural human reason, the source of natural law, remains, unwritten, as a perpetual source of criticism of the written law:

> Princes succeed one another; and one Judge passeth, another commeth; nay, Heaven and Earth shall passe; but not one title of the Law of Nature shall passe; for it is the Eternall Law of God. Therefore all the Sentences of precedent Judges that have ever been, cannot all together make a Law contrary to naturall Equity: Not any Examples of former Judges, can warrant an unreasonable Sentence, or discharge the present Judge of the trouble of studying what is Equity (in the case he is to Judge,) from the principles of his own naturall reason. (Hobbes 1985 [1651], chap. 26, 144)

Defenders of a legal-positivist interpretation of Hobbes will object that there are still no effective constraints on how the sovereign may interpret the natural law. Indeed, it is true that there is nothing in

Hobbes's theory to prevent the sovereign from abusing its power in particular cases, or even in a string of them. Nevertheless since the law of nature always remains—and always remains unwritten—and since judges are bound to consider it in every case over which they preside, it is very unlikely that sustained violations of the law of nature will occur, for, in order to maintain its policies, the sovereign will need to interpret the law of nature anew in each particular case. Abuses may and likely will happen, but, for Hobbes, these will always be short-lived; for the sovereign will come to realize, eventually, that iniquity is not in its own self-interest.[13] This is because, for Hobbes, the interests of the sovereign align with the interests of the commonwealth.

On Hobbes's view, although there is potential for conflict between the sovereign's public and private interest in every form of government, these interests will always align to some extent. The best form of government will be the one in which these interests align almost perfectly. Monarchy, according to Hobbes, comes closest to this ideal:

> Now in Monarchy, the private interest is the same with the publique. The riches, power, and honour of a Monarch arise onely from the riches, strength and reputation of his Subjects. For no King can be rich, nor glorious, nor secure; whose Subjects are either poore, or contemptible, or too weak through want, or dissention, to maintain a war against their enemies. (1985 [1651], chap. 19, 96)

It is not my aim to defend Hobbes's arguments here, least of all his argument in favor of monarchy. That said, we should note that the relatively weak claim that the sovereign's private interests coincide to some extent with the public interest is certainly not implausible. Indeed, if this were not true, at least to some extent, there would be little hope for any form of government. But if *anything* is in the public interest, then equity is, for, without it, society must return into the state of nature: "without [equity], the Controversies of men cannot be determined but by Warre" (Hobbes 1985 [1651], chap. 15, 77). Thus, equity will be in the sovereign's self-interest even if her public and private interests are only minimally aligned. To judge contrary to equity, therefore, can be nothing but an error on the part of the sovereign. But since the laws of nature always remain unwritten, in order for sustained abuses of power to be possible, the sovereign must err again and again in her judgments and continue to err repeatedly.

We can see now that what Hobbes is presenting to us is not a self-effacing but a "fallible" natural-law theory. It is fallible because it must function in spite of human frailty and bias with respect to the determination of the natural law. Hobbes writes,

> The unwritten Law of Nature, though it be easy to such, as without partiality, and passion, make use of their naturall reason, and therefore leaves the violaters 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. (1985 [1651], chap. 26, 143)

On a classical natural-law view, the positive law is straightforwardly deducible from the natural law, according to universal reason, and, therefore, demonstrable to all those who take it upon themselves to attend to the proof. But on Hobbes's view this is impossible, due, in large part, to human bias. To correct for this, the sovereign is set up as the only authorized interpreter of natural law. This helps avoid conflict, on the one hand, since there are no other authorized interpreters; and it helps avoid error, on the other, since the sovereign's interests align with the commonwealth's. "There is not amongst Men an Universal Reason agreed upon in any Nation, besides the Reason of him that hath the Soveraign Power; yet though his Reason be but the Reason of one Man, yet it is set up to supply the place of that Universal Reason" (Hobbes 1971 [1681], 26–27).

There are no guarantees. The sovereign or the subordinate judge may err in his interpretation of the natural law as a result of his own biases and narrow self-interests. But this danger is checked by the fact that every subordinate judge and sovereign is obligated to give the best interpretation of the natural law he can, *no matter* the judgments of previous judges: "because there is no Judge Subordinate, nor Soveraign, but may erre in a Judgement of Equity; if afterward in another like case he find it more consonant to Equity to give a contrary Sentence, he is obliged to doe it" (Hobbes 1985 [1651], chap. 26, 144).

Conclusion

Hobbes's sovereign is granted almost unlimited power in Hobbes's commonwealth; thus, in spite of Hobbes's emphasis on the central role of natural law in his theory, most scholars view him as a "for-all-practical-purposes" legal positivist who requires, of his sovereign, merely that it pay lip service to the law of nature. But as we have seen, the sovereign cannot legislate the natural law away, for it springs from the natural reason of every human being; and as long human reason remains, the natural law will remain, and it will remain a continual check on the excesses of government. Far from being a "for-all-practical-purposes" legal-positivist view, Hobbes's view is a *practical*, realistic, but fallible, natural law conception of law.

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NOTES

1. I am indebted to Dennis Klimchuk for his thoughtful and insightful comments on, and criticisms of, my previous drafts of this paper.

2. Contrast this with, e.g., L. L. Fuller's natural-law theory, in which the constraints are not substantive but procedural. On Fuller's view, valid law must conform to formal standards such as generality, publicity, comprehensibility, consistency, and so forth. Cf. Fuller 1964.

3. The definition of law as command is characteristic of the early legal-positivist views of Bentham and Austin. Contemporary legal positivists differ with respect to this point, however. See, for instance, Hart 1961, chaps. 2–4.

4. I am indebted to Lloyd (2001, 290) for clarifying this point.

5. I have used the term "obligated," while Hobbes, in the passage quoted, uses "obliged." With Hart's distinction between these terms in mind (1961, chap. 5, §2), I think it is clear, given the context of the passage, that Hobbes's intended meaning is "obligated."

6. For an objection to the positivist interpretation of Hobbes that is similar to this, see Murphy 1995, 851–52.

7. On a natural-law view, if a law is invalid (because it fundamentally conflicts with natural law), then subjects have a moral duty to disobey it. But the reverse implication does not hold. It is possible for a subject to have the moral duty to disobey a valid law, for in certain (exceptional) circumstances, even a valid law may, if followed to the letter, result in great evil.

8. See Olafson (1966) for a discussion of the medieval conception of natural law.

9. Note that so-called inclusive legal positivists deny this. I will have more to say on this shortly.

10. Note that this does not mean that the judge has license to do just anything. "An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion" (Dworkin 1977, 33).

11. The principle of equity, that all persons be treated equally before the law, is one of Hobbes's laws of nature (1985 [1651], chap. 15, 77). The precise role it plays in Hobbes's political philosophy, however, is a matter of debate. Witness, for instance, the exchange between Larry May and William Mathie in Walton and Johnson (1987): according to May, equity is a "moral wedge" that is driven into, and tempers, an otherwise strict legal-positivist conception of law. Mathie's view, which I share, is that equity cannot be thought of as an addition to Hobbes's view in this way, but that, on the contrary, it is the core of Hobbes's conception of natural law. I will not pursue this question further, however, for, with respect to our discussion, it suffices that the principle belongs in some way

to the natural law; i.e., that it is one of the fundamental background principles that, for Hobbes, judges must always consider.

12. I am indebted to David Dyzenhaus for this point. See, e.g., Dyzenhaus 2001, 485–91, for concrete examples of cases like these.

13. Note, however, that in committing iniquity the sovereign is not committing injustice and cannot be punished (Hobbes 1971 [1681], 31; 1985 [1651], chap. 18, 90).

REFERENCES

Aquinas, T. 1925 (1274). *The Summa Theologica of Saint Thomas Aquinas; literally translated by Fathers of the English Dominican Province*. London: Burns Oates & Washbourne.

Austin, J. 1965 (1861). *The Province of Jurisprudence Determined*. 2nd ed. New York: The Humanities Press.

Coleman, J. L., and B. Leiter. 1996. Legal positivism. In *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson, 241–60. Cambridge, MA: Blackwell.

Dworkin, R. 1977. *Taking Rights Seriously*. Bristol, UK: Gerald Duckwort & Co. Ltd.

Dyzenhaus, D. 2001. Hobbes and the legitimacy of law. *Law and Philosophy* 20: 461–98.

Fuller, L. L. 1964. *The Morality of Law*. New Haven, CT: Yale University Press.

Gardner, J. 2001. Legal positivism: 5–1/2 myths. *American Journal of Jurisprudence* 46: 199–227.

Hampton, J. 1986. *Hobbes and the Social Contract Tradition*. Cambridge: Cambridge University Press.

Hart, H. 1961. *The Concept of Law*. Oxford: Oxford University Press. Reprint ed. 1982.

Hobbes, T. 1971 (1681). *A Dialogue between a Philosopher & a Student of the Common Laws of England*. Chicago: The University of Chicago Press.

———. 1985 (1651). *Leviathan*. London: Penguin.

Lloyd, S. 2001. Hobbes's self-effacing natural law theory. *Pacific Philosophical Quarterly* 82: 285–308.

Murphy, M. C. 1995. Was Hobbes a legal positivist? *Ethics* 105: 846–73.

Olafson, F. A. 1966. Thomas Hobbes and the modern theory of natural law. *Journal of the History of Philosophy* 4: 15–30.

Riggs v. Palmer, 115 N.Y. 506 (1889).

Walton, C., and P. J. Johnson, eds. 1987. *Hobbes's "Science of Natural Justice."* Dordrecht: Martinus Nijhoff Publishers.

Waluchow, W. 1994. *Inclusive Legal Positivism*. Oxford: Oxford University Press.