

ARTICLES

The Public Conscience of the Law*

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1 Introduction

The idea that a reciprocal relationship is at the foundation of our normative order is central to the modern social contract tradition, from Thomas Hobbes in the seventeenth century to the present. According to that tradition, at least as it is commonly understood, our obligation of obedience to the prescriptions of our rulers stems from the consent of the governed expressed in either an actual or a hypothetical contract. Hume subjected the claim that an actual contract binds future generations to withering criticism. And the alternative claim that there is a hypothetical contract, one to which reasonable individuals would consent, and to which one can thus infer that actual individuals do consent, has been similarly scorned. Nevertheless, the idea survives and was given new life by John Rawls in the twentieth century in his essay 'Justice as Reciprocity,'¹ and more elaborately in *A Theory of Justice*.²

In this paper, I shall focus on Hobbes's account of reciprocity as the foundational principle of normative, political and legal order: an order that legitimately claims to be a source of obligations for legal subjects or the individuals subject to its rule. In particular, I want to sketch the theme in political and legal thought of the law as, in Hobbes's words, 'the publique Conscience, by which [the individual] (...) hath already undertaken to be guided.'³

Any claim that the law is a repository of moral values to which the individuals subject to the law must accord presumptive force will seem deeply reactionary, because it is antithetical to the liberal commitment to the priority of the private, individual conscience. Moreover, Hobbes's political philosophy is widely understood to be authoritarian, requiring the almost unconditional obligation of the subject to obey the enacted law of an absolute sovereign. However, I shall argue here that the idea is not authoritarian once one sets it in the context of Hobbes's complex account of reciprocity.

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1 John Rawls, 'Justice as Reciprocity,' in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999) 190-208.

2 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

3 Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1997), 223; hereafter: *Leviathan*.

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That account is complex because in *Leviathan* there are three different reciprocal relationships in play. First, there is the contractarian idea that individuals in the state of nature agree with each other to create or institute a sovereign whose prescriptions they shall regard as binding. Here reciprocity manifests itself in a horizontal relationship – the pact between all of the individuals in the state of nature. Second, there is the idea that there is a vertical, reciprocal relationship between ruler and ruled, which Hobbes says informs the way he designed his great work *Leviathan* – to ‘set before mens eyes the mutuall Relation between Protection and Obedience.’⁴

If there were only these two relationships in play, the idea of law as a public conscience would be authoritarian. For Hobbes clearly thinks that legal subjects should infer from the mere fact that they are in the vertical relationship that they have consented to obey all of the sovereign’s commands. If the sovereign does not provide protection, notably when he threatens one of his subjects with violence, the subject may rightly resist the sovereign even though resistance is to the duly authorized violence of criminal punishment. But short of these limit cases, it seems that subjects must accept all sovereign commands as correct interpretations of what it takes to provide them with the protection for which they trade their obedience.

However, the authoritarian interpretation of Hobbes neglects the third reciprocal relationship, another horizontal one that obtains between individuals in the civil condition, the condition made possible by the existence of the sovereign who through enacting laws dictates the terms of interaction between his subjects. The sovereign is not a party to the first horizontal relationship between natural individuals, that is, between the individuals in a state of nature. However, he is a party to the second vertical relationship between himself and all of his legal subjects. He also can be a party to the third relationship between individuals in a civil condition, that is, the relationship between legal subjects who to the extent they interact with each other on legal terms, are acting as artificial, not natural persons. Consider, for example, Hobbes’s point that a subject may bring suit against the sovereign as he may against any other subject in a controversy in which the sovereign makes whatever demands he has ‘by force of a former Law,’ since then the suit is not ‘contrary to the will of the Sovereign.’⁵ The fact that the sovereign can be a party to this relationship is, as I shall explain below, significant.

4 Ibid., 491.

5 Ibid., 153. Hobbes qualifies this point by saying that if the sovereign demands not ‘by pretence’ of law but of ‘his power,’ then there is no legal action possible, because the subject must take himself to have authorized all that the sovereign does in virtue of his power. However, as I shall indicate in the text, this qualification is inconsistent with Hobbes’s argument that the sovereign in order to manifest his will has to speak through the law in a way that respects the rules of legal grammar. Note that in English law for a long time there was and still to some extent is a doctrine of sovereign immunity. In order for the sovereign to be sued, the sovereign had to consent to the suit, thus choosing to place himself for that case at the same level as his subjects. Legislation made this unnecessary only in the 20th century. Hobbes’s argument thus suggests a much more legalistic understanding of sovereignty than English law was to adopt for some centuries.

But, as I shall also explain, just as (or more) significant is the quality of the relationship between legal subjects. While the sovereign dictates the terms of the relationship between subjects, he also has to put in place a relationship of a certain sort – one in which subjects relate to each other on terms that reflect their status as free and equal individuals who find that the law makes it possible for them to pursue their own conception of the good. Moreover, the two facts come about because of the nature of sovereignty – that the sovereign is an artificial person who governs through law, or, as Hobbes puts things in *Leviathan*, sovereignty is ‘an Artificiall Soul’ which has an ‘artificial Reason and Will,’ which consists of ‘Equity and Lawes.’⁶

I turn now to tracing the trajectory of the idea of law as public conscience. I shall then sketch the account of reciprocity in Hobbes that makes that idea plausible.

2 The trajectory of public conscience

In chapter 29 of *Leviathan*, ‘Of those things that Weaken or tend to the DISSOLUTION of a Common-Wealth,’ Hobbes sets out the doctrines ‘repugnant to’ civil society that if not rejected by the individuals in that society will prove the internal causes of its disintegration. The specific doctrine that Hobbes wants to reject in the paragraph in which he makes this claim is that ‘whatsoever a man does, against his Conscience is Sinne,’ from which it would follow, according to Hobbes, that no one would ‘dare to obey the Sovereign Power, farther than it shall seem good in his own eyes.’⁷ The transition from the state of nature to civil society, Hobbes thus suggests, is from a state where the individual has ‘no other rule to follow but his own reason’ to a civil society in which he accepts the public judgments of the sovereign about ‘Good and Evill.’⁸ The public or enacted laws of a civil society, ‘publica Lex’ in the Latin version (by which Hobbes means simply all the law made by the sovereign), is then the repository of the society’s values that the individuals in that society must take to justify state coercion. Hence, an individual who is subject to the law of a sovereign should see that ‘the law is the publique Conscience, by which he hath already undertaken to be guided.’⁹

Hobbes seems then not only a legal, but also a moral positivist. All there is to law is the positive law and all there is to morality, or at least to that part of morality which individuals must regard as compulsory or not up to them to decide for themselves, is to be found in the commands of the legally unlimited sovereign. In the terms of the traditional debate about sovereignty, the *de facto* sovereign is always *de iure*. The image of law as our public conscience thus is a deeply troubling

6 Ibid., 9.

7 Ibid., 223.

8 Ibid.

9 Ibid.

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one. We must take out moral values to be the values legislated by an all-powerful sovereign.¹⁰

At most, liberals and others will concede that one can make a case for such an obligation to the law of one's sovereign when the law is the product of a democratic process; but in that case, liberals will insist, the legitimacy of the law derives from the fact that the process is democratic and not from its quality as law. In addition, a concession that there might be such a case does not entail conceding that the law should be thought of as a public conscience, since the resistance to thinking of the law in this way extends to democratically made law. Even if there are reasons to obey law because it is democratically made, these are reasons independent of the content of the laws; the reasons pertain, that is, to the merits of the democratic process. It remains for the individual conscience to judge the merits of the content and, if it is morally offensive, conscientious objection becomes an issue. In other words, if private conscience is to have the priority it should enjoy, it must rely on standards of justice that are independent of the will of the state or of the collective, no matter that the will is both expressed in law and that the law is democratically made. As H.L.A. Hart put it, 'the idea of a moral legislature with competence to make and change morals, as legal enactments make and change law, is repugnant to the whole notion of morality.'¹¹

It is above all Hobbes's moral positivism that is supposed to distinguish Hobbes from later Anglophone legal positivists, notably, Jeremy Bentham, John Austin, and Hart. For since 1958, when Hart published the manifesto for legal positivism that still shapes debates in philosophy of law today, it has been taken for granted in the English-speaking world that legal positivism rejects utterly any thought that individuals should substitute the dictates of the law for the dictates of private conscience. Indeed, Hart argues that legal positivism's insistence that law is no more than the rules that are recognized as valid in a particular society enables the good liberal citizen to establish the priority of the private conscience over the public one. For legal positivism makes clear to the citizen that the content of the law is the product of historical and political contingency and, as such, there is no necessary moral quality to law.¹²

However, Bentham and Austin did adopt, as they understood things, from Hobbes the idea that valid law is to be found in the commands of a legally unregulated sovereign, though their rejection of his moral positivism entailed rejecting Hobbes's location of the basis of the obligation of the subject to obey the sovereign's law in the presumed consent of the subject in the social contract that brings the sovereign into existence. They argued that what motivates obedience is the sanction that attaches to non-compliance with a command; hence, law is not,

10 Our subordination of private to public conscience does not and could not require that we change our beliefs, only that we act in accordance with the dictates of public conscience. See, e.g., *ibid.*, 306: 'A private man has always the liberty (...) to believe, or not believe in his heart (...).'

11 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, second edition), 177.

12 H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' *Harvard Law Review* 71 (1958): 593.

as Hobbes thought, the commands of a legally unlimited sovereign to whom subjects owe a prior obligation of obedience based in their consent; rather, law is the commands backed by sanctions of a legally unlimited sovereign. These sanctions create a prudential, not a moral, reason to obey the law.

Hart, in turn, rejected both the idea that the sovereign is legally unlimited and the claim that all law consists of commands backed by sanctions. In his version of legal positivism, every sovereign is legally limited by the fundamental rules with which he must comply if he wishes his directives to be recognized as law. And these rules are not 'duty imposing' commands of a legal authority backed by sanctions, but 'power conferring' rules that enable the exercise of legal authority. The foundational rule of the legal order is the rule of recognition, which certifies the validity of all other rules, and which exists as a matter of social fact in the practice of legal officials. The officials maintain this rule because they accept that they are under a duty so to do, though their reasons for taking that as their duty can be various, and should not therefore be thought of as amounting to their moral endorsement of the practice.¹³ Since, with Bentham and Austin, Hart rejected Hobbes's moral positivism, and since he also rejected the command model of law, his legal positivism can be viewed as making a complete break with Hobbes.

However, Hobbes's claim that the law provides a public conscience that has some priority over the private conscience of the citizen still resonates outside of Anglophone legal positivism, and even to some extent within it. The Austrian legal positivist Hans Kelsen claimed that every state is a *Rechtsstaat*, thus suggesting that the law is always in some sense legitimate. Moreover, it is hard to understand Hart's claim that legal officials need not morally endorse the practice of legality that they maintain as the basis of legal order. Indeed, his most influential student, Joseph Raz, argues that not only must *de facto* legal authorities claim to be legitimate, but also legal officials must be taken to endorse that claim through their practice.¹⁴ Hart worried that Raz's argument resurrected the Hobbesian theme that there is a prior moral obligation to law.¹⁵ But that argument is hard to resist, as Raz showed in an analysis that borrowed much from Kelsen, once one takes seriously (as both Kelsen and Hart did) that the production of law is legally regulated and that the practice that sustains such regulation can only be understood from the internal point of view of the officials charged with, and committed to maintaining, the practice.

In addition, the two leading Anglophone critics of legal positivism in the twentieth century, Lon L. Fuller and Ronald Dworkin, argue in different ways for the conclusion that law necessarily has a moral quality to it. Neither supposes that the moral quality is conclusive. But the law still amounts to an authentically

13 Hart, *Concept of Law*, 26-49, 100-23.

14 Joseph Raz, 'Authority, Law, and Morality,' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), 194.

15 H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 153-61.

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moral, public conscience, though one whose dictates can be outweighed by the dictates of private conscience. Fuller argues that law is the product of a legal order that complies significantly with formal principles of legality that amount to an 'inner morality of law.' As a result, the law will have a moral quality to it that makes sense of the claim that we owe 'an ideal of fidelity to law.'¹⁶

Dworkin, in turn, argues that we cannot understand law other than in terms of its 'force': its ability to supply genuine moral reasons for state coercion.¹⁷ While he has been ambivalent on this point, the best understanding of his argument is that the basis for such force resides in the principles implicit in the law that supply the best moral justification of the law. Hence, for Dworkin, law's ability to be our public conscience comes about, not because of law's compliance with formal principles of legality, but through the substantive morality that is both implicit in and that justifies the law.

In my view, the attention by twentieth century legal positivists to the legal regulation of the production of law and the echoes of Hobbes's idea that law provides us with a public conscience in both legal positivism and its critics are evidence of the fact that we are still today trying to work out Hobbes's legacy, even as we deceive ourselves on both sides of the positivist/critic of positivism divide that we have moved beyond his horizon. As I shall now argue, Hobbes's great achievement was not the founding of an authoritarian version of legal positivism. Rather, he sought to secularize natural law by showing that the laws of nature are principles of legality intrinsic to the project of legal government.

But Hobbes's achievement goes even further. Hobbes, contrary to his authoritarian reputation, provided the basis for the idea that government according to law is constitutive of a particular kind of liberty – civil liberty, or the liberty the subject enjoys under an order of public laws. His image of law is not then one of law as a necessary constraint on liberty, but law as a necessary condition of civil liberty. Moreover, law is also a sufficient condition for individuals to have liberty in the important sense of civil liberty. Where there is law, so there will be liberty. And that comes about because of the horizontal relationship of reciprocity between legal subjects that law makes possible.

3 Reciprocity in the civil condition

It is the idea that law is a sufficient condition for individuals to have liberty in the important sense of civil liberty that liberals and others will find problematic. For example, contemporary Republican political theorists, notably Philip Pettit and Quentin Skinner, regard the passages where Hobbes expresses this thought as deliberately aimed at undermining the ideal of a 'free man,' articulated by the Republicans of his day, in order to get to the conclusion that one is just as free

16 Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition).

17 Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), 108-13.

under the rule of a despot as one is under the rule of a democratic parliament.¹⁸ Pettit and Skinner are correct. But they do not grapple with Hobbes's actual argument for this claim, an argument that might provide a better foundation for the Republican ideal of freedom as non-domination than either that of the Republicans of Hobbes's day or of ours.

A rare and better appreciation of Hobbes's achievement is to be found in Michael Oakeshott's neglected essay, 'The Rule of Law.'¹⁹ Oakeshott said of Hobbes's laws of nature that 'they should not be seen as independent principles which, if followed by legislators, would endow their laws with a quality of "justice"; they are no more than an analytic break down of the intrinsic character of law, (...) the *jus* inherent in genuine law which distinguishes it from a command addressed to an assignable agent or a managerial instruction concerned with the promotion of interests.'²⁰ And Oakeshott said of the idea of freedom that is secured when there is such law that it is not a 'consequence of' but 'inherent' in 'the character' of a state governed in accordance with the rule of law.²¹ It appears, he went on, in a 'slimmed-down version in the writings of the jurist Georg Jellinek' and 'hovers over the reflections of many so-called "positivist" modern jurists.'²²

In my view, Oakeshott's insights are amply vindicated in an elaboration of the long arc of legality that stretches from Hobbes to the present. The components of a project of elaboration are, following Oakeshott: first, the account of natural law as formal principles of legality with which law has to comply; second, the demonstration of how law that so complies is constitutive of a kind of liberty; third, an analysis of the way in which each of these ideas finds expression in the twentieth century in both the legal theories of the critics of legal positivism and in legal positivism itself, as legal positivists began an attempt to work out the implications of their recognition that the production of the law is legally regulated.

The fourth and final component is also inspired by Oakeshott. It is that the relationship between legal form and liberty, of the idea of freedom under a public order of laws, requires elaboration in its own right without being muddled by an inquiry into the legitimacy of democracy. Put differently, legality has its own legitimacy, and the fact that Hobbes was hostile to democracy turns out to be an advantage because his argument seeks to show that the legal order of any state is legitimate, no matter its political character, a thought that is echoed in Kelsen's assertion that every state is a *Rechtsstaat*, whatever Kelsen himself made of that idea.

18 See Philip Pettit, 'Liberty and Leviathan,' *Politics, Philosophy, & Economics* 4 (2005): 131; Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008).

19 Michael Oakeshott, 'The Rule of Law,' in Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999), 129.

20 *Ibid.*, 172-73.

21 *Ibid.*, 171-72.

22 *Ibid.*, 175.

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For Kelsen, and I would argue for Hobbes, not every centrally organized political power is a state because a state is a centrally organized power that rules through law; and ruling through law entails that the state is itself legally constituted – that the identity of a state is the sum total of legal authorizations to officials of a particular legal order to act in the name of the law. Hart and his followers in Anglophone legal positivism come as close as possible to this insight as they can while maintaining their rejection of the idea that law could be a public conscience.

The most elaborate articulation of this insight is to be found in English in Fuller's account of law's inner morality and in German in the work of the Weimar-era political theorist and constitutional lawyer, Hermann Heller.²³ Heller took Bodin and Hobbes to have established the central idea of modern legal theory that public law creates a juristic bond between ruler and ruled that receives contemporary expression in the idea of the *Rechtsstaat*. Following Georg Jellinek, Heller emphasized two aspects of the *Rechtsstaat*: on the one hand, the law-constitutive character of power: legal order secures and even increases the resources of the powerful; on the other, the power-constitutive aspect of law: legal officials may not act without proper authorization. What connects these two aspects, establishing a dialectical relationship between law and power, is ethics, more precisely what Heller called 'ethical fundamental principles' ['sittliche Rechtsgrundsätze'] of law.²⁴ These principles provide a basis for the juristic assumption that legal order should be conceived as a dialectical unity of law, power, and ethics. That assumption in turn leads to a duty on the part of legal officials to attempt to close the gap between the *de facto* and the *de jure* in the direction of the *de jure*. The officials are under a duty to make law as it in fact is live up to what we might think of as law's inherent, ethical aspirations – the aspiration to be a *Rechtsstaat*. The moral quality that the law acquires in this process has then to be given appropriate weight by the individual confronted by a law the dictates of which seem to be against the dictates of his conscience.

The normative implication of this kind of argument is that the legitimacy of legality is a necessary though not a sufficient condition for the legitimacy of a political order. But the same is true of democracy. A political order is legitimate only when it is both legal and democratic. The mistake made by contemporary Republicans does not reside in their failure to notice the dual conditions of legitimacy, but in their misunderstanding of the legality condition. For they understand it in the way developed by the utilitarian legal positivist thinkers, Bentham and Austin, for whom law is no more than an instrument of power, so that the legitimacy of law derives solely from the moral merits of its content but not from its legality.

There is rather an irony in this mistake in that it is precisely this way of thinking about law that results in the conclusion that law is always a constraint on liberty

23 Heller died in 1933 at the age of 42, and he is almost unknown today, even in Germany.

24 Hermann Heller, 'Bemerkungen zur Staats- und Rechtstheoretischen Problematik der Gegenwart,' in *Gesammelte Schriften*, ed. Christoph Müller (Tübingen: Mohr (Paul Siebeck), 1992), vol. 2, 249-278, at 275.

that these Republicans believe to run from Hobbes through Bentham to Isaiah Berlin's "Two Concepts of Liberty."²⁵ Republicans rightly regard such liberals as committed to the view that the cost to liberty that law imposes is justified only when the moral good that the law achieves outweighs the cost. But Republicans, in adopting that same mistaken view of law as no more than an instrument of externally determined content, are tempted then to suppose (as Pettit does in his latest work²⁶) that as long as the law is democratically made, it is fully legitimate, and hence there is no cost to liberty.

Put differently, the mistaken view of law leads to a dichotomy – law is justified either because of its content or because of the process by which it is made. Hobbes, in my view, put in place a genuine alternative. Law is justified when it is properly legal, when, that is, it has the right form, because when it has that form, it is not only law properly so called, but also constitutes a condition of civil liberty. This is the liberty one has when an artificial person, the sovereign, rules through law, which also means that he rules in accordance with the rule of law. Legal subjects thus have the security of knowing that exercises of state power have to be legally authorized. Moreover, because to rule through law requires ruling in accordance with the rule of law, the law will have the characteristics of non-instrumentality, described by Fuller, Oakeshott, Hayek and others; but also described by Hobbes in his image of the public laws of a legal order as 'Hedges are set, not to stop Travellers, but to keep them in the way.'²⁷ That the law provides such guideposts could, of course, be said to be the general purpose of which the law is the instrument. But the law is also non-instrumental in Oakeshott's sense: it does not conscript an individual in order to achieve some goal but makes it possible for an individual to select his own goals.²⁸

To revert to the language of reciprocity, the sovereign has full authority to dictate through law the terms on which his subjects will interact with each other. But what he dictates is terms of interaction, not something else. Moreover, that the terms are dictated through law – that is, through directives that take legal form – ensure that the terms of interaction will be addressed to subjects as free and equal participants in the civil condition. The rule of the sovereign through law – the exercise of political power by legal means – thus brings about a relationship of reciprocity between those subject to the power which has a particular quality to it, the quality of respecting and enabling the agency of the subjects.

This is the third relationship of reciprocity in Hobbes's account, the horizontal relationship between legal subjects. It is not a relationship so much *at* the foundation of legal order, but *within* legal order, and it helps to explain why legal order is

25 Isaiah Berlin, 'Two Concepts of Liberty,' in Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118.

26 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). See my critical notice of this book, *Canadian Journal of Philosophy* 43(2013): 494.

27 *Leviathan*, 239-40.

28 Oakeshott, 'The Rule of Law,' 148.

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normative – why legal subjects should regard law as a public conscience. Moreover, in explaining the normativity of law, this relationship also helps us to understand the second reciprocal relationship, the vertical relationship between sovereign and subject.

This too is a relationship within legal order. The sovereign is a creature of the civil condition and speaks to his subjects through law, thus using a language that has its own grammar, the grammar of legality whose constitutive rules are the laws of nature. Consider in this regard laws 8-11 of the nineteen laws of nature Hobbes sets out in chapter 15 of *Leviathan*. Law 8 is against ‘contumely’ or insult – that no man shall ‘*declare hatred, or Contempt of another.*’²⁹ Law 9, against pride, requires that ‘*every man acknowledge other for his Equall by nature.*’³⁰ Law 10, against arrogance, depends on 9, and requires that ‘*at entrance to the conditions of Peace, no man require to reserve to himself any Right, which he is not content should be reserved to very one of the rest.*’³¹ Hobbes adds that just as it is necessary to lay down some rights in order to achieve peace, it is also necessary to retain some: ‘as right to governe their own bodies; enjoy aire, water, motion, waies to go from place to place; and all things else, without which a man cannot live, or not live well.’ Finally, law 11, equity, requires that if ‘*a man be trusted to judge between man and man (...) that he deale Equally between them.*’³² And subsequent laws set out the role morality of a judge, including the sovereign in his capacity as the supreme judge.

Thus while the sovereign, as well as being the supreme judge, has a monopoly on legislative power, he is under a duty in both roles to comply with the laws of nature. Hobbes, of course, emphasizes at various points that the sovereign is not accountable to his subjects for breaches of the laws of nature. However, his subordinate judges are under a duty to interpret his law in order to show that it does comply with the laws of nature, so the civil law has to be interpretable in light of the laws of nature. It is perhaps significant that Hobbes says that it would be a great ‘contumely’ to the sovereign for subordinate judges to suppose that his intention could be otherwise than to comply with the laws of nature and that, ‘therefore, if the word of the law do not fully authorize a reasonable sentence, to supply it with the law of nature; or if the case be difficult, to respite judgement till he have received more ample authority.’³³ For if the sovereign could not be understood except as intending that one or more of his subjects be treated inequitably, he would disrupt not only the relationship between himself and the subject, but also the relationship between the subject with a diminished status and other subjects, who would be disabled from obeying laws 8-10. The other legal subjects would have to treat a fellow subject with contempt, as someone not properly in, or even as excluded from the jural community – the moral community constitu-

29 *Leviathan*, 107. His emphasis.

30 *Ibid.* His emphasis.

31 *Ibid.* His emphasis.

32 *Ibid.*, 108. His emphasis.

33 *Ibid.*

ted by civil laws that comply with the laws of nature. And if the subordinate judge ‘respite judgement’ in order to ask the sovereign or some intermediate authority whether the sovereign’s intention was to diminish the subject in this way, and the sovereign or that authority confirms that it is the intention, the subject would have a public assertion that he was no longer in the relationship of protection and obedience. The subject would, that is, find himself in a limit case analogous to the situation where he is entitled to resist punishment.

Similarly, if a subject brings suit against the sovereign, he is not, as Hobbes makes plain in *De Cive*, challenging the sovereign’s ‘right’ to make the law that is the basis of the suit, but rather asserting what the sovereign himself willed should be done when he made the law.³⁴ Hobbes adds that the sovereign will be final judge in the matter and could not give ‘wrong judgment,’ which could mean simply that his judgments have to be regarded as constituting right reason.³⁵ But this addition is problematic because of the law of nature that precludes a judge from being judge in his own cause.³⁶ And it is unclear why Hobbes does not suggest the remedy that he sets out in chapter 26 of *Leviathan* for the situation in which a judge discovers that he is a witness to a fact on which an accused’s innocence depends, in which case the judge should ask the sovereign to appoint another judge.³⁷ That is, the sovereign could refrain from appealing against the judgment of his most senior subordinate judge, if the decision was against him. If he refrained, he would not be setting up this subordinate judge as a rival to himself, but simply affirming tacitly his own will, as interpreted by the subordinate judge. And this should be preferable to the situation in which a judge opts to be judge in his own cause, which (Hobbes is clear) is a decision to reinstate the state of nature of individual warring judgments.³⁸ In short, while Hobbes cannot quite bring himself to embrace all the implications of his idea that the sovereign is an artificial person who speaks only through law, and thus whose authority always requires a legal warrant, he is committed by that idea to such implications. That commitment entails that the sovereign’s commands take legal form, which in turns mean that attempts to exercise power outside of that form break the vertical relationship of reciprocity. Short of such limit cases, however, the subject has reason to regard the law as a public conscience, not merely because of the fact that the sovereign provides him with a stable order and a stable order is always preferable to the anarchic violence of the state of nature, but also because of the kind of stable order that is provided – one that treats legal subjects as free and equal agents.

Now one way of understanding the reason for the subject to regard law as a public conscience is to use the metaphor of an actual or hypothetical contract between

34 Thomas Hobbes, *De Cive: The English Version*, ed. Howard Warrender (Oxford: Oxford University Press, 2002), ch. VI: XV.

35 Ibid. However, Hobbes does not offer this as the reason but, somewhat puzzlingly says ‘as though (the equity of the cause being well understood) he could not give wrong judgment.’

36 Ibid., ch. III: XXI and *Leviathan*, 109, law 18.

37 *Leviathan*, 109, law 18.

38 Ibid., 109.

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free and equal individuals, that is, in accordance with the first reciprocal relationship I identified in Hobbes's account, which is a relationship *at* the foundation of normative legal order. But perhaps the metaphor does little more than seek to convey the idea that there is a moral or normative force to a combination of the second and third reciprocal relationships, an idea that might be better conveyed by seeking to understand just how the two combine to make up a civil condition. In other words, we need to understand better Hobbes's account of the interaction between civil law and natural law if we wish to elaborate the way that reciprocity plays a role in establishing the authority of legal order.