PHL271 Handout 2: Hobbes on Law and Political Authority

§1 Background: Legal Positivism

Many philosophers of law treat Hobbes as the grandfather of *legal positivism*.

> Legal Positivism (Rough Version): whether something counts as a legal system depends upon social facts rather than moral facts.

Even from this rough formulation, it follows that legal positivists deny any *necessary* connection between *the conditions of legal validity*—the conditions that must be met for something to count as a legal system (or for something to count as a law)—and morality.

> *Consequence*: a policy can be moral but not legal; it might also be legal but not moral. So the moral status of a policy does not determine its legal status: an immoral law will still count as a law.

It was H. L. A. Hart who eventually articulated the canonical formulation of legal positivism. On his formulation, legal positivism consists in the conjunction of two claims:

> *Separation Thesis*: there is no necessary connection between law and morality.
>
> *Identification Thesis*: legal systems contain only laws whose content can be determined without appeal to moral argument—so called 'positive law'.

Moving forward, we're going to treat legal positivism as the following view:

> Legal Positivism (Final Version): the *Separation* and *Identification* theses are true.

Anti-positivists reject one or both of the two theses that constitute legal positivism. As we'll see, Lon Fuller and Ronald Dworkin offer competing anti-positivist views in response to Hart's influential defence of legal positivism.

Today we're going to look at Hobbes's account of political authority, with a particular focus on whether his general account generates a form of legal positivism.

Hobbes endorses the *Identification Thesis* in Chapter 26 when he says that 'Law in generall, is not Counsell but Command'.

> The distinction between 'counsell' and 'command' is drawn in Chapter 26. Commands (in Hobbes's sense) derive their force from authority alone, rather than from supporting reasons. Hence acceptance of a command cannot rest on anything beyond our recognition of the authority of the person (or institution) that issues the command.
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> It follows that if a command issues from someone with the relevant authority—in Hobbes's case a sovereign—it counts as law; there isn't a further question of whether the command is backed by appropriate reasons (moral or otherwise).

As we'll see, whether Hobbes endorses the *Separation Thesis* is a surprisingly tricky question. However the dominant reading of Hobbes (the 'Hobbist' reading) treats him as a proponent of both theses, and thus as a legal positivist.

§2 Hobbes on the Establishment of Political Authority

Hobbes's major project in his *Leviathan* is to defend a certain view about the source and limits of political authority. You can think of him as answering the following question: why must members of a society subject themselves to the constraints imposed by the social order on their individual freedom?

> Here are some candidate answers:
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> 1. *Tyranny*: We must subject ourselves because governments impose tyranny through the exercise of force.
> 2. *Moral Order*: We must subject ourselves because we recognise a *moral* imperative to obey the laws instituted by morally upright governments; but we have no such obligation to obey a morally corrupt government.
> 3. *Divine Command*: We must subject ourselves because the social order that governs a civil society has the backing of divine will.
>
> 1–3 offer differing accounts of what compels members of a society to respect the social order: 1 says we are compelled solely by *force*; 2 says we are compelled by *moral obligation*; 3 says we are compelled by respect for *divine will*.

Hobbes rejects these answers; he instead seeks a foundation for political authority on which members of a civil society are *rationally* compelled to subject themselves to political authority.

§2.1 State of Nature

In some ways Hobbes's argumentative strategy is straightforward. He begins by considering the conditions that would obtain were the structures of civil society totally absent. These conditions constitute what he calls the 'state of nature'.

Given some basic assumptions about the state of nature—assumptions that also concern human nature and rationality—Hobbes deduces (a) rational reasons for human beings to exit the state of nature and (b) an account of the conditions a civil society must meet in order to constitute an effective escape from the state of nature.

> In other words, he argues that the rational requirement to exit the state of nature both generates (and limits) our rational obligation to respect political authority.

The full account of Hobbes's state of nature is quite complex. However its basic features are relatively clear:

1. Human beings have interests or desires—for resources, for status, for life, and so on.
2. These interests inevitably come into conflict.

- Two or more people will have interests or desires whose joint satisfaction is impossible (either due to material scarcity, or to a logical incompatibility between the satisfaction conditions—for instance Sakina and Sean might both want to be in charge of the other).

3. In the state of nature, we cannot resolve such conflicts *without rational fear* that others will renege on or escape from any established resolution.
    - If I resolve the conflict by force, the resolution rests on my fleeting superiority; if I resolve it through concession, the resolution rests on my trust that the other parties won't exploit my concession in order to achieve further advantage.
    - Notice: other people might be trustworthy on the whole, but I'm not in a position to know (with certainty) who is trustworthy. And without that certainty, I must always live in fear that my interests will be compromised.
4. Our inability to resolve these conflicts comes from the *essential equality* of people in a state of nature (see Ch. 13): all of us have the power to overcome others; yet none of us have the power to obtain absolute control over others.

At bottom, the rational fear that pervades those in the state of nature threatens our most fundamental interest: our continued survival. It is the most fundamental interest—the one that trumps all others—because our continued survival is the most basic means to the satisfaction of our other interests.

§2.2 Laws of Nature

It's one thing to say that the state of nature is not conducive to our interests, but quite another to say that rationally demands our establishment of, and subjugation to, political authority in the form of a civil society.

Hobbes throughout assumes a quite anodyne principle about human rationality: we ought, all else being equal, to acquire the means to the satisfaction of our interests or goals.

> For example, if I'm hungry, and I know that if I eat the food in my fridge I'll cease to be hungry, I should (all else being equal) eat the food in my fridge.

Given that our fundamental interest is our continued survival, and that persisting in a state of nature threatens this interest, rationality seems to require that we seek a means to exit the state of nature. In fact, we can seek any means to exit the state of nature that does not threaten our continued survival: we can sacrifice any interest—and thus any freedom—up to but *not including* our right to survive. In other words: we're rationally obligated to do what we must to survive.

> These are the first two of Hobbes's 'laws of nature': the need to exit the state of nature—to seek what Hobbes terms 'peace'—and the rational obligation to seek any means to our survival. See Ch. 14.

Hard Question: what status should we afford these 'laws of nature'? In Ch. 25 Hobbes says that prior to the establishment of a state, the laws of nature are 'not properly Lawes, but

qualities that dispose men to peace, and to obedience'. Yet they do not seem to be purely contingent features of human psychology—they have rational force. For compare what Hobbes says later in Ch. 25: 'For whatsoever men are to take knowledge of for Law, not upon other mens words, but every one from his own reason, must be such as is agreeable to the reason of all men; which no Law can be, but the Law of Nature.'

§2.3 Coordination and Contracts

At this stage Hobbes hasn't yet gotten us out of the state of nature and into a civil society. In order to make the final jump to political authority, Hobbes relies upon a claim about how conflicts between competing interests must be resolved through contracts ('covenants').

Hobbes's claim about contracts is this (see Ch. 5 for an argument): the establishment of binding contract (i.e. a contract that both parties can enter into without fear of relative disadvantage) requires a third party, and this third party must meet two conditions: (a) the original parties to the dispute must agree to let the third party decide the matter (and thus give up their individual rights to determine the satisfaction of their interests); (b) the third party must be able to preserve the conditions of the contract through force.

> This central ingredient of agreement backed by force lies at the heart of Hobbes's conception of political authority. The agreement in question is the product of rational coordination amongst subjects who recognise that this kind of agreement is a smarter move, rationally speaking, that continuing to single-mindedly pursue our own individual interests. Cf. Prisoner's Dilemma.

When we're in the state of nature, but want to escape it, what we need is an agreement with other people to protect our interests. But only interest we cannot compromise is our continued survival; to ensure our survival, we should be willing to give up any of our other interests (or 'rights' or 'freedoms'). Yet giving these interests up only makes sense when others give them up as well.

> Thus what Hobbes thinks is necessary for our escape from the state of nature is the establishment of a political authority—the 'sovereign'—to whom we give up all rights (except the right or freedom to life) and whose decisions are backed by force.

Yet while the sovereign isn't constrained by contract—that would require a still higher authority—the sovereign is indirectly constrained by Hobbes's 'laws of nature': the sovereign must act in a way that preserves the motivation for the establishment of political authority, namely security from re-entry into the state of nature—which is just security from the rational fear that pervades those in the state of nature.

§3 The Rule of Law in Hobbes

We now have the basic structure of Hobbes's account of political authority. Where does the law fit into this? Here's what Hobbes says about the purpose of law in Chapter 26:

> 'But the Right of Nature, that is, the naturall Liberty of man, may by the Civill Law be abridged, and restrained: nay, the end of making Lawes, is no other, but such Restraint; without which there cannot possibly be any Peace.' (emphasis added)

And here's his definition of 'Civill Law' (again in Ch. 26):

> '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'

One feature of Hobbes's outlook that this definition makes explicit is his view that 'right' and 'wrong' only have application in the context of a civil society: what is 'right' is just what the sovereign commands; what is 'wrong' is just what the sovereign forbids.

> Notice: Hobbes's definition also includes a formal requirement on the enactment of laws by the sovereign. The laws must be commands (as we've already seen), and these commands must be communicated to members of the society. As he says later in this chapter, to be bound by the law a member of society must (at least in principle) be in a position to ascertain what the law actually is (thus babies, for example, are excluded from being bound by the law).

Hobbes's acceptance of the *Separation Thesis* seems to follow from his view that the law just is what the sovereign commands. The sovereign is not himself bound by the law, yet without being bound by the law, terms like 'right' or 'just' or 'moral' have no application (or so Hobbes believes). Hobbes expresses this view in Ch. 13: 'Where there is no common Power, there is no Law; where no Law, no Injustice… They [i.e. justice and injustice] are Qualities, that relate to men in Society, not in Solitude [i.e. in the state of nature]'.

§4 Adjudication

Hobbes has a very important conception of the role of judges. He shares with Dworkin—an anti-positivist—the view that judges must function as interpreters of the law ('All laws, written, and unwritten, have need of Interpretation'). But whereas Dworkin ties legal interpretation and moral argument, Hobbes seems to sever the anti-positivist link between legal judgment and moral fact.

Here's an essential passage in Hobbes:

> 'The Interpretation of the Law of Nature, is the Sentence of the Judge constituted by the Soveraign Authority, to heare and determine such controversies, as depend thereon; and consisteth in the application of the Law to the present case. For in the act of Judicature, the Judge doth no more but consider, whether the demand of the party, be consonant to naturall reason, and Equity; and the sentence he giveth, is therefore the Interpretation of the Law of Nature; which Interpretation is Authentique; not because it is his private Sentence, but because he giveth it by Authority of the Soveraign, whereby it becomes the Soveraign's sentence; which is Law for that time, to the parties pleading.'

A centrally important question about Hobbes's view about adjudication is this: what does he think guides and constrains the interpretation of the law? It seems as though one source of

guidance and constraint is a judge's knowledge of the Hobbes's natural laws, since those laws determine the limits and purpose of the sovereign's exercise of political authority (namely: to secure safety from re-entry into the state of nature). You can see evidence for this at the end of Ch. 26, when Hobbes says that what makes a good interpreter of the laws is, first, 'A right understanding of that principall Law of Nature called Equity'.

> There's a way of reading Hobbes at this stage on which he looks to have a lot in common with Lon Fuller, who is an anti-positivist but not a Dworkin-like natural law theorist.

One respect in which Hobbes does differ with respect to other theorists who accord judicial interpretation a major role is that he thinks all laws in fact have a determinate and consistent correct interpretation.

> The determinate content of the law is set by the intentions of the sovereign; and the laws are consistent because they issue from the will of the sovereign. Here's Hobbes: 'no written law… can be well understood, without a perfect understanding of the finall causes, for which the Law was made; the knowledge e of which finall causes is in the Legislator. 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… by the Legislative power; which no other interpreter can doe.'

Interpretation is therefore necessary solely because judges do not have perfect knowledge of the intentions of the sovereign, and so must interpret the law in order to satisfy themselves that their reading of the law accords with the intentions of the sovereign.