Laws Living and Armed:
The Legal and Political Theory of Thomas Hobbes

By

Rosemarie Elias Wagner

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Committee in charge:

Professor Kinch Hoekstra, Chair
Professor Wendy Brown
Professor Victoria Kahn
Professor Daniel Lee
Professor Shannon Stimson

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Abstract

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Laws Living and Armed corrects a longstanding misreading of Hobbes's theory of law and its relationship to his political theory. The aim of this dissertation, in addition to offering the first comprehensive account of a Hobbesian theory of positive law, is to demonstrate that Hobbes's arguments about law make at least three significant and previously overlooked contributions to political theory. First, I show that Hobbes's theory of law is not one of unilateral command, but rather depends on (a) the relationship between ruler and ruled, (b) the system of administration through which the sovereign rules, and (c) the goals of the laws. Traditionally Hobbes is portrayed as promoting a simplistic command theory of law that is a sort of crude precursor to legal positivism. Recent provocative scholarship has successfully highlighted many of the overlooked legal arguments Hobbes makes; however, these recent interpretations all portray Hobbes as a proponent of the rule of law constraining the sovereign. I show that Hobbes held that positive law is dependent, not just on having been commanded, but on many other factors such as the system of law in place and the legal understanding of those subject to law. However, this more complex understanding of the requirements of law serves, not to weaken sovereign power, but rather to bolster Hobbes's theory of unified political authority over and above the law.

Second, I show that Hobbesian political power is more legalistic than is commonly thought. Hobbesian political power is almost universally portrayed as being arbitrary and frequently understood in terms of physical force or the fear thereof. The famous frontispiece of *Leviathan*, the sovereign larger than life who wields a sword over and above the land, seems to embody this arbitrary power. However, as I show, Hobbes was committed to a theory of the state that was legal and procedural. While thoroughly legal, it is not exclusively so; the Hobbesian sovereign is absolute in that legitimate sovereign action necessarily extends beyond law. Yet, the sovereign will is generally executed through law and, as such, sovereignty for Hobbes depends upon how the officers of sovereignty interpret and apply the law. This throws into question the distinction between the right of

sovereignty and the exercise of sovereignty that has been made popular recently in political thought.

Third, Hobbes conceives of legal interpretation and execution as existing outside the sovereign legislator, and therefore empowering subjects to act against the sovereign; but I differ from recent work that defends a Hobbesian right of resistance by arguing that he gives subjects this power only in order to protect and further empower sovereignty itself. On my interpretation, there is not only an asymmetrical relationship between obligation and authority in Hobbes's theory (in which authority is absolute but subjects' obligations are qualified), but a further obligation of subjects to support the absolute authority of sovereignty even *against* the sovereign herself. Looking at Hobbesian absolutism through a legal lens reveals that the sovereign has absolute power, not simply because she has the sword, or because she has been authorized absolutely. Rather, it is because subjects have a moral and legal obligation not merely to obey sovereign command, but to actively ensure that sovereign right remains absolute even should the sovereign herself attempt to legislate otherwise. Subjects must, if necessary, defend absolute sovereignty against the sovereign.

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Introduction

Politics, for Thomas Hobbes, is never something that just happens to us; we make it for ourselves. Even when we might feel powerless, we are agents in the state which has power over us. In the introduction to *Leviathan* Hobbes writes that this is how we imitate God as creator: we can create "that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man."[1] In this Artificial Man, "*Equity* and *Lawes*, [are] an artificial *Reason* and *Will*."[2] Laws are the will of the state. In Hobbes's political theory, constituting a state means uniting and transforming each individual's will into the public will of the state, which is primarily (though not exclusively) expressed through the laws. Precisely how these laws work is the topic of this dissertation.

Hobbes writes that, "Law in general, 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."[3] Hobbes calls the laws of a commonwealth, "civil law" and explains that civil law is simply defined as law in general, but with the addition of, "the name of the person Commanding, which is *Persona Civitatis*, the Person of the Common-wealth."[4] The person of the commonwealth, represented by the sovereign, commands laws to the subjects of that commonwealth. These laws are the "Rules of Propriety. . . and of *Good*, *Evill*, *Lawfull*, and *Unlawfull* in the actions of Subjects."[5] The laws of the commonwealth create property boundaries, command all rules of justice, and enforce them through threat of punishment.

Theories of law can lend themselves to a range of political theories and commitments. Natural law theories can lend themselves to arguments for rebellion, to absolutism, to democratic rule or constitutionalism. Positivist legal theories can be part of thoroughly conservative political theories, or radical and revolutionary theories. A theory of law may not necessarily give us political commitments, but it always informs the full picture of a theory of what makes a state legitimate and what makes it work. Understanding what law is and entails is crucial for navigating those moral and political questions of when (if ever) extra-legal or illegal exercises of power are legitimate or necessary. And when (if ever) breaking the law is legitimate or morally required.

The aim of this dissertation, in addition to offering the first comprehensive account of a Hobbesian theory of positive law, is to demonstrate that Hobbes's arguments about law make at least three significant and previously overlooked contributions to political theory. First, I show that Hobbes's theory of law is not one of unilateral command, but rather depends on (a) the relationship between ruler and

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[1] Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Oxford University Press, 2012), hereafter cited by page number followed by chapter at 1651 head edition pagination in brackets, 16 [Introduction, 1].
[2] Hobbes, *Leviathan*, 16 [Introduction, 1].
[3] Hobbes, *Leviathan*, 414 [Ch. 26, 137].
[4] Hobbes, *Leviathan*, 414 [Ch. 26, 137].
[5] Hobbes, *Leviathan,* 274 [Ch. 18, 91].

ruled, (b) the system of administration through which the sovereign rules, and (c) the goals of the laws. Traditionally Hobbes is portrayed as promoting a simplistic command theory of law that is a sort of crude precursor to legal positivism. Recent provocative scholarship has successfully highlighted many of the overlooked legal arguments Hobbes makes; however, these recent interpretations all portray Hobbes as a proponent of the rule of law constraining the sovereign. I show that Hobbes held that positive law is dependent, not just on having been commanded, but on many other factors such as the system of law in place and the legal understanding of those subject to law. However, this more complex understanding of the requirements of law serves, not to weaken sovereign power, but rather to bolster Hobbes's theory of unified political authority over and above the law.

Second, I show that Hobbesian political power is more legalistic than is commonly thought. Hobbesian political power is almost universally portrayed as being arbitrary and frequently understood in terms of physical force or the fear thereof. The famous frontispiece of *Leviathan*, the sovereign larger than life who wields a sword over and above the land, seems to embody this arbitrary power. However, as I show, Hobbes was committed to a theory of the state that was legal and procedural. While thoroughly legal, it is not exclusively so; the Hobbesian sovereign is absolute in that legitimate sovereign action necessarily extends beyond law. Yet, the sovereign will is generally executed through law and, as such, sovereignty for Hobbes depends upon how the officers of sovereignty interpret and apply the law. This throws into question the distinction between the right of sovereignty and the exercise of sovereignty that has been made popular recently in political thought.

Third, Hobbes conceives of legal interpretation and execution as existing outside the sovereign legislator, and therefore empowering subjects to act against the sovereign; but I differ from recent work that defends a Hobbesian right of resistance by arguing that he gives subjects this power only in order to protect and further empower sovereignty itself. On my interpretation, there is not only an asymmetrical relationship between obligation and authority in Hobbes's theory (in which authority is absolute but subjects' obligations are qualified), but a further obligation of subjects to support the absolute authority of sovereignty even *against* the sovereign herself. Looking at Hobbesian absolutism through a legal lens reveals that the sovereign has absolute power, not simply because she has the sword, or because she has been authorized absolutely. Rather, it is because subjects have a moral and legal obligation not merely to obey sovereign command, but to actively ensure that sovereign right remains absolute even should the sovereign herself attempt to legislate otherwise. Subjects must, if necessary, defend absolute sovereignty against the sovereign.

While Hobbes's jurisprudence is interesting in its own right, its impact on how we answer longstanding questions in his political theory is even further motivation. Before turning to Hobbes's theory, however, it is useful to understand the backdrop of Hobbes's jurisprudence so that it is clear what is conventional and what is unique in his presentation. Questions about the theoretical foundations and contours of law have been answered in different ways, and this is no less true in the time Hobbes was writing. In both Continental Europe and in Britain, there was a combination of

different bodies of law and legal traditions that formed legal systems that usually did not cohere clearly into one body of law; this was especially true in England. What follows in this introduction is a brief account of the most prominent and influential theories of law that were likely in the background of Hobbes's writing, and sometimes explicitly in the foreground.

Saint Thomas Aquinas (1225-1274) was the most prominent natural law theorist and in many ways defined the concept of natural law as reason. Aquinas pulled from Aristotle, Cicero, Roman civil law, canon law, and Scripture to construct his theory of law in his *Summa theologiae.* Aquinas's natural law theory emphasized that law cannot be arbitrary will; it must be consonant with reason.[6] Distinctive of Aquinas's theory of law is the priority of right reason or eternal law. Aquinas states that if human law "deviates from the right reason, it is said to be an unjust law, and thus does not have the character of a law but rather that of an act of violence."[7] Aquinas states that eternal or divine law is the "rational plan" of God, and natural law is the way in which humans "participate" in that eternal law.[8] So, therefore, Aquinas's description of human law is: "nothing else than an ordination of reason for the common good promulgated by the one who is in charge of the community."[9] Aquinas recognizes that unjust laws have law-like qualities, but they are not fully laws. As he writes, a "tyrannical law, since it is not in accordance with reason, is not a law in the full sense, rather, it is a perversion of law. Yet, it has something of the nature of law. . . [because] it is a dictate of a ruler given to his subjects and aims at making the subjects fully obedient to the law and this is to make them good, not in the full sense but only in relation to such government."[10] Aquinas is the torch-bearer for the 'rationalist' tradition of natural law, meaning that natural law is a dictate of reason, and that is what gives it its binding force that overrides human law that violates it. The Thomist tradition was dominant throughout medieval and early modern Scholastics.

Voluntarist natural law is another theoretical tradition within medieval and early modern natural law that can be seen in the theories of William of Ockham (1287-1347), and Jean Gerson (1363-1429), among others. Voluntarism is characterized by the theory that natural law exists and is universally binding not because of its consonance with reason, but because the divine will of God commands it. Taken to the extreme, this means that what is good and what is evil depends on God's will, and if God willed an inversion of virtues and vices, then we would be obligated to obey and it would be a sin to do otherwise (murder could be a virtue, for example). Reason does not independently reveal or create a standard of Good and evil, it is always dependent on the will of God. Ockham writes,

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[6] Saint Thomas Aquinas, *The Treatise on Law (Summa Theologiae, I-II; qq 90-97),* ed. and trans. R.J. Henle, (Notre Dame, Indiana : University of Notre Dame Press, [1993] (Baltimore, Md.: Project MUSE, 2015), I-II: q 90.

[7] Aquinas, *Summa Theologiae*, I-II, q 93 .3

[8] Aquinas, *Summa Theologiae*, q 93. 1; q 91. 2

[9] Aquinas, *Summa Theologiae*, I-II: q 90. 4.

[10] Aquinas, *Summa Theologiae*, q. 92. 4

> Hatred, theft, adultery, and the like may involve evil according to the common law, in so far as they are done by someone who is obligated by a divine command to perform the opposite act. As far as everything absolute in these actions is concerned, however, God can perform them without involving any evil. And they can even be performed meritoriously by someone on earth if they should fall under a divine command, just as now the opposite of these, in fact, fall under a divine command.[11]

This debate between whether God's divine command or right reason is the essence of a law of nature parallels and informs later debates over the extent to which human law must be in accordance with reason and/or must be commanded by a sovereign will.[12]

The English legal-philosophical context in which Hobbes wrote was characterized by both deep indebtedness to the legal traditions and theories in Continental Europe, while also repeatedly emphasizing the distinctiveness of English law. John Fortescue (1394-1479) wrote of the constitutional nature of the English monarchy. In his *In Praise of the Laws of England,* "[j]ust as the head of the physical body is unable to change its sinews, or to deny its members proper strength and due nourishment of blood, so a king who is head of the body politic is unable to change the laws of that body against their wills."[13] Fortescue was a natural law thinker of a kind, and wrote about the authority of law adhering through history and custom itself, which was, in his view the crucial difference between the English and French political systems. In England, the King must get consent of the people in order to raise taxes or change fundamental laws. And that consent occurs through the parliament. Whereas French rule was simply the rule by the arbitrary will of the King.

St. German (1460-1540), along with Fortescue is sometimes thought of as a founder of English jurisprudence. In his *Dialogue between a Doctor of Divinity and a Student in the Lawes of Englande* (1531), St. German offers a few different theories of law, all of which emphasize the importance of natural law and the authoritative status of custom. Hobbes's *Dialogue between a Philosopher and a Student of the Common Law*, while not derivative of St. German's work, is clearly influenced by its discussions. For both Fortescue and St. German, the longer a law has been in existence, the more authority it has. A law's authority grows with time, as more legal decisions are made with reference to it, its influence on the body of law as a whole grows. We see this also in Coke's view later on, and it is one of the conventional

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[11] William of Ockham, *Opera Philosophica Theologica,* (New York: Saint Bonaventure University, 1967) *V*, 352.

[12] This debate between the rationalist and the voluntarist understanding of natural law is often called 'the Euthyphro problem,' in reference to Plato's dialogue of the same name in which the interlocutors explore a version of the question, "Do the gods love the good because it is good, or is it good because the god's love it?"

[13] John Fortescue, *In Praise of the Laws of England*, in *On the laws and governance of England* ed. Shelley Lockwood, (Cambridge; New York: Cambridge University Press, 1997) 21 (Ch. 13).

beliefs about law to which Hobbes was stringently opposed, as will be discussed more in Chapter 1.

Neither Fortescue nor St. German gave systematic or cohesive theoretic accounts of law. Most works at the time were written as specific polemics or refutations of specific theoretical arguments. However, there were certainly some who pre-dated Hobbes in publishing books attempting to give comprehensive accounts of law. The foremost of these are Jean Bodin's *Methodus* (1566) and *Les Six Livres de la république* (1576), Francisco Suárez's *De legibus* (1612) and Hugo Grotius's *De jure belli ac pacis* (1625). Hobbes cites both Suárez and Bodin by name in his works, and it is extremely likely that he had read Grotius closely.[14]

Bodin (1530-1596) offered a legal science and a systematic account of sovereignty. While using Roman law, scripture, and traditional legal arguments, Bodin puts forth a theory of law overall as it relates to the structure of his theory of sovereignty. When Bodin raises the question of whether a tyrannical prince may every be slain or be prosecuted by law, the question is necessarily one of where the indivisible sovereignty is located. "[F]or if he be no absolute soveraigne, then must the Soveraigntie of necessitie be either in the people, or in the nobilitie: in which case there is no doubt, but that it is lawfull to proceed against a Tyrant by way of justice, if so men may prevaile agaist him: or else by way of fact, and open force, if they may not otherwise have reason."[15] If, however, the prince is absolute, meaning he alone is sovereign, then no one in the commonwealth can hold the prince accountable to law, "albeit that he had committed all the wickedness, impietie, and crueltie that could be spoken; For as to proceed against him by way of justice, the subject hath no such jurisdiction over his Soveraigne prince."[16] We can see the reliance of a Bodinian definition of law on his theory of absolute sovereignty in his distinction between a law, counsel, and an edict. Bodin gives one definition of law in general and immediately refines it for his argument,

> *Law*, without any other addition, signifieth*, The right command of him or them, which have Soveraigne power above others, without exception of person:* be it that such commandment concerne the subjects in general, or in particular: except him or them which have given the law. Howbeit to speake more properly, *A law is the command of a Soveraigne concerning all his subjects in general*: or else concerning generall things.[17]

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[14] For Hobbes on Suárez see *Leviathan* 122 [Ch. 8, 39]; For Hobbes on Bodin, see *The Elements of Law, Natural and Politic: Part I, Human Nature, Part II, De Corpore Politico; with Three Lives,* Oxford World's Classics (Oxford; New York: Oxford University Press, 1994), 167 [II.27.7], hereafter cited as *The Elements of Law*.

[15] Jean Bodin, *The Six Bookes of a Commonweale, Written by I. Bodin a famous Lawyer, and a man of great Experience in matter of State*, based on French and Latin editions, trans. Richard Knolles (London: Impensis G. Bishop, 1606), 221 [Book II, Ch. 5].

[16] Bodin, *The Six Bookes of a Commonweale*, 222 [Book II, Ch. 5].

[17] Bodin, *The Six Bookes of a Commonweale*, 156 [Book I, Ch. 10].

Bodin explains that what counts as law is not straightforward, and has led to a great deal of confusion over who has sovereign right in any given commonwealth. It can seem that "the power to make lawes is not the proper marke of Soveraignty," because all kinds of magistrates make laws within their jurisdictions and consonant with the sovereign's laws.[18] However, Bodin explains that laws that come from anyone other than the sovereign are edicts or decrees or counsel, until they are made law by the authority of the sovereign.

Bodin links this to the sovereign's unique power to issue capital punishment, though perhaps as further evidence for his argument, and not as logically causing the sovereign right to make laws: "For there is none but the sovereign prince, which can unto his edicts joyne the paine of death."[19] We see in Bodin the argument of regress that we see later in Hobbes: the sovereign in necessarily the one who is unlimited and answers to no human power in order to make laws: "if a prince be bound not to make any law without consent of a greater than himselfe, he is then a verie subject: if not without his equall, he then hath a companion: if not without the consent of his inferiours, whether it be of his subjects, or of the Senate, or of the people, hee is then no Soveraigne."[20] So, the "first and chief" mark of sovereignty is the power to give laws to "all his subjects in general, and to every one of them in particular. . . without consent of any other greater, equall, or lesser than himselfe."[21] In Bodin we see that law is command from an absolute sovereign, and that commands from anyone with less than absolute power can never attain legal status without the authorization by the sovereign.

Bodin's work was known to Hobbes and, after being translated into English in 1606, grew a reputation in England as an extreme theory of absolutism. For example, Johan Sommerville explains that, when forging the Petition of Right in 1628, the House of Lords proposed a clause to state that this left the king's sovereign power untouched. In response the, "Commons refused to accept this. 'What is "sovereign power:?', asked Alford. He turned to Bodin for an answer: 'Bodin says it is that the is free from any condition.' Should the Commons recognize such a power in the king of England? Alford did not think so. 'By this,' he observed, 'we shall acknowledge a regal as well as a legal power.'"[22] Edward Alford was clear that, contra Bodin, they needed a King who was held within the bounds of English law.

Francisco Suárez (1548-1617) did not hold a Bodinian theory of sovereignty, but certainly held that law was command. As far as the debate over whether laws of nature are binding because they are in accordance with reason, or because they are willed by God, Suárez says something similar to Hobbes, which is that both are true. The laws of nature are right reason, but God does exist and wills them as binding

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[18] Bodin, *The Six Books of a Commonweale,* 156-7 [Book I. Ch. 10].
[19] Bodin, *The Six Books of a Commonweale,* 159 [Book I. Ch. 10].
[20] Bodin, *The Six Books of a Commonweale,* 159 [Book I. Ch. 10].
[21] Bodin, *The Six Books of a Commonweale,* 159 [Book I. Ch. 10].
[22] Johann P. Sommerville, *Politics & Ideology in England 1603*-1640 (London; New York: Longman, 1986) 168-169, citing Alford in *Proceedings in Parliament 1628,* eds. R.C. Johnson, M.F. Keeler et al., (1977-83). The first four volumes are entitled *Common Debates 1628*.

law.[23] Suárez wrote that, "to break the natural law without sinning involves an inconsistency… and therefore the existence of an obligation which is imposed by the natural law but which is not a matter of conscience also involves an inconsistency."[24] Suárez held strictly that law is command and (as Hobbes would later argue), that it cannot be custom, and must be at least tacitly authorized by the prince in order to be law.

Grotius (1583-1645) similarly argued that law must be a command, but also held that the laws of nature are binding by virtue of being consonant with right reason. He said stated that the laws of nature would stand even if God did not exist, because they were logically necessary.[25] While there are plenty of similarities to Bodin, Grotius was not committed to Bodinian theory of indivisible sovereignty; he accounted for a variety of constitutions including ones which split fundamental powers. One of the most influential aspects of Grotius's work is his theory of rights. Rights, for Grotius, are liberties. In his contemporary critique of Grotius's *De Iure Belli*, Johannes Felden, a German lawyer, complained that Grotius,

> says that 'civilians call a *Faculty* that *Right properly, and strictly taken'*; I do not understand why. For no one will readily describe liberty as a *ius* over themselves, nor can a dominium properly be termed a ius in something; nor is a father properly said to have a *ius* in his children or a master in his slaves . . . The Roman jurists agree with me – see [Digest] 13.1 and 19*de damn. Inf*., which distinguishes *dominium* from a *ius*; and they never term liberty a *ius* in ourselves.[26]

Felden's complaint was that Grotius's understanding of rights was anti-Thomistic, and seemingly anti-religious. Grotius used rights (or iura) in a few different ways but the crucial definition of ius is "a moral quality of a person, making it possible to have or to do something correctly."[27] Rights are liberties and we are free individuals. Crucially, we are free to renounce those liberties. For Grotius we can renounce all of our rights in the founding of the state, though he qualifies this.[28] Rousseau wrote in

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[23] Francisco Suárez, *De Legibus*, in *Selections from Three Works*, ed. Thomas Pink, trans. Gwladys L. Williams, Ammi Brown, and John Waldrom, revisions by Henry Davis, S.J. (Indianapolis, Indiana: Liberty Fund, 2015) II.6.2.

[24] Suárez, *De Legibus*, II. 9.6.

[25] Hugo Grotius, *The Rights of War and Peace* [electronic resource], ed. Richard Tuck, translated from the edition by Jean Barbeyrac, (Baltimore, Md. : Project MUSE, 2015) Book I, Ch. 1, Section 10, paragraph 5.

[26] John Felden, *Annotata in Hug. Grotium. De Iure Belli et Pacis* (Amsterdam, 1653), 6, 8-9, quoted from Richard Tuck, *Natural Rights Theories*, (Cambridge; New York: Cambridge University Press, 1979) 75.

[27] Grotius, *The Rights of War and Peace*, I.1.1.4.

[28] For the instances in which it seems Grotius says that we can retain the right to self-defense, see Tuck *Natural Rights*, 80-81; Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought,* (Oxford: Oxford University Press, 2016) 262.

The Social Contract, that Grotius "spares no pains to rob the people of their rights and invest kings with them."[29]

Many of the theoretical commitments and formulations for which Hobbes is most famous are found in some of these writers. Grotius contrasted command with counsel and with contract, and insisted that law must be command, as does Hobbes.[30] Suárez writes that law must be promulgated by the sovereign, must prohibit future actions, and must be backed by punishment, as does Hobbes.[31] There are some important points of difference, as well. While Bodin, Suárez, and Grotius all uphold theories of natural law, Hobbes's natural law theory differs from the others in that it is (a) rooted in the desire for self-preservation and peace, and (2) far more focused on committing subjects to always following the civil law, as the natural law primarily subscribes obedience and that is its primary relevance to his political theory. Hobbes is, of course, in line with Bodin's theory of unified sovereignty (which Suárez and Grotius did not maintain), but Hobbes is even more insistent than Bodin that no divine laws can ever justify resistance to the sovereign. Bodin, Suárez, and Grotius, each hold that "a duty to obey divine positive laws – supernaturally revealed by God, and applying to a particular time and place – even if this means disobeying the sovereign."[32] They also hold that laws of nature supervene sovereign-made law.

King James (1566-1625) in many ways made explicit some of the implicit beliefs about the power and right of the monarchy throughout the sixteenth century, but also pushed the underlying assumptions of sovereignty to their logical extremes. He was an outspoken proponent of the divine right of kings. James repeatedly argued that kings ought to rule according to the laws of the land, but also that the king must have final control over what those laws are. In *The Trew Law of Free Monarchies* (1598), James writes that subjects must obey their king's "commands in all things except directly against God."[33] For James, a king's right is absolute and the king can be punished only by God, but James is also clear that "a good king will. . . delight to rule his subjects by the lawe," and that if a King gives privileges to subjects, he cannot justly take them back.[34] Of course the beliefs and the actions of James I and Charles I are crucial context for Hobbes's writing. Most important for our purposes is James's commitment to a free monarchy, meaning one above the law, that rules according to the law but cannot legally be held in check by anyone, and which is legitimated first and foremost by the divine right to rule invested in him by God.

Two jurists whose extremely close professional relationships to King James brought them right into the political and legal action leading to the English Civil War:

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[29] Jean-Jacques Rousseau, On the Social Contract, trans. Donald A. Cress, (Indianapolis: Hackett, 1988) II.2.

[30] See Grotius *The Rights of War and Peace,* I.3.17.1; I.1.9.1; II.4.12.1; II.20.24.1.

[31] See Suárez, *De Legibus*, I.6.11; III.34.1, I.1.7-8; III.15.4.

[32] Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context*, (New York: St. Martin's Press, 1992) 97; see Ch. 1 for a general discussion of Hobbes's context.

[33] King James VI and I, *Political Writings*, ed. Johann P. Sommerville, (Cambridge: Cambridge University Press, 1994) 72.

[34] King James VI and I, *Political Writings*, 75, 80.

Francis Bacon (1561-1626) and Edward Coke (1552-1634). Both wrote extensively on the need for legal reforms in England, and oftentimes their recommendations were quite similar, though they were at odds with one another over questions of the relationship of the King to Parliament, as well as the question of the jurisdiction of the courts of England and the proper place of common law in relation to the king.

Francis Bacon (1561-1626) was trained as a common lawyer and proposed to systematize common law in much the way Roman civil law was. He wrote that Roman civil law, like English common law, was "dictated verbatim by the same reason" shared by all nations and peoples.[35] Bacon's drive to systematize English law was, after the overthrow of Charles I and in the midst of the mid-century legal reforms, picked up by many and Bacon can rightly be thought of as a legal reformer, though one who was a consistent royalist throughout his own life. Bacon argued continuously for legal reform, to simplify the legal code and make it work more efficiently. Bacon did not propose to have a statutory legal code, however, he writes, "In all sciences, they are the soundest that keep close to particulars; and sure I am there are more doubts that rise upon our statues, which are a text law, than upon the common law, which is no text law," and that he prefers "grafting the law, and not to ploughing it up and planting it again; for such a remove I should hold indeed for a perilous innovation."[36] Bacon believed that the laws were that the laws were given legal force by the King, and that legal reform should emanate from the throne and should proceed moderately. Hobbes, who worked as Bacon's secretary and translator for a time, and shares many of Bacon's theoretical commitments and beliefs. Hobbes, however, is clearly more utopian than Bacon was, and at least theoretically, was far more inclined to make "imaginary laws for imaginary commonwealths," as Bacon characterized philosophers in general, ". . . Their discourse are as the stars which give little light because they are so high."[37]

Edward Coke was a common lawyer and King James's Chief Justice. As a theorist of law, Coke was focused on common law as the true English law and particularly that common law courts ought to have jurisdiction over all other courts and final decision-making power. King James and Bacon both held that it is the King who has oversight of all jurisdictions, as played out in 1616, which is discussed at greater length in Chapter 3. Coke sought, as did Bacon, to create a more systematized account of common law, which is a difficult task. Coke followed the conventional belief in common law that it accrues authority through being unwritten law and custom for generations. While Coke did not state disagreement with King James's claims to divine right as the source of kingly legitimacy, he did argue that the King's

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[35] Francis Bacon, "Maxims on Law," *The Works of Francis Bacon in Ten Volumes*, Vol. 4, *The Law Tracts* (London, 1803) 12, cited in Daniel Lee *Popular Sovereignty in Early Modern Constitutional Thought*, 277.

[36] Francis Bacon, *The Works of Francis Bacon.* Ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath (St. Clair Shores, Michigan: Scholarly Press, 1969) Vol. 13, 67, as cited in Barbara Shapiro, "Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform," *American Journal of Legal History* vol. 24 (1980), 338.

[37] Bacon, *The Works of Francis Bacon,* Vol. 13, 475, cited in Shapiro,"Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform," 338.

right is shaped by the long tradition of laws from past kings, a tradition that still has binding force. Coke "justified judicial decisions and parliamentary positions that had the effect of limiting royal power, on the ground that they were dictated by the historical precedents of English law—precedents endorsed by previous monarchs."[38] Coke referred to common law as the fundamental law and the unwritten constitution of England. Coke's *Institutes* (a reference to Justinian's Institutes) maps common law but does not offer a systematic account of the grounds of law. Coke, like Fortescue and St. German, held that the more ancient a law, the more authority it has.

John Selden (1584-1684) also focused on the historical character of law. Selden argues that all laws have their roots in the immutable laws of nature, but that those natural laws inevitably become limited and tailored to each nation, and that legal systems change to adapt to the needs of their political communities, and that older laws do not necessarily have greater authority, because of this need for laws to change. As he says,

> *When there was first a state in that land which the common law now governs*: Then were natural laws limited for the convenience of civil society here, and those limitations have been rom thence, increased, altered, interpreted, and brought to what now they are; although. . . now, in regard of their first being, they are not otherwise than the ship that by often mending had no piece of the first materials, or as the house that's so often repaired *ut nihil ex pristina materia supersit* [that nothing remains of the original material], which yet, by the civil law, is to be accounted the same still. . . Little then follows in point of honor or excellency specially to be attributed to the laws of a nation in general, by an argument thus drawn from difference of antiquity, which in substance is alike in all. Neither are laws thus to be compared. Those which best fit the state wherein they are, clearly deserve the name of the best laws.[39]

This idea that there is a historical aspect to law can be seen in many other English lawyers, and even in Selden's view that it can change so much that one should not appeal to ancient laws as more authoritative.

Roman civil lawyers ('civilians') also played an important role in English jurisprudence and clearly made an impression on Hobbes's jurisprudence. Civil Law was known at the time as having an authoritarian bias, one prone to supporting a monarch above the laws. Common law was fundamentally at odds with the vision of law as command of the sovereign forwarded by Bodin, Suárez, Grotius, and King James, and therefore Roman Law offered a counterpoint and legal reference.[40] Alberico Gentili (1552-1608) was a prominent civilian who theorized the absolute

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[38] Harold Berman, "The Origins of English Jurisprudence: Coke, Selden, Hale," *Yale Law Journal* 103 (1994), 1678.

[39] John Selden, *Opera Omnia* ed. David Wilkins, (London: G. Bowyer & J. Walthoe, 1726) III, cols. 1891-2, cited in Tuck, *Natural Rights*, 84.

[40] See Daniel Lee,*Popular Sovereignty,* 275.

power of the English monarch. Gentili argued (contra Coke and Fortescue, for example), that the English monarch has extraordinary power that cannot be bounded by English law.[41] John Cowell (1554-1611) and Richard Zouch (1590-1661) also forwarded theories of extra-legal royal power that is unlimited, even if only used in times of emergency. Common lawyers, such as Selden, argued against the relevance and theoretical basis of Roman civil law.

Hobbes pulled extensively from Roman civil law for his examples and in some of the building blocks of his arguments regarding law. He also was fluent in the terminology of the common law courts and, as will be examined further, used many of their arguments, particularly those surrounding the artificial reason of the common law, and inverted them to contrary purposes. In Hobbes we see a theory of law which is clearly indebted to Suárez, Grotius, and Bodin, which engages directly with both civil law and common law. Hobbes pulls from many traditions, including those of his political opponents and uses them together to create a unique legal and political theory.

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Chapter 1 examines civil, natural, and divine law as Hobbes describes it throughout his works. The chapter begins with Hobbes's definitions and descriptions of law in general, and then analyzes the way that civil law is the blueprint for law in general and divine and natural laws both fit uncomfortably within that mold and only truly become laws through being legislated as civil law. Hobbes presents natural law as foundational to his theory as a whole, but it is not until we have the full picture of the commonwealth and civil law that we can begin to understand the normative force of natural laws.

Chapter 2 focuses on the recent contributions to Hobbes scholarship that seek to reject the orthodox reading of Hobbes as a crude command theorist by arguing that Hobbes instead holds an account of the rule of law, rooted in natural law, that constitutionally constrains the power of the sovereign. This scholarship, which I call "Rule of Law Hobbesianism," succeeds in bringing to light important complexities in Hobbes's account of law, but overreaches in its conclusions. Contrary to the traditional view of Hobbes's theory of law as absolute command, Hobbes recognizes a variety of constraints on what constitutes law, stemming from his understanding of the moral and legal foundations of the commonwealth, the structure of sovereignty, and the duties of judges. Contrary to the Rule of Law Hobbesians, however, I argue that these constraints do not amount to a systematic limitation of the sovereign but instead reveal the varied ways Hobbes attempts to consolidate unitary sovereign power through law. Through an analysis of the interpretive duties and powers of judges and subjects, this paper shows that Hobbes's legal theory takes seriously the

[41] See Alberico Gentili *Regales disputationes tres*, (London: W. Antonius, 1605) 10. See Lee, *Popular Sovereignty,* 278-279, See Francis Oakley, "Jacobean Political Theology: The Absolute and Ordinary Powers of the King," *Journal of the History of Ideas* 29 (68): 323-46.

complexities of legal interpretation and law's relationship to moral and political requirements, but it is a legal theory which is rooted in and always aimed at authoritarian and unified legislative power.

Chapter 3 examines the legal-theoretical context in which Hobbes was writing in order to show the multiple aspects of equity he invoked as well as the battles for authority being waged in specifically legal contexts, that he engaged in. Equity is an opaque and hugely important moral and legal concept for Hobbes, and one which can seem to provide his theory with some of the moral heft famously absent from his concept of justice. Chapter 3 shows that that Hobbesian equity involves a nuanced account of law and the crucial importance of stable legal rule, but also a reinforced emphasis on the sovereign as arbitrary ruler over and above the law. Hobbesian use of equity, at times, reveals an explicit attack on the class of professional lawyers who sought to bind the sovereign, whether parliament or King, with the body of English law itself. In an echo of St German's theorizing of *epieikeia*, the full range of Hobbes's invocations of equity fail to fully cohere as a theory, but the ways in which Hobbesian equity is fragmented map onto the different equities at play in the debates over the legitimacy of legal exception and the relationship between sovereign and law.

Chapter 4 examines the relationship between the natural right to all things that we have in the natural condition, according to Hobbes, and the sovereign's right to punish. Hobbes argues both that the right to punish is transferred to the sovereign and that it is uniquely *not* transferred to the sovereign. This chapter shows the relationship between a natural and a civil right, as Hobbes outlines it in *De cive*, and how that impacts his authorization theory in *Leviathan*.

Chapter 1: Hobbes's concept of law: natural, divine, and human

In this chapter I examine Hobbes's concepts of law: natural, divine, and human. Hobbes gives a definition of law in *Leviathan* as,

> Law in general, is not Counsell, but command; nor a Command of any man to any man; but only of him, whose command is addressed to one former obliged to obey him.[42]

A few aspects of Hobbesian definitions in general and of his theory of law in particular are evident in this passage. One is that Hobbes often theorizes through contrasts. In other words, he will proceed to explain or define X by explaining why many seemingly similar things are in fact, not X. Hobbes tends to define law, as such, in contrast to something with which it is often mistaken: law as opposed to counsel, covenant, right, charter, or custom. In addition, we see in this passage that Hobbes has nested right into his definition of law, his entire theory of obligation, which he expounds at length long before defining law. In *Elements of Law, De cive, Leviathan*, and *A Dialogue between a Philosopher and a Student, of the Common Law of England*, the essential features of Hobbesian law remain consistent: law is a command, and that command is to someone who already has a prior obligation to obey the commander, a command must apply to future action (or inaction), the person expected to obey the law must be reasonably able to know what the law is and that it was commanded by a legitimate lawgiver.[43] While Hobbes repeats the necessity of clearly defining law, his own account is far less straightforward than it may at first seem. Natural, divine, and human law are all fully law, properly, only when an authority commands them in a way that is made sufficiently known to those who have a prior obligation to obey them. This effectively means that all law reaches full legal status through being legislated by the sovereign in the commonwealth. In other words, natural and divine law become fully law when they are also legislated as human law, or civil law, as he calls it.

In this chapter I examine Hobbes's theory of law generally and how natural and divine law relate to civil law. I will begin below Hobbes's discussion of the importance of the distinction between command and counsel, and what it means for law to be command, for Hobbes. I then examine the essential features of civil law which is in many ways the template of what proper law is, for Hobbes. I will then

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[42] Thomas Hobbes, *Leviathan*, (Oxford: Oxford University Press, 2012), cited by page number, followed by chapter and 1651 page number in brackets, 414 [Ch. 26, 137].
[43] Hobbes, *The Elements of Law, Natural and Politic*, II.29.2.; Thomas Hobbes, *On the Citizen*, eds. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1994), cited hereafter as *De cive,* followed by page number and chapter and paragraph number in brackets, Ch. 14; Hobbes, *Leviathan*, Ch. 26; Thomas Hobbes, *A Dialogue between a philosopher and a student, of the common laws of England* in *Writings on Common Law and Hereditary Right,* eds. Alan Cromartie and Quentin Skinner (Oxford: Oxford University Press, 2008), 29.

discuss natural law: the ways in which it is and is not law, followed by divine law. In the final section I discuss some of the tensions in how these types of law relate to one another.

Law is Command, not Counsel

Hobbes explains in *Leviathan* that command, counsel, and exhortation can all take the imperative form ("Do this."), but there are many differences between these kinds of speech, the most crucial of which is that each invokes a particular kind of reason why the person on the receiving end should, in fact, do this. The basic distinction is between command and counsel (exhortation is a kind of counsel); when someone commands you to "Do this," they are giving their will that it be done as the essential reason you should do it. When someone counsels you to "Do this," they are rather advising that you should want to do what they suggest.

Hobbes writes that, "he that Commandeth, pretendeth thereby his own Benefit," whereas he that counsels, claims it is for the good of the person he counsels.[44] Counsel need not *actually* be for the benefit of the recipient. Nor does it depend on the intention of the speech act (so long as you claim it is for the benefit of the listener, that's what makes is counsel); what matters is what the reason claimed by the speaker is, or the reason implied by the relationship between the speaker and the recipient.

What is the relationship between command and law? All laws are necessarily command, but it does not seem that all commands are law. As Hobbes writes, "first it is manifest, that Law in general, 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."[45] So, what is a command absent prior obligation? It is an imperative statement in which the stated or implied reason for obeying is only the will of the speaker. So, a person standing on the street shouting instructions to people walking by, could very well be commanding them, but no one else needs to agree with the shouter's presumption that his will is a reason for acting. But what is the difference between a person shouting commands on the street corner and a person shouting counsel? If both are saying "Do this," then in the former case the commander is saying, do this because it is my will, in the latter case, the counselor is saying, do this because it is what is best for you. As stated above, it does not matter if the counselor actually believes that, the distinction rests in the stated (or implied) reasoning for acting in accordance with the speech.

When Person A commands Person B to *Do x*, "the reason of his Command is his own Will onely," however, Person A can list all kinds of *other* reasons why Person B ought to do it, to sweeten the deal and encourage obedience by showing how it's really in Person B's best interest to *Do x*. So, if Person B does x because Person A made a convincing case, could that still be a command? A command is "where a man saith, *Doe this,* or *Doe not this*, without expecting other reason than the Will of him

[44] Hobbes, *Leviathan*, 398 [Ch. 25, 131].
[45] Hobbes, *Leviathan* 414 [Ch. 26, 137].

that says it."[46] So, the will of the commander is the only necessary reason. But in whose opinion must it be a reason? It seems that the commander must believe his will is reason, but may of course add on extra reasons (for example,that could increase motivation for obedience). If, additionally, the person commanded does in fact have an obligation to the commanded, then the command is law.

There is an additional difficulty with Hobbes's discussion in which he seems to argue that, because "the reason of his Command is his own Will onely, and the proper object of every mans Will, is some Good to himselfe," and therefore, "he that Commandeth, pretendeth thereby his own Benefit."[47] Counsel is advice that claims to be for the good of the counseled. But it does not seem to follow that a command must always be for the benefit of the commander. It could mean that it would be illogical for a commander to command something in direct opposition to his own desires or his own well being, but that does not seem to be exactly what Hobbes is saying here. It is certainly true that a commander need not state any reasons for anyone else's benefit, for something to be a command. The will is sufficient.

Exhortation or dehortation are kinds of speech that persuade people using, not a list of reasons as counsel does, but rhetoric and passionate language. Exhortation can seem even more like command than standard counsel. Standard advice, according to Hobbes, consists of or suggesting that someone do X, and listing the reasons why. Exhortation, on the other hand, does not engage with reasoning but rather appeals to passions and "other tooles of Oratory" to push their hearers to action.[48] Hobbes explains that exhortation and dehortation are always directed to the good of the speaker, not the recipient, which is contrary to the duty of counsel. However, Hobbes clarifies that statements which are emphatic and imperative in form, can be justified when they take other forms, for example when they are commands, not counsel. If, for example, a leader in an army is giving a lawful order, "sometimes necessity, and alwayes humanity requireth to be sweetened in the delivery, by encouragement, and in the tune and phrase of Counsell, rather then in the harsher language of command."[49] So, counsel can sound like commands and commands can sound like counsel. While the distinction between exhortation and standard counsel can depend on its delivery (among other differences), the broader important distinction between counsel in general and command has to do with "who it is that speaketh, and to whom the Speech is directed, and upon what occasion."[50] Thus, not the statement, but the status of the speaker and the listener, is what matters.

Law, not Covenant.

So, law is a command, one which occurs within a pre-existing relationship of authority and obligation. Hobbes writes in both *Elements of Law* and *De Cive* that law

[46] Hobbes, *Leviathan*, 398 [Ch. 25, 131].
[47] Hobbes, *Leviathan*, 398 [Ch. 25, 131-2].
[48] Hobbes, *Leviathan*, 400 [Ch. 25, 132].
[49] Hobbes, *Leviathan*, 402 [Ch. 25, 133].
[50] Hobbes, *Leviathan*, 398 [Ch. 25, 131].

is commonly mistaken for a kind of covenant or agreement. However, law can only exist after a covenant is already in effect. He writes that "an *covenant* is a *promise*, a *law* command*,* In *covenant* one says*,* I will do; laws *say,* Do. We are obligated by a *covenant* itself; a *law* keeps one to one's obligations. . . And hence in a *covenant,* we must settle what is to be done before we are obligated to do it; but in a *law* the obligation to do comes first."[51] Or as he writes in *The Elements of Law*, "a covenant obligeth by promise of an action, or omission, especially named and limited; but a law bindeth by a promise of obedience in general, whereby the action to be done, or left undone, is referred to the determination of him, to whom the covenant is made."[52] A law is always the will of another, whereas a covenant is the declaration of one's own will ("I covenant to do X in the future"). Though they both oblige, a covenant obligates in a specific way, whereas a law obligates because of a prior more general covenant. So, Hobbes concluded, "from this may be deduced, that which to some may seem a paradox: that the command of him, whose command is a law in one thing, is a law in every thing."[53]

Law, not Right

Hobbes is adamant and consistent throughout his works that *ius* means right, *lex* means law, and a right is a liberty, and a law is a command which restricts liberty. Hobbes says that all humans naturally have inborn the Right of Nature, which is the liberty each individual has to do whatever she judges is necessary, to preserve her own nature.[54] So, we each have a natural liberty to do anything that we judge as necessary. This natural liberty, is restricted by the laws of nature, by divine law, and by civil law, and what liberty we have is whatever is left remaining and is unrestricted by those laws. In both *Elements of Law* and *De cive*, Hobbes describes this in the conventional manner of the canonists discussing the natural hierarchy of laws, in which "*lower laws* can restrict the liberty left by *higher laws*, though they cannot extend it."[55] Hobbes writes that "The civil law cannot permit what is prohibited by *divine law*, nor can it prohibit what is commanded by *divine law*."[56] However, for everything which divine law says is permissible, that is where civil law can restrict. I discuss the relationship between divine and civil laws more below, but it is worth noting that in the parallel passage in *Leviathan*, Hobbes does not speak of divine laws but only of natural laws. Additionally, in the passage in which he seeks to clarify that *lex* means binding law and *ius* means right or liberty, Hobbes refers to the Law of Nature as giving us liberty:

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[51] Thomas Hobbes, *On the Citizen*, eds. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1994), cited hereafter as *De cive,* followed by page number and chapter and paragraph number in brackets, 155 [14.2].
[52] Hobbes, *Elements of Law*, 178 [II.29.2].
[53] Hobbes, *The Elements of Law*, 178 [II.29.3].
[54] Hobbes, *Leviathan*, 198 [Ch. 14, 64].
[55] Hobbes, *De cive*, 156 [15.3]. Also see *Elements of Law*, 179 [II.29.5].
[56] Hobbes, *De cive,* 156 [15.3].

> I find the words *Lex Civilis*, and *Jus Civile*, that is to say, *Law* and *Right Civil*, promiscuously used for the same thing, even in the most learned Authors; which neverthelesse ought not to be so. For *Right* is *Liberty*, namely that Liberty which the Civil Law leaves us: But *Civill Law* is an *Obligation*; and takes from us the Liberty which the Law of Nature gave us. Nature gave a Right to every man to secure himselfe by his own strength, and to invade a suspected neighbor, by way of prevention: but the Civill Law takes away that Liberty, in all cases where the protection of the Law may be safely stayd for. Insomuch as *Lex* and *Jus*, are as different as *Obligation* and *Liberty*.[57]

One way to read this passage is that by "the Liberty which the Law of Nature gave us," Hobbes means, parallel to the previous clause, the liberty which remains after the restrictions of the laws of nature. This reading is also complicated by Hobbes's construction of the first law of nature. Immediately after distinguishing ius from lex, Hobbes then makes *ius* almost a part of the fundamental *lex*: "It is a precept, or general rule of Reason, *That every man ought to endeavor 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 ourselves.*"[58] Hobbes does distinguish *ius* from *lex*, but seems to deliver them as one rule. So, the distinctions between natural law and natural right can be obscure for Hobbes. This is compounded by the ways in which the laws of nature are presented as both laws and not-laws, as I discuss below. However, he is much clearer when it comes to civil law.

All law, properly, binds and restricts liberty. Hobbes extends this distinction between binding law and unbound right in his discussion in *Leviathan* contrasting law and charter. Sometimes it can appear that a sovereign is actually *giving* liberty to a subject with a law, which is impossible for Hobbes, since all law restricts liberty. So, when a sovereign grants a right to a subject that she did not have before, it is technically not law, for Hobbes. If an exception is being made for someone, then it is a charter, a pardon, or a gift, not a law. If it is a general or universal change, then it is an amendment or even abrogation of a previous law, and not itself a law. Hobbes writes, "A Law may be made to bind All the Subjects of a Common-wealth: a Liberty, or Charter is only to One man, or some One part of the people."[59] Later, in the *Dialogue*, Hobbes seems to amend this slightly and give a more complicated answer to this question of whether laws can ever create freedom or rights: "I know that the Kings Charters are not so merely Grants, as that they are not also Laws; but they are such Laws as speak not to all the Kings Subjects in general, but only to his Officers; implicitly forbidding them to Judge, or Execute any thing contrary to the said

[57] Hobbes, *Leviathan*, 450 [Ch. 26, 150], underlining mine.
[58] Hobbes, *Leviathan*, 200 [Ch. 14, 64].
[59] Hobbes, *Leviathan,* 450 [Ch. 26, 150].

Grants."[60] While Hobbes's description of charter changes somewhat in *Dialogue*, he still frames it as creating an exception from law.

H.L.A. Hart's critique of a command theory of law is largely built on the argument that conceiving of law as "orders backed by threats" obscures a great deal of what law actual does, which is, as Hart says, "confers powers."[61] In Hobbes's view we naturally have in us every power and capacity we could ever use in any situation, and laws restrict and change our situations such that we are able to do *far more* when living under law than we ever could living outside of them (indeed, this is one of Hobbes's most vehement arguments in favor of obedience to the sovereign), but that this does not mean the laws themselves confer powers, rather they create the necessary conditions in which we can actually effectively use our powers.

Law, Not Custom

Hobbes says throughout his works that custom ought not be mistaken for law. By custom, Hobbes means primarily two things, First, customs are the laws from previous regimes, when there has been a change in sovereign power, and there are still many divers laws in different areas of the land, from when they were independent or from when the were ruled by previous rulers. Those are not laws of the land, those are custom, and they are made into law by the tacit or explicit authorization of the current sovereign. Second, customs are legal precedent, or specifically, *responsa prudentum*, which were a traditional source of law in the Roman legal system, and which traditionally build the common law, but which Hobbes is adamant are not law without sovereign authorization.

Hobbes writes that, "[w]hen long Use obtaineth the authority of a Law, it is not the Length of Time that maketh the Authority, but the Will of the Soveraign signified by his silence, (for Silence is sometimes an argument of Consent."[62] It is crucial that the force and authority of all law comes from the present sovereign. Additionally important, however, is the emphasis that older laws do not have greater authority than more recent laws. This is in contrast to the legal theories of Fortescue, St. German, and Coke, as discussed in the introduction. If laws contradict one another, the more ancient law does not have precedence. In fact, the more recent law ought to be seen as a correction to the former law. And if there is any question of meaning or adjudication, one ought not use consistency in the body of law as the final

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[60] Hobbes, *Dialogue*, 38. To speculate on the addition of distinguishing between law and charter in *Leviathan* when he had not earlier, I think that one potential factor is not only making his philosophy of law more logically cohesive, but a reference to Charters such as the Magna Charta, or The Petition of Right. Both of which are referred to as charters. This is potentially one more way to emphasize that anything which applies or even refers to the sovereign is not something which binds the sovereign.

[61] H.L.A. Hart, *The Concept of Law*, 2nd ed., (Oxford: Oxford University Press, 1994), 29.

[62] Hobbes, *Leviathan*, 416 [Ch. 26, 138].

determinant, but rather ask the sovereign to apply will and reason to the case and clarify.

In discussing the way custom seems to adhere as law simply by dint of time passing, Hobbes writes that

> where there be divers Provinces, within the Dominion of a Common-wealth, and in those Provinces diversity of Lawes, which commonly are called Customes of each severall Province, we are not to understand that such Customes have their force, only from Length of Time; but that they were antiently Lawes written, or otherwise made known, for the Constitutions, and Statutes of their Soveraigns; and are now Lawes, not by virtue of the Praescription of time, but by the Constitutions of their present Soveraigns.[63]

Judicial decisions can become law through the tacit consent of the sovereign, even when they are poor decisions. However, it is important that these decisions not be automatically considered law, or considered law on their own:

> Custom of itself maketh no law. Nevertheless when a sentence hath been once given, by them that judge by their natural reason; whether the same be right or wrong, it may attain to the viguor of a law; not because the like sentence hath of custom been given in the like case; but because the sovereign power is supposed tacitly to have approved such sentence for right; and thereby it cometh to be a law, and numbered amongst the written laws of the commonwealth. For if custom were sufficient to introduce a law, then it would be in the power of every one that is deputed to hear a cause, to make his errors laws."[64]

Hobbes explains that even if jurists write down their opinions in organized tracts and make themselves seem like authoritative sources of law, they are not law: "nor are the writings of jurists, for lack of sovereign authority, nor the *response prudentum*, i.e. of the judges, except in so far as their responses have attained customary authority with the consent of the sovereign. . . custom does not constitute law in its own right."[65] It is clear from some of this discussion that when Hobbes discusses law in general, he truly only means civil law. Civil law is the paradigm of law in general for Hobbes. It is most clearly and properly law. Natural law and divine law are not as properly law, and when they are fully law, they are made so *through* civil law. So civil law is the model, but also the only way that anything else law-like gains truly legal authority and force.

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[63] Hobbes, *Leviathan*, 420 [Ch. 26, 139].
[64] Hobbes, *Elements of Law* 182 [II.29.10]
[65] Hobbes, *De cive,* 161 [14.15].

The Civil Law

Hobbes writes in *Leviathan* that Civil Law "*Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.*"[66] Some of the basics of civil law are that it must be commanded by the sovereign to subjects, it must be published or made known such that subjects can be reasonably expected to know what they are obligated to do, and it must be interpreted (by the legislator or one authorized by the sovereign legislator). I discuss at length the ramifications of these requirements for civil law in Chapter 2. However, it is worth briefly explaining Hobbesian civil law as he presents it.

Hobbes refers to the laws of the commonwealth as civil law, this is an adoption of the term for Roman civil law code and applying it to all positive law. Hobbes opens his chapter "Of Civill Lawes" by explaining that he knows the name might be misleading but he is not actually referring to the Roman civil law, he is just referring to the official law of any commonwealth. Especially in *Leviathan*, Hobbes depends on Roman civil law as the backdrop for his legal discussion, far more than in previous works.[67]

Law is made so by the authority of the sovereign, by explicitly legislation or very often by tacit consent. Hobbes explains the many different apparent sources of law in England by analogy to Roman Law, in order to explain that the true source of the law is always the sovereign, or else it is not truly law but something similar to law. So, for example, the Roman classification in Justinian's Digest of Edicts of the Prince or Emperor, are like "proclamations of the Kings of *England,*" and "Decrees of the whole people of Rome (comprehending the Senate)" were first laws when sovereignty was in the Roman people, but then continued to be laws by tacit consent of emperors who held sovereignty. This is analogous to "the Acts of Parliament in *England*."[68] He goes on to explain that (1) Proclamations from the King are law because that is explicit legislation, and (2) acts of parliament, (3) orders of the House of Commons, (4) Acts of the king's Privy counsel, Declarations from the Chief Justices, (6) the sentences and opinions of authorized lawyers, and (7) unwritten custom *may all by law by tacit consent of the sovereign.*[69]

Law need not be general; as Hobbes writes, "some Lawes are addressed to all the Subjects in general; some to particular Provinces; some to particular Vocations; and some to particular Men; and are therefore Lawes, to every of those to whom the Command is directed; and to none else."[70] So, law could be specifically targeted at one subject. However, even in that case the law must be made prior to any

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[66] Hobbes, *Leviathan*, 414 [Ch. 26, 137].
[67] See Daniel Lee, "Hobbes and the civil law: the use of Roman law in Hobbes's Civil Science," in *Hobbes and the Law* eds. David Dyzenhaus and Thomas Poole, (Cambridge: Cambridge University Press, 2012).
[68] Hobbes, *Leviathan*, 440 [Ch. 26, 147].
[69] Hobbes, *Leviathan,* 440 [Ch. 26, 440].
[70] Hobbes, *Leviathan* 416 [Ch. 26, 137].

transgression. Hobbes does seem to include a requirement of generality into his theory of law in *Behemoth*, when he states that the King "commands the people in general never but by a precedent Law."[71] So, in *Behemoth*, while a law could in effect only apply to a very small group or even to one person, if a command from the sovereign actually targeted one person by name, it does not seem that would strictly count as a law. It must instead by formulated and commanded more generally. However, this is present only in *Behemoth* and only in one particularly fraught passage in which Hobbes is arguing about whether a King could ever legally command someone to execute his own father. Hobbes decides that, yes, it could be done legally, but it would be a very unlikely law.[72]

Hobbes goes beyond the Roman Civil Law taxonomy to divide laws into either natural or positive. Natural laws are eternal, whereas positive laws "have been made Lawes by the Will of those that have had the Soveraign Power over others; and are either written, or made known to men, by some other argument of the Will of their Legislator."[73] Of positive laws, some are human and some are divine. Divine positive laws are those which are commandments of god, "onely to a certain people, or to certain persons (since the only eternal laws are natural laws)" which are made law by the sovereign of the commonwealth.[74] He divides Human positive law into either distributive or penal, and into fundamental or non-fundamental law.

> *Distributive* are those that determine the Rights of the Subjects, declaring to every man what it is, by which he acquireth and holdeth a propriety in lands, or goods, and a right or liberty of action: and these speak to all the Subjects. *Penal* are those, which declare, what Penalty shall be inflicted on those that violate the Law; and speak to the Ministers and Officers ordained for execution.[75]

Sometimes Hobbes describes penal law in this way, as its own branch of law, sometimes punishments are attached to criminal laws, and sometimes specific penalties are not prescribed in advance and it is the judge who must assign the appropriate punishment. How legal punishment functions for Hobbes is explored more fully in Chapter 4. Fundamental law is essential to the commonwealth. Not fundamental is law which could be revoked and the sovereign power would remain in tact, these are "the Lawes concerning Controversies between subject and subject."[76] Both laws, those that shape the fundamental rules of the commonwealth, and those that govern specific relations between subjects both work in the same way, must be commands, and always function by restricting liberty. The fundamental laws are necessary to the commonwealth, not that they could not change, but they could not simply be revoked. To be clear, the fundamental covenant which

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[71] Hobbes, *Behemoth* 174 [fo. 25r].
[72] Hobbes, *Behemoth*, 173-174 [fo. 25r].
[73] Hobbes, *Leviathan*, 442 [Ch. 26, 148].
[74] Hobbes, *Leviathan*, 442 [Ch. 26, 148].
[75] Hobbes, *Leviathan*, 442 [Ch. 26, 148].
[76] Hobbes, *Leviathan*, 448 [Ch. 26, 150].

underpins subjects' obligation and the sovereign's authority, is not *itself* a law. This foundation for the commonwealth cannot be commanded, rather, it is the precondition that makes commanding law possible.

Civil Laws are the commands of the sovereign to subjects, made publically known. However, there are a range of commands by the sovereign that subjects are not obligated by and therefore, according to Hobbes's own legal theory, are not law. The prime example of this is rooted in individuals' inalienable right of self-defense. So, for example, if the sovereign were to command that subjects not resist when officers come to arrest them for punishment, subjects would be under no obligation to obey that command. There are a variety of cases like this which I discuss in greater detail in Chapter 2. However, in these cases in which subjects have no obligation to obey, it is not that they are under a law which they then have permission to flout. Rather, the obligation never existed and, therefore, neither did the civil law. A Hobbesian law is, to repeat, a command to one who has a prior obligation to obey the commander.

As I discuss in the next section, the relationship between civil and natural laws for Hobbes is not clear. Hobbes repeatedly insists that the laws of nature are truly laws, that they bind eternally, but also that they are *not* law. Additionally, the interaction between natural laws and civil laws is often opaque. In the remainder of this chapter I explore the outlines of both natural and divine law for Hobbes, but I address the complexities of natural and civil law in greater detail in Chapter 3.

Laws of Nature

The laws of nature are difficult to give an adequate account of, and they also pose problems for Hobbes's general theory of law. The laws of nature are the rules of action and intention that help to create peace. Hobbes says that everyone knows them already, that they are binding and obligatory in all circumstances eternally, that they are commanded by God through our natural reason, and that they bind sovereigns even when no human law will. However he also says that they are the "most obscure" of all law, and require the sovereign to tell us what they mean, that they are not properly laws, that our own interests block our ability to know or follow them, and that we can only be obligated by our own voluntary acts, whereas the laws of nature are eternally etched in each of our hearts and seem to obligate us regardless. Hobbes's laws of nature seem eternal and immutable, to obligate everyone, and yet to hold very little obligatory force in and of themselves

The laws of nature become fully and properly law when they are legislated by the sovereign in the commonwealth (as discussed above this can happen tacitly, which means that simply by being at peace and living within a commonwealth, the laws of nature are fully law). However, Hobbes repeatedly states that they are binding as law outside of the commonwealth as well. This is crucial for his claims that the sovereign has moral duties to rule well, as well as his argument that individuals are morally obligated to uphold promises, particularly the covenants that underpin the existence and legitimacy of the commonwealth and therefore make it

possible for a sovereign to exist and command civil law.[77] There are two main questions this section sets out to address: (a) what is the legal status of the laws of nature (and/or can they have normative force without being law), and (b) what is their relationship to civil law.

The laws of nature are rules found out by human reason that seek peace, and therefore ensure communal security. Hobbes defines a law of nature in *Leviathan* as, "a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved."[78] From this initial law, Hobbes deduces a series of laws of nature which Hobbes argues are the way toward peace.

Before he introduces the first law of nature, Hobbes defines the Right of Nature as "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto."[79] As discussed above, Hobbes is focused on fixing the definitions of *lex* and *ius* such that *lex* means law, which is something that binds, and *ius* is right, which is a liberty. In our natural condition, "every man has a Right to every thing."[80] The fundamental law of nature "is a precept, or general rule of Reason, *That every man, ought to endeavour Peace, as farre as he has hope of obtaining it*."[81] From this fundamental law of nature Hobbes derives the second law, how to pursue peace: each man ought to be willing to lay down their right of nature reciprocally with other men (meaning, when they are also willing), "*and be contented with so much liberty against other men, as he would allow other men against himselfe.*"[82]

Hobbes enumerates a detailed but partial list of the total laws of nature. He explains only those most relevant to "the doctrine of Civill Society," as opposed to personal morality.[83] The first few laws of nature focus on the action of covenanting that makes the commonwealth possible and explains how moral obligation arises from promising.[84] These also include laws of nature that we must recognize one another as equals and specific instructions about how to do that, including how to use a shared good in common when all are equals, and how to judge fairly between equals.[85] Each law, he says, is logically deducible and true. While the laws of nature

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[77] Hobbes's argument that the laws of nature are binding outside the commonwealth are also relevant for interpretations that seek to draw from Hobbes a theory of international relations. The "Law of Nations" are the same thing as the Law of Nature (*Leviathan*, 552 [Ch. 30, 185]).

[78] Hobbes, *Leviathan*, 198 [Ch. 14, 64].

[79] Hobbes, *Leviathan*, 198 [Ch. 14, 64].

[80] Hobbes, *Leviathan*, 198 [Ch. 14, 64].

[81] Hobbes, *Leviathan*, 200 [Ch. 14, 64].

[82] Hobbes, *Leviathan*, 200 [Ch. 14, 65].

[83] Hobbes, *Leviathan*, 238 [Ch. 15, 78].

[84] Hobbes, *Leviathan*, Ch. 14.

[85] Hobbes, *Leviathan*, 230-238[Ch. 15, 75-78].

may not be deducible by everyone in the logical format he outlines, their essence is "intelligible even to the meanest capacity, and that is *Do not that to another, which thou wouldst not have done to thyself*."[86] Hobbes repeats this, that the laws of nature are known to anyone with natural reason. However, Hobbes also writes that the laws of nature are, of all laws, the most obscured and the most in need of guided and controlled interpretation in the commonwealth.[87] In *Leviathan*, Hobbes spends the opening chapters constructing the political psychology of man to explain how subjective our experiences of the world are and how, outside the commonwealth, our own reasoning about how to live leads, not just to clashes, but to unending insecurity. Many other times, however, he suggests that human reason, especially 'natural reason,' is context-independent and leads us truly toward peace.

The evidence that the laws of nature are best thought of as laws is as follows: (1) Hobbes calls them laws repeatedly,[88] (2) he includes them in the overall classification of laws, saying that all law is either natural or human,[89] (3) he says they are eternal and immutable, (4) they are always oblige *in foro interno*, (5) they are commands from God and therefore are laws. Additionally, (6) Hobbes is adamant that sovereigns have many moral duties to rule well, by rooting their practices in the laws of nature, and (7) subjects' foundational obligation to obey the commonwealth is rooted in the supposed normative force of the laws of nature.

The evidence that the laws of nature are not laws, and do not have normative force, is as follows: (1) immediately after calling them laws in both Chapters 15 and 26 of *Leviathan*, he clarifies that they are not, (2) 'dictates of reason,' are not commands, which laws must be, and (3) even as commands from God, which Hobbes does say they are, we do not necessarily have sufficient reason to obey commands from God unless they are legislated to us by our earthly Sovereign, under Hobbes's own theory, (4) Hobbes writes that we can only be obligated by things in which we play some agential role (by promising), whereas the laws of nature seem to be eternally binding on everyone regardless of what we choose.

I am sympathetic to Bramhall's complaint of Hobbes that, "First he maketh the laws of nature to be laws and no laws: Just as a man and no man, hit a bird and no bird, with a stone and no stone, on a tree and no tree. . . not laws but theorems, laws which required not performance but endeavours, laws which were silent, and could not be put in execution in the state of nature."[90] The status of the laws of nature has been the topic of much debate within Hobbes scholarship. Some have argued that Hobbes has no real moral theory, that any gestures to it are simply rhetorical embellishments to soften an absolutist theory rooted in his own political commitments. Some have argued that it is no proper moral theory, because he tries to conjure an ought from an is, and fails (the charge is that Hobbes attempts to

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[86] Hobbes, *Leviathan*, 240 [Ch. 15, 79].
[87] Hobbes, *Leviathan*, 430 [Ch. 26, 143].
[88] See, for example, *Leviathan,* Ch. 14-15, Ch. 26.
[89] Hobbes, *Leviathan* 442 [Ch. 26, 148].
[90] John Bramhall, *The Catching of Leviathan, or the Great Whale* in *Castigations of Mr. Hobbes with an appendix concerning The Catching of Leviathan*, (London: 1658), *Early English Books Online*, 569.

transform the factual claim that all humans seek self-preservation into the prescription that all humans *ought* to seek self-preservation in these specific ways).[91] While others argue Hobbes's moral theory succeeds in standing apart from self-interest and is an independent moral theory with normative force; for some this means Hobbes's theory depends on the existence of God and for others it does not.[92]

Hobbes writes that the laws of nature are not properly law in the way that civil law is, but that they could be law in certain circumstances. 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; wheras 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 are they properly called laws.[93]

The laws of nature are not, as he has described them, commands and are therefore not *properly* law. He repeats this again when distinguishing between natural and civil laws, saying the laws of nature "are not properly Lawes, but qualities that dispose men to peace and to obedience."[94] Although laws of nature exists eternally, they cannot be known in a stable and useful way without an absolute judge to resolve differences of opinions as to what the natural laws require. He says if we "consider" the same theorems as delivered in the word of God, then they are properly called laws. They are properly laws, but only for us as individuals, they do not work to reliably coordinate us together, nor even predictably dictate individual action, unless they are commanded by the sovereign. They do oblige in our consciences, however.

Hobbes writes that the, "Lawes of Nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*, that is, to the putting them in act, not always."[95] One could argue that the idea of the laws of nature obligating *in foro* interno is a fundamentally empty statement because for Hobbes, to be truly obligated means there is someone to *keep* you to that obligation, there is a common power in existence to ensure performance of all obligations. However, for Hobbes we can be obliged separately from being held to our obligations. At least that seems to be Hobbes's position in both *De cive* and in *Leviathan*, though it can be argued that it's unclear what his position is in *Leviathan* and/or that he changed it in

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[91] See David Gauthier, "Hobbes and The Laws of Nature," *Pacific Philosophical Quarterly,* 82.2 (2001), 258-84.

[92] For theories that Hobbes's moral and political theory depend on the existence of God, see Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation* (Oxford: Oxford University Press, 1957); A.P. Martinich, *The Two Gods of Leviathan* (Cambridge: Cambridge University Press, 1992); For useful discussions on this topic, see Perez Zagorin, "Hobbes as a Theorist of Natural Law," in *Intellectual History Review*, 17:3.

[93] Hobbes, *Leviathan*, 242 [Ch. 15, 80].

[94] Hobbes, *Leviathan*, 418 [Ch. 26, 138]

[95] Hobbes, *Leviathan*, 240 [Ch. 15, 79].

the Latin translation. [To sidebar about this idea for a minute,] Hobbes writes that "either where one of the parties has performed already; or where there is a Power to make him performe," then one is obligated to uphold their promise.[96] If someone else performs first, even though there's no one threatening punishment if you don't uphold your end of the deal, you still have an obligation to perform. This is different from the kind of obligations that a system of laws and punishment rooted in one sovereign can create, because that is much more stable and reliable and therefore creates the possibility of further moral duties in that circumstance of peace. However, even without that, we can have obligations. One could say that we have a reason to act, but not a motivation. Would that be right? It may be in this sense that the laws of nature oblige. They oblige morally on our passions that incline individuals toward peace: "Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them."[97] The dictates of reason cannot motivate us, but they show us reasons for acting. This idea is present in Hobbes's discussion of obligation in *De cive*: "*A man in obligated by an agreement, i.e. he ought to perform because of his promise. But he is kept to his obligation by a law, i.e. he is compelled to performance by fear of the penalty laid down in the law.*"[98]

The most reasonable interpretation of Hobbesian laws of nature is that they are suggestions that do not actually obligate us eternally. This is because they depend on having a prior desire for peace. We cannot be morally or legally obligated to desire peace, in the strict sense. However, Hobbes gives us the strongest reasons he can for why we ought to want peace, why obtaining any other desires relies on peace. And once one *does* want peace, then the laws of nature do have sway, not in the same way that laws properly do, but neither are they simply prudence. Hobbes argues that seeking self-preservation is natural, but not necessarily that it is always an overriding goal. Hobbes was certainly aware of the existence of zealous martyrs, of those more than willing to die for causes that meant more to them than their earthly existence. Indeed, Hobbes accounts for such desires and says that no subject can be obligated by a law that commands her to do something she deems more dishonorable than death.[99] That introduces an additional complication, which is, in addition to knowing that, of course, martyrdom is possible, Hobbes seems to claim it here as reasonable. different aspect which is, not only did Hobbes know as a matter of fact that humans did not all have an overriding desire for self-preservation, but in addition, he thought choosing death was morally defensible and reasonable in some cases.

However, one ought to always prioritize peace when possible. And if one does choose that, then the laws of nature can gain normative traction as principles by which one ought to live. As Hobbes says to Bramhall, one *does* in fact have to choose

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[96] Hobbes, *Leviathan,* 224 [Ch. 15, 73].
[97] Hobbes, *Leviathan,* 196 [Ch. 13, 63].
[98] Hobbes, *De cive*, 155 [14.2].
[99] See *De cive* 40 [2.19], *Leviathan* 338 [Ch. 21, 112], and *Behemoth* [173-174 fo. 25r], though in *Behemoth* Hobbes says that the subject should just escape the commonwealth, and in *Leviathan* it does not warrant disobedience in cases where the existence of the commonwealth depends on your doing the dishonorable task.

the laws of nature, "whereas he [Bramhall] saith, the law of nature is a law without our assent, it is absurd; for the law of nature is the assent itself that all men give to the means of their own preservation."[100]

One way to unpack Hobbes's laws of nature is to ask, if these are dictates of reason, how does reason work? Hobbes spells out a few different kinds of reason, and this has led different scholars to see the laws of nature in considerably different lights. One is prudence, or means-end reasoning informed by desires and experience, and the other is ratiocination, or scientific reasoning, which is dependent on language and involves making logical connections between the consequences of definitions.[101] Both of these, typically, are seen as having no end-goal or direction in themselves. So the debates over the laws of nature have often fallen into questions over whether they are (a) actually more dictates of *prudence*, in which case they're just instrumental reasoning and not a moral theory at all, and therefore Hobbes is misrepresenting his theory by calling it a moral science and obligating, or (b) dictates of *ratiocination*, in which case they could stand logically independent of any empirical claims Hobbes makes, and could obtain a kind of objective truth value. Viewing the laws of nature as dictates of prudence does not align with the majority of what Hobbes says about the laws of nature being the only true science (prudence is not scientific reasoning). Viewing the laws of nature as dictates of pure *ratiocination* is at odds with Hobbes's claim that they are known naturally to all humans, which is crucial to their normative power.[102]

The laws of nature are, as Hobbes repeatedly states, dictates of *natural* reason.[103] Natural reason, for Hobbes, is not pure deductive scientific reasoning of experts, nor is it simply prudence or instrumental reasoning. Rather, natural reason is the term Hobbes uses for the kind of reasoning the average individual is capable of. It relies on language and therefore on relations with other humans to some extent, and is not shared with non-human animals. It is motivated by our desires, but also involves ratiocination. It is this reason which dictates the laws of nature to us. Natural reason is within reach of average persons (if they are able to develop basic language and reasoning skills in community with others). Hobbes says, "the Laws of Nature, that is to say, the Precepts of Naturall Reason, [are] written in every mans own heart."[104]

Bernard Gert has argued that natural reason has a built-in goal of avoidance of violent death, and that therefore, reason can dictate the means to that reasonable

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[100] Thomas Hobbes, *The Questions Concerning Liberty, Necessity, and Chance,* in *The English Works of Thomas* Hobbes, ed. Sir William Molesworth (London: 1839-45), Volume V., 180.

[101] On prudence, see Hobbes, *Leviathan*, 42 [Ch. 3, 10], On ratiocination, see Hobbes *Leviathan*, 64 [Ch. 5, 18].

[102] For an analysis of the many shortcomings of a formalist approach to the laws of nature, see Kinch Hoekstra, "Hobbes on Law, Nature, and Reason," in *Journal of the History of Philosophy*, Vol. 41.1, (2003).

[103] Some examples: Hobbes, *Leviathan* 426 [Ch. 26, 142], 574 [Ch. 31, 193], 812 [Ch. 42, 282].

[104] Hobbes, *Leviathan*, 812 [Ch. 42, 282].

end. All human reasoning, in Gert's interpretation of Hobbes, "presupposes the end of natural reason, the avoidance of violent death."[105] While I think it is correct to say that natural reason is foundational, or "Hobbes's complete concept of reason," as Gert puts it, I do not think Hobbes gives us sufficient argument that natural reason has as its necessary end, the avoidance of violent death.[106] In part because Hobbes seems to acknowledge the reasonableness of choosing death over certain horrors. And also when he speaks of natural reason specifically, it does not always tend away from violent death. For example, he writes that, when men out of the Principles of naturall Reason, dispute of the Attributes of God, they but dishonor him: For in the Attributes which we give to God, we are not to consider the signification of Philosophicall Truth; but the signification of Pious Intention."[107] In this case, natural reason leads men to dispute the nature of God, one of the primary causes of conflict, which leads to war and to violent death. Natural reason is better understood as something like the amount of *ratiocination* that an average person can manage, motivated by desires. And natural reason only suggests these principles of peace to us after we have the desire to pursue peace.

To say they are dictates of natural reason does not settle the question of whether the laws of nature can logically have normative force. The most often time Hobbes invokes natural reason is to explain that it is the word of God, and that this is how God speaks to us. So, perhaps the laws of nature simply have force because God commands them to us through natural reason. This would make Hobbes's theory dependent on the existence of God. However, he is clear that having natural reason is not sufficient for knowing that we are being commanded and that we ought to obey a law. Hobbes writes, "How then can he, to whom God hath never revealed his Will immediately (saving by the way of natural reason) know when he is to obey, or not to obey his Word, delivered by him, that says he is a Prophet?"[108] Natural reason here is not sufficient to guide us, in order to know what laws of God to obey we must, as I will briefly discuss in the next section, have an earthly sovereign to command us.

Hobbes on Divine Law

Hobbes writes that, "[t]he most frequent praetext of Sedition, and Civill Warre, in Christian Common-wealths hath a long time proceeded from a difficulty, not yet sufficiently resolved, of obeying at once, both God, and Man, then when their Commandments are one contrary to the other."[109] Of course, Hobbes says, if one is faced with contrary commands, and knows one of them is God's, one must obey God and disobey the Sovereign. However, it is impossible to know when a command is truly from God. However, we can know when we have sufficient reason to obey a

105 Bernard Gert, "Hobbes on Reason," in *Pacific Philosophical Quarterly*, 82 (2001), 253.
[106] Gert, "Hobbes on Reason," 248.
[107] Hobbes, *Leviathan*, 568, [Ch. 31, 191].
[108] Hobbes, *Leviathan*, 580, [Ch. 32, 196].
[109] Hobbes, *Leviathan*, 928 [Ch. 42, 321].

command. Luckily for the devout subject, so long as one always obeys (even an infidel, even an atheist) sovereign, one is doing enough to get into heaven. [110]

We can know God's commands for us in three ways: as dictates of natural reason (laws of nature), by revelation, and by prophesy.[111] To "rule by Words, requires that such Words be manifestly known; for else they are no Lawes."[112] So, how can God's laws become sufficiently known to us through any of these avenues? Regardless of the avenue by which the laws come from God, they are not law until they are authorized as law by the sovereign of one's commonwealth.

As discussed in the previous section, the question of God's existence and the mechanics of divine law feature heavily in debates over how the laws of nature work. God speaks to us through the laws of nature, even though every individual's natural reason may be sufficient to determine the laws of nature. Yet, it is not until the laws of nature are interpreted by the 'Right Reason' of the sovereign with the ability to coordinate our efforts, that they are binding as law.

As for the second possibility for the word of God: God can give us a direct revelation, but "there have not been any Universall Lawes so given, because God speaketh not in that manner, but to particular persons, and to divers men divers things."[113] So revelation cannot be used for coordinating multitudes of people and giving them laws, but even on an individual level, we cannot necessarily know for sure whether we can trust our own dreams or hallucinations to be truly from God.

The third way God speaks is through the mediation of another person who speaks for God. The question becomes then, how does one know if a person is actually mediating a relationship with God? One cannot simply believe someone else when they say they have had a revelation, or someone who claims to have the authoritative reading of holy texts (after all, which texts even are holy is for the sovereign to determine).[114] One cannot even trust someone who can supposedly perform miracles as evidence of their true connection to God. As Hobbes writes, "no man can infallibly know by natural reason that another has had a supernatural revelation of God's will, but only a belief."[115] However, while we can only have belief about whether or not someone is speaking for God, we can have true knowledge of whether or not we are bound to obey what that person says God commands. Anyone within a commonwealth,

> concerning the Will of God, is to obey for such the Command of the Common-wealth: for if men were at liberty to take for Gods Commandements, their own dreams, and fancies, or the dreams and fancies of private men; scarce two men would agree upon what is Gods Commandment; and yet in respect of them, every man would despise the

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[110] On obeying an infidel King, see Hobbes *Leviathan*, 954 [Ch. 43, 330-331]; that faith is all that is required for salvation, see Hobbes, *Leviathan*, 930 [Ch. 43, 322].
[111] Hobbes, *Leviathan*, 556 [Ch. 31, 187].
[112] Hobbes, *Leviathan*, 556 [Ch. 31, 187].
[113] Hobbes, *Leviathan*, 556 [Ch. 31, 187].
[114] Hobbes, *Leviathan*, 604 [Ch. 33, 205].
[115] Hobbes, *Leviathan*, 444 [Ch. 26, 148].

> commandements of the Common-wealth. 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.[116]

So, it is not only the revelations of others one ought not believe, but also one's own revelations. Hobbes argues that when one shifts from asking whether any one person or text truly speaks for god, to asking whether one is obligated to obey, then the answer is clearer. In the state of nature, one ought to follow one's own natural reason. In the commonwealth, one ought to follow the sovereign's commands and use one's own natural reason where the sovereign's laws are silent.

Hobbes writes that, "besides the Laws of Nature, and the Laws of the Church, which are part of the Civill Law, (for the Church that can make Laws is the Common-wealth,) there bee no other Laws Divine."[117] Subjects can become fixated by trying to understand how they can know when something is truly from God, whether it be a command or a holy text. Hobbes says that we should not try to discover absolute and certain knowledge "that the first and originall *Author* of them is God," rather, the "question truly stated is, *By what Authority they are made Law.*"[118] God does not make them law, even when God speaks to us through natural reason, Hobbes says "this is no other Authority, then that of all other Morall Doctrine consonant to Reason; the Dictates wherof are Laws, not *made*, but *Eternall*."[119] But the question, Hobbes says, is who *makes* it into law, which is, short of God "supernaturally revealed," it must be the authority of "the Common-wealth, residing in the Soveraign, who only has the Legislative power."[120] The sovereign makes the law

Conclusion

Law is a command, and that command is to someone who already has a prior obligation to obey the commander, a command must apply to future action (or inaction), the person expected to obey the law must be reasonably able to know what the law is and that it was commanded by a legitimate lawgiver. Some of what Hobbes refers to as law strains against these criteria, particularly the laws of nature. In the next chapter I will examine the authority of the sovereign of the commonwealth and how it relates to civil laws. The Hobbesian vision of sovereign as lawgiver over and above the body of law is complicated by the network of subordinate administrators within sovereignty, who are entrusted with the task of executing and, in particular, adjudicating, the sovereign's laws.

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[116] Hobbes, *Leviathan*, 448 [Ch. 26, 150].
[117] Hobbes, *Leviathan*, 952 [Ch. 43, 330].
[118] Hobbes, *Leviathan*, 604 [Ch. 33, 205].
[119] Hobbes, *Leviathan*, 604 [Ch. 33, 205].
[120] Hobbes, *Leviathan,* 604 [Ch. 33, 205].

Chapter 2: The Rule of Law

Introduction

While Chapter 1 explored Hobbes's concept of law generally and the relationship between the laws of nature and his legal theory, Chapter 2 focuses on the laws of the commonwealth, or civil law. In particular I examine the relationship between Hobbes's legal theory and a kind of 'rule of law' theory that many have attributed to him. This recent scholarship, which I have named Rule of Law Hobbesianism, has largely overreached in its conclusions by claiming Hobbes as some kind of rule of law theorist or constitutionalist.[121] While I do not follow these scholars in most of their conclusions, their research highlights many important and overlooked aspects of Hobbes's theory of law. As I show here, however, a more complete understanding of the requirements of law serves, not to weaken sovereign power, but to bolster Hobbes's theory of unified political authority over and above the law.

The traditional portrait of Hobbes as a crude positivist and command theorist of law permeates surveys and reference works in jurisprudence and political thought and persists as the most common view in Hobbes scholarship.[122] As M. M. Goldsmith

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[121] Some examples of this "Rule of Law Hobbesianism" include: David Dyzenhaus, "Hobbes and the Legitimacy of Law," *Law and Philosophy* 20, no. 5 (2001); David Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" *The Modern Law Review* 72, no. 3 (2009); David Dyzenhaus, "Hobbes's Constitutional Theory," appended to *Leviathan: Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill*, by Thomas Hobbes, ed. Ian Shapiro (New Haven: Yale University Press, 2010); David Dyzenhaus, "Hobbes on the Authority of Law" in David Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge: New York : Cambridge University Press, 2012); Dennis Klimchuk, "Hobbes on equity" and Lars Vinx, "Hobbes on civic liberty and the rule of law," in *Hobbes and the Law*; Larry May, *Limiting Leviathan*; Larry May "Hobbes, law, and public conscience," *Critical Review of International Social and Political Philosophy* 20, no. 1 (2016): 12-28; Luciano Venezia, *Hobbes on Legal Authority and Political Obligation* (New York, Palgrave MacMillan: 2015).

[122] See Hobbes's "stark legal positivism," in John Watkins, *Hobbes's System of Ideas*, 2nd ed. (London: Gower, 1973), 114. Also see Brian Barry, "Warrender and His Critics," *Philosophy* 43 (1968); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), 62-64; John W. N. Watkins, *Hobbes's System of Ideas*, 114; Gregory S. Kavka, *Hobbesian Moral and Political Theory*, 248–50; Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986); This traditional interpretation of Hobbesian law tends to identify Hobbes as both a command theorist and as a legal positivist (or proto-legal positivist). While these two positions can be separated, they have often been conflated, particularly in the case of Hobbes. Command theory refers primarily to the source of law, while positivism refers primarily to the relationship between law and morality, specifically their separability. Some view these theories as identical or entailed by one another: as

writes, "Hobbes is not only a command theorist but also a legal positivist. Legal positivism denies that general principles of justice, morality, or rationality (as such) are criteria of the validity of law. Crudely, it denies that laws need be just, right, moral, or good in order to be laws."[123]

This orthodox view of Hobbes holds that there is no standard for the legitimacy or meaning of state (what Hobbes calls 'civil') law outside of what the sovereign commands. This is commonly understood to mean that law is simply *whatever* the sovereign commands, and that it is crucial to Hobbes's theory of law that there are no restrictions on the content of law. This is the legal and political absolutist Hobbes who is most familiar to us. If there is only this procedural requirement (that law is the command from the sovereign to the subjects), then power over what is law is completely centralized within sovereignty and is not subject to any further authority or criteria.

There is certainly textual support for this orthodox view, however it does not accurately portray the relationship between sovereign, subject, and the laws of a commonwealth. In this chapter I show that Hobbes's legal theory cannot be reduced to the orthodox interpretation due to the moral constraints on what counts as law. However, I also show that neither should Hobbes be classed as a 'rule of law' theorist (the alternative presented in recent years). Instead, I offer here a picture of Hobbesian law in which legality is sometimes dependent on judgments of individuals besides the sovereign, especially by the sovereign's appointed subordinate judges. However, in my reading, the role of judicial interpretation does not amount to systematic legal constraint on the sovereign. Instead what emerges is a theory of law in which the subjects and judges are empowered with the authority to interpret the law, but primarily in order to *strengthen* the authoritative rule of the sovereign.

In section 1 below, I explain Hobbes's formal requirements of law: that it be a command from the sovereign to subjects, and that it be sufficiently made known to subjects. In section 2, I outline the content that Hobbes specifies cannot be made into law, or made fully legal. Section 3 explains the role of judges and their interpretive power, section 4, what it means for the sovereign to be 'above the law', and lastly, section 5 explores the unique legal and political case of Hobbesian sovereign unity.

1. The Form of Law

Jean Hampton writes, Hobbes's definition of law as the command of the sovereign, "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 law" (Jean Hampton, *Hobbes and the Social Contract Tradition*, 107).

[123] M. M. Goldsmith, "Hobbes on Law," in *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 1996), 275. See in particular the work of Mark Murphy: Mark C. Murphy, "Was Hobbes a Legal Positivist?," *Ethics* 105, no. 4 (1995); Mark C. Murphy, "Hobbes (and Austin, and Aquinas) on Law as Command of the Sovereign," *Oxford Handbook of Hobbes*, ed. A. P. Martinich and Kinch Hoekstra (Oxford: Oxford University Press, 2016).

Law in general, distinct from any other kind of thing, is a command "of him, whose Command is addressed to one formerly obliged to obey him," and civil law is commanded by the person of the commonwealth to subjects: "CIVILL LAW*, Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.*"[124]

Crucially, these commands must be published and made known to the subjects. Civil laws are "to every subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will...."[125] Two things must be conveyed in this publishing of laws: (1) that the person promulgating the law has the authority to do so, and (2) "the actual meaning of the law."[126]

To indicate that a law is truly from the sovereign, it must bear the marks of sovereignty. These norms of legal recognition must be standardized in some way for laws to be successfully published, and therefore to be part of a legal system.[127] For example, if new civil laws are always posted with a royal seal, a declaration lacking that seal is rightly not recognized as legitimate law. This is a way to create stability and security in the commonwealth, to ensure that illegitimate forces cannot claim power or privileges or claim to speak for the sovereign. They are requirements of sufficient evidence. However, these same mechanisms for protecting sovereign authority have the effect of constraining and encumbering the sovereign herself, in a way. As these legal standards stabilize and reinforce sovereign authority, they also shape the way in which sovereign authority legislates. The sovereign must conform to these norms of legal recognition when legislating. I say the sovereign 'must' do this as a kind of practical constraint as well as a formal one. To get subjects to obey laws, they must, practically speaking, recognize them as laws. And since part of Hobbes's understanding of law is that it is sufficiently declared, if people cannot understand what the sovereign is doing to be commanding law, it is not law.

While Hobbes clearly places the power of determining what is law in the hands of the sovereign, commanding is necessarily a relational act as Hobbes describes it, and this bounds what counts as a law. How far these procedural or formal requirements are actually meaningful constraints on the Hobbesian sovereign can be difficult to see. For example, if the sovereign whispers a command alone in her bedroom that is meant to be obligating on all subjects, that is not a law, but this is not a particularly illuminating restriction on law. If, however, a law becomes codified only with a seal from the houses of parliament as well as the king, then a formal constraint can become substantive and look very similar to attempts, not simply to identify and clarify the sovereign's law, but to divide sovereignty itself.

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[124] Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Oxford University Press, 2012), cited by page number followed by chapter and 1651 'Head" edition page number in brackets, 414 [Ch. 26, 137].

[125] Hobbes, *Leviathan*, 414 [Ch. 26, 137].

[126] Hobbes, *De cive*, 160 [15.13].

[127] On this see David Dyzenhaus; "Hobbes and the Legitimacy of Law," and "Hobbes on the Authority of Law."

To what extent must subjects understand the sovereign's law in order for it to be binding? There is a minimal sense in which subjects must understand that they are subjects of a commonwealth and know who the sovereign is, and the law must be in a language they can understand and not be so complicated or vague that it is unclear what one must do to obey said law. Recent scholars whom I have named Rule of Law Hobbesians, such as David Dyzenhaus, posit that, in order for subjects to understand a law sufficiently to make it binding, they must understand that it aims at peace, and that it conforms to the laws of nature, to the existing body of civil law, and/or to the moral norms of the commonwealth. All of these claims have some limited merit, but ignore the great burden Hobbes places on the subjects themselves to know what the laws are. While ignorance of particular laws, for example, may be a mitigating factor, ignorance of who one's own sovereign is, is never an excuse for violating a law.[128]

This is where some Rule of Law Hobbesians, and David Dyzenhaus in particular, see an important link between the formal and the conceptual constraints on law. Laws must be made known to subjects, as discussed in section 1; they must be sufficiently intelligible to subjects. Dyzenhaus takes this to mean that, Dyzenhaus argues that, because laws are for the peace and defense of the commonwealth, for subjects to understand commands as laws, they must understand them as aiming for the peace and defense of the commonwealth. There is clearly a minimal sense in which laws must be intelligible to subjects, which I discuss above. If a command does not meet these minimal requirements, it may not be recognizable as law by subjects. There are three further, more substantive ways to understand legal intelligibility that Rule of Law Hobbesians wrongly employ. Firstly, that if a law is so far outside the body of existing civil law, is so incongruent with that body of law, then subjects will not recognize it as law. Secondly, that if a law were contrary to the laws of nature (or contrary to peace) it could not be recognized as law. Thirdly, that if the command were so contrary to the moral code of subjects, then they could not recognize it as law. Dyzenhaus takes the public criteria of law to mean different things at different times, but in general he creates far too high a threshold for the requisite publication of law for it to be recognizably Hobbes's.

Dyzenhaus's argument is that, since laws must be intelligible to the subjects, therefore laws must reflect "the fundamental norms of the moral community of which all legal subjects are members."[129] For Dyzenhaus, judges have a duty to apply and interpret laws in a way in which they believe subjects can understand them sufficiently to obey them. Hobbes does insist that a subject must be able to understand what a law asks of her and that it is truly from the sovereign. Dyzenhaus claims that Hobbes is committed to the much stronger thesis that a subject must understand how a law aims at peace, accords with the laws of nature, and/or with her own moral norms and if she has *that* understanding of law, it is *therefore* binding on her.[130]

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[128] See in particular Hobbes, *Leviathan* 454-456 [Ch. 27, 152].
[129] David Dyzenhaus, "Hobbes on the Authority of Law," 208.
[130] David Dyzenhaus, "Hobbes on Authority of Law" 208-209.

The existing body of civil law, the laws of nature, and the moral norms of subjects are all factors the sovereign may take into account when legislating, and it may be both the prudent and moral thing to do in any given case. However, the argument that laws will simply not be intelligible to subjects as laws, unless they hew closely enough to the existing body of law, or to a fundamental moral code, overstates the criteria for what is required to understand law.

The propagation of the idea that subjects should use their private judgment to assess the sovereign's laws is one of the central causes of the weakening of the commonwealth.[131] Laws may be confusing or disliked, but the relevant question subjects must ask of themselves is not, "do I understand how this law is an extension of the body of law I understand myself to be under, promotes the wellbeing of the commonwealth and my ability to live according to the laws of nature?" Rather, the question is, "am I under the protection of the sovereign?" If so, then the subject is obligated by her commands. When subjects do not understand the reasoning behind laws or do not like certain laws, Hobbes argues that they need to trust that the sovereign has the long view of what is necessary for the commonwealth.[132]

2. The Content of Law

Even if a command has the correct form to make it a law, its content could still prevent it from being fully legal. These cases of conceptual constraints on law make clear that there are moral commitments underpinning what content qualifies as fully binding law. This is in direct opposition to the orthodox presentation of Hobbesian law. In this section I will present each of these cases, and in following sections I will explore more fully the implications for these complications in law when it comes to the role of judges (section 3) and the relationship between legal and extra-legal power (section 4). What emerges is not the orthodox view nor the Rule of Law view of Hobbes, but rather an authoritarian theory of law which opens the door to both moral concerns and the practicalities of ruling by law rather than by force, but is always focused on having a will, not a system of laws or morals, at the heart of the legal system. The main conceptual constraints on law which Hobbes explores are cases in which laws 1.) are contrary to self-defense, 2.) punish innocent subjects, 3.) are contrary to peace and defense, and 4.) implicitly divide sovereignty.

1.) Laws contrary to self-defense: There are laws which the sovereign can command but which subjects have no obligation to obey: the paradigmatic case of this, for Hobbes, is the subject's inalienable right to self-defense. If a sovereign commands that a subject not defend her own body when attacked, the subject has no obligation to obey. When Hobbes outlines how covenants work in Chapter 14 of *Leviathan*, he writes that, "A covenant not to defend my selfe from force, by force, is alwayes voyd."[133] There always remains a right to resist a law if one is commanded to kill or harm oneself. In these cases, even if the command meets the formal

[131] Hobbes, *Leviathan*, 502 [Ch. 29, 168].
[132] Hobbes, *Leviathan*, 282 [Ch. 18, 94].
[133] Hobbes, *Leviathan*, 214 [Ch. 14, 69].

requirements of law, the subject, "may neverthelesse, without Injustice, refuse [to obey that law]."[134] This extends beyond simply protecting one's body to also accusing oneself of a crime, and can apply to cases in which one's life is not in immediate danger to instead cases in which a subject is commanded to do something dangerous or dishonorable.[135] In cases in which subjects have no obligation to obey, or are committing no injustice by disobeying, in that case, those actually *are not laws*. As discussed previously, there must be prior obligation for a command to be law.[136]

2.) Punishing Innocents: Punishment is a crucial part of Hobbes's theory of law and his belief in the stability of the state. A significant part of what makes punishment moral, according to Hobbes, is that it follows certain rules that encourage peace and stability and make it quite different from the violence between enemies. Related to this, Hobbes goes to great lengths to distinguish legal punishment from simple acts of hostility. And in this way Hobbes gives a great deal of specificity as to what counts as punishment, the sovereign cannot just do *anything* and have it count as legal punishment. Innocent here means already proven innocent in court, and the prime example of punishing an innocent is the case of asset forfeiture. After a subject who has been "acquitted, is neverthelesse condemned to lose his goods; this is a manifest condemnation of the Innocent. . . This therefore is no Law of *England*."[137] In Chapter 4, I discuss punishment, its justification, and the distinction between correct legal punishment and mere acts of violence, whether committed against subjects or enemies.

3.) Contrary to peace and defense: Hobbes writes that civil law is "*to every Subject, those Rules which the Common-wealth hath Commanded him*."[138] And the commonwealth is defined as, "*One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.*"[139] The sovereign represents the commonwealth and is authorized absolutely so that she may pursue peace and common defense. It therefore seems that all of the sovereign's actions, both through law and outside of law, ought to be for peace and defense. So, if the sovereign begins plundering the commonwealth for personal gain and acting blatantly contrary to the interests of the commonwealth, can those acts be made according to the law? If a sovereign were

[134] Hobbes, *Leviathan*, 336 [Ch. 21, 111].
[135] Hobbes, *Leviathan*, 338 [Ch. 21, 112]. However, in some of these cases, subjects are still obligated to perform the act being commanded if the sovereign determines that the commonwealth requires.
[136] On this, see Mark C. Murphy, "Was Hobbes a Legal Positivist?" in *Ethics* 105.4 (1995).
[137] Hobbes, *Leviathan*, 434 (Ch. 21 [144-145])
[138] Hobbes, *Leviathan*, 414 [Ch. 26, 137].
[139] Hobbes, *Leviathan*, 260-262 [Ch. 17, 88].

explicitly to state "I command this law in order to destroy the commonwealth," that would fail to be properly law.[140]

However, short of explicitly stating that, in the sovereign's judgment, a command is for the purpose of destroying the commonwealth, it would still be valid as law. However, it does not meet the moral standards which laws ought to meet; it certainly would not be a good law. This is similar to most any potential violation of the laws of nature the sovereign could commit. When Hobbes outlines the duties of the sovereign, one is to legislate only good laws. If a law does not have "the true End of a Law," it is not a good law, but it is still law.[141] So if the sovereign legislates things contrary to the safety of the people, such a law violates the moral constraints of the laws of nature, but still holds as law. If the sovereign were to explicitly state that she was aiming for the harm of the people and the destruction of the commonwealth, then it would not properly be considered law. Additionally, there are some limiting cases in which something is so harmful to the commonwealth that judges and subjects could not understand it as law.

4.) Implicitly dividing sovereignty: Hobbes is adamant throughout his works, but especially in *Leviathan*, that no law nor action of the sovereign can be interpreted as dividing or forfeiting sovereignty unless it is explicit. Hobbes writes that if a sovereign has not explicitly abdicated power, any command that seems to divide sovereignty cannot be recognized as law: such a "Grant is voyd."[142] No subject or judge can interpret the sovereign to mean to divide the essential powers of sovereignty because that would destroy sovereignty, and no one can rightly assume that she means to destroy sovereignty if she has not made this explicit. Therefore, there can be no law (even if it fulfills the formal requirements of law) that divides sovereignty. In the case of protecting unified sovereignty, Hobbes does grant the power of a kind of active judiciary, to interpret laws contrary to the plain meaning in favor of the supposition that sovereignty must be kept intact.

When subjects fear a law, policy, or action of the state may endanger the welfare of the commonwealth, they must submit to the judgment of the sovereign. When, however, the unity of the sovereign is in question, it is their duty to interpret the sovereign as always meaning to maintain the unity of sovereignty.

These four cases I have presented — laws which 1.) are contrary to self-defense, 2.) punish innocent subjects, 3.) are contrary to peace and defense, and/or 4.) divide sovereignty — show some of the ways in which Hobbesian laws can fail to be fully law because of their content. In all of these cases, the content of the law affects its legality. In the next section I will explore the ways these legal grey areas can complicate the role of subordinate judges in Hobbes's theory.

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[140] See Dyzenhaus on the idea that "every command of the sovereign has a tacit rider to the effect that the sovereign's judgment is that this command will serve the common good of peace," in "Hobbes and the Legitimacy of Law," *Law and Philosophy* 20 (2001): 475.

[141] Hobbes, *Leviathan*, 540 [Ch. 30, 182].

[142] Hobbes, *Leviathan*, 280 [Ch. 18, 93].

3. *How Laws Must be Interpreted*

The sovereign must be the sole legislator, and must also be the supreme and final judge of that law. However, in a commonwealth of any size, the sovereign cannot settle every dispute personally and therefore there must be an administrative system in place to do so. In *Leviathan* in particular, and later in *A Dialogue between a Philosopher and a student, of the Common Lawes of England*, Hobbes highlights a special class of people who have a particular relationship to law: subordinate judges within the commonwealth. Hobbes's theory of legal interpretation opens the door to a kind of diffusion of sovereign decision-making power that reflects the reality of having a legal system executed by multiple individuals, but is also sometimes in tension with his own theory of sovereignty.

Some recent scholars have leveraged Hobbes's discussion of the duties of subordinate judges, and specifically of his discussions of equity, to argue that Hobbes has a nascent theory of the rule of law in which the sovereign is constrained in what laws they may legislate. Those who have this 'rule of law' interpretation see Hobbes as theorizing internal checks on sovereignty rooted in the subordinate judges' obligations to follow the laws of nature and interpret civil law accordingly. I argue, on the contrary, that the primary texts relied upon for such an interpretation are all places in the texts where Hobbes is attempting to reformulate judicial duties in order to weaken common law and the power of legal precedent as forces that could threaten to limit sovereignty. Precisely where it can seem that Hobbes is creating constraints on sovereignty are where he is shoring up the power of the unified sovereign over and above law.

No law has a self-evident meaning; all laws require interpretation.[143] After laws have been sufficiently published, "there wanteth yet another very material circumstance to make them obligatory. . . that is to say, the authentique Interpretation of the Law (which is the sense of the Legislator)."[144] The sovereign must necessarily be both the maker and the interpreter of law, for Hobbes. Or rather, the sovereign must appoint interpreters. Otherwise, Hobbes warns, "by craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Soveraign; by which means the Interpreter becomes the Legislator."[145] The interpretation of law must be completely under the control of the sovereign, lest there be a power outside the sovereign legislator threatening to be the authority of what law means and how ought to be applied (which would threaten a disastrous division of sovereignty). However, practically speaking, the apparatus of legal interpretation is going to involve different interpreters, which introduces complications.

Law must be interpreted, not according to the letter, but according to the intention of the law. Hobbes emphasizes this repeatedly. To be clear, this is the intention, not of whoever the initial legislator was, but rather, of the current sovereign who is now giving it force as law. Every sovereign, either by explicitly commanding or by tacit consent, gives laws their obligating force. So laws must be

[143] Hobbes, *Leviathan*, 430 [Ch. 26, 143].
[144] Hobbes, *Leviathan*, 428 [Ch. 26, 142].
[145] Hobbes, *Leviathan*, 428 [Ch. 26, 142].

interpreted according to the intention of the current sovereign. This directive can be opaque, and Hobbes clarifies that "the Intention of the Legislator is always supposed to be Equity."[146] Therefore, if the words of the law "do not fully authorise a reasonable Sentence," the judge ought to "supply it with the Law of Nature; or if the case be difficult, to respit Judgement till he have received more ample authority."[147] The meaning of laws is never self-evident, and sometimes it can be quite difficult to discern. The task of judges is to interpret laws according to the sovereign's intention; when that's not clear, they ought to assume the intention is equity. If this still does not give a clear meaning or clearly settle a dispute, then judges ought to use the laws of nature to fill out the meaning of the civil law, and lastly, if the meaning of the sovereign's law is still unclear, they ought to withhold judgment and ask for someone with greater authority to decide (potentially going up the chain to the sovereign representative herself).

What exactly it means to suppose the sovereign's intention to be equity, and what it means to supply the civil law with the laws of nature, Hobbes does not sufficiently clarify, and will be examined fully in Chapter 3. This ambiguity is partly why there has been a great deal of forceful interpretation from scholars who see Hobbes as tasking judges with the power and authority to potentially limit the sovereign's legislation and create a more constitutionalist framework of power. While I disagree with many of their conclusions, engaging with some of these interpretations clarifies how Hobbes theorizes equity in the context of judicial obligations to interpret law. Hobbes is doing with equity, and with the obligations of judges to interpret laws.

David Dyzenhaus argues that it is the duty of judges to ensure, not only that what the sovereign commands are laws, but that they are *good* laws: when a statute is not clearly void but seems to undermine one or another law of nature, the judge is under a duty to try to find an interpretation of the statute that will make it "less problematic from the perspective of legality."[148] The reason for this, according to Dyzenhaus, is that a sovereign must command laws which are "intelligible...to the legal subject" and in such a way that the laws must "conform to the moral commitments of the political community, expressed in the laws of nature."[149] Judges must interpret and apply the laws according to what they believe subjects will be able to understand as laws, according to Dyzenhaus.

Dennis Klimchuk and Larry May join Dyzenhaus in giving a broadly Rule of Law Hobbesian interpretation, while focusing more on equity than on the public criteria of law. Klimchuk reads Hobbes's declaration that judges ought to suppose the sovereign's intention to be equity to entail that laws which are contrary to equity are not properly binding as law.[150] And, similar to Dyzenhaus, he argues that subordinate judges have a legal, moral, and political obligation to *make* laws equitable, and have license to interpret creatively even if contrary to the plain

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[146] Hobbes, *Leviathan,* 436 [Ch. 26, 145].
[147] Hobbes, *Leviathan*, 436 [Ch. 26, 145].
[148] Dyzenhaus, "Hobbes on the Authority of Law," 209.
[149] Dyzenhaus, "Hobbes on the Authority of Law," 209.
[150] Klimchuk, "Hobbes on Equity."

meaning of the law. Larry May takes this further by arguing that equity is "the central moral concept for Hobbes" and that equity places "rather stringent constraints on what the sovereign law-maker can do."[151]

There are at least two important ways in which this general interpretation – given by scholars such as Dyzenhaus, Klimchuk, and May – overstates the power of subordinate judges and mischaracterizes Hobbesian law. These are (1) the centrality of equity to Hobbesian legal interpretation, and (2) the artificiality of the sovereign and the sovereign's ability to legitimately act outside of law. In this section I will briefly discuss equity and in the remainder of this chapter will discuss the relationship between the sovereign and the laws.

Appealing to equity or to the laws of nature in general does not provide the kind of constraint on sovereignty that Dyzenhaus, Klimchuk, or May claims. From the perspective of subordinate judges, appealing to equity or the laws of nature is not an appeal to some independent standard. Equity itself is shaped by the sovereign. So appealing to equity is just another way to appeal to the sovereign. Hobbes writes that, due to the distorting effects of the passions, the law of nature has "now become of all Laws the most obscure; and has consequently the greatest need of able Interpreters."[152] These interpreters, according to Hobbes, are the sovereign and those whom the sovereign appoints. The sovereign gives both force and specific content to the laws of nature. So when judges appeal to equity or the laws of nature, they are, even then, not appealing to a standard independent of the sovereign.

As Hobbes writes in *De cive*, the question is not "what the holder of sovereign power may rightly do, but what he willed; hence he himself will be the judge, as if he could not give an unfair judgement, when equity is taken into account."[153] This passage reveals important aspects of Hobbes's understanding of the sovereign's relationship to both civil and natural law. Any question to the sovereign regarding civil law will never be about what the sovereign may or may not legislate. The question would rather be to clarify what the sovereign willed in legislating a particular law. The sovereign (or the sovereign through her appointed judges) will then clarify what she actually wills, and that decree will be taken as equity, and therefore the clarification of the law.[154]

The legislator is the ultimate judge, and Hobbes's requirement that judicial interpretation look to equity and the laws of nature is not a substantive constraint on sovereign law-making, but an attempt to consolidate sovereign authority and pre-empt the constraining power of common law and legal experts. Hobbes writes that, to understand a law and how to apply it, one must look to its final causes, and the

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[151] Larry May, *Limiting Leviathan*, 16.

[152] Hobbes, *Leviathan*, 430 [Ch. 26, 143].

[153] Hobbes, *De cive*, 85 [6.15].

[154] However, Hobbesian equity is not the same as Hobbesian justice. It is logically impossible for any law of the sovereign's to be unjust, but it is logically possible for a law to be contrary to equity. The fact that the sovereign can violate equity does not entail, however, that equity exists as an independent standard that anyone, including subordinate judges, could point to in their legal decisions.

knowledge of final causes is in the legislator.[155] The sovereign legislator is the one who can untangle, or otherwise resolve, any seeming contradiction or difficulty in a law or system of laws.

> To him therefore there can not be any knot in the Law, insoluble; either by finding out the ends, to undoe it by; or else by making what ends he will, (as *Alexander* did with his sword in the Gordian knot,) by the Legislative power; which no other Interpreter can doe.[156]

The Sovereign may cut through any law, or group of laws, to *will* it to mean something new. This image illustrates the nature of the relationship between subordinate judges as ministers of sovereignty and sovereignty itself. The subordinate judges may offer their understanding of an unclear part of the law and the sovereign may correct or clarify it. Hobbes does create some boundaries for what may be done by law, as opposed to simply by the power of the sovereign, and Hobbes clearly argues that ruling the commonwealth by law is the best way to ensure peace. However, this does not empower subordinate judges to constrain the sovereign.

4. The Sovereign is Above the Law

As the positivist interpretation insists, the Hobbesian sovereign may legislate bad and even wicked laws, which nonetheless obligate as laws. What is more, any extra-legal action she takes is nevertheless authorized by subjects of the commonwealth. Rule of Law Hobbesians such as Dyzenhaus, May, and Klimchuk, on the contrary, argue that the sovereign can only rule by law. Dyzenhaus writes, "for Hobbes, the sovereign has to rule by law…[and] rule by law is necessarily rule in accordance with the laws of nature, a kind of rule which supplies us with a rich account of the Rule of Law."[157]

Dyzenhaus pushes this point too far and in the wrong direction. There is a particular way in which Hobbes does open the door to subjects to interpret the content of laws and decide based on that content if the laws are obligating. It is revealing, however, that the cases in which Hobbes a law as unintelligible and therefore void as law are almost entirely cases of sovereign indivisibility. Hobbes goes out of his way to insist on the interpretive power of subjects when they are able to use that power to consolidate unified sovereign power. I will discuss this interpretive power in the final section, below.

The foundational human obligation, Hobbes insists, is to seek peace when possible; for subjects in a commonwealth, the way to seek peace is first and foremost to obey the laws of the commonwealth. The sovereign also has a range of moral duties to legislate well and judge well, but the presence of those moral constraints on

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[155] Hobbes, *Leviathan*, 430 [Ch. 26, 143].
[156] Hobbes, *Leviathan*, 430 [Ch. 26, 143].
[157] David Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" 493.

the sovereign's conscience does not mean there are any mechanisms in place by which Hobbesian subjects may check the sovereign.

Rule of Law Hobbesians read into Hobbes's theory the notion of the ideal sovereign who acts only in the true interests of the commonwealth, a standard to which subjects and judges can refer when assessing the pronouncements of the *actual* sovereign. Crucial to this interpretation is the emphasis on the sovereign as an artificial person. This understanding of sovereignty as a set of ideal principles rather than an acting person is implicit in all Rule of Law readings of Hobbes. For Rule of Law Hobbesians, the person of the commonwealth exists, by definition, for the "Peace and Common Defence" of subjects.[158] The sovereign is the representative who "carryeth this Person," the artificial person that is the commonwealth.[159]

When the sovereign is commanding laws, not from her own natural will, but from the artificial will of the commonwealth itself, Rule of Law Hobbesians therefore argue that her laws must necessarily be for the peace and defense of subjects, and in accordance with the laws of nature. The Rule of Law Hobbesian formula is as follows: the commonwealth is by definition for the peace and defense of its subjects and was created to carry out the laws of nature. Therefore, the person of the commonwealth always wills this, by definition. Therefore, when the representative acts as the sovereign willing through law, it must always be for peace and defense, and in line with the laws of nature.

By this logic, whenever the representative acts contrary to those ends, she is not willing the proper end of sovereignty, and therefore she is not acting as sovereign and her commands do not properly obligate as law. However, this ignores Hobbes's purposeful conflation of the person of the commonwealth and the person who represents the commonwealth: the commonwealth "is no Person, nor has capacity to doe any thing, but by the Representative, (that is, the Soveraign;)."[160] It is crucial to Hobbes's theory that the commonwealth is an entity without purposes separate from the stated purposes of the person who represents that commonwealth. This is so, even though Hobbes says that the sovereign may err, the sovereign may be vainglorious, and the sovereign may act contrary to the laws of nature and divine laws. Rule of Law Hobbesianism over-identifies the sovereign with the good sovereign. The sovereign may erode the commonwealth through iniquitous laws or extralegal actions, but those laws are still laws, the subjects are still obligated to obey them, and she still rules as sovereign.

Hobbes writes that the "Soveraign, that is to say, the Common-wealth (whose Person he representeth,) is understood to do nothing but in order to the common Peace and Security."[161] This does not mean that a sovereign order contrary to peace and security is not a law; rather, it means that subjects must understand what the sovereign does as seeking peace, even when the sovereign acts contrary to the laws of nature:

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[158] Hobbes, *Leviathan*, 262 [Ch. 17, 88].
[159] Hobbes, *Leviathan*, 262 [Ch. 17, 88].
[160] Hobbes, *Leviathan*, 416 [Ch. 26, 137].
[161] Hobbes, *Leviathan*, 390 [Ch. 24, 128].

> It is true, that a Soveraign Monarch, or the greater part of a Soveraign Assembly, may ordain the doing of many things in pursuit of their Passions, contrary to their own consciences, which is a breach of trust, and of the Law of Nature; but this is not enough to authorise any subject to make warre upon, or so much as to accuse of Injustice, or any way to speak evill of their Soveraign; because they have authorised all his actions, and in bestowing the Soveraign Power, made them their own.[162]

This is a case in which "the Commands of Soveraigns are contrary to Equity, and the Law of Nature."[163] It is always legally possible for the sovereign to legislate contrary to the laws of nature, contrary to equity, and contrary to peace. And, importantly, bad laws are still binding as law.[164] It is clear from this that Hobbesian sovereigns should legislate with an eye to peace and defense and in accordance with equity, but when they do not, their corrosive laws are still laws to be obeyed (as discussed in the section above). Hobbes argues both that what the sovereign wills is equity, and that the sovereign may will contrary to equity. As discussed above, Hobbes employs equity in at least two distinct senses, one the standard of equity created by God and by which the Sovereign can be judged, and the other is the practical standard of equity which is set by the sovereign. At one level, the sovereign may act contrary to equity, contrary to the laws of nature, and sin against God. At another level, however, that of subjects and subordinate judges, equity, practically, is whatever the sovereign says it is. When it is unclear what a particular judgment or law asks for, one may ask the sovereign for clarity, and then that clarification in the law stands, for us (thought not for God), as equity.

When one looks at Hobbes's list "*Of those things that Weaken, or tend to the* DISSOLUTION *of a Common-wealth*," the first threat is that the sovereign will not keep her power unified and absolute.[165] After that, the greatest dangers to the health of the commonwealth are seditious doctrines that might lead subjects to think they have grounds for questioning the sovereign's course of action, for example by holding the sovereign accountable to an independent moral standard, or holding the sovereign accountable to her own civil laws.[166] It is just such accountability that Rule of Law Hobbesians maintain that Hobbes requires, when instead he repudiates it. Hobbes *is* extremely concerned that the sovereign legislate good laws, truly aiming at the peace and defense of the commonwealth. However, the two most crucial prerequisites for this are (1) absolute sovereign unity, and (2) quelling any private judgment that rivals the judgment of that sovereign power. The Rule of Law Hobbesians are thus putting forward a fundamentally anti-Hobbesian view.

Contrary to Rule of Law Hobbesians, I argue that it is clear the sovereign can act outside of civil law and is not subject to it, and that even when acting within law, the sovereign is not constrained by law in the ways they claim. While the sovereign

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[162] Hobbes, *Leviathan*, 390 [Ch. 24, 128].
[163] Hobbes, *Leviathan*, 390 [Ch. 24, 128].
[164] Hobbes, *Leviathan*, 540 [Ch. 30, 181-182].
[165] Hobbes, *Leviathan*, 498 [Ch. 29, 167].
[166] Hobbes, *Leviathan*, 502-506 [Ch. 29,168-170].

does rule by law, the sovereign's power extends beyond law. That the sovereign has the power to act outside of law (and not simply the power to control the laws) is central to Hobbes's understanding of the sovereign as the ultimate judge of people's safety. Thomas Poole refers to the prerogative power as the "dark matter" of the Hobbesian commonwealth.[167] While the sovereign's commands are enacted through legal channels, the sovereign's "prerogative power is needed to institute law."[168] In addition to being necessary for instituting law, his power to act outside of law is always present within the commonwealth. For the sovereign to act outside of the legal order via prerogative power is not only legitimate, but could very well be necessary to ensure the safety of the people and therefore obligatory for the sovereign.

The sovereign may risk destabilizing the legal order when she acts extra-legally, and every act that is clearly outside the system of laws should be weighed in terms of its benefit to the commonwealth and the potential danger of weakening the stability that a legal order brings. However, this is simply to return to the point that Hobbes recognizes an entire spectrum of better or worse ways for the sovereign to rule, and that the sovereign will be answerable to God for breaking the laws of nature, and will face the natural punishments of bad rule.[169]

Rule of Law Hobbesians exaggerate the conceptual constraints on legal obligation stemming from the inalienable rights of subjects. According to Dyzenhaus, the strict right to self-defense seems to be expanded in *Leviathan*, when Hobbes writes that:

> No man is bound by the words themselves, either to kill himselfe, or any other man; And consequently, that the Obligation a man may sometimes have, upon the Command of the Soveraign to execute any dangerous, or dishonourable Office, dependeth not on the Words of our Submission; but on the Intention, which is to be understood by the End thereof. When therefore our refusall to obey, frustrates the End for which the Soveraignty was ordained; then there is no Liberty to refuse: otherwise there is.[170]

Dyzenhaus says that, since it would be incoherent to will oneself into danger, the obligation subjects have to put themselves in danger or dishonor depends not on "the words of our Submission," but rather on the "End for which Soveraignty was ordained."[171] Dyzenhaus argues that this effectively puts the decision in the hands of the subjects as to whether or not a law is obligating, and that therefore Hobbes "generalizes the right of resistance."[172] If the sovereign commands something that is

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[167] Thomas Poole, "Hobbes on Law and Prerogative," *Hobbes and Law*, ed. Thomas Poole and David Dyzenhaus (Cambridge: Cambridge University Press, 2012), 90.
[168] Poole, "Hobbes on Law and Prerogative," 89.
[169] Hobbes, *Leviathan*, 572 [Ch. 31,193].
[170] Hobbes, *Leviathan*, 338 [Ch. 21, 112]
[171] Hobbes, *Leviathan*, 338 [Ch. 21, 112].
[172] Dyzenhaus, "Hobbes on the Authority of Law," 189.

contrary to the end of the commonwealth––that is, contrary to peace––then subjects may without injustice disobey, because that is the true liberty of subjects.[173]

This Rule of Law Hobbesian reading could also pull from *De cive*, in which Hobbes explains that "it is one thing to say, I give you the right to command whatever you wish, another to say, I will do whatever you command."[174] If a subject is commanded to do something to which he "may prefer to die rather than live in infamy and loathing" (a son being commanded to kill his father, for example), then that subject cannot be understood to have obligated him or herself to obey that sort of command.[175] In both of these cases, because of the source of sovereign authority and the logic of subjects' obedience to laws, there are certain things that are outside the bounds of what is legally obligating. Dyzenhaus argues that, for subjects to understand that a law is obligating, it must be clear to them that it is something they could have conceivably willed themselves, or at least they can understand that it is for peace, the proper end of the commonwealth.

Although it is now famous as a statement of inalienable rights, this passage actually insists on a *curtailment* of the subject's right to resist. Hobbes is saying here that when disobeying a command would undermine the peace and defense of the commonwealth, then one is obligated to obey *even if* that means she must do something dangerous or dishonorable, and even if the words of submission had not explicitly included such actions.[176] Hobbes argues that "[w]hen, therefore, our refusall to obey frustrates the End for which the Soveraignty was ordained, then there is no liberty to refuse; otherwise there is."[177] Dyzenhaus misreads this passage to be an expansion of the liberty of subjects and an affirmation of his view that Hobbesian subjects are only obligated by the sovereign's laws if they believe them to be for the good of the commonwealth. It is instead a further restriction of the right to resistance and an affirmation that the sovereign's judgment of what is necessary for the commonwealth can even obligate subjects to put themselves in grave danger or dishonor. This passage does not hand over interpretive power to subjects who then must obey only when they can understand their actions to be conducive to peace, but rather reinforces the absolute authority of the sovereign.

There are some extreme cases which push Hobbes to draw a clear line, not to limit the authority of the sovereign, but to limit the legal obligations of the subject. But the inalienable rights of subjects and the impossibility of dividing sovereignty may constrain lawmaking through the anticipated practical effects of the permissions granted to subjects. In neither case, however, are there juridical constraints being placed on sovereign authority itself. Rather, there are some things it is practically nearly impossible for the sovereign to do since she will be constantly interpreted as meaning the opposite (in the case of trying to divide sovereignty), or because her commands are likely to be ignored because of their practical effects (because they conflict with the lives and rights of subjects). In both these cases, the practical effects

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[173] Dyzenhaus, "Hobbes on the Authority of Law," 189.
[174] Hobbes, *De cive*, 82 [6.13].
[175] Hobbes, *De cive*, 83 [6.13].
[176] Hobbes, *Leviathan*, 338 [Ch. 21, 112].
[177] Hobbes, *Leviathan*, 338 [Ch. 21, 112].

create feedback for the sovereign, but in neither case are they enforceable juridical constraints on the sovereign.

Dyzenhaus's focus on constructing a theory of Hobbesian sovereignty as a kind of moral constitutionalism committed to a robust rule of law leads him to exaggerate the limitations on sovereignty and to overlook Hobbes's repeated insistence on the dangers of private judgment. The distortions that result from a Rule of Law reading are nicely illustrated in Dyzenhaus's interpretation of Hobbes's account of the biblical story of David and Uriah. Dyzenhaus's normative idealization of the sovereign person prevents him from recognizing that this example is about the power rather than the limits of sovereignty, and is not at all at odds with Hobbes's theory of the sovereign as an artificial person.

Hobbes writes that there are some cases in which a subject "may be put to death, by the command of the Soveraign Power, and yet neither do the other wrong."[178] In the case of "a Soveraign prince that putteth to death an Innocent Subject," the sovereign does the subject no wrong, even though the subject is innocent.[179] It is in this context that Hobbes introduces the story of David and Uriah. King David had Uriah killed because David had slept with Uriah's wife, Bathsheba, and she had become pregnant. In order to marry her and not have their affair made public, King David secretly orders the death of Uriah.[180] Hobbes writes:

> For though the action be against the law of Nature, as being contrary to Equitie (as was the killing of *Uriah*, by *David*;) yet it was not an Injurie to *Uriah*; but to *God*. Not to *Uriah*, because the right to doe what he pleased, was given him by *Uriah* himself: And yet to *God*, because *David* was *Gods* Subject; and prohibited all Iniquitie by the law of Nature. Which distinction, *David* himself, when he repented the fact, evidently confirmed, saying, *To thee only have I sinned*.[181]

Hobbes uses the story of Uriah and David to explain that a sovereign has *absolute authority* over his subjects and that no wrong, no transgression of the laws of nature, changes that absolute authority. By contrast, Dyzenhaus writes that, because King David has failed to utter the command according to norms of legal recognition (because it is a secret message ordering his death), "Uriah is, on Hobbes's own terms, entitled to say to David that in issuing that order he has stepped out of his artificial role as sovereign and into a state of nature relationship of hostility with Uriah, in which if David prevails, it will be by sheer power, not by right."[182] His argument is that Hobbes would not regard David's command as proper civil law, nor as an authorized extra-legal act of a sovereign, but only as an act of power (and therefore King David is not acting as sovereign at all, according to Dyzenhaus). And *because* of that, Uriah has a right to contest the sovereign's actions over him. However, Hobbes's

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[178] Hobbes, *Leviathan*, 330 [Ch. 21, 109].
[179] Hobbes, *Leviathan*, 330 [Ch. 21, 109].
[180] 2 Samuel 11.
[181] Hobbes, *Leviathan*, 330 [Ch. 21, 109].
[182] Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" 500.

point is that, even when one may rightfully resist one's own legal execution, and even when one is not guilty of any wrongdoing, one has still authorized his own execution because everything the sovereign does is authorized. Contrary to Dyzenhaus's reading, the subject never has this kind of right against the sovereign. Dyzenhaus seizes on Hobbes's use of the story of Uriah as an illustration of when a subject can say to the sovereign, "you are stepping outside of your authority as the sovereign." Hobbes's point with the story is precisely that David retains his sovereign authority throughout.

In the end, Dyzenhaus is forced to conclude that, because Hobbes's use of the story of David and Uriah is so "jarringly discordant" with the (Rule of Law) Hobbesian notion of sovereignty, the better interpretation of this biblical story is that, at the time of David and Uriah, and unlike in seventeenth-century England, God was the true sovereign. Dyzenhaus writes that "…God is the guardian of the moral order and will see to it that order is restored by visiting David's sin on David's household and, eventually, on David himself."[183] Dyzenhaus argues that this is a story about the need for divine intervention because King David overstepped his role as King and did not have the proper authority when he had Uriah killed for a personal vendetta.

Dyzenhaus's argument is that, given the logic of the artificial person of Hobbesian sovereignty, the sovereign's authority is legally limited by judges and by subjects' interpretations of the laws of nature and of their own rights. Subjects "are entitled to make judgments about what the laws of nature require so that when one of the sovereign's enactments seems clearly to lead to an unreasonable result, they may contest that interpretation of the law."[184] Given this, subjects can then claim, against the sovereign, that "he has stepped out of his artificial role as sovereign."[185]

Contrary to this strained reading, it is clear that Hobbes uses this extreme example to highlight that *even here*, Uriah has authorized his own execution. Although Hobbes explicitly uses this story to show that there are no limits to the rights of the sovereign that a subject may draw, Dyzenhaus tries to conclude just the opposite. While any subject has a right to defend his own body, the sovereign does not wrong him when she orders his death, even if he is an innocent. While it is perhaps an open question whether King David's command is a law or an extra-legal exercise of power, either way David is authorized and Uriah has no claim against his king.

5. The Special Case of Unified Sovereignty

While I have been critical of Rule of Law Hobbesians in this chapter, they are clearly right that there is a great deal more going on in Hobbes's discussions of civil law, and particularly of the interpretive power of citizens and judges, than has previously been thought. I wish to argue that citizens and subordinate judges may act as a counterweight to bad rule, but in a more limited and specific sense than Rule

[183] Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" 501.
[184] Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" 500.
[185] Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" 500.

of Law Hobbesians propose. The possibility of judicial or citizen interpretation constraining sovereign command is most pronounced and significant when the law threatens to destroy sovereignty itself. As discussed above, there are powers fundamental to sovereignty. "[T]he Rights, which make the Essence of Soveraignty" include the power of the militia, raising taxes, and governing religious doctrine.[186] If the sovereign seems to grant away any of these powers, but has not explicitly renounced sovereignty, then "the Grant is voyd."[187] In this final section I demonstrate that the broadest interpretive power of both subjects and judges is aimed at maintaining sovereign unity. Actors other than the sovereign *are* empowered to declare the sovereign's laws void, or to interpret them in creative ways––*for the purpose of upholding unified and absolute sovereign power*.

Even were the sovereign to command, in the clearest terms such that all subjects were aware, that the power of raising taxes belonged not to the sovereign king but to parliament, it is the obligation of judges (and subjects) to view that command as having an implied non-obvious meaning, or as void and not a law at all.[188] For, to uphold such a command would be the same as dissolving sovereignty, and unless the sovereign explicitly renounces sovereign power (thus dissolving the commonwealth), one must assume that the sovereign power has not been renounced.

This places an important interpretive role outside the sovereign: subjects must be able to understand what powers are fundamental to sovereignty to understand what is and is not a law, and thus what laws are therefore not truly laws at all. Whereas elsewhere, Hobbes is at pains to emphasize that whatever the sovereign commands, and only that, is law, here he is clear that there may be a command of the sovereign that cannot be called a law. To grant away the fundamental powers of sovereignty, to divide sovereignty, is impossible. It is not void because such an act is against God, nature, or reason (though it is against all three). The grant is void because to separate sovereignty would be to destroy it in that very same act, which (unless the sovereign explicitly renounces sovereignty) no one can interpret the sovereign as doing. Normally, the authority of the sovereign requires obedience to her command. In the case of a command obedience to which would destroy sovereign authority, the authority of the sovereign requires disobedience (or reconstrual of) her command.

Hobbes does introduce an alternative to declaring such a grant void, one could interpret it, not as a division of sovereign power, but only of administration. It cannot truly be a law if it seeks to divide, and therefore destroy sovereignty. Sovereignty remains indivisible, and it must always be implicit that "the King of *England* may at all times, that he thinks in his Conscience it will be necessary for the defence of his People, Levy as many Souldiers, and as much Money as he please, and that himself is

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[186] Hobbes, *Leviathan*, 278 [Ch. 18, 92].

[187] Hobbes, *Leviathan*, 280 [Ch. 18, 93].

[188] For recent useful discussions of the inalienability of sovereignty in Hobbes, see Noel Malcolm "General Introduction" in *Leviathan*, vol. 1, 24-35; Kinch Hoekstra, "*Leviathan* and its Intellectual Context," *Journal of the History of Ideas* Vol. 76 No. 2 (April 2015).

Judge of the Necessity."[189] In the case in which the sovereign *seems* to be allowing another power to limit the absolute sovereign power—for example by transferring or renouncing the sole authority to tax or conscript—the implication is always that, as soon as the sovereign judges he must act in an unlimited way for the sake of the safety of the people, he does so legitimately.[190]

It is not clear where this leaves the Hobbesian subject. Similar to the way in which a subordinate judge should, "if the case be difficult…respit Judgment till he have received more ample authority," perhaps subjects who simply cannot understand a sovereign command as obligating should, if possible, delay obedience until they receive clarification.[191] This could create a kind of stalemate within the commonwealth, as subjects simply could not believe the sovereign has commanded something that seems to end the commonwealth.

While it is impossible for the sovereign to will away the indivisible powers of sovereignty without explicitly renouncing sovereignty, it *is* possible for the sovereign to renounce sovereignty itself. As Hobbes writes in *De cive*, "a holder of sovereign Power is not understood to have summoned the citizens to debate about his own right, unless, in absolute disgust, he abdicates power in explicit terms."[192] Therefore, the sovereign may explicitly abdicate power. When Hobbes writes, in *Leviathan*, that "Soveraigne Power cannot be forfeited," it is to emphasize that the sovereign is not party to any covenant, and therefore nothing the sovereign does can be claimed as evidence of a breach of covenant with subjects.[193] Hobbes's Latin here is even clearer on this point: "the sovereign power cannot be taken away from the holder of it on account of the bad government of the commonwealth."[194] To say sovereign power cannot be forfeited means precisely that it cannot be taken by the people as a consequence of any action of the sovereign. This is because the sovereign is not party to any covenant with the people, and "besides," Hobbes adds, even if there were such a claim of a sovereign breach of covenant, there would be "no judge to decide the controversie."[195]

Hobbes's position that sovereignty can never be forfeited has been taken to deny that the sovereign may abdicate, or at least to contradict his allowance of abdication.[196] The seeming contradiction disappears, however, when we understand what forfeit here means. Forfeit, for Hobbes, and commonly in seventeenth-century

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[189] Hobbes, *Dialogue*, 22 [22].

[190] For an analysis of the absolutist reasoning in Hobbes's theory and the distinction between right and exercise of sovereignty, see Kinch Hoekstra, "Early Modern Absolutism and Constitutionalism," in *Cardozo Law Review* 34, no. 3 (2013).

[191] Hobbes, *Leviathan*, 436 [Ch. 26, 145].

[192] Hobbes, *De cive*, 89-90 [6.20].

[193] Hobbes, *Leviathan*, 266 [Ch. 18, 89].

[194] Hobbes, *Leviathan*, 266/267 [18, 89/87]

[195] Hobbes, *Leviathan*, 266 [Ch. 18, 89].

[196] The seeming paradox is particularly clear when Hobbes lists the rights of sovereignty: "His Power cannot, without his consent, be Transferred to another: He cannot Forfeit it: He cannot be Accused by any of his Subjects, of Injury: He cannot be Punished by them. . ." (*Leviathan,* 306 [Ch. 20, 102]).

Britain, meant to lose something as a consequence of, or penalty for, some breach or transgression. The definition of forfeit as losing the right to something "in consequence of a crime, offence, breach of duty, or engagement" was in common usage throughout the sixteenth and seventeenth centuries.[197] As John Cowell defined it in his 1607 legal dictionary, forfeiture is "the effect of transgressing a penall lawe."[198] To say the sovereign forfeited something is to accuse the sovereign of transgressing a covenant or violating civil law, which, on Hobbes's view is impossible. Thus, even though the sovereign power "cannot be forfeited" through actions or words, the sovereign may explicitly abdicate that power. Hobbes's distinction relies on the specific legal meaning of forfeit as the consequent penalty for a transgression. No judge or subject can claim that the sovereign has ceased being sovereign because of any sovereign action (other than explicitly renouncing sovereignty). There cannot be "any pretence of forfeiture," by which a subject may claim to be "freed from his subjection."[199]

Hobbes's use of forfeit/forfeiture elsewhere in *Leviathan* reinforces this reading. For example, though not applicable to sovereign power, subordinate bodies within the commonwealth might breach covenants and therefore "may be punished, as farre-forth as it is capable, as by dissolution, or forfeiture of their Letters (which is to such artificiall and fictious Bodies, capitall),"[200]**;** when describing an iniquitous law, Hobbes describes a man who flees when accused of a felony, and even after his innocence is proven, his fleeing entails that he must "forfeit all his goods, chattels, debts, and duties,"[201]**;** when describing Adam's fall from Eden, Hobbes writes, "Eternall life was lost by Adams forfeiture, in committing sin,"[202]; when describing the perceived conflict between obedience to one's earthly and heavenly sovereigns, Hobbes writes that if a civil law "may be obeyed without the forfeiture of life eternal, not to obey it is unjust**."[203]**

Yet a question remains about the circumstances in which the sovereign can actually abdicate power, even explicitly. If the sovereign were abdicating power *to* another sovereign, for example in surrender, there is no great complication there for Hobbes's theory. If that is the best way forward for the safety of the people, then it is what the sovereign ought to and can do. However, if the sovereign wished to simply dissolve the commonwealth and return to a state of nature, that would (a) clearly be in violation of the laws of nature, but also (b) might actually approach the level of legal difficulty discussed in the "tacit peace rider" examples, of a sovereign saying, "I will this law in order to destroy the commonwealth." If, in the sovereign's judgment,

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[197] "forfeit, v.". OED Online, June 2016, Oxford University Press, <http://www.oed.com/view/Entry/73279>; the OED cites Andrew Marvell *Let.* 14 Apr. in *Poems & Lett*. (1663 [1971]), II.35, "The house adjournd till Wednesday fortnight…every one absent to forfeit fiue pounds."

[198] John Cowell, *The Interpreter* (Cambridge, 1607), *Early English Books Online*.

[199] Hobbes, *Leviathan*, 266 [Ch. 18, 89].

[200] Hobbes, *Leviathan*, 352 [Ch. 22, 116].

[201] Hobbes, *Leviathan*, 434 [Ch. 26, 144]

[202] Hobbes, *Leviathan*, 700 [Ch. 38, 238].

[203] Hobbes, *Leviathan,* 928 [Ch. 43, 321]

abdicating power is for the purpose of the safety of the people, of their peace and defense, then it is moral and it is a law. However, the case of legal abdication may push at the boundaries of what judges and subjects can recognize as intelligible content for a law to have.

Short of explicitly abdicating, nothing the sovereign does may be interpreted as giving up sovereign power. Hobbes writes that if there is something "in the law, edict or decree which diminishes the sovereign power," subjects should deny that it is a sign of the sovereign's will.[204] However, this introduces a puzzle for Hobbes's legal and political theory. The sovereign is the ultimate legislator and interpreter, and yet the sovereign may legislate something which would diminish or divide sovereign power. In that case, it is the subjects and subordinate judges who must interpret, contrary to the straightforward meaning of the sovereign. This puts an important limit on the sovereign's position as absolute and final judge. If the sovereign commands something which would diminish sovereignty, "one must not believe that he wishes to have his authority clipped by any of his ministers, while he retains the will to rule."[205]

This is a challenge, though not an intractable problem for Hobbes's theory of sovereignty: the sovereign is the absolute, unified power, both ultimate legislator and judge; and yet, that very same absolute sovereign can misunderstand her own power or misstate her will. The ultimate judge may not understand how sovereignty works and therefore put laws into place undermining her own power. In *Leviathan*, Hobbes adds a new primary cause of the weakening of the commonwealth: the sovereign does not understand that he must retain absolute power at all times. If the sovereign "*is sometimes content with lesse Power*," then when it is necessary for the sovereign to resume control of absolute power "it hath the resemblance of an unjust act; which disposeth great numbers of men (when occasion is presented) to rebell."[206] The subjects are in such a case empowered to set aside the sovereign's command, not to limit the sovereign, but to preclude or eliminate any limitation.

When faced with the possible destruction of sovereignty by the sovereign herself, subjects have a moral and legal obligation to defend the commonwealth. They are empowered as legal subjects, counterintuitively for us, in order to ensure that the sovereign remain an unlimited and absolute power. Sovereignty is legally limited only in its power to limit itself.

Conclusion

The hard cases for Hobbes, the ones in which commands from the sovereign can fulfill the formal requirements of law and yet be invalid, open the door to an understanding of law that is not simply the commands of an arbitrary ruler. However, those hard cases are precisely the ones in which sovereignty itself is being threatened by the sovereign's commands. Therefore, it is the duty of Hobbesian subjects and judges, in interpreting law, to shore up the supreme and

[204] Hobbes, *De cive*, 160 [14.13].
[205] Hobbes, *De cive*, 160 [14.13].
[206] Hobbes, *Leviathan*, 498 [Ch. 29, 167].

unified power of the sovereign, even when she is the one who seems to be compromising that power. The power to interpret law is in the hands of the people, in some sense to override the sovereign's explicit words, but solely in order to protect sovereignty.

Subjects and judges, if the right situation arises, have a moral and legal obligation to defend sovereignty *against* the sovereign. However, Hobbes does not explicitly extend this logic to, say, defending the commonwealth in other ways against the sovereign's bad legislation. Although sovereignty and the commonwealth are coterminous, Hobbes's theory of the limits of sovereign lawmaking does not treat them identically. For Hobbes, division of sovereignty is the immediate and complete destruction of the commonwealth, and therefore (to use Hobbes's metaphor from the Introduction of *Leviathan*), it is a clear and immediate threat to the body of the commonwealth. There is no comparable threat to the commonwealth, such as unwise distribution of lands or resources, foolhardy or errant wars, that, to Hobbes, would constitute the sovereign willing the destruction of the commonwealth. Anything less clear or urgent than the immediate threat of sovereignty imploding is not grounds for subjects or judges declaring a sovereign's 'law' void and not law at all.

In the legal debates of Hobbes's day, it can seem that one side holds that law is wholly in the hands of the sovereign and is an extension of that power, while the other maintains that law must also be in the hands of those ruled, as a way to constrain that authority. What Hobbes offers is a theory of law in which the subjects and judges are empowered with legal interpretive authority, but primarily in order to *strengthen* the authoritative rule of the sovereign. However, we have here only touched the surface of equity, which is a crucial moral and legal concept. In the next chapter, I discuss the range of meanings equity had in early modern Britain, and the ways in which Hobbes utilized them in his own legal theory.

Chapter 3: Equity

Hobbes writes that "the King is not bound to any other law but that of equity."[207] Hobbes's theory of equity diverges significantly from our current understanding of equity as well as other early modern theories of equity. Equity is an important moral virtue for Hobbes, and is an important part of multiple laws of nature. Additionally, equity is crucial for Hobbesian judges to do their duties of judging correctly. Hobbes invokes equity in quite a few different contexts throughout his works, but the consistent theory of equity, which he espouses throughout, is that equity is, properly, the reason of the sovereign over and above any existing body of law. This Hobbesian equity runs counter to the dominant understanding of common lawyers, who saw equity as intrinsic to the body of common law and decipherable only with the expert reasoning of lawyers. In contrast, Hobbes argues that the natural reason of any individual is sufficient to see that equity is rooted in the sovereign's judgment, not any specialized knowledge of lawyers.

Equity is fundamentally, for Hobbes, the moral obligation to apply law equally to all individuals under it. So long as individuals are treated equally, then whatever distribution of rights and property result in that legal system, is an equitable one. This does not mean that Hobbes's theory cannot explain or accommodate the legality of a hierarchical system. Laws can privilege some over others, allow some individuals or classes greater freedom than others. However, so long as it is all codified in law, then it is equitable. In other words, wealthy people ought not be able to buy their way out of obeying the law, or prejudicial judges ought not be allowed to underserve certain groups or individuals in ways that are at odds with what they are due according to law. Equity is the virtue of legal impartiality, meaning that, however the sovereign decides what property, wealth, position in society people have, that is the equitable amount owed. In addition, Hobbes uses equity sometimes as shorthand for all the laws of nature together. Equity has a special place in the Hobbesian moral virtues, and it is especially relevant in the current discussion of Hobbes's legal philosophy.

Equity poses a problem for readers of Hobbes which this chapter aims to solve. On the one hand, Hobbes writes that the sovereign determines what an equitable distribution is, and determines what equity is in all circumstances. On the other hand, equity cannot be reduced to simply justice, which is wholly and precisely defined by the laws of the sovereign. While it is impossible for the sovereign to create an unjust law (because the laws themselves determine what justice and injustice are), it is possible for the sovereign to commit actions, commands, and even make laws that are contrary to equity.[208] So, the extent to which equity exists as a moral value independent of the sovereign can be opaque.

What this chapter argues is that, for Hobbes, the equity which the sovereign determines for her commonwealth is similar to justice in that it is not possible for the sovereign to violate that standard of equity. However, there does seem to be a separate standard of equity that exists within, not the public conscience of the

[207] Hobbes, *Dialogue*, 68 [87].
[208] Hobbes, *Leviathan*, 390 [Ch. 24, 128].

sovereign, but her private conscience. In addition to this, equity was a highly contested term in the seventeenth century and Hobbes takes advantage of its multiple definitions to undermine the common law association with equity and to instead highlight the equity of The Royal Court of Equity, or Chancery. Hobbes uses his theory of equity to wrest power away from common lawyers and weaponizes their own term against them.

Equity is of central moral and legal importance, for Hobbes. But it is not, as some have argued, "a wide notion of equity or fairness which did provide for a moral basis of criticizing the law," or a "criterion of legality" by which subordinate judges and even subjects can critique civil law.[209] This chapter builds on chapter 2's critique of "Rule of Law Hobbesianism," while also analyzing the particulars of equity both in Hobbes's theory and in the sixteenth and seventeenth centuries more broadly.

1. Hobbesian Equity

In *Leviathan*, equity is the eleventh law of nature, the command that "if *a man be trusted to judge between man and man*, it is a precept of the Law of Nature, *that he deale Equally between them*." [210] The violation of the law of equity is called προσωπολησία (prosopolepsia), acception of persons, or favoritism. What Hobbes means by this, in its most basic form, is that a judge must not privilege anyone above the law.[211] Impartial judgment is crucial to creating and maintaining peace and stability. To judge in one's own case is inevitably to return to a state of war, for Hobbes, and an impartial third party is necessary for peace. In the commonwealth, of course, "the Soveraign is already agreed on for Judge by them both. . ."[212] The judge must treat both parties as equal before the law. Hobbes writes that the safety of the people requires that the Sovereign power administer justice equally to all degrees of people.

Equity is deeply connected to the laws of nature dealing both with distribution of property and how to acknowledge one another as equals by nature.[213]

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[209] Larry May, "Hobbes on Equity and Justice," 241; Dennis Klimchuk, "Hobbes on Equity," 165.

[210] Thomas Hobbes, *Leviathan*, 236 [Ch. 15, 77]. Equity is attached to differently numbered laws of nature in both Elements of Law and De cive, and the form of those laws do change; for the current chapter, I will simply refer to this as the eleventh law of nature.

[211] "acception of persons" comes from the Latin "acceptione personarum", from the Old Testament passage being referenced (in the Vulgate, the most relevant verses are Job 34:19 and Romans 2:11; also relevant here is Thomas Aquinas's II.2.63 article entitled "De Acceptione Personarum". Hobbes's framing calls to mind the King James Version of Job 34:19: "*How much less to him* that accepteth not the persons of princes, nor regardeth the rich more than the poor? for they all *are* the work of his hands."

[212] Hobbes, Leviathan, 380, [Ch. 23, 125].

[213] In *Elements of Law* and in *De cive*, equity is not assigned exclusively to the impartiality of judges but more generally to impartiality and equality in distribution of goods, as well as the requirement that individuals acknowledge one another's

These are all intimately related as Hobbes explains that individuals might have radically different distributions of property, but so long as everyone is equal before the law and their rights to property stem from the same sovereign, then they have exactly the amount of property they deserve. What they deserve is to be treated equally under law, which needn't entail equal property. All inequality that matters is *created* by law; there is no inequality outside of law (created by nature, by other peoples' opinions, or by the laws of foreign nations) that should shape how people are treated under law. Corruption, bribery, and privileged treatment for the aristocracy were commonplace and this is precisely the kind of exemption from the law that Hobbes sought to remedy. Hobbes writes that, "whatsoever is not regulated by the Common-wealth, tis Equity (which is the Law of Nature, and therefore an eternall Law of God) that every man equally enjoy his liberty."[214] The liberty left to subjects where the civil law is silent is carved out for them by the sovereign, and for the commonwealth to violate that (to restrict someone's liberty where there is no law dictating that) violates that equal treatment under law.

Equity is the administering of equal justice, to which, Hobbes says, "a Sovereign is as much subject, as any of the meanest of his People."[215] So, the sovereign is subject to equity; however, the sovereign is not subject to the *same* equity her subjects are, nor in the same way. Subjects of the commonwealth ought all be treated equally under the sovereign's law. The sovereign, however, will be treated equally under God's law. The sovereign cannot be treated equally under her *own* law, because she creates the law and is not subject to them. However, God is sovereign over all and when it comes to God's judgment in the afterlife, a sovereign gets no advantage or privilege and is judged as any other individual would be.

This does not mean, to repeat, that the sovereign is somehow subject to *her own* administration of equitable treatment to others. There are, in fact, as many different forms of equity as there are codes of law. If equity is, roughly speaking, being treated equally under the law, then one must be subject to the law in order to be treated equitably.

In addition to equity as equal treatment under law, Hobbes uses equity more broadly to mean what is reasonable and fair from the sovereign's perspective. In *De cive* he describes equity as "encompassing" all the laws of nature.[216] Or when Hobbes refers to equity in only one place in the whole second half of *Leviathan*, to argue that the word of God is to be taken as the dictates of reason and equity.[217] In Hobbes's opening metaphor of the commonwealth as an artificial man in the introduction to *Leviathan*, he writes that "*Equity* and *Lawes*" are the commonwealth's "artificial

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natural equality. On acknowledging one another as equals and natural equality, see Kinch Hoekstra, "Hobbesian Equality," in *Hobbes Today: Insights for the 21st Century*, ed. S.A. Lloyd (Cambridge University Press, 2012).

[214] Hobbes, *Leviathan*, 448 [Ch. 26, 150].

[215] Hobbes, *Leviathan*, 534 [Ch. 30, 180].

[216] Hobbes, *De cive,* 62 [4.12].

[217] Hobbes, *Leviathan*, 656 [Ch. 36, 224].

Reason and *Will.*"[218] Multiple times Hobbes refers to "reason and equity" as the "word of God"; for example, he writes that in Scripture, "by the *word of God*, is signified such Words as are consonant to reason, and equity." [219]

One added wrinkle in this analysis of equity is the question of *iniquity* (which many scholars have translated into in*equity*, a similar term, but one which Hobbes never used when writing in English). For example, when Hobbes writes that the sovereign "may commit Iniquity; but not Injustice, or Injury in the proper signification," he means iniquity as a violation of (any or all of) the laws of nature.[220] This is even clearer in the Latin, when he changed this passage slightly to say, "I have not denied that the sovereign can act iniquitously… For that which is done against the law of nature is called 'iniquitous', and that which is done against the civil law is called 'unjust'."[221]

Iniquity is not specifically a violation of equity as equal treatment under law, but, more broadly, "sin" and in Hobbes's terms, a violation of any of the laws of nature. In the OED, Hobbes is quoted in both of these definitions for iniquity: (1) "wickedness, sin," and (2) "violation of equity."[222] While the flexibility of iniquity in Hobbes's text does not entail the same flexiblity in equity, other passages corroborate that equity can mean something much broader than simply the eleventh law of nature for Hobbes. He uses equity later in his *Dialogue*, to stand in for the laws of nature. And even in his earlier works he uses equity in this broader sense.

Hobbes introduces the idea of "common equity" by arguing that subjects may sometimes have claims in court, not based in written law, but "depending on the Law of Nature; that is to say, on common Equity." [223] There are instances in which Hobbes refers to equity as a concept which stands above all the laws of nature, or which captures all the laws of nature, and where it is simply implausible to understand him to mean his own eleventh law of nature. These can often be read as an invocation of the traditional and colloquial understanding of equity. However, Hobbes also uses equity in a broad sense at times to invoke the Court of Equity, also known as the Court of Chancery, or the Court of the King's Conscience.

In the *Dialogue,* the Philosopher opens with one of Coke's definitions: "Equity is a certain perfect Reason that interpreteth and amendeth the Law written, it self being unwritten, and consisting in nothing else but right Reason." The Philosopher says that when he tries to take this definition seriously, he is dumbfounded, for "it frustrates all the Laws in the World: for upon this ground any man, of any Law whatsoever may say it is against Reason, and thereupon make a pretence for his

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[218] Hobbes, *Leviathan*, 16 [Introduction, 1]; In the Latin he later omits "and Will" so that equity and laws are simply equivalent to the reason of the state.
[219] Hobbes, Leviathan, 656 [Ch. 36, 224].
[220] Hobbes, *Leviathan,* 270 [Ch. 18, 90].
[221] Hobbes, *Leviathan*, 271 [Ch. 18, 88], "Quin is qui Summam habet Potestatem facere iniquè possit, non negaverim. Iniquum enim quod contra Legem Naturae, Injustum quod contra Legem Civilem factum est, appellantur." .
[222] "iniquity, n.". OED Online. September 2016. Oxford University Press.
[223] Hobbes, *Leviathan* 428, Ch. 26 [142].

disobedience."[224] Anything that gives life to the law must be natural reason, not artificial reason, argues the Philosopher and, "It is not Wisdom, but Authority that makes a Law."[225]

The Philosopher explains that the *summa Ratio*, the highest reason, is not lawyerly reason, but rather "the Kings Reason, be it more, or less." He continues, "the Kings Reason, when it is publickly upon Advice, and Deliberation declar'd, is that *Anima Legis,* and *Summa Ratio*, and that Equity which all agree to be the Law of Reason, is all that is, or ever was Law in *England*."[226] Hobbes starts with the Coke position that equity is the artificial reason of lawyers used to correct the law, and that the body of law itself is animated and ruled by the collective reason of learned common lawyer. And Hobbes takes this to turn it and say, well, yes of course, equity is reason, indeed all law is reason and equity, but the law, and the reason which guides the law, and equity, are all the same: they are the reason of the sovereign over and above the law.

Despite his rejection of Coke's view, throughout the *Dialogue* the Philosopher equates equity with reason. In response to a question of what happens if a written law is against equity, the Philosopher says, "It cannot be that a Written Law should be against Reason: For nothing is more reasonable than that every Man should obey the Law, which he hath himself assented to. . ."[227] Here we see Hobbes playing with a common understanding of what it means for a law to be "against reason", the Philosopher claims that the only reason a subject needs to worry about is reasoning over whether she has to obey a law, and she always has to obey a law, so a law can never be against *that* reason.

Equity plays a central role in Hobbes's discussion of judicial duties in *Leviathan.* Hobbes is clear that, in order to interpret a law, a judge must look not merely at the words of the law but at the intention and purpose of the law. And when a decision is not clear, "the Intention of the Legislator is alwayes supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne. He ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply it with the Law of Nature."[228]

To "suppose" the sovereign's intention to be equity could entail at least one of two different and opposing directives. First, if one is unsure what a law requires, one ought to look to the sovereign's intention, and whatever that intention is for that law or what one can surmise as the sovereign's intention more generally, stands as equity and serves to guide interpretation. Second, supposing equity could mean that one can and ought to employ an independent standard of equity to stand in as the sovereign's intention. In both cases it requires the judge to use their own reasoning, but in the

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[224] Thomas Hobbes, *A Dialogue between a Philosopher and a Student, of the Common Laws of England* in *Writings on Common Law and Hereditary Right* eds. Alan Cromartie and Quentin Skinner (Oxford: Clarendon Press, 2008), hereafter cited as *Dialogue*, followed by page number and 1681 pagination in brackets, 9 [3].
[225] Hobbes, *Dialogue*, 10 [4].
[226] Hobbes, *Dialogue*, 19 [17].
[227] Hobbes, *Dialogue*, 64 [81].
[228] Hobbes, *Leviathan,* 430 [Ch. 26, 143]; 436 [Ch. 26, 145].

first case it is about what the actual sovereign intended and intends with the law in question, in the latter it is reasoning about the independent moral standard of equity. Some recent scholars, to varying degrees, endorse this latter view, while I endorse the former. One must look to the will and intention of the sovereign to give us the standard for equity by which we fill in possible gaps in specific laws.

For example, in Chapter 24, when Hobbes explains how land distribution ought to work, he writes that the sovereign ought to assign property "according as he, and not according as any Subject, or any number of them, shall judge agreeable to Equity, and the Common Good."[229] So whatever the sovereign judges is according to equity is the correct distribution. Hobbes pushes this further to say that, "For seeing the Soveraign, that is to say, the Common-wealth (whose Person he representeth,) is understood to do nothing but in order to the common Peace and Security, this Distribution of lands, is to be understood as done in order to the same." [230] So *whatever* distribution the sovereign decrees is understood to be for the common peace and security. From the perspective of the subjects, the sovereign's actions and laws are understood to be equitable, indeed, they fill in the specific content for that commonwealth of what equitable means.

Another helpful illustration of what Hobbes means by equity as the sovereign's reason comes when he is discussing how it is that custom can become law. This can happen only through the authority of the sovereign (including authorization through tacit consent). He writes that,

> if the Soveraign have a question of Right grounded, not upon his present Will, but upon the Lawes formerly made; the Length of Time shal bring no prejudice to his Right; but the question shal be judged by Equity. For many unjust Sentences, go uncontrolled a longer time, than any man can remember. And our Lawyers account no Customes Law, but such as are reasonable, and that evill Customes are to be abolished: But the Judgement of what is reasonable, and of what is to be abolished, belongeth to him that maketh the Law, which is the Soveraign Assembly, or Monarch.[231]

Here, Hobbes indicates that the sovereign may always determine right according to her own present will; but her will may be to have right determined by precedent law. If such precedent law should undermine or contradict sovereign right, however, the putative law has no authority in virtue of its age, but only if it is in accord with equity. He goes on to explain that only reasonable customs ought to become laws, and the judge of "what is reasonable" is the sovereign.

However, equity is not just what the sovereign declares it to be, because Hobbes frequently invokes equity as a standard to turn to when it is *not* immediately clear what the sovereign's laws are meant to declare. The first on the list of things that "make a good Judge," is "A *right understanding* of that principall Law of Nature called *Equity*, which depend[s] not on the reading of other mens Writings, but on the

[229] Hobbes, *Leviathan*, 388 [Ch. 24, 128].
[230] Hobbes, *Leviathan,* 390 [Ch. 24, 128].
[231] Hobbes, *Leviathan*, 416-418 [Ch. 26, 138].

goodnesse of a mans own naturall Reason."[232] A right judicial understanding of equity depends on one's own natural reason. Additionally, Hobbes writes of judicial duties that, "all the Sentences of precedent Judges that have ever been, cannot all together make a Law contrary to naturall Equity: Nor 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."[233]

It can appear here that Hobbes is positioning the subordinate judge's reason in opposition to the sovereign's reason. For what if the sovereign legislates something that a subordinate judge considers iniquitous in some way. When a case comes in front of her, the subordinate judge might say truthfully, this does not accord with equity as I understand it; and she may conclude that she cannot apply this law. Or, she might say, well, I have to interpret this law in an extremely creative way in order to make it equitable. In this way, recent scholars such as Larry Mary, David Dyzenhaus, and Dennis Klimchuk, aim to show that there is an independent moral standard of equity that can effectively bind the sovereign's exercise of power through law, as discussed in the previous chapter.

What's important to note in these passages I've cited above and many similar to them, is that in each case in which Hobbes emphasizes the importance of natural reason and equity as being crucial to judicial duties, it is always in opposition to the power of legal precedent itself, or of the opinions of common lawyers. In each of these cases in which Hobbes relies on natural reason and equity, he is using those as leverage *against* the view (famously held by Edward Coke) of the absolute necessity of the artificial reason of common lawyers and the power of the body of law itself to bind the sovereign. So in each of these instances, Hobbes is referring to one's own reason *over* the opinions and writings of lawyers, and *over* binding precedent, but (I wish to argue) *under* the will of the sovereign.

So what does it mean to have "A *right understanding* of that principall Law of Nature called *Equity"* which depends not on other mens writings but on natural reason? If we think back to Hobbes's statement that all laws, including the laws of nature, require interpretation, we see that not everyone is capable of correctly interpreting the laws of nature. Despite Hobbes's repeated insistence that the laws of nature lie in every man's heart, he also says, of course, that the laws of nature, just like laws of the commonwealth, require interpretation. In fact, the laws of nature are in even more dire need of correct interpretation. Hobbes writes that the law of nature has "now become of all Laws the most obscure; and consequently has the greatest need of able Interpreters."[234] And who are "able interpreters"? Hobbes argues that they are those who are authorized to be interpreters by the sovereign. I think it bears reiteration that when judges appeal to equity, or appeal to the laws of nature to "supply" their interpretations, they are not reaching for standards untouched by the sovereign. The sovereign gives both force and specific content to

[232] Hobbes, *Leviathan*, 438 [Ch. 26, 146-7].
[233] Hobbes, *Leviathan*, 432 [Ch. 26, 144].
[234] Hobbes, *Leviathan*, 430 [Ch. 26, 143].

these laws of nature, and to that very reason which judges of the commonwealth use to apply laws and decide cases.

Scholars have argued over Hobbes's ambivalent use of equity, but have failed thus far to fully account for the ways Hobbes employs it and to what end.[235] In Tom Sorell's recent article "Hobbes and Equity," he argues that equity is treated either as the eleventh law of nature, or Hobbes uses it to mean simply reason.[236] Johan Olsthoorn also argues that Hobbes uses equity in two ways, as the eleventh law of nature and also as, "'unwritten' principles of fairness according to which judges should adjudicate conflicts and interpret statute law. The principles of equity turn out to be the same as the common laws of England and as the laws of nature, dictated by God."[237] Each of these pieces represents some of the best work published on Hobbes's conception of equity. However, I believe both accounts are incomplete. Sorell's explanation of equity as simply "reason" does not take into account Hobbes's many and varied discussions about *which* reason should be used to rule the state: natural reason, artificial reason, or the sovereign's reason.

A great deal of what is difficult in equity rests on ambiguities about that distinction. Hobbes is not only employing the common notion of equity as a correction to law's application, he is also leveraging the association between equity and the Court of Equity to make common law subordinate to the Court of Equity and therefore the sovereign. This underpins Hobbes's theory that sovereign reason determines equity. For those within a commonwealth, equity only exists in relation to a body of laws and one who commands them. So, for subjects and judges, in determining what is equitable, they must look to their own sovereign for the standard of equity. However, the sovereign herself is, not only the standard of equity within the commonwealth, she is also subject to God's standard of equity. It is according to this standard of equity that the sovereign is morally obligated to act and legislate. This moral obligation, however, cannot be enforced by the subjects, including those in the judiciary. God's standard of equity, to which the sovereign is bound, is importantly *not* identical to the practical standard to which judges are to refer. If we turn back to the story of King David and Uriah from Chapter 2: David sins by punishing innocent Uriah, but we know that, according to Hobbes, there is no injustice done against Uriah (because justice is defined as breaking of a compact and the sovereign has no compact with a sovereign); in addition, there is no violation of equity against Uriah. King David violates equity, but it is against God that he sins, not his own subject. As David says to God, "To thee only have I sinned."[238]

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[235] I have omitted discussing S.A. Lloyd's theory of equity and the laws of nature as it is outside my current discussion. Her theory that reciprocity is the foundation of Hobbes's moral theory and her explanation of equity is in S.A. Lloyd *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge: Cambridge University Press, 2009)

[236] Tom Sorell, "Law and Equity in Hobbes," *Critical Review of International Social and Political Philosophy* 19, no. 1 (January 2, 2016): 29–46.

[237] Johan Olsthoorn, "Hobbes's Account of Distributive Justice as Equity," *British Journal for the History of Philosophy* 21, no. 1 (2013): 13–33.

[238] Hobbes, *Leviathan*, 330 [Ch. 21, 109]; 2 Samuel 11.

Whereas equity was often thought of as a power inherent to the common law and which could alter or overrule positive law to ensure greater fairness, Hobbes repeatedly uses equity to return, not to some disembodied reason of the law itself, but rather to the reason of the sovereign. This is the reason of the *actual* sovereign representative, not an abstract or idealized form of what the sovereign ought to determine as equitable. In this way Hobbes pulls from a different strand in equity, historically, not the equity of common law but of the Court of Equity. In the next section I will discuss the divided and contentious history of equity in order to better situate Hobbes's argument and show the way that Hobbes sought to redefine legal equity as the will of the sovereign, alienating it from its common law associations and utilizing its associations with the Court of Equity.

2. Equity in Context

Equity as a legal concept has a long and divided history. As historian Stuart Prall wrote,

> It was this dual definition of equity that lay at the bottom of so much of the controversy over the prerogative jurisdiction in the sixteenth and seventeenth centuries. For on the one hand 'equity' in English usage did come to mean that law which was adjudicated in the Chancery, and thus inspired the rivalry between the common law courts and the prerogative courts. While on the other hand 'equity' was also a judicial principle itself, modifying, interpreting, and even setting aside the law in the name of 'reason' or 'justice.'[239]

Equity was variably treated as the power of common law courts to manage the body of law themselves, and also the power of the Court of Chancery to overturn or contradict those decisions. We see Hobbes invoke both of these meanings, but by framing equity as necessarily determined by the reason of the sovereign, he deflates any power equity might have *against* the sovereign. Hobbes continues the line of theorizing equity as prerogative power, but not as a force external to the body of law, but rather as a continuation of it, since all law is the sovereign's will.

As indicated by Stuart Prall, some writers on equity in the English legal tradition have spoken of a sharp divide in how equity was thought of in early modern England. Sharon Dobbins argues that some saw equity as "a canon of legal interpretation, tempering the letter of the law to perfect its just intention," while others saw equity as the "discretionary dispensing power of an absolute sovereign."[240] Aristotle's definition of *epieikeia* is most often cited as the textual source of a legal understanding of equity, although there are references to epieikeia

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[239] See Stuart E. Prall, "The Development of Equity in Tudor England," *The American Journal of Legal History* 8, no. 1 (January 1, 1964): 13.

[240] Sharon K. Dobbins, "Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared," *Journal of Law and Religion* 9, no. 1 (1991): 114.

in Homer, Thucydides, Plato, and others.[241] For Aristotle, epieikeia is the "rectification of law insofar as the universality of law makes it deficient."[242] Due to law's general form, it will go astray and/or not apply in some particular cases, and therefore equity, or correction for specific cases, is necessary. Aristotle writes that one should "rectify the omission by what the legislator himself would say if he were present, and if he had known would have provided."[243] It's worth noting that, in the traditional Aristotelian definition, one shouldn't rectify the particular situation based on one's own moral sense, but with reference to what the legislator would have wanted.

The idea of equitable correction to the law is famously discussed by Christopher St. German in his dialogues *Doctor and Student* (1528), who employs an Aristotelian notion of *epieikeia* by way of Gerson's reading of Aristotle.[244] At the time when St. German was writing *Doctor and Student*, the terms 'equity' and 'conscience' were not distinctly associated with the jurisdiction of the Court of Chancery. One can see in St. German the intimate relationship between the notion of equity as mercy and equity as making an exception. St. German writes that equity is a righteousness that considers the particular circumstances of a deed and tempers the judgment with,

> the swetnes of mercie…It is not possyble to make any generall rewle of the lawe/ but that it shall fayle in some case… And therfore to folowe the wordes of the lawe/ were in some case both agaynst Iustyce & the common welth: wherefore in some cases it is *good and even* necessary to leue the wordis of the lawe/ & to folowe that reason and Justyce requyreth/ & to that intent equytie is ordeyned/ that is to say to tempre and myttygate the rygoure of the lawe. And it is called also by some men epicaia.[245]

One can also see in St. German the theory of equity as both within human laws but, crucially, a higher law (of reason and of god) above human law: "The whiche [equity] is no other thynge but an excepcyon of the lawe of god/ or of the lawe of reason/ from the generall rewles of the lawe of man…the whiche excepcion is secretely understande in every generall rewle of every positive lawe."[246] St. German does not put forward one singular and coherent theory of equity but rather offers many

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[241] In Hobbes's translation of Thucydides he translates epieikeia as "equity" but also as "lenity" (see 1.76.4 and 3.40.2).

[242] Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, 2nd edition (Indianapolis, Ind: Hackett Publishing Company, Inc., 1999), 1137b26-7. Also see *Rhetoric* 1.13, and 1.15 in which Aristotle is clear that he means this not only for legislators but also for those in the courtroom.

[243] Aristotle, *Nicomachean Ethics*, 1137b26-7.

[244] See Zofia Rueger, "Gerson's Concept of Equity and Christopher St. German," *History of Political Thought* 3.1 (Spring 1982): 1-30.

[245] Christopher St. German, *Doctor and Student*, ed. T.F.T. Plucknett and J.L. Barton, vol. XCI, The Publications of the Selden Society (London: Selden Society, 1974), 95–97. This was the popular name of *Dialogus de fundamentis legum Anglie et de conscientia*, published in 1528, English translation in 1530 or 1531.

[246] St. German, *Doctor and Student*, XCI:97.

different aspects of it. John Doderidge, in his 1623 *English Lawyer*, explains St. German's definition of equity as having "a triple use in English law, namely, '1 . . . it keepeth the common Law in conformity [by considering the reason of like or unlike cases]. 2 Or it expoundeth the Statute Law. 3 Or thirdly giveth remedy in the Court of Conscience in cases of extremity, which otherwise by the Lawes are left unredressed.'"[247]

Edmund Plowden and William Lambarde both proposed theories of equity in the sixteenth century that, while not precisely Hobbesian, are certainly very close to Hobbes's own view. Edmund Plowden's theory of the necessity of equity in his *Commentaries* (published in 1571 as *Les comentaries ou les reportes de Edmunde Plowden* and then abridged by Thomas Ashe and published as *The Commentaries* in 1597) is far more explicitly rooted in the sovereign as lawmaker than St. German's picture.[248] Plowden wrote that equity is a "necessary Ingredient in the exposition of all Laws," but it is itself, "no Part of the Law, but a moral Virtue which corrects the Law."[249] Plowden wrote of the necessity to look to the intention of the lawmaker and to imagine the lawmaker in the room while one interprets a statute in order to come to the equitable outcome, and in this Plowden was referring to all judgments in common law, not the court of chancery specifically. Plowden referred, as many did at the time, to two kinds of equity, one that expands the application of a law in a particular instance and one that restricts it, in order to have an equitable outcome.[250] This idea of imagining the legislator in the room with you is extremely close to, and probably ultimately dependent on, Aristotle's own statement about imagining what the legislator would say if he were present.

William Lambarde's *Archeion* of 1591 is in many ways a treatise on equity. Mark Fortier, in his *The Culture of Equity in Early Modern England*, portrays Lambarde as having a "proto-Hobbesian view" of "equity as a kind of rough justice and ad hoc corrective."[251] For Lambarde, equity is the King's discretion but eventually any King will abuse his power and therefore "laws and rules of justice came into being as a check on the discretionary power of governors."[252] The opposition between the power of the King and the power of laws developed into the King's Bench as the court of "*Rights* and *Law"* and Chancery a court of "*Equitie* and *Conscience*."[253] The Chancellor is the keeper of the King's conscience and Lambarde

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[247] John Doderidge, *English Lawyer; Describing a Method for the Managing of the Lawes of this Land* (London, 1631), 210, 211.

[248] See Stuart E. Prall, "The Development of Equity in Tudor England," *The American Journal of Legal History* 8, no. 1 (January 1, 1964): 13

[249] Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden*, 466–467; quoted in Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot, Hants, England and Burlington, VT: Ashgate, 2005), 66.

[250] See Fortier, *The Culture of Equity in Early Modern England*, 65–68.

[251] Fortier, *The Culture of Equity in Early Modern England*, 69.

[252] Fortier, *The Culture of Equity in Early Modern England*, 69.

[253] William Lambarde, *Archeion, Or, A Discourse upon the High Courts of Justice in England*, ed. Charles Howard McIlwain and Paul L. Ward (Cambridge, Mass: Harvard

writes, as many do at the time, of the dual role of the Chancellor: as bearing both his ordinary power and the King's extraordinary power. In his ordinary powers, the chancellor simply decides cases, but in bearing the King's extraordinary power, the Chancellor may, as the keeper of the king's conscience, overrule the letter of the law. Lambarde warns, however, that this extraordinary power of "*Equitie* should not be appealed unto but only in rare and extraordinary matters," because a man's judgment unchained from law is what Aristotle called a beast, and "commonly carried away, with unruly affections."[254] For Lambarde, equity and law are in opposition to one another, and while society needs both, it is important that law keep equity constrained. Equity comes from the sovereign, outside of law, and Chancery is the monarch's "prerogative court of equity, outside and apart from the common law."[255] While I would not call this a proto-Hobbesian view, as Fortier does, since Lambarde is really relying on an opposition between the laws of the land and equity as the king's discretion, it is nonetheless important to see that through-line of equity as the will of the sovereign over and above law.

John Cowell's explanation of the Court of Chancery in his 1607 legal dictionary *The Interpreter* is similar in many ways to Lambarde's view. Cowell writes that the "*Chancerie* (*cancellaria*) is the court of equitie and conscience, moderating the rigour of other courtes, that are more straightly tyed to the leter of the lawe, whereof the Lord Chancelor of *England* is the chiefe Judge."[256] Therefore, in defining chancellor, Cowell explains, quoting Staunford, that the Lord Chancellor has two kinds of power:

> For whereas all other Justices in our common wealth, are tied to the lawe, and may not swerve from it in judgement: the Chanceler hath in this the kings absolute power, to moderate and temper the written lawe, and subjecteth himself onely to the lawe of nature and conscience, ordering all things *iuxta equum & bonum*. And therefore *Staunford* in his *Prerogative.ca.*20.*fo*.65. saith, that the Chanceler hath two powers: one absolute, the other ordinary: meaning that though by his ordinary power in some cases, he must observe the forme of proceeding, as other ordinarie Judges: yet that in his absolute power he is not limited by the

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University Press, 1957), 19; quoted in Fortier, *The Culture of Equity in Early Modern England*, 69.

[254] Lambarde, *Archeion, Or, A Discourse upon the High Courts of Justice in England*, 44; quoted in Fortier, *The Culture of Equity in Early Modern England*, 70.

[255] Fortier, *The Culture of Equity in Early Modern England*, 71.

[256] John Cowell, *The Interpreter: Or Booke Containing the Signification of Vvords Wherein Is Set Foorth the True Meaning of All, or the Most Part of Such Words and Termes, as Are Mentioned in The Lawe Writers, or Statutes of This Victorious and Renowned Kingdome* (Cambridge, 1607), EEBO 55; William Staunford Sir, *An Exposicion of the Kinges Prerogatiue Collected out of the Great Abridgement of Iustice Fitzherbert and Other Olde Writers of the Lawes of Englande by the Right Woorshipfull Sir William Staunford Knight, Lately One of the Iustices of the Queenes Maiesties Court of Comon Pleas: Whereunto Is Annexed the Proces to the Same Prerogatiue Appertaining.* Early English Books, 1475-1640 / 332:09 (London, 1567), fold65r.

> written law, but by his conscience and equitie, according to the circumstances of the mater in question.[257]

Cowell writes that in this one respect, the Lord Chancellor has the King's absolute power. Staunford's *Exposicion of the Kinges Prerogative* (1567) to which Cowell refers, theorizes the absolute power of the King and therefore the dual role of the Lord Chancellor. Outside of discussion of the Court of Chancery specifically, Staunford writes that, to lay any claim on one's own land that diminishes the "ancient rights of the Crowne" would be "against all naturall equitie."[258]

Edward Hake in his 1603 *Epieikeia*, in contrast particularly to Lambarde's formulation of equity, but also in contrast to both Staunford and Cowell, writes that equity is not outside of law, but comes from within it. He writes, "the *Equity* of all humane lawes is to be sought for in the same lawes, namely, owt of the internall sense thereof."[259] The internal sense, however, should be sought by looking to the intention of the legislator. Hake's three dialogues continually refer to the equity that is within all of common law, but he also writes that, when someone says "*You have no remedy at the Common lawe but must seeke to be relieved in Equity*, it is to be understood that the *Equity* there ment is the *Equity* of the Chauncery."[260] For Hake, Chancery has absolute equity, which is "deryved allonly from the conscience of the Lord Chancellor," whereas common law has strict equity.[261] English legal thinkers typically drew the parallel between the Court of Chancery and Roman Praetors; as Hake writes, ". . . by the Civile lawe the examination of the aforesaid circumstances, as of infynite others, were wholly referred to the *Pretorian Equity*, which with the Romanes was as the Chauncery's *Equity* is nowe with us."[262]

Francis Bacon, who became the Chancellor following Lord Ellesmere, argues that the Chancery looks beyond the common law.[263] Bacon, as was common, refers to Chancery as the Praetorian court. In his "Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms," Bacon writes that Praetorian

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[257] Cowell, *The Interpreter*, Chanceler entry. See also William Staunford Sir, *An Exposicion of the Kinges Prerogatiue Collected out of the Great Abridgement of Iustice Fitzherbert and Other Olde Writers of the Lawes of Englande by the Right Woorshipfull Sir William Staunford Knight, Lately One of the Iustices of the Queenes Maiesties Court of Comon Pleas: Whereunto Is Annexed the Proces to the Same Prerogatiue Appertaining.* Early English Books Online / 332:09 (London, 1567), fo.65r.

[258] Staunford, *An Exposicion of the Kinges Prerogatiue…*, fo.25r.

[259] Edward Hake, *Epieikeia, A Dialogue on Equity in Three Parts*, ed. D.E.C. Yale (New Haven: Yale, 1953), 48.

[260] Hake, *Epieikeia*, 47.

[261] Hake, *Epieikeia,* 122.

[262] Hake, *Epieikeia,* 122. See Darien Shanske, "Four Theses: Preliminary to an Appeal to Equity," in *Standford Law Review*, 57.6 (2005), 2064 on the relevance of canon and civil laws in the works of St. German and Hake.

[263] Francis Bacon, *The Learned Reading of Sir Francis Bacon, One of Her Majesties Learned Counsell at Law, upon the Statute of Uses Being His Double Reading to the Honourable Society of Grayes Inne ...*, [London: 1642] 12–13.

courts ought always to have the right to review any case heard at common law, but should "entirely confine themselves to monstrous and extraordinary cases," because if the Praetorian courts were to overextend themselves, "the distinction of cases will not be retained, but discretion will in the end supersede the law."[264]

The Court of Equity (or the Court of Chancery) was one of the prerogative, or royal, courts; it began as an administrative office of the King, and grew into a court of its own that heard cases that could not be properly dealt with in other courts. Hobbes does not discuss any specifics about legal jurisdictions in *Elements of Law, De cive,* or *Leviathan*. However, in the *Dialogue* and *Behemoth*, both of which are more concerned with concrete and historical details, the Court of Chancery is discussed in detail. Hobbes's account of the Court of Chancery, and its supremacy over all common law courts, reinforces his argument that equity is necessary to interpret law. The Court of Chancery was a Royal Court, and was closely associated with claims of royal overreach; any arguments at the time about equity would call to mind the many recent debates over the Court of Equity, and the underlying question of it could overturn any decision made at Common Law.

The Court of Chancery or Equity was also called the Court of the King's Conscience, and in the seventeenth century was embroiled with criticism that equity was merely the discretion and arbitrary will of the sovereign, or of the Chancellor appointed by the Sovereign. Therefore equity was associated, not merely with legal principles of common lawyers, but with the arbitrary will of the sovereign over and above common law.

Throughout the *Dialogue* Hobbes continually uses Edward Coke's formulations to twist them to Hobbesian ends. He does this with both Coke's definitions of equity and reason. Hobbes's Philosopher argues that, since all decisions must be equitable, if there is ever a question at law, the Court of Equity ought to oversee all those decisions. Because the Court of Equity had a reputation for being subject to the whims or arbitrary will and also had a long history of corruption, that the Court could ensure the virtue of equity was highly suspect. John Selden famously called equity "a roguish thing," saying, "Equity is according to ye conscience of him that is Chancellor, and it is larger or narrower, soe is equity[.] Tis all one as if they should make the Standard for the measure we call A foot, to be the Chancellor's foot."[265] Hobbes's consistent positioning of the Court of Equity above common law courts is also a consistent positioning of the Sovereign's authority over and above the law. In this way equity is not a constraint on sovereign acts but rather a

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[264] Francis Bacon, "Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms" appended to Book 8 of *De Augmentis* (1623), *Works of Francis Bacon*, vol. 5, 88-110; quoted in Klinck, "Imaging Equity in Early Modern England," in *Canadian Bar Review* 84 (2005), 170.

[265] John Selden, *Table talk of John Selden* ed. Sir Frederick Pollock, Selden Soc. (London, 1927), s.v. "Equity"; quoted in Alan Cromartie "General Introduction" in Thomas Hobbes, *Writings on Common Law and Hereditary Right* eds. Alan Cromartie and Quentin Skinner, xxxiv.

representation of Hobbes's attempts to further demarcate the sovereign as unconstrained by law. [266]

The 1616 *Earl of Oxford's Case* was the famous court case in which it was decided that the Court of Equity does technically have jurisdiction over any case heard in a common law court. The official question at hand was, ". . .by what Words in any Statute is the Chancery to be restrained, and Conscience and Equity excluded, banished and damn'd?"[267] Edward Coke, Lord Chief Justice had tried to argue that, if the Court of Chancery's jurisdiction were not limited, it amounted to *praemunire*, which was a crime that was specific to making appeals to the Pope. King James I sided with Lord Ellesemere, the Chancellor.

James I said in his speech to Star Chamber of 20 June 1616 that Chancery is the

> "Court of Equitie. . . the dispenser of the Kings Conscience."[268] As the dispenser of the King's Conscience, the goal of the Court of Equity is always the intention of Law and Justice; not altering the Law, [and here, Alan Cromartie notes, this is "revealingly defensive"[269]] not making that blacke which other courts made white, or *è conuerso*, But in this it exceeds other Courts mixing Mercie with Justice, where other Courts proceed only according to the strict rules of Law: And where the rigour of the Law in many cases will undoe a Subject, there the Chancerie tempers the Law with equitie, and so mixeth Mercie with Justice, as it preserves men from destruction. . . The Chancerie is independent of any other Court, and is onely under the King: There it is written *Teste meipso*; from that Court there is no Appeale."[270]

James I defines equity as a kind of mercy that must be mixed in, and it is by the conscience of the King (as represented by the Lord Chancellor or as represented by himself when he wishes to sit in on court proceedings) only that this can be achieved. It is *because* the Chancery is independent of any other court, is only under the King, that it is able to do this. James I also said, "in the case of Equitie, where the Law determines not clearly, there the Chancerie doeth determine, hauing Equitie belonging to it, which doeth belong to no other court."[271] This famous confrontation between the Court of Equity, which in so many ways represented the power of the

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[266] For a discussion of equity and the Court of Chancery, see Dennis Klinck, *Conscience, equity and the Court of Chancery in early modern England*, (Burlington: Ashgate, 2010).

[267] "The Jurisdiction of the Court of Chancery Vindicated," in *Reports of Cases Taken and Adjudged in the Court of Chancery* (London, 1693), 24 EEBO: 184.

[268] James I, *His Maiesties Speech in the Starre-Chamber the XX of June Anno 1616* (London, 1616), 13r.

[269] Alan Cromartie, "General Introduction" to *Writings on Common Law and Hereditary Right*, xxxiv.

[270] James I, "A Speech in the Starre-Chamber, The XX. Of June. Anno 1616," in *Political Writings*, 214.

[271] James I, "Speech to Starre-Chamber," in *Political Writings,* 214.

throne to intervene in matters of common law, and undermine this baseline understanding of many common lawyers in England that the body of the common law did restrain the sovereign, James was insistent that he, as sovereign, could himself sit in on cases, and that the court of his conscience, of equity, of chancery, could oversee any case at common law. This famous case is just one point in the long story of equity and of the Court of Chancery, however it is particularly relevant to Hobbes since two of the key players were rivals Francis Bacon and Edward Coke, the former of whom Hobbes was an amanuensis, the latter of whom Hobbes repeatedly argued against by name throughout his works.

Much of the *Dialogue* uses Coke's legal definitions as starting points for debate, and the Philosopher argues that, given Coke's definition of Equity, Coke should also believe that the Court of Chancery has jurisdiction over all other courts. As the Philosopher argues, if Equity is just unwritten reason, and all judges should deliberate according to reason, then "what harm is there to any Man, or to the State, if there be a subordination of Judges in Equity, as well as of Judges in Common-Law?"[272] Here Hobbes takes Coke's equity but twists it in order to make an anti-Coke argument.

Hobbes repeats the claim that the best organization of courts is for the Court of Equity to be over and above all common law courts. Indeed the Philosopher argues that there should be no distinction and that, since all courts use equity in their judgment, all courts (including common law courts) should be considered Courts of Equity: . ". . . or in any other Kings court whatsoever, either of Law, or Equity; for Courts of Equity are most properly Courts of the common-Law of *England*, because Equity, and Common-Law (as Sir *Ed. Coke* says) are all one."[273] To say they should all be Courts of Equity means they should all be courts under the sovereign, that are not bound by all the rules of common law courts. Throughout the *Dialogue* Hobbes systematically argues that the only reasonable jurisdictional organization is for common law courts to become totally subsumed under the Court of Equity. Any other organization would amount to potentially dividing the sovereign.

And while the Philosopher and the Student do sometimes make a distinction between courts of justice and courts of equity, they argue that (a) all judges ought to judge according to Equity, which is the law of reason, which is the reason of the king publicly declared, and (b) in addition to that, there ought also be a distinct court of equity in which the King, who "is not Bound to any other Law but that of Equity" may give remedy when needed.[274]

Conclusion

The legal, moral, and political context of equity shows it to be a contested concept and one that was loaded with concerns of sovereign overreach and prerogative power. Equity, while in many ways seen as a virtue of law and embedded in common law, by the early seventeenth century was also strongly associated with

[272] Hobbes, *Dialogue*, 62 [77].
[273] Hobbes, *Dialogue* 106 [146].
[274] Hobbes, *Dialogue,* 31 [32].

the Court of Chancery which was viewed by its critics as corrupt, unregulated, and lawless compared to the common law courts. Contributing to this distrust of the Court of Chancery and of equity are broader political concerns about the overreach of the king and the king's own claims to be unbound by the laws of England. To say that the king is bound by nothing but conscience and equity is to say that the king is not bound by the laws. Whereas Coke argues that equity should be understood as the right reason of lawyers trained in the law, Hobbes argues to the contrary that equity cannot be understood to be the artificial reason of lawyers, it is rather the reason of the sovereign that determines what equity and right reason are.

Hobbesian equity is best thought of as the moral virtue that comes with an impartial judge. Equity does not offer a legal limit on sovereign power. Equity, for Hobbes, works both as a moral standard (between the sovereign and God) and as a practical political standard (between those in the commonwealth and the sovereign); this duality captures much of what is often misunderstood in the relationship between Hobbesian natural law and positive law. Unpacking the relationship between equity and positive law helps to resolve some persistent sticking points in Hobbes's legal and political theory and also helps us understand why he stands so far apart from the common lawyers in this debate. Equity had a twofold nature in early modern Britain as well as in Hobbes's works. The most consistent line through Hobbes's discussions of equity is that he seeks to disempower the artificial reason of common lawyers and to empower natural reason and the public reason of the sovereign over and above any existing body of law.

Chapter 4: Punishment

Punishment, or more specifically, fear of punishment, holds together the Hobbesian Commonwealth. And the distinction between lawless violence and lawful punishment is the difference between what creates war and what prevents it. As Hobbes writes, "the miserable condition of Warre. . . is necessarily consequent (as hath been shewn) to the naturall Passions of men, when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of their Covenants."[275] This "visible Power" combines both "right and force sufficient to compel performance," of covenants.[276] In order for a judge to truly settle conflict, both conflicting parties must agree upon a third party judge. In order for enforcement to create peace, the power must not only be sufficient, but also agreed upon as the rightful source of enforcement.

This chapter analyzes Hobbes's theory of punishment, and specifically his defense of the state's right to punish. In essentially every theory of the right to punish, there is a corollary obligation to not resist punishment. However, Hobbes is adamant that the sovereign has the right to punish and those punished have a right to resist. In these cases that punishment is still importantly different from simply the use of force as one would use against an enemy. So, what is 'rightful' about punishment, according to Hobbes? I begin by discussing Hobbes's definition of punishment and goes on to an analyze Hobbes's theory of the sovereign's right to punish as it relates to the right to resist punishment.

Hobbes defines punishment as "*an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience*."[277] This is a loaded definition and one which Hobbes explicitly unpacks in Chapter 28 of *Leviathan*, in part by listing all the things which are *not* punishment, but could be mistaken for it. These include 1.) harm done by private individuals or entities, since punishment must come from the public authority, 2.) not having preferred status because that is not an active harm, 3.) evil inflicted by the sovereign "without precedent publique condemnation," 4.) evil inflicted by usurped power, 5.) evil inflicted without deterrence being the intention, 6.) evil that occurs potentially as a consequence of wrongdoing, but not purposefully inflicted by the sovereign, 7.) if the harm inflicted is less than the benefit of the crime, this is not punishment but rather a fine or price, 8.) if a law prescribes a specific punishment, any harm beyond that prescription is not punishment, 9.) harm inflicted without a transgression of law occurring first, 10.), Any harm inflicted on the sovereign is not punishment, and 11.) harm inflicted on a declared enemy, is not punishment.[278]

It seems that, for Hobbes in *Leviathan*, at least, revenge is an umbrella term, and punishment is one subset. Revenge simply means "retribution of Evil for Evil," and as he explains in the seventh law of nature, there is a moral way to exact

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[275] Hobbes, *Leviathan*, 254 [Ch. 17, 85].
[276] Hobbes, *Leviathan*, 210 [Ch. 14, 68].
[277] Hobbes, *Leviathan*, 482 (Ch. 28, 161).
[278] Hobbes, *Leviathan*, 484-486 (Ch .28, 162).

revenge: retributive evil must be inflicted exclusively for the purpose of affecting future behavior.[279] Hobbes generally uses the term punishment to mean civil punishment, or punishment by the commonwealth. Punishment, properly speaking, is not done in response to just any kind of evil, but specifically in response to a crime. Private revenges can occur within a commonwealth (for example, giving time-outs to children, receiving a formal reprimand at work) and these can be done more or less morally or cruelly according to the seventh law of nature, but the term punishment is reserved for that done by the state.

So, private revenges, whether in the state of nature or within the commonwealth, can happen more or less morally. Acts of hostility can also be done more or less morally, according to the same rule that "*Men look not at the greatness of the evill past, but the greatnesse of the good to follow*."[280] Acts of hostility can be inflicted by a sovereign a.) on subjects of other nations b.) on other sovereigns, c.) on her own subjects but outside the bounds of law, and d.) on rebels who were subjects but in declaring their rejection of the commonwealth become enemies and therefore no longer subjects. Acts of hostility can also be committed by usurped power and by private individuals or entities *against* the sovereign.

Similar to Hobbes's definition of law, his definition of punishment has built into it a pre-existing relationship of authority and obligation. Only the sovereign has authority to punish subjects of her own commonwealth. Crucially, for Hobbes, a law must exist on the books and be sufficiently published, then a subject must violate that law, then it must be established publicly that the crime occurred and punishment prescribed. Only then is punishment properly executed. Hobbes is extremely concerned that subjects not be punished for things that are not technically law, or were not law at the time the act in question was committed. A crime is a sin consisting in the violation of a law. So "every Crime is a sinne; but not every sinne a Crime. To intend to steale, or kill, is a sinne, though it never appeare in Word, or Fact: for God that seeth the thoughts of man, can lay it to his charge: but till it appear by some thing done, or said, by which the intention may be argued by a humane Judge, it hath not the name of Crime."[281]

Crimes must be external actions and cannot be merely thoughts. Sins that do not extend to action, Hobbes reserves for divine punishment, in part because it is simply not within the realm of things humans have control over with regard to one another. As he writes in the appendix to *Leviathan*,

> natural law is eternal, divine, and written only in our hearts. But there are few who know how to look into their own hearts and read what is written there. So they learn from the written laws what things are to be done, and what avoided;. . . Besides, if something is done against the Natural Law, it is usually called a sin, not a crime. . . malice is left to God alone to punish. For

[279] Hobbes, *Leviathan,* 232 [Ch. 14, 76].
[280] Hobbes, *Leviathan*, 232 [Ch. 14, 76].
[281] Hobbes, *Leviathan*, 452-454 [Ch. 27, 151].

> if one sinner punishes another sinner merely for a sin, after the law has been satisfied, it is like civil war.[282]

Hobbes clarifies his concern: even if the source of punishment is not another subject but the sovereign, the rightful punishing authority, to punish actions that are not explicitly against the written law is to act contrary to the purpose of the commonwealth, which is to create peace for subjects within it. Hobbes writes,

> the purpose of lawful punishment is not to satiate people's anger against someone, but, so far as possible, to prevent injuries, for the benefit of mankind. Every law that does not threaten before it strikes is iniquitous; and however arbitrary the right of sovereign powers to make laws may be, it is not arbitrary in the way of exacting punishments that have not previously been defined by laws.[283]

After a subject has committed a crime, been publicly accused, heard, and condemned, then she may be properly punished. Hobbes says that punishments can be attached to laws, or they can be decided at the time of the condemnation, at whether the punishment is prescribed at the time of legislation, or in the court, the reasoning must always be deterrence, either to deter future bad action of that individual, more general deterrence by her example, or both. Of the kinds of punishment available to the commonwealth, Hobbes draws four categories (which may also be combined): corporal, pecuniary, ignominy, and imprisonment.[284] Corporal punishment can be capital punishment, or any bodily harm less than capital punishment. Pecuniary punishment is taking away someone's money, lands, or goods; in the case of pecuniary punishment, Hobbes is very clear that this ought not be confused with the prices or fines for various things for which subjects might pay. Ignominy is the dishonor of stripping a subject of honors and titles previously awarded by the commonwealth. Imprisonment is the deprivation of liberty after being condemned, and ought not be conflated with simply holding someone while awaiting trial.[285]

In outlining what is and is not punishment, Hobbes is concerned to clarify that various natural evils and other kinds of suffering, and even having things withheld by the commonwealth, are not punishments. But the most important distinction, one which Hobbes clarifies repeatedly, is the distinction between punishment and acts of hostility. For the remainder of this chapter I will examine the underlying right to punish, according to Hobbes, and what the relationship is between simply doing violence versus executing punishment.

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[282] Hobbes, Appendix to *Leviathan*, 1204 [Ch. 2].
[283] Hobbes, Appendix to *Leviathan*, 1202 [Ch. 2].
[284] Hobbes, *Leviathan*, 288 [Ch. 28, 163].
[285] Hobbes, *Leviathan*, 488-490 [Ch. 28, 163-164].

The Hobbesian Right to Punish

Hobbes writes in *De cive* that it is the right to punish that makes the sovereign. Establishing the commonwealth,

> *necessarily* require[s] that the *right* of using the *sword* to punish be transferred to some man or some assembly; that man or that assembly therefore is necessarily understood to hold *summum* imperium in the commonwealth by right. For whoever has the right to inflict penalties at his discretion, has the right to compel anyone to do anything he wants.[286]

The sovereign's right to punish is essential and foundational; however, it is not theoretically grounded in the same way as are all other sovereign rights. Analyses of Hobbes's theory of punishment have understandably focused primarily (or often exclusively) on *Leviathan*. However, it is in *De cive* that Hobbes first theorizes that (a) the sovereign's right to punish results from a different kind of transfer of rights, and (b) subjects necessarily retain a right to resist the sovereign's punishment. Most discussions of Hobbes's theory of punishment are framed by the question, "Is the right to punish the same as the Hobbesian right of nature, or is it authorized?" In *De cive,* we can see many (but not all) of the tensions in *Leviathan's* theory of punishment. Hobbes's first articulation of his theory of the right to punish (as a distinct right) in *De cive* offers readers a view of the complexities of punishment without authorization. First, I examine the sovereign's right to punish in *De cive*, how he explains the right to resist punishment and its relationship to the right to punish, and how he views the relationship between punishment and obligation. Then I turn to the theory of punishment in *Leviathan*.

To set up the problem, then: Hobbes posits that we each have an inalienable right to self-defense, and also posits that individuals can covenant to create a commonwealth and a sovereign who then has the right to punish subjects in that commonwealth. In nearly all other spheres of sovereign action, the rights of the sovereign entail an obligation on the part of subjects to obey the sovereign and to not resist. However, there is a class of actions that the sovereign has the right to command but subjects do not have an obligation to obey.[287] If the sovereign comes to punish you, to exact bodily harm or to put you in prison, you retain the right to defend yourself against the sovereign as much as possible.[288] Hobbes explains that the establishment of the sovereign requires everyone else laying down their right to resist that sovereign. If a person has the right to fight back, in what sense is the

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[286] Hobbes, *De cive*, 78 [6.6].

[287] See *Leviathan* Ch. 21 for the "true liberty of subjects," discussed in more detail below.

[288] Subjects do not have a right to resist all kinds of punishment. They only have the right to resist punishment when they believe that fighting for their life is the lesser evil, given their options. This occurs, according to Hobbes, in cases of capital punishment, in any kind of imprisonment, or any confinement related to punishment.

sovereign's right to punish truly a right as opposed to merely a power? As his contemporary critic, the Earl of Clarendon put it, "surely, no man can legally take his life from him who may lawfully defend it."[289]

It is not necessarily a problem for Hobbes to have rights conflict, because this is the status quo in his state of nature. However, civil society is supposed to cure us of exactly that conflict of rights. Scholars have argued that when a Hobbesian sovereign is punishing a subject, they are both in a state of nature with regard to each other, or even that they enter this state of nature the moment a subject commits a crime. For some, this is a devastating weakness in Hobbes's political theory, while others argue that having a state of nature relationship in the midst of being punished by one's sovereign is not a significant problem.[290] The question is always one of how to square this fundamental lawlessness of sovereign power and the crucial right to punish with Hobbes's statements that punishment is actually authorized by the subject being punished. [291]

In *De cive*, Hobbes writes that to transfer a right "consists solely in non-resistance" of the transferor because "the recipient already had a right to all things *before the transfer of the right*; hence the transferor could not give him a new *right*. Justified resistance, however, on the part of the transferor, which previously prevented the recipient from enjoying his *right*, is now extinguished." [292] So, everything the sovereign does by right is done because they had the natural right to all things. The transferal of rights and the creation of the commonwealth does not give the sovereign new rights, exactly. Rather it creates the conditions in which the rights of sovereignty can effectively be exercised.

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[289] Edward Hyde, Earl of Clarendon, *A brief view and survey of the dangerous and pernicious errors to church and state, in Mr. Hobbes's book, entitled Leviathan* (Oxon: Printed at the Theater, 1676), 87.

[290] For some examples of theories that Hobbesian punishment occurs in a state of nature relationship of a kind (with a range of conclusions over whether this is devastating for Hobbes's political theory or it is ultimately inconsequential), see David Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Oxford University Press, 1969); S.A. Lloyd, *Ideals as Interests in Hobbes's Leviathan: The Power of Mind Over Matter,* (Cambridge: Cambridge University Press, 1992); Alice Ristroph, "Respect and Resistance in Punishment Theory," in *California Law Review*, 97.2 (2009); Thomas Schrock, "The Rights to Punish and Resist Punishment in Hobbes's *Leviathan,"* in *The Western Political Quarterly* (1990); and Yves Charles Zarka, "Hobbes and the Right to Punish," in *Hobbes: The Amsterdam Debate*, ed. Hans Blom, Hildesheim (Amsterdam: 2001).

[291] For two recent, though differing, accounts of how Hobbesian punishment is authorized, see Michael J. Green, "Authorization and the Right to Punish in Hobbes," in *Pacific Philosophical Quarterly* 97 (2016), and Arthur Yates, "The Right to Punish in Thomas Hobbes's *Leviathan*," *Journal of the History of Philosophy*, 52.2 (2014). For a recent contrasting theory that punishment cannot be authorized, see Signy Thora Gutnick-Allen, "Thomas Hobbes's Theory of Crime and Punishment" (PhD diss., Queen Mary University of London, 2016).

[292] Hobbes, *De cive,* 34 [2.4].

This right to all things, which individuals must transfer or renounce in order to escape the state of nature, is retained only by the sovereign, with respect to both their own subjects and outsiders.[293] Richard Tuck argues that the great weakness of the theory of sovereignty in *De cive* stems from the shift in Hobbes's natural right theory. In *The Elements of Law*, Hobbes states that it is a "*right of nature*: that every man may preserve his own life and limbs, with all the power he hath."[294] As an extension of this right, Hobbes explains that, "all things he willeth, must therefore be good unto him in his own judgment, because he willeth them; and may tend to his preservation some time or other; or he may judge so, and we have made him judge thereof."[295] Hobbes writes that we by nature have a right to all things, because whatever one desires, one desires because it is a good, and as a good it will aid in one's self-preservation in some way.

Hobbes repeats a nearly identical claim in 1.10 of *De cive*. Then in one of his notes added for the 1647 publication, Hobbes amends this to clarify that it is only when one wants something and truly believes it will support their self-preservation that one has a right to it. This is because a "person may sin against the Natural Laws. . . if he claims that something contributes to his self-preservation, but does not believe that it does so."[296] Hobbes felt the need to clarify that sometimes people want things for reasons other that self-preservation, but what was sanctioned by the laws of nature was the right to all things for the purpose of self-preservation (and not, for example, vainglory or any other aims).

Tuck reads this as a significant weakening of Hobbes's theory of sovereignty and "certainly" one of the considerations that led Hobbes to develop his theory of authorization in *Leviathan*. The problem, as Tuck sees it, is that the sovereign in *The Elements of Law* has an unlimited right to do anything for any reason, while the sovereign of *De cive* only has the "the right to defend *himself* - for that was now the only right anyone possessed. And clearly, that was no use if he was to act in the way that sovereigns are normally supposed to."[297] However, the right of sovereignty in *The Elements of Law* was not simply the right to all things, and the right of sovereignty in *De cive* was not simply the right to self-defense. In both cases the right of the sovereign was to use his judgment, not only for self-preservation, and not for any reason at all, but rather for the *common good*. In both cases the natural right to all things for the purpose of self-preservation grounds the sovereign's right to all things for the purpose of the preservation of the commonwealth and the "common good."[298]

While it is not yet clear how the right to all things in pursuit of one's own self-preservation is transformed into the sovereign's right to all things in pursuit of the commonwealth's preservation, the relevant point here is that *De cive* does not

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[293] The relationship with outsiders is altered by whether there are treaties in place, so that must be qualified; for example, see *De cive* 40 [2.18].
[294] Hobbes, *The Elements of Law*, I.14.6.
[295] Hobbes, *The Elements of Law*, I.14.10.
[296] Hobbes, *De cive,* 29 [I.10 note].
[297] Richard Tuck, *Natural Rights Theories*, 129.
[298] For example, *The Elements of Law* I.19.9; *De cive,* 70 [5.6].

represent a significant weakening of the Hobbesian sovereign's natural right. Hobbes's reformulation of the right of nature in *De cive* indicates a more complex psychology (by explicitly stating that individuals seek all kinds of things that they know are for reasons other than their own self-preservation), but it does not significantly alter the sovereign's right. So, the sovereign has a right to all things, but the sense in which the sovereign 'has" this right is quite abstract until everyone else lays down their own rights and the sovereign can actually exercise their right.

De cive is where Hobbes first articulates the right to resist punishment and the consequence that therefore the right *to* punish must have a slightly different origin than all other sovereign rights. As Richard Tuck has traced in *Natural Rights Theories*, from *The Elements of Law* to *De cive*, the act of resisting punishment changes from being excusable, to being by right. [299]

All the separate components of such a right to resist punishment were all present in *The Elements of Law*, but remained in contradiction with one another until *De cive*. For example, Hobbes clearly states that individuals must retain a right to self-defense (I.17.2), and that we cannot be obligated to do impossible things (II.10.7), and that natural law only dictates that we transfer the rights "that cannot be retained without loss of peace" (I.20.2). However, he states that the sovereign cannot be established without a complete transfer of all rights and therefore all subjects must give up their right to resist the sovereign (I.19.10, II.20.7). It is not until *De cive* that Hobbes elaborates the right to resist punishment as a corollary of the right to self-defense.

In *De cive,* Hobbes explains that "no one is obligated by any *agreement* he may have made not to resist someone who is threatening him with death, wounds or other bodily harm."[300] Hobbes lays out two different covenants: (1) "If I do not do X by a certain date, kill me," and (2) "If I do not do X by a certain date, I will not resist your killing me,"[301] I can covenant for you to kill me, but I can't be obligated by a covenant not to resist you when you come to kill me. As Hobbes puts it, "Everyone makes use of the first mode of agreement if there is need to do so, and sometimes there is; no one uses the second mode, and there is never a need to do so."[302] In the example of the two different kinds of covenants, he does not actually say it's impossible to do the latter, only that no one ever does it, "and there never is a need to do so."[303] He then goes on to give three examples of why there is never a need to make the second kind of covenant (to not resist punishment after violating a covenant). These three examples are in the purely natural state, in the state of nature that exists between commonwealths, and within the commonwealth. In the purely natural state, you have the right to kill anyone already, so there is no need to "trust first and kill later."[304] Between commonwealths, if a treaty is broken, and the

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[299] Tuck, *Natural Rights Theories*, Ch. 6 ; also on this point, see Thomas Schrock, "The Rights to Punish and Resist Punishment in Hobbes's *Leviathan."*

[300] Hobbes, *De cive*, 39 [2.18].

[301] Hobbes, *De cive* 39-40, [2.17-18].

[302] Hobbes, *De cive*, 40 [2.18].

[303] Hobbes, *De cive*, 40, [2.18].

[304] Hobbes, *De cive*, 40, [2.18].

only thing keeping the peace was said treaty, then you're already returned to a state of war by default and therefore, "the right of war returns" and "all things are allowed, including therefore resistance."[305]

In the case of life within the commonwealth, he actually gives two separate examples. If two subjects were to try to make either of these covenants it wouldn't be valid since the right of killing has necessarily been transferred to the sovereign. In the case of the relationship between sovereign and subject, the commonwealth does not need to require an agreement not to resist, "but only that no one protect others."[306] So, the sovereign does not require such a promise. And anyway, Hobbes said, it would be impossible. After explaining why it's not necessary, Hobbes explains that certain death is always worse than fighting. It is impossible to choose what seems to be the greater of two evils, and therefore one cannot promise not to resist because that would be obligating oneself to an impossibility.

So, in *De cive*, in the case of the commonwealth, each individual transfers their right to kill any one else (except as authorized by the sovereign or in self-defense), and while they do not transfer their right to resist when they themselves are being punished by the sovereign, they transfer their right to resist in defense of anyone else being punished by the sovereign. The covenant not to protect one another is a necessary condition of the sovereign's right to punish. It is not clear from these pages if the covenant, "If I do not do X, kill me," is necessary. Hobbes writes that "everyone" makes that agreement "if there is need to do so, and sometimes there is." It seems as if all subjects must make this covenant, but it is clear that neither of those two examples of covenants gives the sovereign the right to punish.[307]

In describing the creation of the commonwealth and the right of the sovereign, Hobbes writes, "security is to be assured not by *agreements* but by *penalties"*; and the assurance is adequate only when the penalties are set so high that that people will keep their agreements.[308] The right of punishment, or the right of the sword of justice, needs to be centralized. Here he repeats that the "right of punishment is recognized to have been given to someone, when each one agrees that he will not go to the help of anyone who is to be punished."[309] He adds that individuals generally keep this agreement "except when they or those close to them are to be punished."[310] In this way the right of punishment is transferred and the holder of it is understood to hold sovereign power by right.

In this explanation, it seems that Hobbes deals with the practical conflict of individuals resisting punishment, but not the theoretical conflict. In other words, the commonwealth can of course handle any one individual resisting its massive force, so long as no one do joins forces against the commonwealth. However, if no one ever transferred the right to punish to the sovereign, if everyone retains a right to defend themselves from punishment, then it becomes difficult to see how Hobbes could ever

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[305] Hobbes, *De cive*, 40, [2.18].
[306] Hobbes, *De cive*, 40 [2.18].
[307] Hobbes, *De cive*, 39-40 [2.18].
[308] Hobbes, *De cive,* 78 [6.5].
[309] Hobbes, *De cive*, 78 [6.5].
[310] Hobbes, *De cive*, 78 [6.5].

make a distinction between the power to punish and the right to punish. Of course both are important for the sovereign to have, but as Hobbes repeatedly says, it is when the someone is recognized to have the *right* of punishment that they are sovereign.

Hobbes gives us a revealing passage about the difference between how subjects who break the law ought to be punished, versus how rebels ought to be punished. Those who commit treason do not simply violate the civil laws, they transgress the foundational moral obligation that underpins the force of all civil laws. So in violating that natural law, they are in a different class of criminal. Hobbes writes, "It follows from this that *rebels, traitors* and others convicted of *treason* are punished not by *civil right*, but by *natural right*, i.e. not as *bad citizens*, but as *enemies of the commonwealth*, and not by the *right of government* or dominion, but by the *right of war*."[311] Traitors are to be punished as "enemies of the commonwealth," by the "right of war." This means for Hobbes that all things are licit in the punishment of a traitor, there are no civil laws that can constrain the sovereign's punishment of them. However, there are moral constraints on the sovereign, even on treatment of enemies.

The sixth law of nature in *De cive* is that "In revenge [ultio] or Punishment [Poenae] consider future good, not past evil. That is, it is only permitted to inflict a penalty in order to correct the wrongdoer or so that others may be reformed by taking warning from his punishment."[312] All punishment ought to be for the purpose of deterrence. However, this is not specific to the punishment of citizens. Even when punishing enemies or traitors, the sovereign has a moral obligation to do so only for the purpose of future good. Whether the sovereign is acting from the right of the government or the right of war, she must not be cruel. Hobbes is clear that, even in the state of nature, one has an obligation to seek peace by not being cruel. Any backwards-looking reactive harm (any retributivism) is not done for the purpose of future good and is therefore only vainglory and cruelty.

The major difference between punishing someone as a bad citizen versus punishing someone as no citizen at all is that punishment of citizens ought not exceed or differ from that stated in law. Hobbes writes that a ""A major part of the *liberty* which is harmless to the commonwealth and essential to happy lives for the citizens, is that they have nothing to fear but penalties which they can anticipate or expect."[313] One of the crucial ways this can happen is that, "the penalties actually inflicted are no greater than those defined."[314] The penalty can be defined in "explicit words" or "in practice" (not written into law but after the first person is punished, natural equity dictates that like cases should be treated alike) but in both cases it is "contrary to the law of nature" to punish beyond what could have been anticipated by subjects.[315]

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[311] Hobbes, *De cive*, 166 [14.22].
[312] Hobbes, *De cive*, 49 [3.11]. Hobbes, in both *De cive* and *Leviathan*, uses revenge in two ways, (a) any harm in response to a harm, or (b) a retributive harm, or cruelty.
[313] Hobbes, *De cive*, 151 [13.16].
[314] Hobbes, *De cive*, 151 [13.16].
[315] Hobbes, *De cive*, 151-152 [13.16].

In punishing subjects, the sovereign is morally obligated to punish according to the civil laws; in punishing enemies, the sovereign is morally obligated only to punish according to her own judgment of what will aim for the future good. To say the sovereign ought to punish according to civil laws does not mean that the sovereign is subject to those laws, because to be subject means that there is a human power who can hold you accountable to that obligation. But the sovereign is morally obligated to punish according to the laws. Before moving onto *Leviathan*, where Hobbes explores the specifically juridical nature of civil punishment much more fully, I want to pause on Hobbes's use of the phrase "civil right [*iure civilis*]". The sovereign punishes subjects according to civil right and enemies according to natural right. In practice this means that, when acting against traitors, the sovereign is well within their right as sovereign to far exceed any punishments written in the books or anticipated by the traitors. Conceptually I think Hobbes means here by civil right something like ruling according to one's own laws. Hobbes writes that all civil law is divided into two parts, distributive justice and "vindicative justice." They are two parts to the same law. All punishment of subjects is vindicative law, while punishment of enemies has no law.[316]

Hobbes writes that a union is formed from individuals when there is a "*submission* of all their wills to *the will of one man* or of *on Assembly.*"[317] This union, the commonwealth, is "a *civil person*; for since there is *one will* of all of them, it is to be taken as *one person*," and this new civil person is to be taken as its own entity, "having its own rights and its own property."[318] This new civil person has civil rights, for example the right to punish bad citizens, and also the natural right of war, or the right to all things. Hobbes insists in the opening paragraphs of Chapter 28 of *Leviathan* that the sovereign's rights cannot literally be transferred or given to the sovereign, but rather all rights of the sovereign are left to them in tact while the citizens' rights are curtailed when the civil person is brought into being. However, this civil person never existed by nature, it was *created* through this union of wills, so in what sense can a civil person have retained natural rights? If the sovereign is an assembly of 30, say, and that entity cannot exist as one will by nature, what does Hobbes mean when he says that the sovereign merely has rights left to it.

To try to address these concerns, I turn in the next section to Hobbes's theory of punishment in *Leviathan* to see how his theory of authorization and personation further develops this theory of the civil rights of the civil person of the commonwealth. It will be useful to turn first to Hobbes's pronouncement in *Leviathan* that punishment is necessarily a right by nature, not by artifice.

In *Leviathan*, the infamous opening paragraphs to Chapter 28 state that the sovereign's right to punish could never be "grounded on any concession, or gift of the Subjects," and that the right to punish is necessarily grounded in the sovereign's natural "right to every thing. . . to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto."[319] It is often

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[316] Hobbes, *De cive*, 157 [14.17].
[317] Hobbes, *De cive*, 72 [5.7].
[318] Hobbes, *De cive*, 73 [5.9].
[319] Hobbes, *Leviathan,* 482 [Ch. 28, 161].

argued that this is in direct contradiction with the theory of authorization Hobbes introduces in *Leviathan.* Moreover, these statements in the opening of Chapter 28 also potentially contradict *De cive* and, indeed, sentences in that same paragraph of Chapter 28. In this last section, I will spend some time to explore the tensions in Hobbes's theory of punishment that are introduced in *Leviathan*, as well as those which continue from *De cive*.

In *Leviathan*, Hobbes goes to great lengths to outline the juridical nature of punishment and how it is different from all other forms of harm (or other actions that could be mistaken for punishment). He defines punishment as, "*an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.*"[320] Punishment, like civil law itself, depends on a preexisting relationship of obligation and authority. Punishment must come from the public authority and be directed toward someone who has transgressed a law which they were obligated to obey. In *Leviathan*, Hobbes expands on his statements in *De cive* that sovereigns have a duty to punish in a way that allows subjects to anticipate the consequences of their actions, with the aim of changing their deliberative calculations to encourage more obedient subjects.

Subjects ought to be guilty of committing a crime before being punished, and ought to receive a public hearing to determine their guilt. Additionally, and as outlined in *De cive*, actual punishment ought not deviate from that outlined in law. Hobbes clarifies that any violence that extends beyond the sentence, or is directed at innocent subjects, or is retributive instead of aiming at deterrence, is not properly punishment but rather an act of hostility.[321] Whereas in *De cive*, Hobbes divided the acts as punishing someone as a bad citizen, or punishing someone as an enemy, in *Leviathan* punishment is reserved exclusively for punishing bad citizens, according to a great many guidelines. In *Leviathan,* punishing someone as an enemy is not truly punishment at all but an act of hostility.

However, before Hobbes goes on to spend the chapter inferring the consequences of his definition of punishment, he says he must answer a question "of much importance, which is, by what door the Right or Authority of Punishing in any case, came in."[322] Hobbes explains that no man can promise not to resist violence against themselves, "and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person."[323] Because no one can transfer away their right to resist violence, no one could ever give the right to lay violence on them. Hobbes then explains that the sovereign already had the right to all things, and so was never being *given* any rights. "Subjects did not give the Soveraign that right [to punish]; but onely in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all."[324] This is puzzling, because at the beginning of the paragraph it seems that Hobbes is arguing that no one could give the

[320] Hobbes, *Leviathan,* 482 [Ch. 28, 161].
[321] Hobbes, *Leviathan*, Ch. 28.
[322] Hobbes, *Leviathan,* 482 [Ch. 28, 161].
[323] Hobbes, *Leviathan,* 482 [Ch. 28, 161].
[324] Hobbes, *Leviathan,* 482 [Ch. 28, 162].

right to punish because no one could lay down their own right to resist punishment. However now it seems that Hobbes is merely reiterating the point he had made now in *Elements of Law*, *De cive*, and *Leviathan*, which is that no one literally *transfers* rights, because we all have a right to all things by nature. "However, from the fact that each one laid down his right, the sovereign gained so much strength that he was able to use his own natural right."[325]

Hobbes repeats the argument from *De cive* that although no individual can covenant not to resist in their own case, they can and should covenant not to resist on behalf of anyone else being punished by the sovereign. Hobbes writes that "to resist the Sword of the Common-wealth, in defence of another man, guilty or innocent, no man hath Liberty; because such Liberty, takes away from the Soveraign, the means of Protecting us; and is therefore destructive of the very essence of Government."[326] Hobbes repeats the same two arguments about covenanting to give someone the right to punish from *De cive*. The first is that you can covenant "Unless I do so, or so, kill me," even though you cannot logically covenant, "Unlesse I do so, or so, I will not resist you, when you come to kill me."[327] In *Leviathan* he says even more clearly that any such covenant of non-resistance is void. The second argument he repeats from *De cive* is that everyone establishing a commonwealth promises to the sovereign that, "If you come to kill a fellow subject, I will not resist you on their behalf."[328]

Hobbes writes that, even when we covenant to help the sovereign punish others, that does not give the sovereign the right. No subject can transfer to the sovereign the right to punish because to do that one must "have the right to do so himself."[329] It seems here as if Hobbes is clearly stating that individuals who become subjects, by nature, do not have a right to punish one another, but the individual(s) who becomes sovereign *does* have a right by nature to punish. Or at least, in the case of the sovereign, having the right of nature is sufficient grounds to have a right to punish, but for individuals who become subjects, it is not sufficient ground to transfer to the sovereign the right to punish. So, is there a natural right to punish or isn't there? We certainly have a natural right to enact violence on one another in pursuit of self-preservation, but especially in *Leviathan*, but also in *De cive*, punishment is specifically done by the person of the commonwealth, which necessarily does not exist in the state of nature.

It seems that Hobbes theorizes no natural right to punish. At least he certainly does not in the same way that, for example, Grotius and Locke do, who each posit an explicit pre-political right to punish which then translates into the sovereign's right to punish. However, Hobbes is very clear that the foundation of the sovereign's right to punish is the natural right to all things, and this is not only because by nature we have a right to take revenge, but rather because by nature we have a right to all things, actual and hypothetical. Each individual has the right by

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[325] Hobbes, *Leviathan,* 483, translation 482 fn 9.
[326] Hobbes, *Leviathan,* 340 [Ch. 21, 112].
[327] Hobbes, *Leviathan,* 214 [Ch. 14, 70].
[328] Hobbes, *Leviathan,* 340 [Ch. 21, 112], 482 [Ch. 28, 161].
[329] Hobbes, *Leviathan,* 482 [Ch. 28, 161].

nature to establish the legal machinery necessary to run a commonwealth and to issue punishments and rewards accordingly, so long as it is for the purpose of seeking peace (should the opportunity arise). In the debate of is the right to punish natural or artificial, it is important to state that *all rights* of the sovereign fall under the umbrella of the right to all things. Even if a sovereign could not acquire a certain right without the existence of a commonwealth, it still falls under the category "all things."

An added difficulty here is similar to that discussed above and the question of how a civil person could have natural rights. Here Hobbes writes that the sovereign, who is an artificial person according to Hobbes's theory of personation, has its natural right to every thing, "left to him, and to him onely. . . as entire as in the condition of meer Nature."[330] The sovereign never existed in the state of nature because the sovereign is an artificial person. It is not clear what confusion Hobbes seeks to clear up, because he says that the right to punish is the result of no gift of the subjects, but his description of individuals laying down their right so that the natural right to everything of the sovereign is strengthened maps on quite easily to Hobbes's definition of a gift in Chapter 14.[331]

So, the sovereign's right to punish is grounded in the natural right to all things, but because punishment necessarily must happen through the infrastructure of the commonwealth, it comes with many limits. Or rather, punishment must take a certain form and follow certain rules to be proper punishment.

It may seem that whenever a citizen breaks a civil law, they effectively violate the covenant with the sovereign and makes themselves, no longer a citizen, but an enemy of the state. Even if at that moment she is still a citizen, certainly as soon as the sovereign comes to punish the citizen, then they are nothing but enemies to one another (because when the sovereign comes to punish you, you have every right to resist force with force).[332] Hobbes's theory of punishment can thus seem fundamentally lawless. The important thing to note, as a few scholars have recently done, is that Hobbes does not say the right to punish is natural, only that the *grounds* for rightful punishing are natural.[333]

What is the distinction between a sovereign punishing a subject and simply a state of war? In both cases there are two persons attacking one another with right. Gauthier argues that when a subject breaks the law, the subject places himself in the state of nature in relation to the sovereign, and therefore the sovereign is "in the position of an enemy in the state of nature with regards to that person."[334] However, the subject and sovereign do not revert to a simple state of nature relationship,

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[330] Hobbes, *Leviathan* 482 [Ch. 28, 162].

[331] Hobbes, *Leviathan* 204 [Ch. 14, 66].

[332] Gauthier, *The Logic of Leviathan*; Schrock, "The Rights to Punish and Resist Punishment in Hobbes's *Leviathan";* and Zarka, "Hobbes and the Right to Punish," all argue along these lines.

[333] On this, see Green, "Authorization and the Right to Punish in Hobbes"; Gutnick-Allen, "Thomas Hobbes's Theory of Crime and Punishment"; and Yates, "The Right to Punish in Thomas Hobbes's *Leviathan*."

[334] Gauthier, *Logic of Leviathan*, 148.

because the sovereign still has moral-legal duties to that subject, for example to ensure that their punishment does not exceed that outlined in law, and that the subject gets a public trial and is sentenced for their crime before punishment begins.[335]

To tackle the relationship between punishing subjects and punishing enemies in *Leviathan*, it is necessary to explore Hobbes's theory of authorization. Hobbes writes that,

> every man [has] given the Soveraignty to him that beareth their Person; and therefore if they depose him, they take from him that which is his own, and so again it is injustice. Besides, if he that attempteth to depose his Soveraign, be killed or punished by him for such attempt, he is author of his own punishment, as being by the Institution, Author of all his Soveraign shall do: And because it is injustice for a man to do any thing, for which he may be punished by his own authority, he is also upon that title, unjust.[336]

So, a man who breaks the law is "author of his own punishment." He repeats this multiple times in different contexts.

If someone besides the sovereign inflicts evil on a subject, that is "not Punishment; but an act of hostility; because the acts of power usurped, have not for Author, the person condemned; and therefore are not acts of publique Authority."[337] So authorizing one's own punishment is part of the definition of punishment. Additionally, Hobbes writes that, while God's right to reign and punish is derived from his irresistible power, the sovereign's "ariseth from Pact."[338]

Hobbes uses the theory of authorization to explain the right to resist. It is through authorizing the sovereign that Hobbes explains the true liberty of subjects in Chapter 21 of *Leviathan*. He says, "the Consent of a Subject to Soveraign Power, is contained in these words, I *Authorise, or take upon me, all his actions*; in which there is no restriction at all, of his own former naturall Liberty: For by allowing him to *kill me*, I am not bound to kill my selfe when he commands me. 'Tis one thing to say, *Kill me, or my fellow, if you please*; another thing to say, *I will kill my selfe*, *or my fellow*."[339] Hobbes goes on from here to outline the instances in which the sovereign may act with right against the subject and the subject may, with right, resist the sovereign. As Susanne Sreedhar writes, "this makes it clear that Hobbes does not understand the authorization itself as generating unconditional obligations. Instead, he invokes it to emphasize the unrestricted nature of the sovereign's power to command."[340]

Authorization poses new puzzles for his account of the right to punish and how Hobbes understands the relationship between absolute authority of the

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[335] Hobbes, *Leviathan*, 484-486 [Ch. 28, 162].
[336] Hobbes, *Leviathan,* 266 [Ch. 18, 89].
[337] Hobbes, *Leviathan,* 484 [Ch. 28, 162].
[338] Hobbes, *Leviathan*, 558 [Ch. 31, 187].
[339] Hobbes, *Leviathan* 338 [Ch. 21, 112]
[340] Sreedhar, *Hobbes on Resistance,* 99.

sovereign and limited obligation of subjects. Subjects are entitled to certain things from their sovereign, that they ought to receive a public trial and their punishment ought not exceed that outlined in law. To authorize one's own punishment does not mean one ought not resist it. It means that the punisher proceeds by right and that the person's identity as a subject is constitutive of the punishment received.

Conclusion

Hobbes's theory of punishment in *De cive* offers a clear account that can help us to grasp his more complex theory in *Leviathan.* It's in *De cive* that one can see the emergence of his theory that, so long as individuals do not defend one another against the sovereign, their right to self-defense does not endanger the efficacy of the sovereign's right to punish. This solution in *De cive* remains the most successful aspect of his theory of the right to punish in *Leviathan*. The natural right to all things which the sovereign retains is necessarily channeled through the legal infrastructure, through subjects' understanding of the civil law and their expectations of how the sovereign will act, to create civil punishment as opposed to mere violence.

The close relationship between the natural right to all things and the civil character of punishment is clear in both *De cive* and *Leviathan*. However, the exact mechanism by which the right to punish is legitimate seems to rest necessarily on the practical fact of the sovereign's power to punish. This is not necessarily a problem for Hobbes's theory, since this power to punish is wrapped in the moral obligations to carry it out legally, which makes it punishment as opposed to an act of hostility. The civil right of the sovereign is the natural right to all things, exercised according to and through the civil law. The sovereign could legitimately exercise her natural right and commit acts of hostility, but exercising her civil right means to act according to the civil laws which she authorizes. Punishment must be known and predictable in order to motivate subjects to obey the law. In the *Dialogue*, the Philosopher asks, "how can any Laws secure one Man from another? When the greatest part of Men are so unreasonable, and so partial to themselves as they are, and the Laws of themselves are but a dead Letter. . . " and the lawyer answers him, "By the Laws, I mean, Laws living and Armed. . . 'Tis not therefore the word of the Law, but the Power of a Man that has the strength of a Nation, that makes the Laws effectual."[341] In Hobbes's view, for a commonwealth to create the peace and defense for which it exists, the laws and the punishments must be clear, needful, and predictable. The sovereign right which underlies that punishment depends on the right of war; funneled through the laws, the punishment is legitimate and the laws are alive and effectual. The legitimacy of the sovereign's laws and punishment also depends on the sovereign's absolute authority and therefore legitimacy to act with hostility against anyone at any time for the peace and defence of the commonwealth. On Hobbes's innovative account, the right to resist violence must exist hand in hand with choosing to live under state threat of violence.

[341] Hobbes, *Dialogue*, 14 [10-11].

Conclusion

This dissertation is the beginning of a study of Hobbes's legal theory and of how that theory, in turn, influences some of his approaches and solutions to political-theoretical questions. I turn here to sketching one example of how Hobbes's theory of law intersects with central questions in his political theory. In the background of many of the scholarly disagreements over how best to characterize Hobbesian jurisprudence is his theory of sovereignty and state representation. I would like here to briefly explore the relationship between Hobbes's theory of the person of the state and his theory of law.

It is crucial for Hobbes's theory that no one can ever legitimately have standing to say publicly to the sovereign, 'you do not speak for the people.' For Hobbes, 'the people' only exist to the extent that they are represented by a sovereign. The sovereign necessarily makes all the laws for the people, and cannot herself be held to account by those same laws. Hobbes's sovereign, to whom subjects owe obedience, must be unitary and must be above the law in order to create the peace and defence for which she exists. One of Hobbes's aims here is to establish that no one can legitimately claim to be a higher authority on what law demands than the sovereign herself. This is because it is particularly on grounds of legal interpretation and disagreement that the seat of sovereignty can seem to move about or even crumble. For example, when Parliament passed a bill in 1642 to fund their fight against the King, it was officially "for the Defence of the King and both Houses of Parliament."[342]Hobbes explains in *Behemoth* that by 'King', these Parliamentarians mean "not his Person but his Laws."[343]

This understanding of sovereign authority creates a problem for an absolutist thinker. By separating out the King's laws from the King's person, one can create the veneer of legitimacy in attacking the King's person's in defense of the King's laws. In this instance, Parliament claims the authority to determine what the King's laws are and what must be done to defend them, so that, in attacking the person of the King in defense of Parliament, they claim to be defending the *true King*.

Hobbes's legal theory seeks to undermine this line of reasoning by arguing that whoever has final standing to state what a law demands must necessarily be the law-maker and therefore must be the sovereign. There ought never be doubt about whose authority makes law, and thus who has final say over what law requires. Additionally, the sovereign's authority extends beyond law, so that the sovereign

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[342] 'Propositions and orders by the Lords and Commons in Parliament. For bringing in of Mony or Plate, to maintaine Horse, Horse-men and Armes for the preservation of the Publike Peace, and for the Defence of the King and both Houses of Parliament,' 10 June (*An Exact Collection of All Remonstrances, Declarations, Votes, Orders, Ordinances, Proclamations, Petitions, Messages, Answers, and other Remarkable Passages between the Kings most Excellent Majesty and his High Court of Parliament beginning. . . in December 1641, and continued until March the 21, 1643 which were formerly published either by the Kings Majesties command or by Order from one or both Houses of Parliament (1643)*, quoted in Hobbes, *Behemoth*, 150 [fo. 52r].

[343] Hobbes, *Behemoth*, 150 [fo. 52r].

may act extra-legally, or even illegally, and still be well within her rights as sovereign. When it comes to questions of implementing the sovereign's laws, Hobbes builds an argument founded on certain theoretical distinctions into his argument that are meant to create a stable commonwealth and therefore a stable sovereign. These distinctions, however, can seem to work to constrain the sovereign. They are (a) the division between the natural and the artificial person of the sovereign, and (b) the division between the sovereign herself, and the ministers of sovereignty (this latter division can be referred to as the division between the right of sovereignty and the exercise of sovereignty, or the division between sovereignty and government). Opponents of absolute sovereignty used the multiple personhoods of the King as a way to argue that citizens owe loyalty and obedience to the *office* of sovereignty, and not the actual sovereign.

Hobbes theorizes that the sovereign necessarily has multiple capacities, an argument that was a hallmark of anti-Royalist argumentation at the time Hobbes was writing.[344] Many have written on Hobbesian personhood and what kind of person the state and the sovereign might be.[345] For Hobbes, the sovereign is a natural person (or composed of multiple natural persons), and, in his capacity as the sovereign representative, is an artificial person as well.[346] Hobbes theorizes the indivisibility of sovereignty as fully harmonious with his theory of the multiple personhood of the sovereign.

Additionally, Hobbes theorizes that there is a distinction between the right of sovereignty and the exercise of sovereignty. The sovereign power itself may never be divided, but in the exercise of sovereignty there are numerous ministers to whom different responsibilities may be doled out and this can, in effect, create divisions within the exercise of sovereignty. All subordinate ministers' authority is derived from the sovereign, so the sovereign's authority remains absolute. So, when subjects obey a command from a subordinate judge, or take her word as the sovereign's word on some matter, they obey not because she is right, but because she has the right, delegated to her by the sovereign, within her jurisdiction. For example, Hobbes writes

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[344] For the canonical study of the history of the multiple capacities of the king, see Ernst Kantorowicz, *The King's Two Bodies*: *A Study in mediaeval Political Theology*, (Princeton: Princeton University Press, 1957); for a treatment of specifically English radical use of this theory, see Janelle Greenberg, *The Radical Face of the Ancient Constitution* (Cambridge: Cambridge University Press, 2001), Ch. 5.

[345] On this see Quentin Skinner, "Hobbes on Representation," in *European Journal of Philosophy* 13, no. 2 (2005), Quentin Skinner, "A Genealogy of the Modern State," in *Proceedings of the British Academy* 162 (2009), Mónica Brito Vieira, *The Elements of Representation in Hobbes* (Leiden: Brill, 2009), *Hobbes Studies* issue 31 (2018) which focuses on Representation, and Laurens van Apeldoorn, "On the person and office of the sovereign in Hobbes' *Leviathan*," in *British Journal for the History of Philosophy* (2019).

[346] See Hobbes *Leviathan*, Ch. 16 on his explanation of personhood, and see 260-262 [Ch. 17, 88] for one of Hobbes's descriptions of the state and the sovereign as persons.

> If a Constable lay hands upon me for misdemeanor, I aske him by what right he meddles with me more then I with him. He will answer me, *Iure Regio*. . . by the right of the King. He needs not say, because you are a Theefe. For perhaps I might truly say as much of him.[347]

Hobbes is clear that all ministers of sovereignty are subordinate to the actual sovereign. The relationship between the artificial and the natural persons of the sovereign is a fraught one for Hobbes, though. It is important to him that the sovereign person not become overly abstract, as this may make it difficult for the sovereign to speak for herself. In order to avoid becoming sovereign in name only, she must retain the essential rights of sovereignty and it must be publicly known throughout the commonwealth that the sovereign has such rights and power. If, however, one were to allow that the sovereign exists, but rarely acts and rather allows ministers to exclusively speak for her, one runs the risk of changing where sovereignty is located, which is to say (in Hobbes's view) dissolving the state. This is a possibility about which Hobbes is deeply concerned.

Hobbes's concerns on this front were well-grounded, at least as regards 1640s England. In *Behemoth*, he tells us that the Parliament claimed, among other things, that waging war against

> the personal Commands of the King (though accompanied with his presence) is not levying Warre against the King; but the levying of Warre against his Politick person, viz. his Laws etc, though not accompanied with his person, is levying Warre against the King.[348]

In other words, the Parliament claimed that, by fighting against the actual natural person of the King, they were defending the artificial, or politic person of the King. Hobbes writes that Parliament even "pretended that the King was always virtually in the two Houses of Parliament, making a distinction between his person Naturall and Politick."[349]

In Hobbes's view, the majority of the sovereign's public actions will occur through law—not law that the sovereign made from scratch, or even explicitly authorized, but law that holds in virtue of the sovereign's silence. While all law gains its legal status from being commanded by the sovereign, the way in which it is commanded can be quite indirect. For example, laws can be customs that were in place for a long enough time that it can be assumed from the sovereign's silence on them that they are law. These laws are then interpreted and applied by ministers of sovereignty. Hobbes places the sovereign's agency at the center of this theory of law, to reiterate that it is always the authority of the current sovereign which gives law force, and that the relevant standard when interpreting law is the sovereign's own judgment.

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[347] Thomas Hobbes, "Questions Relative to Hereditary Right," ed. Quentin Skinner, in *Writings on Common Law and Hereditary Right*, 177.
[348] Hobbes, *Behemoth*, 244 [fo. 50v].
[349] Hobbes, *Behemoth*, 273 [fo. 60r].

In Hobbes's entire theory of absolute sovereignty he offers only one case in which both ministers of sovereignty and subjects may need to protect sovereignty against the sovereign herself: the case in which the sovereign attempts to legally divide sovereignty. Hobbes tells us that such a command is void.[350] Outside of the unique case of sovereign indivisibility, there are no cases in which Hobbes allows that one might legitimately defend the artificial person of the sovereign from the natural person of the sovereign. No danger to the commonwealth or any portion of the population could suffice as justification, but only that case in which a law might endanger or destroy sovereignty itself.

For Hobbes, the sovereign speaks for the state and the sovereign's will is the will of the state as a whole, and of each individual subject. This will is necessarily enacted mostly through a system of laws, and the interaction between this arbitrary will and a state-wide legal apparatus is often fraught. We can see in Hobbes's works his commitment both to the homogeneity of law throughout the state, and to the arbitrary will of the sovereign. Sometimes these reinforce one another fairly seamlessly, such as in Hobbes's views that law must be command and must be authorized by the sovereign. At other times these commitments pull against one another, such as in his theorizing of equity and the duties of subordinate judges. Even allowing for such tensions, Hobbes's legal theory informs his conception of sovereignty and his arguments for the foundation of a legitimate state.

[350] Hobbes, *Leviathan*, 280 [Ch. 18, 93].

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