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Cover Page Footnote

Professor of Law and Philosophy, University of Pennsylvania. I am indebted to Greg Hall for comments and for assistance with research, and to Leo Katz and Ben Zipursky for conversations on the topic of this essay.

HOBBS AND THE INTERNAL POINT OF VIEW

*Claire Finkelstein**

INTRODUCTION

With the introduction, by John Austin, of the command theory of law,¹ a certain distinction among theories of law entered the jurisprudential landscape: the distinction between theories that seek to characterize obedience to law in terms of external motivations, such as sanctions for noncompliance, and those that characterize obedience to law in terms of internal motivations, such as a moral commitment or other sense of duty. In the former category we might place not only Austin's command theory, but Oliver Wendell Holmes's bad man "theory" of law, as well as what is thought to be the granddaddy of them all, Thomas Hobbes's authoritarian approach to law and civil authority. In the latter category we might place natural law theories, as well as positivistic theories like H.L.A. Hart's that ground the duty to obey the law in norms, or at least in normative practices that treat law as reason-giving.

In this paper I shall argue that Hobbes has only been situated in the former category through a mistaken reading of his theory, and that while it may be true that Austin, and Holmes after him, acquired many elements of their own theories from his, the "external" or sanction-based accounts they developed do not owe as much to Hobbes's own thinking about law as the authors purporting to follow him supposed. In particular, while Hobbes's account of law differs significantly and in many crucial respects from Hart's, the central advance of Hart's theory, namely combining a broadly positivistic approach with the idea that law has an internal aspect, was already present in Hobbes. It is not that I think Hobbes is uncontroversially characterized as a positivist—indeed I have argued elsewhere that he is not. It is rather that the positivistic elements of his account (those elements he shared, for example, with Austin) did not preclude his recognition of true legal duty with its attendant internal aspect.

The point may seem an arcane one for those more interested in jurisprudential debates about the nature of law than in intellectual history. But the Hobbesian theory of law, if understood in all of its complexity, has

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1. *See generally* John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 13-16 (Isaiah Berlin et al. eds., Noonday Press 1954) (1832).

the potential to transform jurisprudential debates. For sanction-based accounts are now, thanks to Hart, all but discredited, and that has left social practice accounts as the only viable positivistic option. Hobbes's theory of law would thus suggest an alternative way in which central positivistic notions could be combined with a full account of legal obligation. Arguably, grounding the notion of legal obligation in the idea of a social contract is neither positivistic nor naturalistic—it is a third way that the better-attended-to attempts to explain legal duty as a normative social practice, on the one hand, or moral duty, on the other, have eclipsed.

I. WHO IS HOBBIAN MAN?

Hobbesian man is not a particularly nice fellow. He appears to be entirely motivated by selfish ends, and has not a shred of fellow-feeling or compassion for others. As soon as he finds himself in competition with one of his peers, he will stop at nothing to undercut and even to destroy him. As Hobbes writes, “[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavour to destroy or subdue one another.”²

At first blush, these traits are a simple product of Hobbesian man's focus on survival, against the background of an extreme scarcity of resources and anticipated aggression from others. Few people are altruistic and demur when fighting for their lives. But on closer inspection, Hobbesian man turns out to be even more of a rogue, since the provision of his basic bodily needs often does not suffice to improve his temperament. Beyond securing his physical well-being, he seeks his own advancement in a variety of other ways. He is narcissistic and vain, and constantly craves flattery and power, even beyond any benefit to his physical security. Hobbes writes,

[B]ecause there be some that tak[e] pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires, if others (that otherwise would be glad to be at ease within modest bounds) should not by invasion increase their power, they would not be able, long time, by standing only on their defence, to subsist. And by consequence, such augmentation of dominion over men being necessary to a man's conservation, it ought to be allowed him.³

As Hobbes points out, even those who do not seek self-aggrandizement will be forced to pursue it by the unbridled ambitions of those who do. For those with modest ambitions will not be satisfied to cede position and power to those more powerful than they. Consequently they will be inspired to vie for position with those who seek, above all else, to dominate others. Thus even those who are not rotten to the core become moral

2. Thomas Hobbes, *Leviathan*, ch. XIII, ¶ 3 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668) [hereinafter *Leviathan*].

3. *Id.* ch. XIII, ¶ 4 (footnote omitted).

monsters when pressured by the need to keep pace with their more avaricious peers.

Told thus, Hobbesian man looks to be very much the “bad man” Holmes describes in *The Path of the Law*, “who cares only for the material consequences which . . . knowledge [of the law] enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”⁴ Law for the bad man is a yoke around his neck that restrains him from various liberties he might otherwise wish to enjoy. It also constrains his ability to benefit himself and to further his various ends; including ends of survival and physical well-being. He has no sense of legal duty and would think nothing of violating the law if he could do so with impunity. The only restraint on illegality is the possibility of detection, which he would constantly weigh against the potential for gain. As the oft-quoted passage from Holmes goes, “what does [the notion of legal duty] mean to a bad man? Mainly . . . a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.”⁵ Or, to put matters in Hartian terms, the bad man adopts only an external perspective on the law. He looks at law as a basis for predicting what others will do—as a *sign* that they will behave according to the law’s dictates. But the person who seizes the law’s internal aspect will look at legal restrictions as a *signal* that he should behave in a certain way; it provides him with a *reason* for behaving as the law demands.⁶

It is therefore unsurprising that commentators have seen Hobbes as a Holmesian-style positivist and *Leviathan* as an early articulation of the command theory of law. As Stephen Perry has written, “[I]f we are to understand Holmes as advancing a theory of law at all, that theory is clearly Hobbesian in character.”⁷ And presumably Perry would hold the reverse true, namely that Hobbes’s theory of law is suited only for a character such as the Homesian bad man. Another commentator, M.M. Goldsmith, claims that “Hobbes is not only a command theorist but also a legal positivist,” basing his argument primarily on the fact that Hobbes’s sovereign is not himself subject to the law.⁸ Finally, Hart himself appears to subscribe to this view of Hobbes, treating Hobbes as the originator of the view, followed

4. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

5. *Id.* at 461.

6. H.L.A. Hart, *The Concept of Law* 90 (2d ed. 1994). I do not mean to suggest that any account of law that assumes the external perspective necessarily adopts a “bad man” view of the law. But the converse seems quite clearly to be true, namely that a “bad man” view of the law will be committed to adopting the external perspective on law, and hence will be unable to account for law’s *internal aspect*.

7. Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *The Path of the Law and Its Influence* 158, 175 (Steven J. Burton ed., 2000).

8. M.M. Goldsmith, *Hobbes on Law*, in *The Cambridge Companion to Hobbes* 274 (Tom Sorrell ed., 1996), *reprinted in* *Hobbes on Law* 3, 4 (Claire Finkelstein ed., 2005).

by Bentham and Austin, that the "present status [of legislation] as law . . . is due to its recognition as law by the present sovereign."⁹

But is Hobbesian man really guilty of the same external stance towards his legal duties as Holmes's bad man? Certainly there is reason to think so if we restrict our focus to Hobbes's best known remarks about civil law. Most importantly, Hobbes says that "law in general is not counsel, but command,"¹⁰ and the command of one who himself "is not subject to the civil laws."¹¹ At another point he says that "all laws, written and unwritten, have their authority and force from the will of the commonwealth, that is to say, from the will of the representative."¹² And further, he adds that "before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant."¹³ Hobbes is suggesting that the concept of justice (and, we can extrapolate, of law) depends on the existence of a sovereign empowered to inflict a harm for breach of covenant that exceeds the gain to those contemplating a breach. Hobbes's sovereign is certainly thus empowered, since "nothing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice, or injury."¹⁴ All the elements of the Austinian command theory of law seem to be present in Hobbes—the command aspect of the theory, the fact that the sovereign who issues the commands is above the law, and the "bad man" motivations of the subjects toward whom law is directed. Presumably this would have been Holmes's theory too, had he cared to articulate a theory of law in full detail.

Yet, as Perry himself notes, there is an important wrinkle to the parallel between Holmes and Hobbes. The Holmesian bad man, according to Perry, is only *parametrically* rational, meaning that he "sees the law as a force that constrains *him*, and hence as something that is not in his interest, rather than as a force that constrains *him and everyone else*, and hence as an institution that might well be in his interest."¹⁵ Thus while Hobbesian man is immoral and selfish, Holmesian man is immoral, selfish, *and* dumb. He perceives his interest only in the most immediate of terms and cannot understand that advancing his long-term ends might require him to accept restrictions on his liberty for the sake of generalizing those restrictions to others whose liberty he would also like to have restricted. Holmesian man will thus bridle under the constraints of legal authority, since his imagination is too limited to perceive its restrictions as indirectly advancing his own aims. Hobbesian man, by contrast, may fare better. For unlike Holmesian man, he can come

9. H.L.A. Hart, *supra* note 6, at 64.

10. *Leviathan*, *supra* note 2, ch. XXVI, ¶ 2.

11. *Id.* ch. XXVI, ¶ 6.

12. *Id.* ch. XXVI, ¶ 10.

13. *Id.* ch. XV, ¶ 3.

14. *Id.* ch. XXI, ¶ 7.

15. Perry, *supra* note 7, at 175.

to understand that his selfish aims will be furthered by the constraints of legal authority, and so he comes to accept law as a necessary evil for the accomplishment of his ends. That is, he may be able to perceive that his own freedom may achieve its greatest expanse when realized in the context of restrictions on everyone's freedom. This explains why Hobbesian man is ultimately willing to enter into an agreement with his fellows to authorize a sovereign to act on his behalf, despite the fact that this agreement requires him to relinquish a portion of his natural rights.

But the fact that Hobbesian man has the capacity to use his reason to recognize the benefits to himself of living in a regime of law does not ensure his cooperation. For he is always in danger of slipping back into the frame of mind of the Holmesian bad man, and thinking that he can do better by shedding these constraints. After all, he may realize, he does not require the application of any given law to *himself* in order for him to reap the benefits of law more generally. He only requires its application to others, and would do best were such restrictions to exempt only him. Hence the agreement Hobbesian man makes with his fellows requires rigid, indeed tyrannical enforcement. Hobbesian man's obedience to the agreement can be sustained only insofar as the enforcement is perfect and absolute. Thus despite his greater sophistication about the need for law and the rationality of submitting to authority more generally, Hobbesian man is still ultimately in the position of the bad man in recognizing primarily *sanction-based reasons* to obey the law. Or so the story goes.

II. A MORE COMPLICATED PICTURE

The wrinkle that Perry notes turns out to be only the tip of the iceberg, however, as far as Hobbes's theory goes. Matters are considerably more complicated than this thumbnail sketch of Hobbes's account of law would suggest. These complications have largely been overlooked by commentators, for reasons that remain unclear. Austin's apparent reception of Hobbes as the forerunner of his own command theory may have something to do with it. In what follows, I shall call into question most of the elements of the foregoing picture—the Austinian/Holmesian equation of legal obligation with legal compulsion, the positivistic account of law in terms of command, and the *idée fixe* that Hobbes's theory of law is incompatible with the recognition of restrictions on the nature of law based on the content, and not merely the pedigree, of such laws.¹⁶

Let us begin with Hobbes's account of legal obligation. The first hint that something is amiss with the standard picture becomes apparent from a

16. Ben Zipursky has pointed out to me that the Holmesian bad man view of the law is arguably quite different from the Austinian command theory. It is, for example, entirely possible that an Austinian command theorist thinks of law as imposing obligations, rather than as merely obliging (to use the Hartian terminology). Although there is much reason to suppose that John Austin himself did not see matters this way, there is nothing implicit in the nature of a command theory that would commit one to taking the external perspective. The distinctions between Holmes and Austin, however, do not particularly concern us here.

more complete examination of the passage we considered earlier. In fact, Hobbes does not just say that law is "command." He goes on to add, "nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him."¹⁷ The full story about legal obligation requires reference to a preexisting obligation: Subjects have to obey the sovereign. The source of this obligation is the same renunciation of right that we understood to constitute a condition on obligation. The subjects are obligated to obey the sovereign because they have obligated *themselves* to obey his commands, and they have done so in the form of a commitment to their fellow man (rather than by committing directly to the sovereign himself). It is not merely the fact that the sovereign has the power to back up his commands with force and hence to mandate compliance. It appears, instead, that the subjects' own renunciation of right has given them an independent reason to adhere to the sovereign's commands, independent, that is, of the power he has to coerce them.

What more can we say about the nature of that reason? After all, Holmes's bad man also has a *reason* to obey the law, namely the fear of sanctions. From one perspective, sanction-based reasons are every bit as *internal* as other kinds of reasons to obey the law, insofar as they are considerations by which an agent is strongly and immediately motivated. Indeed, arguably sanction-based accounts of legal obligation are more internal than other accounts, because, unlike natural law accounts, they deny that there can be reasons to obey the law that are wholly divorced from what motivates an agent to act. A natural law account, by contrast, *could* maintain that there are legal obligations by which an agent is left entirely cold, since the motivation to obey the law is not a necessary part of a natural law account of why the obligation obtains. This shows that we need to be clearer about our use of the terms "internal" versus "external" in this context.

When moral philosophers use these terms as applied to reasons for acting, they typically mean to suggest that a consideration is an "internal reason" if it is appropriately connected with elements of an agent's current set of motivations. A consideration is said to be an "external reason" if an agent is wholly unmoved by it, and cannot be brought to be moved by it by deliberation on elements of the agent's motivational set.¹⁸ The distinction between theories of legal obligation that see law as having an "internal aspect" and those that do not, however, cuts across the foregoing distinction. On the one hand, theories of law with an internal aspect may or may not connect legal obligation with the motivations of legal subjects, since arguably subjects can recognize legal rules as having a normative hold on them without being particularly motivated to obey. On the other hand,

17. *Leviathan*, *supra* note 2, ch. XXVI, ¶ 2.

18. See generally Bernard Williams, *Moral Luck*: Philosophical Papers 1971-1980 (1981).

theories of law that are wholly “external” may nevertheless give legal subjects internal reasons to conform their behavior to the law, since the law may motivate them through the threat of sanctions. The distinction on which we are currently focused—that between theories of law that give subjects sanction-based reasons and those that give them reasons based on a shared commitment to a larger normative structure to obey the law—is best characterized as a split within internal reasons in the sense moral philosophers have in mind.¹⁹

The idea of the “internal point of view,” as introduced by Hart, was meant to capture the latter distinction, namely that between someone who obeys the law because he fears the sanction, and someone who obeys the law because he has internalized the normative structure that obligates him to do so. It would be a distortion, Hart suggests, to think of the former person as “obligated” to obey the law, just as it would be a distortion to think of the person who hands his money over to a gunman because he fears harm as having a duty to submit.²⁰ This flawed picture is the model of legal obligation we receive from Austin, and from Holmes presumably no less. Hart calls it the “predictive” account of legal obligation,²¹ since on this view we say a person is obligated to obey the law when we can make a reliable prediction that if he does not he will be subject to sanctions. So while the predictive account of legal obligation would posit that law gives legal subjects internal reasons to obey the law, it would also present an external account of the nature of legal obligation:

The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.²²

And while Hart thinks that others are given a *reason* or *justification* to apply a sanction if a person fails to obey a legal norm, he also appears to think that the reason-giving force of law applies on the other side as well—namely that the law gives individuals independent reasons for doing what the law requires, and not just a basis for predicting that if they do not obey they will receive a sanction. Hart’s account would be internal in both of the senses we have considered.

What is defining of the internal aspect of law is that the relevant participants in a legal system take what Hart calls a “critical reflective attitude” towards the rules of the system. He writes,

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should

19. Once again, however, the latter theory of legal obligation could be based on external, rather than internal reasons.

20. See Hart, *supra* note 6, at 82.

21. *Id.* at 83-84.

22. *Id.* at 84.

display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", "right" and "wrong".²³

The idea that law has an "internal aspect" can be articulated in any number of ways. Hart's idea that legal rules, like the rules of a game, have an internal aspect when at least relevant persons in a legal system participate in a shared practice of treating them as normatively binding is only one possible version of that thesis. But all theories of law that treat legal obligations as internal in this sense must somehow account for the fact that participants in a legal system see themselves as normatively bound by legal rules, rather than merely experiencing themselves as coerced into following them. The reasons for acting that the law gives members of a legal system must be identified by reference to a broader system of norms in a way that immediate considerations of self-interest are not.

The question, then, is whether Hobbesian man has reasons of this normative variety to obey the law, or whether Hobbesian reasons are entirely lacking in internal aspect, as Austinian reasons might be. The first and most obvious basis for thinking that Hobbesian reasons possess this internal aspect is that Hobbesian subjects have reasons to be committed to the system of norms from which particular laws take their authority, even if the subjects lack such reasons for obeying particular laws themselves. Thus recall that individuals in a state of nature can expect to fare significantly better if they abandon a portion of their infinite right in favor of a sovereign who abandons none of his. The reason they have to abandon this right and enter into agreement with their fellows is also a reason to adhere to the dictates of the sovereign, since the agreement contemplates adherence to the sovereign's will as the primary contractual condition. There are thus *extended* reasons of self-interest for Hobbesian subjects to endorse a system of law as a normative force in their lives, and this gives them a basis for thinking of particular laws as having normative authority as well.

Notice that the bad man might also come to accept such extended reasons of self-interest, given his motivations. If the bad man does not take himself to have a reason to cooperate with his fellows, it is only that he is too shortsighted to perceive the benefits to himself from doing so. But his motivations are consistent with seeing himself as having reasons to cooperate, and in might, therefore, be brought to see the value of self-limiting behavior of this sort. We might say, to borrow an idea from Bernard Williams, that there is a sound deliberative route from the bad man's *sanction-based reasons* to the Hobbesian man's somewhat broader *self-interested reasons*.²⁴ And thus while this extension of self-interest gives Hobbesian man reasons of a normative variety to obey the law, these

23. *Id.* at 57.

24. Williams, *supra* note 18, at 104-05.

reasons are only a step removed from the reasons of self-interest on which a sanction-based theory of law typically builds.

Hobbes also traces several deeper connections between renunciation of right required for any obligation and the obligation the law imposes. The first such connection is a quasi-analytic one. In Chapter XIV of *Leviathan*, Hobbes says that when a man has either renounced or transferred a right in favor of another, “he [is] said to be Obligated or Bound not to hinder those to whom such right is granted or abandoned from the benefit of it.”²⁵ He says further that “it is his Duty, not to make void that voluntary act of his own, and that such hindrance is Injustice, and Injury, as being *sine jure* [without right], the right being before renounced or transferred.”²⁶ Hobbes then makes the curious claim that just as it is an “*absurdity* to contradict what one maintained in the beginning”²⁷ in logic, “so in the world it is called injustice and injury voluntarily to undo that which from the beginning he had voluntarily done.”²⁸ In other words, having authorized the sovereign to act on one’s behalf by laying down a portion of right in his favor, it is now an injustice (tantamount to a logical contradiction) to ignore that authorization and defy his order. It is presumably not that a man is bound under all circumstances to stick to his intentions once formed—that would be too strong. But intention carries a special weight where others are depending on one’s fidelity. Particularly in this situation, Hobbes suggests, it is an injustice to fail to honor what one has promised to do.

These remarks come into clearer focus when we consider the account Hobbes offers of the required authorization for civil authority. Legal obligations are no different from other civil obligations, according to Hobbes, in that they must be voluntarily imposed.²⁹ Thus, if man in civil society can be thought of as having true legal obligations, it must be that he has in some sense imposed those obligations on himself. Indeed, it is this feature, so crucial for understanding Hobbes’s theory of law, that characterizes civil society as a whole. Hobbes goes so far as to define a commonwealth as when

one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he

25. *Leviathan*, *supra* note 2, ch. XIV, ¶ 7.

26. *Id.* (footnote omitted).

27. *Id.*

28. *Id.*

29. True, it is in theory possible for a large number of individuals in a state of nature forcibly to take away rights of a smaller number. And so one might suppose that loss of right can occur by “conquest” as well. But first, Hobbes thinks that no one can permanently amass enough power or establish a permanent enough confederacy to gain mastery over his fellows in this way. “[T]he weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others that are in the same danger with himself.” *Id.* ch. XIII, ¶ 1. Second, it is not clear that Hobbes would consider loss of right “by conquest” a loss of right at all. (This last point, however, is a tricky one, and more would need to be said to show this.)

may use the strength and means of them all, as he shall think expedient, for their peace and common defense.³⁰

Hobbes later concludes that when the sovereign makes laws for the subjects, they have no grounds for complaint, since "every particular man is author of all the sovereign doth; and consequently he that complaineth of injury from his sovereign complaineth of that whereof he himself is author."³¹ Thus the first and clearest contrast with a "bad man" legal theory is that law, for Hobbes, is imposed by subjects on themselves, and the sovereign is only the intermediary or instrument through which this self-imposition takes place.

By implication, then, we can see that Hobbes's explanation of the duty to obey the law has an internal aspect of the sort Hart had in mind, and not just the "externally" motivated reason a man has to obey the sovereign when he fears the sanction if he does not obey. The possession by the sovereign of the power to coerce is required in order for the reason to obey the law to come into existence, since each man's reason to obey the law is dependent on every other man having the same reason. The *content* of the reason, however, is not itself the threat of sanction, or the fact that there is a sanction. The reason to obey the sovereign's law is that doing so is required by the social contract, the obligations of which each subject has voluntarily assumed. Moreover, that voluntarily assumed obligation is not an arbitrary commitment. The reason-giving force of the obligation is itself supported by reason, insofar as reason dictates the commitment to the contract in the first place (Hobbes's second law of nature). Reason further dictates that having once renounced a right by committing to contractual provisions, those provisions must be observed (the third law of nature), as we will see in the next part. Thus although it is fear of sanction that makes it possible for men to advance their reasons in the context of a social organization, fear of sanction does not of itself obligate, and so cannot by itself be a *reason* for obeying the law.

III. THE FOOL'S CHALLENGE

We have seen that Hobbesian man has narrowly self-interested reasons to authorize a sovereign to legislate on his behalf, provided that others do the same. The rationality of each man's submission to the sovereign thus depends on the simultaneous submission of his peers. It is not surprising, then, that at the beginning of Chapter XV Hobbes elevates the idea "that men perform their covenants made"³² to a law of nature, that is, a "precept or general rule, found out by reason"³³ by which human beings are to determine what it is that conduces to their own preservation. Hobbes calls

30. *Id.* ch. XVII, ¶ 13 (emphasis omitted).

31. *Id.* ch. XVIII, ¶ 6.

32. *Id.* ch. XV, ¶ 1 (emphasis omitted).

33. *Id.* ch. XIV, ¶ 3.

the third law of nature the “fountain and original of Justice.”³⁴ For the obligation to abide by the terms of the contract is the essence of the obligations that man in a state of nature chooses to impose on himself. The third law of nature is perhaps best conceived as a corollary of the self-imposed quality of civil authority.³⁵

There is now a further question about Hobbesian reasons of self-interest that must be addressed, namely how those reasons stack up against reasons of obligation when they side with defection, rather than fidelity. While reasons of self-interest, narrowly conceived, are sufficient to induce Hobbesian man to enter into the authorization agreement in the first place, they are not sufficiently motivating to ensure that he will adhere to the agreement once formed. In particular, Hobbesian man realizes that defection once others have already entered the agreement is less likely to cast him back into the state of nature than refusal on his part to contract in the first place. Thus, unlike when the initial agreement is made, it seems possible to reap the benefits of others’ cooperation without having to stick to the agreement oneself once in civil society. So what reason does Hobbesian man have not to free-ride on the self-limitation of others and defect from the agreement if one could expect to do better this way?

The story we told about authorization in the previous part does not answer this question. For a subject could benefit from ignoring a command of the sovereign even though such commands emanate from his own will. This is borne out by the fact that the authorization story is presented in Chapter XIV of *Leviathan*, but this objection appears in Chapter XV as a challenge to the third law of nature. This is the objection that Hobbes places in the mouth of the fool.

The fool’s challenge is that “every man’s conservation and contentment being committed to his own care, there could be no reason why every man might not do what he thought conduced thereunto, and therefore also to make or not make, keep or not keep, covenants was not against reason, when it conduced to one’s benefit.”³⁶ That is, since the right of nature entitles everyone to act as he thinks required for his own welfare and benefit, there can be no general, natural rule of keeping covenants. Whether covenants should be kept or not is entirely a function of whether it would be in a person’s interest to keep them. The fool would not obey the sovereign’s law out of a sense of obligation to his fellow man, nor because of a strategic understanding that norms of reason sometimes require self-

34. *Id.* ch. XV, ¶ 2.

35. True, Hobbes makes clear, the sense in which keeping covenants should actually be considered a rule of reason in the absence of civil society is quite limited, so that while “the nature of justice consisteth in keeping of valid covenants, . . . the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them.” *Id.* ch. XV, ¶ 3. The existence of a civil power merely specifies the conditions under which the rule of reason that dictates the keeping of covenants can be given effect.

36. *Id.* ch. XV, ¶ 4 (internal quotation marks omitted).

limitation, but only because he sees an immediate advantage to obeying. The fool is essentially the Holmesian bad man.

What is Hobbes's answer to the fool? First, he says that the fact that a person may incidentally benefit from something that has a tendency to undermine his own welfare does not mean that it was rational to do it ("that when a man doth a thing which, notwithstanding anything can be foreseen and reckoned on, tendeth to his own destruction[,] . . . yet such events do not make it reasonably or wisely done"³⁷). Second, a person who thinks it rational to deceive others into cooperating with him cannot expect to reap the benefits of cooperation, since he would have to count on others' irrationality in order to claim their assistance. As Hobbes writes,

He, therefore, that breaketh his covenant, and consequently declareth that he thinks he may with reason do so, cannot be received into any society that unite themselves for peace and defence but by the error of them that receive him; nor when he is received, be retained in it without seeing the danger of their error . . ."³⁸

And no one can rationally count on others making a mistake of this sort, especially because if one is rational oneself, one cannot attribute irrationality to others, given the condition of equality in nature ("which errors a man cannot reasonably reckon upon as the means of his security"³⁹). In other words, the fool is a fool to think he can advantage himself by brute calculations of personal benefit. If he is rational, he will see that he must attribute rationality to his fellows as well, and this attribution commits him to making good on his agreement with others.

Perhaps this helps us to understand why Hobbes thinks violating the contract involves a kind of logical contradiction. Having correctly perceived his long-term benefit as lying in the decision to relinquish a portion of his own right and authorize an omnipotent sovereign to act on his behalf, Hobbesian man cannot now back out of that agreement without contradicting his initial assumption that his fellow contractors are possessed of rationality equal to his own. This shows that someone who reasoned like the Holmesian bad man would ultimately fail to free himself from the terrible tyranny of nature, if Hobbes's account of that state is to be credited. He tends to perceive only his own rationality, and is driven by his own needs and wants either to respect or violate civil authority based solely on the immediate advantages to himself of pursuing one course rather than another. But if he were able to perceive the fact that rationality generalizes to other subjects as well, he would be unable to think of his own possible defection from the agreement as an exception to the contract. He would thus be unable to exempt himself from its conditions, as he is at least minimally aware that widespread defection from the contract will place him back in the condition of nature.

37. *Id.* ch. XV, ¶ 5.

38. *Id.*

39. *Id.*

Whether Hobbes's answer to the fool is successful remains unclear, despite the wealth of commentary on this important portion of *Leviathan*.⁴⁰ For our purposes the important point is that Hobbes thought he *had* an answer to the fool, and thus thought that the "bad man" reasoning the fool endorses could not be vindicated on rational principles. It is ironic, then, that Hobbes's successors came to see him as glorifying narrowly self-interested reasoning in the domains of political and legal obligation. One would have thought that the very name Hobbes bestowed on his infamous bad man would have forestalled such misunderstanding on the part of successive generations of commentators.

IV. IS HOBBS A POSITIVIST?

There is yet a second cluster of reasons to resist assimilating Hobbes with Austin and Holmes on this topic, and this has to do with Hobbes's account of the sources of law. As we shall see, Hobbes goes beyond even Hart in the degree to which he identifies law as a normative enterprise. The aspect of Hobbes's account we are about to explore is at least superficially severable from the central features of his legal theory discussed until now. And while it may be combined with the contractarian story we have just told, it is not essential to a contractarian account of law.

The positivistic picture of law that contemporary analytic jurisprudence inherits from Austin, and partially from Hart, suggests that anything with the right sort of pedigree can count as law. In a command theory like Austin's, the point is easiest to see: While there may be formal restrictions on what sorts of prescriptions can be commanded, and what sorts of commands can be coerced, there is nothing to limit what can count as a law based on the content of the prescription. The same is true for Hart. In theory anything with the right generality and backed up by a social practice in the right sort of way can count as law.⁴¹ While the freedom from morality is the feature that most prominently separates positivistic from natural law theories, one might less controversially identify the absence of content-based restrictions as the dividing line between these two types of theories.⁴²

If we take content-based restrictions on law as the dividing line between positivistic and natural law theories, there is a fair argument that Hobbes is

40. See, e.g., David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* 76-88 (1979); Gregory Kavka, *Hobbesian Moral and Political Theory* 137-56 (1986); Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation* (1957); David Gauthier, *Three Against Justice: The Foole, the Sensible Knave, and the Lydian Shepherd*, in *Moral Dealing: Contract, Ethics, and Reason* 129, 136-37 (1990).

41. I except from this Hart's "minimum content of natural law" conditions from chapter nine of *The Concept of Law*, which seem out of keeping with the theory of law that precedes it. Hart, *supra* note 6, at 193-200.

42. This is especially helpful for making room for the possibility of "soft positivism," as it has recently been called, which Hart set out in the *Postscript to The Concept of Law*. *Id.* at 250-54.

a natural law theorist, at least when it comes to positive law. First, in the chapter on Civil Laws, there is the rather remarkable statement that "[t]he law of nature and the civil law contain each other, and are of equal extent."⁴³ Hobbes goes on to explain that the laws of nature, which are justice, gratitude, and other moral virtues, are mere "qualities that dispose men to peace and to obedience."⁴⁴ They become laws once a commonwealth is formed. Hobbes thus appears to assume that the laws of nature supply the content for the commands of the sovereign, and hence for the civil laws generally. The sovereign, he seems to think, translates and interprets the laws of nature, interpreting them and giving them definite positive form.

There are other expressions of enthusiasm for natural law in Hobbes's writings, the most prominent surfacing in his furious attack on the notion of precedent. This appears mostly in a short English work Hobbes wrote called *A Dialogue Between a Philosopher and a Student of the Common Laws of England*.⁴⁵ Here Hobbes calls into question Sir Edward Coke's idea that legal decision making is "an Artificial perfection of Reason gotten by long Study, Observation, and Experience, and not of every Man's natural Reason."⁴⁶ Coke had defended the view that legal reasoning is characterized by its reliance on the notion of precedent. Against precedent, which Hobbes calls "custom," Hobbes writes,

[A]s to the Authority you ascribe to Custome, I deny that any Custome of its own Nature, can amount to the Authority of a Law: For if the Custom be unreasonable, you must with all other Lawyers confess that is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity that makes it Law.⁴⁷

Hobbes argues that there is never any reason to adhere to precedent. For if the precedent case was wrongly decided, following it in the present case would only perpetuate error. But if the precedent case was rightly decided, we ought to be able to discover the same solution in the present case on the basis of first principles, making the precedent case otiose. Thus, precedent is either misleading or extraneous, and there is no justification for following it. The question about Hobbes's argument that will immediately present itself, of course, is what measure he is using to determine whether a case is rightly or wrongly decided *other* than precedent? In the Anglo-American common law system, we do not suppose that we have a way of determining the rightness or wrongness of a decision that is wholly divorced from the relation of that decision to earlier similar decisions. Hobbes's argument

43. *Id.* ch. XXVI, ¶ 8.

44. *Id.*

45. Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Joseph Cropsey ed., Univ. of Chi. Press 1971) (1666) [hereinafter *Dialogue*].

46. *Id.* at 61.

47. *Id.* at 96.

here makes no sense unless he is supposing that a judge has something like a natural law foundation for legal decision making.

We catch a glimpse of this in the very beginning of the *Dialogue*, where Hobbes contrasts the “Artificial Reason” of the common law with “Natural” reason, which is reasoning from first principles.⁴⁸ Which first principles should a judge use to decide cases? Hobbes does not give specifics. But in many places he equates reason, or “right Reason,” with “Equity,” which he explains as “a certain perfect Reason that interpreteth and amendeth the Law written, it self being unwritten, and consisting in nothing else but right Reason.”⁴⁹ There is even some support for this in *Leviathan*, where “equity” is presented as the eleventh law of nature, which Hobbes explains thus:

[I]f a man be trusted to judge between man and man, it is a precept of the law of nature that he deal equally between them The observance of this law (from the equal distribution to each man of that which in reason belongeth to him) is called Equity⁵⁰

Equity thus appears to be at once a quality of human beings, or of some human beings, and a law of nature that human beings are obligated to follow. We might conclude that Hobbes thinks judges have a combined function: first, to deal equally with litigants, and second, to interpret the written law generously, namely in such a way that supports what equality of treatment requires.

Moreover in the *Dialogue*, Hobbes appears to be of the opinion that all courts should be equity courts, and that the methods and more informal mode of judging applied in those courts should be extended to all disputes. Consistent with this preference for equity, Hobbes makes the astonishing suggestion that bishops would be the best suited to be judges, because they are men most likely to be skilled in dealing equitably among men: “The Bishops commonly are the most able and rational Men, and obliged by their profession to Study Equity, because it is the Law of God, and are therefore capable of being Judges in a Court of Equity.”⁵¹ When the lawyer challenges Hobbes by saying that bishops are not familiar with the workings of statutes, Hobbes makes the still more surprising statement that judges do not particularly require knowledge of statutes, as the lawyers for the parties can inform a bishop as well as a judge learned in the law. The general point is in fact well supported in other places in *Leviathan*, namely the idea that judges should decide cases on the basis of equity, fairness, and justice, rather than on the basis of artificial legal principles whose authority stems only from tradition.

All this talk about equity should leave us rather puzzled: How does Hobbes’s enthusiasm for equity square with the emphasis he places on

48. *Id.* at 55.

49. *Id.* at 54.

50. *Leviathan*, *supra* note 2, ch. XV, ¶¶ 23-24.

51. *Dialogue*, *supra* note 45, at 99.

authority and command elsewhere in his legal and political philosophy? That is, if law is command, how can it also be right reason, or equity? The emphasis on equity suggests that civil pronouncements can be disqualified from counting as true civil law if their content cannot be defended as fair. But the Hobbes of *Leviathan* repeatedly asserts that “nothing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice, or injury.”⁵² This fits well with a command theory of law, since if the sovereign has unlimited authority, we would expect at least all of his general commands to have the status of law. It also fits with a contractarian approach to political legitimacy, since, as Hobbes goes on to remind us in that same passage, the subjects are themselves author of everything the sovereign does. But Hobbes’s views on equity do not appear to fit well with either the command or the contractarian aspect of his legal philosophy, especially as articulated in *Leviathan*. How can we reconcile the more standard features of Hobbes’s account of law with his naturalistic attack on the common law in the *Dialogue*?

The answer to this question is far from clear, especially as there are precious few places where Hobbes says anything that squarely addresses the problem. One test case for the conflict between the two perspectives would be that of a sovereign who does something that violates natural law. Would his commands still be law, as a positivist would probably assert, or would Hobbes side with the natural lawyers who would say that a law that violates natural law is “no law at all”?⁵³

The closest we get to a discussion of this in Hobbes appears in his consideration of the sovereign who condemns an innocent man to death. In Chapter XXI, in discussing the killing of Uriah by David, Hobbes writes, “For though the action be against the law of nature, as being contrary to equity . . . , yet it was not an injury to *Uriah*, but to *God*.”⁵⁴ The reason, Hobbes explains, is that Uriah had given David the right to do whatever he wanted to him, and thus Uriah could not regard himself as injured, despite the fact that he was innocent. But Hobbes emphasizes that the action was still iniquitous, and hence a sin against God. Hobbes thus appears to think that the laws of nature bind the sovereign *in foro interno*, despite the fact that there are no external constraints on the sovereign’s authority. If the sovereign passes unjust laws, or laws that violate the duty of equity, those commands are still laws, but they are iniquitous laws. Hobbes gives some explanation for how that can be. In any dispute between himself and another man, each person will naturally be partial to himself. If each man is to serve as his own interpreter of the laws of nature, there can be no civil law. Thus Hobbes suggests that each person must agree to take the sovereign’s reason as his own, and to replace his own judgment with that of

52. *Leviathan*, *supra* note 2, ch. XXI, ¶ 7.

53. Augustine, *On Free Choice of the Will*, bk. one, no. 5 (Thomas Williams trans., Hackett Publ’g 1993) (395).

54. *Leviathan*, *supra* note 2, ch. XXI, ¶ 7.

the sovereign. In this way, it is the sovereign's reason, and the sovereign's alone, that will serve as the measure of right reason according to the laws of nature.

What, then, is the position of a subject faced with a command of the sovereign's that violates the laws of nature? Is a subject confronted with positive laws that violate natural laws still obligated to obey the former? It remains unclear. The standard response would say that Hobbesian subjects are bound to obey the sovereign, whatever he commands. After all, as we have said, Hobbes is clear that the sovereign can do the subjects no "injury" or "injustice." But there are important passages that cut the other way. The first and most important such passage is where Hobbes says that the obligation of subjects to the sovereign is extinguished when the sovereign is no longer able to protect them:

The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished.⁵⁵

That is, Hobbes connects the limitation on the sovereign's power to the argument he makes for the inalienability of the right to self-defense. Because it is against reason (under the laws of nature) for a subject to transfer away his right to self-defense, the power of the sovereign (which depends on authorization) is necessarily limited by the interests of the subjects in self-preservation.⁵⁶ If the sovereign's dictates become ineffectual with regard to that preservation, his authority over the subjects ceases, and they are no longer obligated by reason to adhere to his commands. Thus in the final analysis, if the sovereign's commands do not properly reflect the laws of nature, subjects are entitled to side with natural reason over the sovereign's commands. Here, Hobbes comes surprisingly close to the Augustinian position on this question.⁵⁷

What is important for our purposes about Hobbes's appeal to natural reason is that the subject is emphatically *not* in the position of the Holmesian bad man with respect to legal duty. His relation to his obligation to obey the law is not at all external, as it would be on a sanctions-based view. It is rather emphatically internal—indeed so internal that Hobbes seems to think a subject's obligation to obey the law may dissolve when the sovereign's laws consistently fail to comport with rational and moral duty.

I have not meant to convey the impression that I view Hobbes as a natural law theorist. He is not, among other things, because the natural law elements of his theory are subsidiary to the contractarian elements. Yet both the role played by contractual authorization of the sovereign, and the

55. *Id.* ch. XXI, ¶ 21.

56. I discuss this point in greater length in Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 *Pac. Phil. Q.* 332 (2001).

57. See Augustine, *supra* note 53.

emphasis Hobbes places on natural reason, point in the direction of a theory of law that sees law as equipping agents with reasons for acting of a rather robust sort. Moreover, Hobbes's account of reasons for acting arguably runs even deeper than it does for a theorist like Hart, since for Hart, social practices can in and of themselves provide agents with reasons for acting, virtually without regard to the moral defensibility of the practice itself. For Hobbes, by contrast, the reasons are not themselves up for grabs; the reasons for acting that positive law provides ultimately depend for their normative status on the resonance between those laws and human rationality. If, further, we focus our attention most squarely on the contractarian aspect of Hobbes's account of law, we have a model of how law can have an internal aspect, as Hart was right to insist on, without making use of either the notion of a normative social practice, on the one hand, or the idea of a natural morality on the other.

In this essay, I have tried to present a number of reasons to question the standard view of Hobbes as advancing an external, or sanctions-based legal theory. By far the most significant of these comes from understanding the way in which Hobbes sees all obligation as self-imposed, and the implications of this central tenet for other aspects of Hobbes's theory. If the reason to adhere to legal rules is ultimately that they are voluntarily assumed, then legal obligation *cannot* be explained without reference to what Hart would have called law's internal aspect. Understanding the role of self-imposition in Hobbes's legal and political theory also holds the promise of transforming our understanding of Hobbes's place in relation to his successors. Could it be, for example, that in Hobbes's idea that each subject should think of himself as the author of all of the sovereign's law, we have the germ of the idea of self-legislation that is so central to Kant's ethics? Hobbesian subjects legislate for themselves through the person of the sovereign. The source of their obligation to obey the law is thus ultimately their own wills. Kantian subjects legislate for themselves in a moral arena without intermediary. For both philosophers it is man's own reason that teaches him to be a source of law for himself—whether the law is civil or moral in nature. Thus it may be Kant, rather than Austin, that is the true successor to the Hobbesian theory of law.