Leviathan
Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill

THOMAS HOBBES

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Hobbes's \textit{Leviathan} is a wonderfully written, complex argument about how to design an enduring political order. It was first published during the "Engagement Controversy" following the English Civil War, when the parliamentary victors caused a crisis of conscience for the losing side—including Hobbes, an avowed royalist—by requiring a public promise of allegiance to their new government. We can therefore read the book as an extended justification for such "engagement.‖ Hobbes's arguments remain relevant to us today, because they are perennially relevant: people will always wonder about the relationship between power and authority, about the question, "What can make the exercise of political power authoritative such that I should obey its dictates, even when their content seems to me to be incorrect?‖

Hobbes's radical answer to this question is that subjects are obliged to obey whatever sovereign power rules over them (whether democratic assembly, aristocracy, or monarch) so long as that power can provide them with "Protection."\footnote{Dunn, \textit{The History}, chap. 4.} Exactly what he means, I will argue, can be understood only through a close examination of \textit{Leviathan}'s somewhat neglected discussions of law and legal theory. There Hobbes explains how the relationship between sovereign and subject is mediated by law and law, in his view, has two parts. First, there is the extensive set of natural, unwritten laws that he claims are obligatory even in the state of nature,\footnote{Dunn, ed., \textit{The Economic Limits to Modern Politics} (Cambridge: Cambridge University Press, 1990); Albert Hirschman, \textit{The Passions and the Interests} (Princeton: Princeton University Press, 1977); eds. Istvan Hont and Michael Ignatieff, \textit{Wealth and Virtue} (Cambridge: Cambridge University Press, 1983); and Istvan Hont, \textit{Jealousy of Trade} (Cambridge, Mass.: Harvard University Press, 2005).} and which are altogether obligatory in civil society. Second, he maintains that sovereign commands constitute a set of civil or enacted laws that subjects are also obliged to obey.

Hobbes claims that these two kinds of law "contain each other, and are of equall extent."\footnote{Dunn, \textit{The Cunning}.} However, the fact that the sovereign seems to have authority to enact whatever law he pleases creates the possibility of a clash between obligations in cases where the sovereign enacts a law that contradicts a precept of the law of nature.

Quentin Skinner and his influential school. Skinner insists that classics of political theory have to be understood in their own immediate context, if we want to avoid anachronistically foisting our questions on theirs. In part, this is because he holds that the arguments of the classics have to be interpreted in the light of the understandings of the audience of the particular author. That audience, familiar with the political controversies of the day and with the tropes and nuances of political discourse of its time, is an invaluable interpretive resource. To understand a classic of political thought is an exercise in careful reading of the text, situated firmly in its context. On this basis, Skinner concludes that Hobbes is best interpreted as sharing the views of those contemporary “Hobbists” who either associated themselves or were associated with his works. We should read Hobbes, that is, as someone whose reduction of morality to self-interest and belief in humanity’s fundamentally anti-social nature leads him to argue that we are under a virtually unconditional obligation to obey our sovereign—the person or body who has a monopoly of political power. Legitimacy flows thus from facts about power—a de facto sovereign is by definition a de iure sovereign. Generally speaking, Skinner concerns himself with Hobbes’s laws of nature only to explain how it is that a subject might irrevocably assume the obligation to obey almost any sovereign command.

The Hobbist interpretation has of course much textual support in Leviathan. Hobbes often argues that since any order is better than the misery of the state of nature, it is rational to give one’s obedience to one’s sovereign, as long as he is in fact providing one with the kind of protection—enforceable laws that safeguard one’s survival—so manifestly absent in the state of nature. Hobbes knows that some will object that it is odd that his argument delivers us from the state of nature into the hands of someone who has the discretion to act as a tyrant, that is, “that the Condition of Subjects is very miserable; as being obnoxious to the lusts, and other irregular passions of him, or them that have so unlimited a Power in their hands.” His answer seems to be that those who have understood the horrors of the state of nature or of civil war, will know that order—any order—is better than chaos, as long as they are equipped by “Morall and Civill Science” (the lesson of Leviathan) with “prospective glasses.”

Based on these sorts of passages, even philosophers less concerned with historical context than Skinner usually conclude that Hobbsism is the best reading of Leviathan. For these writers, Hobbes’s natural laws have a “self-efficacy” role. They provide a ladder of obligation out of the state of nature. Once individuals have reached its top, at which point the Commonwealth and sovereignty are established, the ladder is kicked away in that the individuals, now subjects, have duties to the sovereign but no rights against him. Only in the limiting case, when the sovereign actually threatens the continued survival of a particular individual, does that subject cease as a matter of his or her right to self-preservation to owe the sovereign obedience.

Skinner and these philosophers share not only a similar interpretation of Leviathan, but a similar disregard for significant chunks of the text which support what we might think of as a natural law reading of Hobbes, one which says that one’s obligation to the sovereign is based not on his power but on his compliance with the laws of nature. Notably, Hobbsism cannot easily account for Hobbes’s lengthy discussion of natural law in chapter 15, nor for much of his discussion of civil law and the role of judges in interpreting the law, both natural and civil, in chapter 26. In addition, these chapters resonate with extensive and emphatic statements in other chapters which clearly support a natural law reading.

To the extent that philosophers who support Hobbsism do look at what Hobbes actually says in these discussions, their allegiance to Hobbsism forces them to resolve any textual difficulties in ways that seem to strain Hobbes’s claims. For example, on Hobbes’s list of the “Immutable and Eternall” laws of nature is law 15—that safe conduct must be given to mediators, people who are appointed to bring about peace by mediating between the antagonists. If the civil law is simply the commands of the sovereign whom one is under (by definition) a prior obligation to obey, and the sovereign commands that all mediators be executed on sight, it follows from Hobbsism that one is under an obligation to kill mediators, despite one’s knowledge of the laws of nature, a knowledge in which, Hobbes argues, a sovereign is under a duty to instruct his subjects. Indeed, it seems to follow that the command, “kill all mediators,” is the correct interpretation of Hobbes’s claim that the law of nature requires safe conduct for mediators, because subjects must assume that their access to the laws of nature is through the content of the sovereign’s enactments.

This result is not only odd but it reduces the complexity of Hobbes’s argument to something so crude that one might wonder why Leviathan is regarded as a classic. Surely we would not read Hobbes simply as the best exponent of Hobbsism of his time when there were better logical exponents, that is, writers, who, while not nearly as gifted wordsmiths, did not make such a muddle out of presenting the doctrine?

Indeed, it might seem that the only way to save the complexity of Leviathan is to divide it into two books. The first would explain to subjects why rationality requires that they obey the sovereign’s commands no matter their content, because they must take his commands as representing “right
There would be no need in this book for sovereignty by institution, sovereignty created by covenant of individuals in the state of nature, except as a kind of creation myth. Hobbes, indeed, might be better off simply telling subjects that there is no point in delving into the origins of any Commonwealth, as there is “scarce a Commonwealth in the world, whose beginnings can in conscience be justified.” Sovereignty by acquisition, the case where one should understand that one has consented to the rule of a conquering sovereign in the act of subjecting oneself to his power, is all that Hobbes needs to resolve the Engagement Controversy.

The second book, access to which would be reserved to sovereigns and their closest advisers, would instruct sovereigns how to be “able architects,” how to design order in a way that made it most likely that it would endure and thus avoid being a “crasse building,” liable to “fall upon the heads of their posterity.” This advice would include the injunction “Follow the laws of nature,” since a sovereign who does this is more likely not to anger his subjects, just as a sovereign who wishes to decree an official religion (which Hobbes thinks sovereigns have the right to do) should not decree a faith that is deeply at odds with the faith to which most subjects happen to subscribe. Sovereigns who need something more than the counsel of prudence that they should follow the laws of nature in order to secure peace and stability can also be told that if they fail to follow the laws they will be accountable to God. Similarly, subjects in the first book can be told that the rational argument for obedience to de facto sovereignty is one that is also supported by Scripture (on the assumption that the audience is composed of Christians).

I will argue that one should reject the two book thesis, since one can save much of the complexity in Hobbes, and thus do justice to more of his text, by paying proper attention to his discussions of both natural and civil law. These passages reveal Hobbes’s constitutional theory, a theory of fundamental principles of legality which does not fit neatly into our contemporary categories of legal positivism and natural law. Indeed, it seems to me that we can make better sense of Hobbes as an early member of the rule of law tradition, whose members hold that the ultimate constitution of political order is legal not political. For them, the main question of legal philosophy is not what institutions serve to make the exercise of political power most effective, so that law is conceived in terms of criteria for effective communication of command. Rather, the question is what makes the exercise of effective political power legitimate, so that one can conceive of one’s political rulers as authorities, as sovereigns whom one has a prior obligation to obey.

As I will show, for Hobbes, order is legal order, an order created by a sovereign who rules through law, but which necessarily incorporates the laws of nature. So the question is whether a commitment to rule through law, that is, to rule through both civil and natural law, entails accepting constraints that screen or filter out some significant extent commands motivated by “lusts” and “irregular passions” that would disrupt this order. Do the constraints of legal order make the exercise of political power less arbitrary?

Hobbes, on my argument, answers “yes” to this question, despite the fact that he claims that he could never understand why any author would want to make a distinction between fundamental and not fundamental law. For Hobbes, the laws of nature represent exactly these fundamental laws of commonwealth: their observance preserves a legal order that maintains basic protections for subjects, and consequently their obligation to the sovereign. Indeed, proper attention to Hobbes’s discussion of the role of judges in chapter 26 of Leviathan supports a kind of accountability of the sovereign to the laws of nature within civil society that reaches not to God but, via the judiciary, to the sovereign’s subjects. Such accountability comes about not because the sovereign owes any duties to his judges, nor from the duty of judges to legal subjects. Rather, it comes about because of the duty the judges owe their sovereign, one inherent in the judicial role. Only on this view can one account for Hobbes’s own statement of the aim of Leviathan as the demonstration of how to pass “unwounded” between those who “contend, on one side for too great Liberty, and on the other side for too much Authority.”

Hobbes on the Laws of Nature

Hobbes’s general definition of law is that it is “not Counsell, but Command; nor a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to obey him.” Thus Hobbes, unlike John Austin, the nineteenth-century legal positivist, does not define law as a command backed by a sanction, but as a command backed by an obligation. When searching for the source of this obligation, one might well look to civil law, which Hobbes argues that subjects are obliged to follow by virtue of their covenant to submit to a common sovereign. For him, these commitments are binding on the basis of nature’s third law, which holds that individuals should fulfill their covenants. Given the definition just cited, however, this explanation simply raises further questions, this time about...
the laws of nature themselves. Whose commands are they and why are people obliged to follow them? Hobbes says in chapter 13 that in the state of nature there is no justice, since justice requires the presence of a sovereign—a “common Power.” In the very next chapter, he sets out the first two “fundamental” prescriptions in an extensive set of laws of nature that he describes as preceding the establishment of any sovereign power: to seek peace, on condition that this quest does not endanger one’s survival, and to lay down as much of one’s unlimited right of nature as is necessary to secure peace, on condition that every other individual lay down an equal amount. In chapter 15 he sets out another nineteen laws of nature, including law 3, which requires that we keep our promises, the “Fountain and Original Of Justice”; law 7, which requires that punishment be directed solely at the offender or the deterrence of others; law 11, which requires that judges deal with those subject to their judgment in an equitable fashion; law 16, which requires that one take one’s disputes with others to arbitration; law 17, which requires that arbitrators be unbiased; and law 18, which requires that arbitrators be impartial.

Hobbes claims in chapter 15 that individuals in the state of nature are under an obligation to follow these laws, but bound in conscience alone (in foro interno), not in action (in foro externo). One is not obliged to do anything that makes one vulnerable to one’s fellows. When individuals covenant to form a civil society, however, they do so specifically to bring about the secure conditions under which in foro externo obedience to the natural law becomes obligatory—peace enforced by a sovereign power that Hobbes repeatedly insists remains “bound” by the laws of nature.

When we consider Hobbes’s hypothetical state of nature, in foro interno obligation looks rather thin, not only because one is entitled always to put one’s own survival ahead of it, but also because each individual is entitled to his or her own understanding of what the laws of nature require. In fact, Hobbes often qualifies his claim that the laws of nature are laws properly so called, most notably when he says:

> 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; whereas Law, properly is the word of him, that by right hath 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 they are properly called Lawes.

He thus seems to be saying that in the state of nature the laws are not really laws, unless we also understand them as God’s commands. Once we are in civil society, however, Hobbes seems to deem that any problems about the status of the laws of nature are solved: they are the “commands of the Common-wealth; and therefore also Civill Lawes: For it is the Soveraign Power that obliges men to obey them.”

Hobbes, then, offers three ways to understand the status of the laws of nature: they are theorems of reason; God’s commands; or the sovereign’s commands. However, the first way is inconsistent with the claim about in foro interno obligation, since the fact that obeying the laws of nature allows peaceful coexistence in civil society says—on its own—nothing about whether one ought to follow these laws in the state of nature. It is also inconsistent with Hobbes’s repeated claim that the sovereign is accountable to the laws of nature, which Hobbes generally explains as accountability to God. The second way is inconsistent with the idea that the laws are discovered by reason and with the fact that Hobbes insists that the basis of our obligation is our consent to subject ourselves to the sovereign. The third renders Hobbes’s claim about prior obligation to the sovereign circular, because in chapter 30 he insists that the sovereign must teach his subjects the grounds of his rights because the rights “cannot be maintained by any Civill Law, or terrour of legall punishment.” A law that forbids rebellion creates an obligation only because it expresses the “Law of Nature, that forbideth the violation of Faith; which naturall obligation if men know not, they cannot know the Right of any Law the Soveraign maketh.”

David Gauthier has argued that despite the textual difficulties each way encounters, we should prefer the first because it makes better sense of Hobbes’s overall argument. The fact that individuals assent in the state of nature to lay down part of their right of nature is therefore sufficient to ground the subject’s obligation to the sovereign, its rational basis both preexisting the establishment of civil society and persisting into that society.

In my view, that basis is rational only if consent is conditional in the following sense. Individuals consent to the sovereign’s rule on condition that he rule in accordance with the laws of nature. Hobbes says that one must infer the liberties and constraints implicit in a subject’s submission to his or her sovereign from that covenant’s end, that is, the personal security and the opportunity for commodious living afforded by peaceful coexistence. According to him, the laws of nature provide a universally accessible set of infallible instructions to that end. If a ruler should issue an order that breaches the natural law, it cannot therefore be taken as serving
the end of sovereignty, and hence—like an order to commit suicide—it falls outside the scope of those orders the subject has covenanted to obey. It fails to qualify as a true command because no covenant could ever oblige someone to breach the rational precepts for peaceful coexistence. Since all obligation arises from covenants, the Hobblist argument that one is obligated to obey even those of the ruler’s orders that breach the natural law seems incoherent.

As Hobbes makes clear, subjects originally assent not simply to a state which is sufficiently powerful to enforce commands. They assent also, indeed primarily, to a state which will make it possible for them to obey the laws of nature. That is, they assent as individuals who understand that they have a genuine obligation to obey the laws of nature even in the state of nature. Consequently, there is no logical tension between Hobbes’s claim in chapter 26 that in civil society the laws of nature are to be understood as the sovereign’s commands and his claim in chapter 30 that obedience to the civil law depends on a prior obligation, based on the laws of nature. For when we authorize the sovereign, we do not authorize him only because we need a final decision-maker with enforcement powers. If finality were all that was required, Hobbes would not need to appeal, as he does very early in Leviathan, to the figure of an arbitrator as key to the argument of the whole book rather than to a figure who has power to decide in any way he sees fit. It would not do, for example, to have a sovereign arbitrator who decides disputes by flipping coins, since we want someone who actually exercises judgment, and to be a judge means to accept a role that is inherently constrained. As the laws of nature that pertain to arbitration tell us, it would not do to have an arbitrator who took bribes, did not attend to the facts, and who, in a civil society, failed to take account of the law relevant to the controversy, including the laws of nature.

In sum, we appoint an arbitrator not simply to put in place a decision procedure for resolving disputes but also and primarily to ensure that the decisions are appropriate or reasonable judgments. Likewise, individuals in the state of nature consent to another’s sovereignty to institute not merely an effective political order but specifically one shaped by appropriate decisions—decisions, that is, which secure peace by enforcing natural law. As I will now argue, Hobbes’s claim that the laws of nature and the civil law “contain each other and are of equall extent” is best understood as establishing a link between the form of law and natural law substance. A civil society is a legal order, one in which the sovereign rules not only by or through law, but also in accordance with the rule of law.

Hobbes’s view of sovereignty is a legalist one, by which I mean not only that a sovereign is under a duty to rule both by law and in accordance with the rule of law, but also that a sovereign in order to be recognized as such has so to rule. That is, Hobbes’s sovereign is an artificial person, who acts as a sovereign only as long as he acts within the constraints of his role.

Note that in chapter 25, Hobbes sets up his discussion of law as command in chapter 26 by distinguishing between command and counsel or advice. The commander expects that the subject will perform the command simply because it is what he wills. Hence, the commander “pretendeth thereby his own benefit,” that is, “some Good to himself.” In contrast, with “Counsel,” the adviser purports to be advising one for one’s own benefit, which makes one the proper judge of whether to follow the advice. That would seem to make the sovereign, who legislates on behalf of the Commonwealth, someone who pretends only his own benefit. But that cannot be right since the sovereign is an artificial person to whom subjects are “formerly obliged,” and they are obliged because the sovereign’s commands are by definition directed at the end of sovereignty—service to the interests of his subjects. Thus, although Hobbes does not say so, commands that are civil laws differ from other commands, for example, the commands of a manager to an employee, in that they partake of one element of advice—that they pretend the benefit of the individuals commanded.

In part, this role requires that all of the sovereign’s acts be done in the service of the interests of his subjects. In addition, as I argue in this section, it is difficult to understand how the sovereign might act other than by making a law which authorizes his officials to do things. In sum, the acts of the natural individual or individuals who occupy the role of sovereign count as sovereign acts when and only when they are authorized by a law which can be understood as seeking to serve the interests of those subject to it.

Against my interpretation of Hobbes and in favor of the Hobblist one is Hobbes’s reliance on the biblical story of David and Uriah, in which David has the innocent Uriah killed in order to conceal the fact that he had impregnated Uriah’s wife while Uriah was away fighting in one of David’s wars. David, Hobbes following the Bible says, commits no crime or sin against Uriah.

Hobbes uses this story to make the point that the liberty of the subject to do as he pleases within the space left to him by the silence of the law is consistent with the unlimited power of the sovereign, and thus with the
sovereign’s power of life and death. Further, it shows that no act of the sovereign against a subject “can properly be called Injustice, or Injury; because every Subject is Author of every act the Soveraign doth.”

However, in any complex society, in particular in any society in which the sovereign is a democratically elected body, the only way for the sovereign to have someone executed is to enact a law that authorizes his execution by public officials. If the sovereign enacts such a law, the question arises whether it is a law in form but not in substance—a bill of attainder. A bill of attainder is a common law category for a statute that complies with all the technical criteria for the validity of a law in a particular legal order but which may nonetheless fail to be law since it purports at the same time to convict and punish an individual. Such a law violates several rule of law principles: that no one can be convicted retrospectively of a crime, that is, preexisting law has to define the crime in general terms; that the conviction has to take place in a court of law which hears proof, is unbiased, impartial, etc.; and that the punishment has to be proportional to the act.

It might seem absurd to attribute to Hobbes a common law category that seems to permit judges to invalidate statutes properly enacted by the supreme legislature. However, Hobbes is committed to the category by the logic of his understandings of the role of law and of punishment in constructing civil society.

In regard to the logic of law, consider the following extract from Hobbes’s Behemoth or the Long Parliament, a work written after Leviathan, which is a reflection on the civil war in the form of a dialogue where B is the young Hobbes and A the mature Hobbes:

B: Must tyrants also be obeyed in everything actively? Or is there nothing wherein a lawful King’s command may be disobeyed? What if he should command me with my own hands to execute my father, in case he should be condemned to die by the law?

A: This is a case that need not be put. We have never read nor heard of any King so inhuman as to command it. If any did, we are to consider whether that command were one of his laws. For by disobeying Kings, we mean the disobeying of his laws, those his laws that were made before they were applied to any particular person; for the King, though as a father of children, and a master of domestic servants command many things which bind those children and servants yet he commands the people in general never but by a precedent law, and as a politic, not a natural person. And if such a command as you speak of were contrived into a general law (which never was, nor never will be), you were bound to obey it, unless you depart the kingdom after the publication of the law, and before the condemnation of your father.

In this passage, Hobbes expresses doubt that any sovereign would enact the law proposed in the question to him. This doubt is evidence of his optimism that sovereigns will not produce pathologies—situations which undermine subjects’ basis for obedience or continuing consent to sovereign rule. Hobbes does, however, confront the pathology. His first point is that we have to be careful about what counts as a law. There is a difference between, on the one hand, the commands of a father to his children or to his servants and, on the other, the commands of the same individual who happens to be king when he wished to fulfill his political role as sovereign. In the latter case, his commands have to be issued as laws, with the result that no command has any effect until it is in proper form.

Hobbes’s second point is that proper form requires not only that the law precede any official act, but also that it be couched in general terms. A law that commanded me to execute my father if my father were found guilty of a particular offense would not count as a law. Hobbes does then suggest that the sovereign could “contrive” to give this command general form and says that if the sovereign succeeded, I would be bound to obey unless I managed to get out of the country before the condemnation of my father. So while it would be difficult to wrestle legal form into a shape where a law that Hobbes clearly regards as so inhumane that it contravenes the laws of nature could be rendered valid, he admits that, if this could be done, I would be under an obligation.

Now consider Hobbes’s account of punishment, which introduces precisely the rule of law principles listed above in the explanation of a bill of attainder. In discussing harm inflicted by the state, Hobbes distinguishes between acts of hostility and punishment for crimes. Crimes have to be set out in a prior law, a punishment prescribed which is greater than any benefit violating the law can bring (though Hobbes does not in fact require publicity for the punishment), but not greater than what is needed to dispose the criminal to future obedience, and the person has to be properly convicted of the crime.

So if David instead of simply killing Uriah enacts a statute that requires that Uriah be put to death, that statute is effectively a bill of attainder—an illegitimate act of hostility disguised as law, since it inflicts a serious harm, but one which can only properly be inflicted through the mechanism of the criminal law. It is difficult to imagine how such a law could be put—
“contrived” as Hobbes says in the passage from Behemoth—into a form that could coherently claim that subjects were under a prior duty of obligation to obey it. The sovereign would have to enact a law that makes it a capital crime to be a person with whose wife the natural individual or individuals who make up the sovereign body wish to marry. Such a law would put into grave question the rational basis for consent, not only because of its inhumanity, but also because it undermines the distinction between the artificial person of the sovereign and the natural individual or individuals who occupy that role.

Despite my arguments above, the ultimate legal authority that Hobbes reserves for sovereigns might seem to mean that in practice there are no legal constraints on the scope of legitimate law. In addition, even saying that commands by definition serve the interests of subjects does not in itself tell against Hobbism, for example, since Hobbists rely on exactly such definitions. For them, the assertion that a sovereign’s commands are by definition just, in accordance with natural law, etc., means simply that subjects are under a duty to take the commands as representing right reason and this position certainly seems to accord with Hobbes’s repeated insistence that subjects must subordinate their judgment to the sovereign’s, adopting his law as “the publique Conscience, by which [they] hath already undertaken to be guided.” 47 Furthermore, a Hobbist might well maintain, even if the sovereign does violate the laws of nature, Hobbes takes great pains to emphasize that he is accountable only to God for his iniquity.48

Nevertheless, I show in the following two sections how proper attention to Hobbes’s discussion of the role of judges in chapter 26 of Leviathan supports a kind of accountability of the sovereign to the laws of nature within civil society that reaches not to God but, via the judiciary, to the sovereign’s subjects. Such accountability comes about not because the sovereign owes any duties to his judges, nor from the duty of judges to legal subjects. Rather, it comes about because of the duty the judges owe their sovereign, one inherent in the judicial role.

The Interpretive Obligation of Judges

Judges are, as Hobbes tells us in the “The Introduction,” the “artificiall Joynts” of that artificial creation, the sovereign, who wields, Hobbes says in a little noted phrase “just Power.” 49 In chapter 26, he tells us that all laws, written and unwritten, need interpretation and judges are the officials who are delegated authority by the sovereign to do that task.50 In addition, Hobbes insists that when they do that task, they must interpret law in general so as to make it comply with their understanding of the laws of nature. It would be a great insult—a “contumely”—for judges to think other than that the sovereign intended to implement the laws of nature.51

There are several ways, however, in which Hobbes seems to limit the role of the judiciary in implementing the laws of nature. First, it is for the sovereign to declare what the laws of nature require, so when interpreting an enacted law, the judge is always working with text provided by the sovereign. While the judge must come up with a “reasonable” interpretation of that text, where “reasonable” means “in accordance with the laws of nature,” his interpretations are of that text. Second, while Hobbes insists that the laws of nature are both immutable and eternal, he exploits this claim to argue for limits on the legal force of judges’ interpretations of the laws of nature to the case before them. There can be no doctrine of precedent, especially when it comes to judicial interpretation of the laws of nature, because of the risk of perpetuating mistakes as to what the laws require.52 Third, Hobbes never suggests that a judge may invalidate a law for inconsistency with the laws of nature; rather, if the judge cannot find a reasonable interpretation, he should “respit Judgement till he have received more ample authority,” which suggests that ultimately the sovereign will decide.54 This suggestion is in line with Hobbes’s claim that the sovereign is the final interpretive authority, because if the sovereign is not, if he is bound by laws of which others are the interpreters, the others are the sovereign, which makes them bound by law, thus producing an infinite regress.55

These limits might seem to support Hobbism, especially because the sovereign has both first and ultimate authority to declare what the laws of nature require. Each limit, however, ultimately reinforces a natural law reading of Leviathan. First, all those parts of the text where Hobbes contemplates the possibility that the sovereign may violate the laws of nature, far from supporting Hobbism, raise a problem which is apt for a natural law solution.56 Hobbism, that is, is best supported if Hobbes denies any possibility of conflict between the sovereign’s deeds, including his enactments, and the laws of nature. Second, while Hobbes excludes a doctrine of precedent in respect of the laws of nature, this exclusion includes the sovereign, for not even the sovereign may refuse to hear proof, or one can assume, make a law which requires that judges are permitted to convict
without hearing proof. The very fact that Hobbes confines the legal force of judgments to the parties, especially in the case of interpretation of the laws of nature, heightens rather than diminishes the status of the laws of nature in civil society. It reinforces their immutability by requiring that their interpretation not be fixed by the contingencies of time and place. Third, when Hobbes insists that the sovereign is legally unlimited, he means legally unlimited only in that the sovereign can escape being bound by his own enactments by enacting a statute that frees him from a particular law. Even when Hobbes insists that a sovereign must have final interpretive authority over the law, he is careful to qualify his claim. He states that the sovereign's lack of legal limitation does not mean that the sovereign is free to disobey enacted law. The sovereign is free only to change the enacted law and that lack of legal limitation pertains only to the limits set by enacted law not, Hobbes emphasizes, to the limits set by the laws of nature.

Despite the textual evidence above, it might seem that when push comes to shove the sovereign must prevail when it comes to the content of the law, which shows that ultimately Hobbes's theory of law and politics is Hobbesian. Should the judges arrive at interpretations of the law at odds with the sovereign's judgments, the sovereign can simply enact his own interpretations into the law in a much more explicit fashion, to which judges will have ultimately to defer. At that point, Hobbes's claim that the law of nature and the civil law contain each other and are of equal extent does not support the natural law position that the laws of nature control the content of the enacted law. Rather, it supports the Hobbesian position that one should defer to the enacted law is by definition legitimate.

But this conclusion fails to take into account three features of Hobbes's position. First, while the sovereign has to prevail in any interpretive dispute with judges, it is important to appreciate that the dispute is an interpretive one, a contest of interpretations, in which the issue is law's authority, not the question whether the sovereign has superior power. Second, if the sovereign chooses to prevail by power rather than by interpretation, so that he effectively overrides the laws of nature, this fact does not in any way diminish the laws' status as fundamental principles of legality, which have to be in place for civil society to be maintained. Finally, if the sovereign does so to prevail, he signals to his subjects that he no longer governs by the laws of nature, and thus undermines at the same time his authority and the basis for their consent.

My argument requires us to consider examples which Hobbes did not directly address. But they are sufficiently close to examples he does address to make them apt for drawing out the implications of his legal theory.

Hobbes's view about final interpretive authority over natural and civil law is quite complex. For example, assume that judges have been interpreting enacted laws in ways which do not reflect the sovereign's understanding of the laws of nature, and the sovereign wishes to bring them back into line. In order to exercise his final authority, he would have to enact a new law. That law in turn would necessarily be subject to interpretation by judges, since all laws are subject to interpretation. If a challenge to the law arose, judges would have to try to interpret it in light of their understanding of the laws of nature. Of course, if the sovereign's interpretation of the laws of nature was reasonable, judges would have no need to attempt to reinterpret—to try to come up with a reasonable interpretation to avoid the unreasonable result which the letter of the new law might seem to indicate.

In other words, an "authentique" interpretation of the law requires more than that the interpretation is issued by a person who has authority to do so and who has complied with the formal requirements for issuing an interpretation—handing down judgment in proper form for a subordinate judge or enacting a law in the case of the sovereign. It also requires that the interpretation is such: it is not an overriding of the law.

Suppose, for example, that the government of the day sets up by executive decree a system of military tribunals to try those suspected of being security risks. The tribunals operate with special rules of evidence that permit suspects to be convicted without being able to test the allegations made against them when these come, according to the government, from sensitive sources of information. When this system is challenged in court, the judges find that there is in fact no law that gives these tribunals authority, because the legislature has not enacted such a law. Some of the judges also express concern about the nature of the procedures, because they seem to allow for conviction on the basis of untested allegations, rather than facts. Should the legislature subsequently enact a law that both establishes such tribunals and requires them to operate under special rules designed properly to test the sensitivity of confidential information, that law is a reasonable interpretation of the law of nature which requires judges to take notice of the facts. However, a law that sets up the tribunals and permits them to convict on the basis of untested allegations overrides and does not interpret the laws of nature.

Consider now a different example—a law ordering judges not to have regard to the laws of nature in interpreting the sovereign's enactments. Such a law has many contemporary equivalents in legislation which contains
ouster or preclusive clauses. These are statutory provisions which either oust totally or partially the jurisdiction of the courts to review the decisions of tribunals or officials, or which preclude the courts from relying on particular principles of the rule of law in interpreting the statute. Indeed, such provisions are back in fashion in the wake of 9/11, as governments seek to shield statutes from judicial interpretation too friendly to the rule of law.

In this example, the sovereign issues a law which contains an ouster provision of the second sort. It does not tell judges that they are deprived of jurisdiction to interpret the law that authorizes an official to act, a command which would be problematic for Hobbes because any official has an authority limited by law, both written and unwritten, so that it is imperative that a legal subject is entitled to ask of a judge by what warrant the official acts, that is, whether the official is acting within the limits of his delegated authority. Rather, the law tells judges that when they interpret the sovereign's enactments, they may not rely on the laws of nature. Thus it attempts a prospective override of the laws of nature. Were this law in place, it might seem to follow that judges who had to interpret the law which sets up the tribunals and permits conviction on the basis of untested allegations could not construe that law as an overriding law. In order so to construe it, the judges need the resource of the laws of nature, of which they have been deprived by sovereign command.

However, were the sovereign to enact this law, he would not merely deprive judges of an interpretive resource, he would also change the judicial role in a way that offends Hobbes's idea of the legal constitution of political authority, a constitution which has to be in place in order for civil society to exist. At stake here are two ideals of law, one which fits better with the legal positivist tradition, the other with the natural law tradition.

The positivist ideal regards law as an instrument for communicating the judgments of the sovereign as effectively as possible. The sovereign has to observe certain constraints in order to make his judgment known; for example, he must comply with his rule of recognition—whatever technical criteria have to be met in order for a law to be recognized as such. But these are not constraints on content; rather they are constraints which ensure that his laws will be recognized as such and thus that the content of his judgments will be known to his subjects. The role of judges is then simply to resolve the inevitable cases of interpretive doubt.

At first sight, this positivist ideal might seem to describe Hobbes's view of judicial role, but it leaves out some essential features of his discussion. Hobbes shares with the natural law tradition a non-instrumental view of law since his ideal of legality includes the laws of nature. As we have seen, judges are required to endeavor to understand enacted law as if it were intended to live up to that ideal.

In other words, Hobbesian judges must try to work out what the sovereign intended. But while that task is in part one of working out what the particular law was designed to achieve—what the sovereign intended to communicate—a more general aim is always attributed to the sovereign—the sincere attempt to further the constitutional principles of legal order. Thus, the role of judges in ensuring law lives up to the ideal is not confined to cases of interpretive doubt in the positivist sense, cases which arise because the sovereign failed to communicate clearly. Doubt arises also when what otherwise might appear to be a clear communication is suspect because if that communication were taken to be the intention of the sovereign, the judge would have to conclude that the sovereign intended to override rather than uphold a constitutional principle.

Positivists traditionally reject the claim that legal order must include such constitutional principles, just because they appreciate that any concession that there are such principles gives to judges a very different role than the one they find politically desirable. Moreover, they argue that the presence of such principles is contingent on a political decision both to incorporate them into law and to give to judges a constitutionally entrenched authority to protect the principles even in the face of an explicit statutory intention to override them. They take the fact that many legal orders do not give judges such an authority as evidence of the claim about the contingency of constitutional principles. Indeed, even the natural law tradition might seem ambivalent on this point, with its proponents either insisting that judges must have such authority since an overriding law cannot be valid, and has thus no claim to be applied by a judge, or judging their views on this issue.

Hobbes's position is unusual since he insists there are such principles at the same time as he seems explicitly to deny judges authority to protect the principles in the face of an explicit statutory intention to override them. He thus recognizes that a sovereign can violate constitutional order. Hobbes also wants such actions constrained. He maintains, for example, that an explicit grant by the sovereign of one of his rights of sovereignty to another individual must be treated as void, as such a grant is inconsistent with the end of sovereignty. He is never clear, however, about what the institutional remedies in such cases should be. The closest he comes is in his suggestion that a judge confronted by an overriding law should defer
deciding until the judge has consulted a higher authority. It might then seem that Hobbes is engaged in the same fudging exercise as some other proponents of the natural law tradition.

However, if we look to two quite recent institutional innovations in common law orders, we can better understand that the important issue for philosophy of law is not so much the issue of what kind of institutional remedy is prescribed for such statutory overrides. Rather, the issue is the very recognition that such cases present problems or pathologies for one's account of the interaction of law and politics such that the question of institutional remedies becomes pressing.

Consider, for example, section 33 of the Canadian Charter of Rights and Freedoms which permits the federal and provincial legislatures to override by statute judicial determinations that their statutes violate certain Charter-protected rights and freedoms. The override is valid for a period of five years, after which it must be legislatively renewed if it is not to lapse. However, the override does not render any of the overridable values unconstitutional. It merely gives to the legislature a limited opportunity to operate unconstitutionally for a period, on condition that it owns up to that fact.

Consider, in addition, the United Kingdom's Human Rights Act (1998), which in section 3 requires that judges strain to interpret statutes to make them compatible with the human rights commitments of the statute, and in section 4 requires judges to make a declaration of incompatibility of the statute with the human rights commitments, if they cannot find an interpretation under section 3. If a section 4 declaration is made, the government may itself amend the statute, have the legislature amend it, or do nothing, though doing nothing puts it in violation of its international legal commitment to the European Convention on Human Rights, a matter on which the European Court of Human Rights will eventually pronounce.

Both of these legal orders have adopted a form of constitutionalism that is deeply influenced by their common law heritage, in which judges are under an interpretive obligation to find a meaning for statutes that conforms to fundamental principles of legality, principles to which the legislature is taken to be committed qua legislature. That obligation entails the distinction between a statute that can reasonably be understood as an interpretation of the principles and one that overrides. From that distinction it follows that an overriding statute presents an institutional problem that requires a solution. It also follows that the government's decision to govern outside of the constitutional order will put strain on its claim to be legitimate, since a valid override requires the public to take note of the fact that the constitutional order has been put aside for the time being.

Hobbes, despite his aversion to the common law tradition, shares with it this very constitutional structure. He identifies peace and protection as the end of commonwealth, and as the justification for subjects' obedience to their sovereign. As a result, he maintains that a sovereign must enact "good" laws, understood as those necessary for the benefit of subjects. Given his repeated insistence that the laws of nature represent immutable means to the end of peace, "good" laws are necessarily those that enforce and respect the natural law. A Hobbesian sovereign therefore secures political authority, the right to rule, to the extent that his legislation effectively enforces and respects the laws of nature. Moreover, Hobbes is clear that civil society depends on such constitutional rule not only for its viability, but also for its legitimacy.

The issue here is not so much whether subjects are entitled to disobey laws that clearly override the laws of nature, though it always worth recalling the right of the subject to disobey commands that threaten his survival. It is sufficient to establish these claims to point out, as Hobbes does, that people under the rule of iniquitous laws will simply rebel or revert to behaving as though they were in the state of nature, questions of obligation becoming irrelevant as the commonwealth disintegrates. Rulers who fail to observe the laws of nature, then, effectively design "crass" legislative structures in the same way as those who succumb to the other political pathologies that Hobbes lists in his chapter on the things that tend to weaken or lead to the dissolution of a Commonwealth. Indeed, one could argue that Hobbes must hold Hobbism to be self-defeating, since it licenses exactly the sort of infractions against the laws of nature that will ultimately precipitate the breakdown of social order it claims to prevent.

Finally, the judges have a distinct role in maintaining the relationship between subject and sovereign because of their duty, one owed to the sovereign, to interpret all enacted law in the light of their understanding of the laws of nature. When a Hobbesian sovereign deals with an interpretive problem arising out of a conflict between the positive law and the laws of nature by making it clear that his intention is to violate the laws of nature, he is overriding in the section 33 sense. My thought is that a Hobbesian (not a Hobbist) judge may then make the informal equivalent of a section 4 declaration of incompatibility, by pointing out in his judgment that it seems that that the sovereign has manifested an intention to violate a law of nature.

Notice that such an informal declaration is the remedy judges have always had available to them in the common law tradition. Even when judges do not accept a claim that a statute is void if it offends fundamental principles of legality, they are able to signal in their judgments that the
legislature has chosen to override principles which the judges regard as constitutional. Such a signal is entailed even in the very bare suggestion Hobbes makes that a judge should defer judgment to consult a higher authority, when a statute appears to be an overriding one.

This situation is different from a failure to make a law, the first example from *Behemoth*, since there is a valid law. But it is one which has a question mark over it because it is suspect from the perspective of legal order, more precisely from the basis of legal order—its immutable, constitutional principles. In other words, it is the second example from *Behemoth*, a law which has a shaky claim to authority.

Hobbes's remark that one may escape the obligation of the properly formulated command to kill one's father by leaving the country after publication of the law but before one's condemnation might seem to amount to the uninteresting claim that one can escape one's obligations by escaping the territorial limits of the power of the sovereign. Similarly, Hobbes's reservation of the right of resistance to the sovereign to situations in which one's personal security is threatened can be interpreted as his recognition of the fact that people who are so threatened will resist, given the human drive for survival. However, both these interpretations fail to grasp the way in which these situations are normatively complex for Hobbes, because of the clash of important principles.

In the case of the right of the subject to resist official action likely to result in the death penalty, it might seem that the logic of Hobbes's argument should issue in the prohibition of the death penalty as contrary to natural law, rather than in the messy situation where sovereign authority clashes with the right of resistance. Similarly, in the situation where the sovereign manages to enact a properly formulated law that overrides the laws of nature, it might seem that the logical solution is to give judges authority to invalidate the law or to suspend its operation, rather than to raise doubts about whether such a law could in fact be contrived and then to raise doubts about the claim to authority of such a law, if contrived into existence.

However, as already indicated, the issue of what kinds of remedy a judge has for violations of fundamental principles of legality is not as important as recognizing that this kind of tension arises in legal order because any legal order is based on such principles. It is a positivist mistake to suppose that fundamental principles of legality have weight in legal order only when they are entrenched in a bill of rights, which gives to judges the authority to invalidate offensive statutes. Indeed, the tensions I described earlier within Hobbes's characterization of the laws of nature might well be explained by the fact that he did not see that the legal force of the laws, their bindingness, is best captured by the metaphor of weight. That is, Hobbes's only model for understanding the force of law was command, which meant that he found himself required at times to distort his own account of the status and role of the laws of nature.

Here I am thinking of Ronald Dworkin's initial critiques of legal positivism, in which he argued that positivists understood law as a system of rules, thus neglecting the role of legal principles. A rule differs from a principle, according to Dworkin, in that a rule applies in an all or nothing manner, while principles always apply, if relevant, but have to be assigned weight. Judges are the officials charged with determining the issue of weight.

I would venture that same distinction is implicit in Hobbes, though he differs from Dworkin when it comes to the force of judges' decisions—they have force only for the parties to the case, not for the future; that is, judgments are not a source of law. Indeed, Hobbes differs from Dworkin and the common law tradition, not because he rejects the idea that judges must rely on fundamental legal principles in order to interpret the law, but only because he wishes to confine the scope of their judgments as to what those principles require. Hobbes also differs from Dworkin that the fundamental principles of legality are not worked out by judges examining substantive rules of law and asking what shows such rules in their best moral light. Rather, such principles are worked out as a matter of institutional design—how to design legal order in such a fashion as to ensure that those who have political authority will exercise that authority in a way most likely to serve the interests of legal subjects, to maintain, in short, the reciprocal relationship between protection and obedience.

Whatever these differences, the commonality just mentioned is crucial. Dworkin's theory of law is often criticized as parochial because it seems to presuppose judicial review on the constitutional model of the United States of America, where judges are able to strike down statutes that offend constitutional principles. To the extent that Dworkin gives the impression that this kind of judicial review is necessary to legal order, he is indeed vulnerable to this criticism. But if one appreciates that the issue is not what remedies are available in legal orders for legislative overrides of constitutional principles, but rather the insight that constitutional principles inhere in the practices of a legal order, it follows that Dworkin and the common law tradition, with its feature of legislative supremacy, are part of the same family of positions in legal theory. Hobbes then belongs to that same family, and not to the positivist tradition, which is best understood as one which for political reasons wishes to understand law simply as an effective instrument for
the commands of the governing elite. Hobbes, in other words, is a rule of law rather than a rule by law thinker.73

Conclusion

Recall Hobbes's remark that there is "scarce a Common-wealth in the world, whose beginnings can in conscience be justified."74 We also know that he thought that power is not a sufficient condition for authority. In order to have authority, the sovereign has to rule by right. Even the most determined interpreters of Hobbes as a Hobbist admit this. Thus there seems to be a contradiction at the heart of Hobbes's political thought, one which Hobbism resolves by inferring an almost absolute obligation to obey the sovereign, whatever the content of his commands. The sovereign has absolute authority, showing that Hobbes failed in his aim to show how we might avoid the peril of granting the sovereign too much authority.

Over the course of this essay, however, I have argued that we can make better sense of Hobbes as a founder of the rule of law tradition, whose members hold that the ultimate constitution of political order is legal not political. For them, the main question of legal philosophy is not what institutions serve to make the exercise of political power most effective, so that law is conceived in terms of criteria for effective communication of command. Rather, the question is what makes the exercise of effective political power legitimate, so that one can conceive of one's political rulers as authorities, as sovereigns whom one has an absolute obligation to obey.

For Hobbes compliance with legality is both necessary and sufficient for legitimacy, while for later thinkers it is usually necessary but not sufficient, notably because representative democracy and/or constitutional entrenchment of liberal principles are also considered necessary. But even if Hobbes were wrong to think that compliance with legality is sufficient for legitimacy, what drew him to that thought remains of enduring importance. I mean here his idea that there are fundamental principles of law compliance with which can serve to distinguish between sheer power, the ability to secure compliance through terror, and authority, the ability to secure compliance on an ongoing basis through consent.

Even if the origin of every sovereign state lies in a series of successful and bloody power grabs, sovereignty by institution might represent not an actual process but a model for rendering de facto power legitimate. De facto sovereigns take a step to becoming de iure sovereigns when they exercise their power according to law, which requires compliance not only with legality's form, but also with legality's substance in the laws of nature. A sovereign who rules by acts of hostility (Hitler or Stalin) is not a sovereign properly so called, since he treats his subjects not as such but as potential enemies.75 The subjects are in a state of nature relationship with him, not a civil society relationship. If the state of nature relationship is disguised as a legal relationship, that disguise brings the legal order into disrepute, amongst other things making it difficult for law to be considered by its subjects as their "publique Conscience."76

Hobbes's great insight is that an enduring order is one which most subjects have reason to believe deserves their consent and that legality plays a crucial role in providing them with a basis for this belief by protecting their basic interests. In an era when there is increasing skepticism about not only the effectiveness of Western attempts to export to or impose on the rest of the world the principles of liberal democracy, but also about the morality of such attempts, it might well be worth focusing on Hobbes's reflections about the kinds of institutions that will help us to pass "unwounded" between those "that contend, on one side for too great Liberty, and on the other side for too much Authority."77

NOTES

I thank my Philosophy 412 undergraduate seminar in the Fall of 2006 for providing me with an ideal forum to discuss these ideas, especially Alastair Cheng, who also provided me with a challenging set of comments on a draft of this essay, and Ian Shapiro, for comments on the final draft.


6. At times Skinner does express concern about this interpretation—see Skinner, “The Proper Signification of Liberty,” in Skinner, Visions of Politics, p. 209, at 232-37. Nevertheless, he consistently concludes that in authorizing the state, individuals place themselves "under an absolute obligation not to interfere with the sovereign in the exercise of the rights they have transferred to him. The sovereign acquires complete discretion and absolute power to decide what shall be done to preserve the safety and contentment of every subject under his charge."

Hobbes, Leviathan, chapter 24, p. 150.
Indeed, it would be self-contradictory for a subject to refuse to assist the public acts of the sovereign. "The concept of the political covenant is not a means of limiting the powers of the crown; properly understood, it shows that the powers of the crown have no limits at all" (ibid., p. 208).  

7. Hobbes, Leviathan, chapter 20, p. 126, for example.  
19. See, for example, Hobbes, Leviathan, chapter 26, p. 172.  
20. Hobbes, Leviathan, chapter 26, p. 174. He immediately adds, "Nevertheless one may very reasonably distinguish Laws in that manner" and that a fundamental law "is that, which being taken away, the Common-wealth falleth, and is utterly dissolved; as a building whose Foundation is destroyed," (ibid., chapter 26, p. 174).  

21. See his Dedication to Francis Godolphin, Leviathan, p. 3.  
27. See Hobbes, Leviathan, chapter 17, p. 102, for the aim of peace, and chapter 26, p. 167, for perhaps Hobbes's strongest claim about the status of the laws of nature.  

33. Gauthier, "Hobbes: The Laws of Nature," p. 283. In particular, Hobbes claims that "when a man hath in either manner abandoned, or granted away his Right [i.e. renounced or transferred it]; then is he said to be OBLIGED, or BOUND" (Hobbes, Leviathan, chapter 14, p. 81); likewise, he holds that "there is no Obligation on any man, which ariseth not from some Act of his own" (ibid., chapter 21, p. 131).  
34. Although Gauthier does not explicitly make the argument I present in the text, much of what he says seems to support it. See Gauthier, "Hobbes: The Laws of Nature," pp. 278–79.  
42. Though see Hobbes's distinction between sovereign action by virtue of law and by virtue of power (Hobbes, Leviathan, chapter 21, p. 133).  
45. Hobbes, Leviathan, chapter 28, p. 188.  
46. Ibid. In an illuminating essay on Hobbes's theory of punishment, Mario A. Cattaneo suggests that the logical conclusion of Hobbes's arguments in this regard is that the death penalty should be outlawed because of its deep irrationality (Mario A. Cattaneo, "Hobbes's Theory of Punishment," in K. C. Brown, ed., *Hobbes Studies* (Oxford: Basil Blackwell, 1965), p. 275, at 293). The death penalty, that is, conflicts with the right of self preservation. Even though Hobbes did not himself come to this conclusion, Cattaneo thinks it is significant that Hobbes set some limit to the absoluteness of sovereign authority, through the insistence on the affected individual's right of resistance. The limit is that the sovereign's act of punishment does not have authority over the subject—he is entitled to resist.  
cially, chapter 26, p. 168, where Hobbes maintains that subordinate, if they refuse to hear, Sentence exemption from accusations of injustice, for example, chapter 24, p. 110. Thus, the insistence on the sovereign's incapacity for committing injustice, and on his exemption from accusations of injustice, for example, chapter 24, p. 110, he also mentions that property distributions prejudicial to the public good run counter to the ends of sovereignty, and are likewise "to be reputed void" by the will of all subjects. Nevertheless, Hobbes immediately follows up by arguing that no such "breach of trust, and of the Law of Nature" can justify accusing the sovereign of injustice, let alone taking arms against him (chapter 24, p. 150).

56. See Hobbes, Leviathan, chapter 18, p. 108; chapter 28, p. 190; and especially, chapter 26, p. 168, where Hobbes maintains that "all Judges, Soveraign and subordinate, if they refuse to hear, Proofes, refuse to do Justice: for though the Sentence be Just, yet the Judges that condemn without hearing the Proofes offered, are Unjust Judges," a claim that comes very close to contradicting his earlier insistence on the sovereign's incapacity for committing injustice, and on his exemption from accusations of injustice, for example, chapter 24, p. 150.

59. This example is loosely based on Hamdan v. Rumsfeld 126 S. Ct. 2749 (2006).
63. See especially Hobbes, Leviathan, chapter 21, p. 132.
64. Hobbes, Leviathan, chapter 30, p. 208. The chapter as a whole suggests that Hobbes does not consider the requirements of sovereign office to be prudential—they are all full blooded duties.
66. In addition, consider the following comments: "When therefore our refusall to obey, frustrates the End for which the Soveraigny was ordained; then there is no Liberty to refuse; otherwise there is" (Hobbes, Leviathan," chapter 21, p. 132): "I conclude therefore, that in all things not contrary to the morall Law, (that is to say, to the Law of Nature,) all Subjects are bound to obey that for divine Law, which is declared to be so, by the Lawes of the Common-wealth" (chapter 26, p. 173).
67. Hobbes, Leviathan, chapter 30, p. 201. Despite his insistence that natural law is universally comprehensible and self-evident, Hobbes can still sometimes be cagey about endorsing the idea that individual subjects might access the laws of nature independently of the sovereign and his judiciary; nevertheless, his admonition (in chapter 27, p. 182), to subjects to "take notice of what is inconsistent with the Soveraignity" in cases where rulers grant liberties that clash with their ideal ends tacitly allows subjects to recognize at least extreme cases of unconstitutional sovereign activities by themselves. This is fully consistent with the connections Hobbes draws between negligent government and rebellion (chapter 30, p. 202), a reasonable outgrowth of his claim that "needy men, and hardly, not contented with their present condition" in a political order will seek relief through "a new shuffle" (chapter 11, p. 62).
69. See note 46 above.
70. Beyond Hobbes's characterization of sovereign attempts at divesting essential powers as "void" except through total abdication (Hobbes, Leviathan, chapter 18, p. 111), he also mentions that property distributions prejudicial to the public good run counter to the ends of sovereignty, and are likewise "to be reputed void" by the will of all subjects. Nevertheless, Hobbes immediately follows up by arguing that no such "breach of trust, and of the Law of Nature" can justify accusing the sovereign of injustice, let alone taking arms against him (chapter 24, p. 150).
72. Lon L. Fuller might then be the twentieth-century philosopher of law whose account of the interaction of law and politics is closest to Hobbes's, since he, like Hobbes, generated what he called the "internal morality of law" out of thought experiments about optimal institutional design in the service of a relationship of reciprocity between lawmaker and legal subject. See Fuller, The Morality of Law (New Haven, Conn.: Yale University Press, Revised Edition, 1969). Fuller himself adopted the Hobbesist interpretation of Hobbes and so would not have taken kindly to this comparison.
73. In seeing why this distinction is fundamental in the history of legal thought, one also sees why the terms of contemporary debate in legal philosophy might be unhelpful for understanding Hobbes, just because they require us to pigeonhole thinkers as positivists or natural lawyers. It also shifts the terrain of argument from conceptual claims about the very nature of law to political claims about the most productive way to understand law's role in maintaining a stable order, one which is designed to serve the interests of those subject to centralized political power. It allows us to see, for example, that Hobbes, Dworkin and Hans Kelsen belong to the tradition of rule of law thought, while Jeremy Bentham, John Austin, and HLA Hart belong to the rule by law tradition.
76. Hobbes, *Leviathan*, chapter 29, p. 194. Hobbes also says that when the sovereign punishes properly, his relationship with the individual punished is a state of nature relationship. That is, at the moment of punishment, at least from the subject's perspective, the act of punishment is tantamount to an act of hostility, in which the sovereign will prevail by sheer power, not authority. There is, I would venture, something deeply humane about Hobbes's refusal to provide a metaphysical solution to the problem of punishment in political theory—one which attempts to show that there is no violence at all because the victim's rational self consents to the violence, or because it makes the victim more whole, and so on. However, it is still important that other subjects understand that when power—the sword of the sovereign—is needed to enforce authority because a subject has failed to understand his obligations, the exercise of power be performed in as legitimate a fashion as it can be, that is, in accordance with the laws of nature. In addition, from the punished individual's perspective, it might well be considered important that while he is entitled to look on the act of punishment as an act of violence, the fact that it is properly performed is important for the prospect of reforming him, so that he might reenter civil society as a subject.


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**THE RECEIVED HOBBES**

ELISABETH ELLIS

Three and a half centuries of commentary have not exhausted the store of insight to be drawn from Thomas Hobbes's *Leviathan*. While the standard view that has accumulated over scores of works continues to offer a satisfactory starting point for understanding the text, a number of basic interpretive issues remain controversial. Moreover, even hundreds of years after its initial publication, *Leviathan* still regularly inspires new modes of understanding the world. In addition to its fundamental place in the development of modern moral and political philosophy, Hobbes's work remains a vital and essential point of reference for research in the human sciences.

*Leviathan*'s durability is all the more astonishing when one considers the radically alien vision of human life on which it is based. While the later British contractarian John Locke remains appealing in part due to the familiarity of his assumptions about human nature, Hobbes enjoys continued popularity despite the strangeness of his view. In fact, much of the power of Hobbes's system derives from its very distance from empirical political reality. Like an economist who presumes perfect competition in order to examine general relationships between supply and demand, Hobbes discounts fundamental elements of reality—including especially political solidarity—in order to investigate the conditions of stability and social cooperation.

In this essay concerning the reception history of Hobbes's *Leviathan*, I distinguish between two major lines of interpretation—historical and philosophical. Both schools offer useful correctives to the conventional view of Hobbes's system, and I discuss them in the first section of the essay. Next, I show that the historical and philosophical readings of Hobbes's response to the "fool" tend to speak past one another, with the former interpreting the fool as a representative of dangerous doctrines, and the latter concentrating on the fool's dangerous individual behavior. Scholarly focus on the different interpretive points of view, however, has obscured the audacity of Hobbes's system. I turn in the third section of the essay to a review of some of *Leviathan*'s more radical political teachings.