

## Deconstructing and Reconstructing Hobbes

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# Deconstructing and Reconstructing Hobbes

Isaak I. Dore \*

## ABSTRACT

*The political and legal philosophy of Thomas Hobbes is often misunderstood or oversimplified. The two most well-known aspects of his philosophy (the condition of man in the pre-political state of nature and his concept of sovereign power) are not properly connected to show the unity of his thought. However, systematic study shows that Hobbes's political and legal philosophy has a sophisticated underlying unity and coherence. At the heart of this unity is Hobbes's utilitarian consequentialist ethic, which remarkably anticipates the major strands of contemporary consequentialism. To explain the unity in Hobbes's philosophy via his consequentialist thought, the Article deconstructs and reconstructs the principal elements of Hobbes's concept of sovereign obligation, his deism and theory of the divine covenant, his conceptions of the state of nature, the duties of the sovereign in civil society, and the rights and duties following from subject to sovereign and sovereign to subject.*

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#### INTRODUCTION

The political philosophy of Thomas Hobbes is often misunderstood or oversimplified. The two most well-known aspects of his philosophy (the condition of man in his pre-political state of nature and the nature of sovereign power) are not properly connected to show the unity of his thought. Instead, focus on man's life in the former as poor, nasty, brutish and short presents an overly crude psychology of man;<sup>1</sup> whereas focus in the latter on the omnipotence of sovereign power creates the misleading impression of the hapless citizen-subject caught in the grip of brute power against which there is no recourse and no escape.<sup>2</sup>

However, systematic study shows that Hobbes's political philosophy has a sophisticated underlying unity and coherence. At the heart of this unity is Hobbes's utilitarian consequentialist ethic.

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1. For such a view of Hobbes's state of nature, see LINDA S. BISHAI, *FORGETTING OURSELVES: SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY* 73 (2004).

2. For such a discussion of the notion of sovereign power, see James H. Read, *Thomas Hobbes: Power in the State of Nature, Power in Civil Society*, 23 *POLITY* 505 (1991).

Hobbes's views on the following will be utilized to demonstrate how consequentialism imbues and unifies his philosophy: the nature of political society; the scope of sovereign obligation; the theory of the divine covenant; the duties of the sovereign; the state of nature; and rights and obligations of people and the sovereign in civil society.

### I. HOBBS AND CONSEQUENTIALISM

It is the consequentialist impulses of Hobbes's political philosophy that give it its underlying unity and coherence, and which have been neglected all too often. In order to explain this it will be necessary to reconstruct the principal elements of Hobbes's political philosophy in the ensuing sections.

Hobbes's thought anticipates several strands of contemporary consequentialism. Although this is not the focus of this Article, it is helpful to describe these strands in order to understand how they bring unity and coherence to Hobbes's doctrine as a whole.

The cardinal postulate of consequentialism is that values exist independently of morality. Although morality is largely focused on evaluations of agents and of character, consequentialist evaluations focus on situations and outcomes. Thus, if an action produces a desirable result in a given situation, then the act is "good."<sup>3</sup> An important feature of consequentialism is the idea that the value of a particular course of action is determined from an agent-neutral perspective.<sup>4</sup> An agent-neutral perspective is derived from the viewpoint of society as a whole, whereas an agent-relative perspective is derived from the viewpoint of a particular individual.<sup>5</sup> Since values are assessed purely in accordance with the consequences of actions, they are essentially instrumental and non-moral in character.<sup>6</sup>

There are several distinct branches or "schools" of consequentialism, such as welfare consequentialism,<sup>7</sup> rule consequentialism,<sup>8</sup> act consequentialism,<sup>9</sup> and utilitarianism.<sup>10</sup> However, all consequentialist approaches are based on theories of the intrinsic and incommensurable value of outcomes generated

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3. TIM MULGAN, *THE DEMANDS OF CONSEQUENTIALISM* 3 (2001).

4. Stephen L. Darwall, *Introduction*, in *CONSEQUENTIALISM* 2 (Stephen L. Darwall ed., 2003).

5. *See id.* at 1.

6. *Id.* at 2.

7. *See infra* Part I.A.

8. *See infra* Part I.B.

9. *See infra* Part I.C.

10. *See infra* Part I.A.

from an agent-neutral perspective. Of course, Hobbes did not consciously adopt any one of these approaches, much less was he a self-proclaimed consequentialist. Yet paradoxically, he was, in contemporary terms, a welfare consequentialist, a rule consequentialist, an act consequentialist and a utilitarian all at once. Before discussing how these strands of consequentialism are implicit in Hobbes's political doctrine, it is necessary to first set forth their basic postulates. Welfare consequentialism and utilitarianism overlap so much that they are treated together for purposes of this article, without denying that they could or should be treated separately in other contexts.

#### *A. Welfare Consequentialism/Utilitarianism*

This strand of consequentialist thought espouses one or the other of two non-moral value theories. The first is a hedonistic value theory under which pleasure is the only incommensurable value. The second is the desire-based conception of welfare that is evident in Hobbes's political doctrine. Both of these value theories stress that the valued consequence must have meaning initially in an agent-relative sense, but which is then abstracted at the aggregate societal level. The starting point is always a valuable outcome *for* some conscious being, usually, but not always, involving a subjective consciousness. A hedonistic pursuit is viewed as intrinsically valuable due to its pleasurable impact on the experience of the conscious being; similarly, desire-based pursuits of welfare are intrinsically gratifying due to their positive impact on mental states.

As demonstrated below, Hobbes's advocacy of a political society with a unitary sovereign reveals a desire-based conception of welfare. Indeed, for Hobbes, the move to such a society is an objective need (if not necessity), for it is only in such a society that man's desire for security and self-aggrandizement can be optimized. Hobbes the consequentialist is iterating that the sum total of benefits to all subjects under civil society outweighs the costs (such as the duty of unconditional obedience or the duty to lay down one's arms).

According to John Stuart Mill, perhaps the most classical exponent of utilitarian thought, utilitarianism is "[t]he creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, [and] holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce

the reverse of happiness.”<sup>11</sup> In Mill’s words, therefore, the core feature of utilitarianism is the normative judgment of an action in accordance with its consequences (i.e. whether the action promotes happiness or unhappiness).<sup>12</sup> Indeed, this form of welfare utilitarianism judges the normative value of an action by comparing the benefits and costs of a particular course of action to all affected parties.<sup>13</sup> The value of an action thus depends on whether the utility (i.e., benefits in the form of welfare, happiness or pleasure) of the action outweighs the costs (i.e., pain or misfortune).<sup>14</sup> Because pain and pleasure are, respectively, universally good and bad, utilitarianism invokes an agent-neutral perspective to argue that it is bad whenever pain happens, yet good whenever pleasure (or desire) is satisfied.<sup>15</sup> In a famous passage from *An Introduction to the Principles of Morals and Legislation*, Jeremy Bentham elaborated upon the utilitarian perspective:

An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any which it has to diminish it.<sup>16</sup>

Thus, to a utilitarian such as Bentham or Mill, an action should be undertaken when the consequences of that action result in the greatest net utility, or benefits, to the community.<sup>17</sup>

Contemporary classical utilitarianism abstracts this principle agent-neutrally at the societal level. A concise formulation is given by Rawls: “The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.”<sup>18</sup>

11. JOHN STUART MILL, *UTILITARIANISM* 55 (Roger Crisp ed., Oxford Univ. Press 1998).

12. *See id.*

13. Darwall, *supra* note 4, at 3.

14. *Id.*

15. Stephen L. Darwall, *Introduction*, in *DEONTOLOGY* 1 (Stephen L. Darwall ed., 2003).

16. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (London, Oxford Univ. Press, 2d. ed. 1876) (1823).

17. Now, Hobbes was writing as a *political* consequentialist, not as an economist, much less as a moral theorist. He was convinced that, at the political level at least, society as a whole would enjoy the greatest net benefit only under *his* vision of civil society, under *his* structure of civil authority, and under *his* conception of sovereign duty. *See infra* text accompanying notes 55–65, 73–74, 84, 87–88, 146–48, 155–69, 204, 219–39, 250–53, 263–90.

18. JOHN RAWLS, *A THEORY OF JUSTICE* 22 (1971).

Just as all consequentialist theories are grounded on non-moral agent-neutral values, Hobbes's philosophy as a whole is outcome oriented and posits its political framework as having an intrinsic agent-neutral (and therefore non-relative) value. This value is appreciated or measured agent-neutrally in terms of overall societal peace rather than moral assessment of the person of the Hobbesian sovereign or his character. The moral character of the sovereign may of course be a part of the assessment, but that is, *stricto sensu*, not relevant to and distinct from a systemic evaluation of the Hobbesian political order and its commensurability with *pax et justitia*, overall good government, and public welfare. The Hobbesian vision of the optimum political conditions of civil society, the desired structure of civil government, the instrumental nature of sovereign rights and obligations, as well as the instrumental nature of his theory of punishment, are all desire-dependent. Their adoption is pivoted on the non-moral and agent-neutral projection of possible outcomes for society as a whole.

### B. Rule Consequentialism

For the rule consequentialist the normative value of action does not depend upon a simple analysis of the consequences of the action. Instead, the consequences of a particular *rule* requiring, permitting, or prohibiting an act or conduct must be examined. When social acceptance of a particular rule leads to the best consequences as compared with other rules for similar circumstances, then that rule should prevail. Hooker defines rule consequentialism as a form of consequentialism in which preference is given to "the [moral] code whose collective internalization has the best consequences."<sup>19</sup>

In what way, then, can Hobbes be seen to be a rule consequentialist? His doctrine envisages collective as well as individual internalization of rules *in foro interno*.<sup>20</sup> The collective internalization embodies three fundamental rules; the first requiring the transition to civil society, the second requiring obedience to the sovereign, and the third establishing the pre-political character of *obligation*. All three rules are agent-neutral.<sup>21</sup> But, the sovereign is also bound by natural law, which Hobbes believes is a superior moral law that commands the sovereign to make rules promoting the good of the community, to practice just

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19. BRAD HOOKER, *IDEAL CODE, REAL WORLD: A RULE CONSEQUENTIALIST THEORY OF MORALITY* 2 (2000); see also Darwall, *supra* note 4, at 2.

20. See *infra* text accompanying notes 184–89.

21. See *infra* text accompanying notes 249–70.

judgment, humanity, mercy and benevolence, and to protect property and liberty, all of which are clearly secular and utilitarian goods. As demonstrated below, the sovereign is accountable to god for breaching these rules, but this accountability is seen by Hobbes not as a good in itself; rather, it is a good because it serves the utilitarian goal of good governance.<sup>22</sup>

Another example of how Hobbes may be seen as a rule consequentialist is his rule that “every man ought to endeavour peace, as far as he has a hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.”<sup>23</sup> According to Hobbes, this agent-neutral rule, particularly the obligation “to endeavour peace,” says Hobbes, “binds the conscience” *in foro interno*; in other words, its origin is agent-relative in that it has value for every conscious being. Yet, Hobbes deftly moves to aggregate the rule at the society-wide level through the principle of reciprocity.<sup>24</sup> This rule then becomes a “dictate of right reason” or a “general rule of reason” knowable to all men.<sup>25</sup>

### C. Act Consequentialism

Like other variants of consequentialism, act consequentialism embraces the idea of the preferential ranking of overall conditions of society agent-neutrally. These overall rankings are not supposed to differ from person to person but are to be judged as the best for society as a whole. Upon providing some yardstick for generating these rankings, act consequentialism requires each agent to act in such a way as to attain the best ranked overall good.<sup>26</sup> Put differently, the value of the consequences of any given course of action is to be compared with that of any other under the circumstances, and preference is to be given to that course of action which yields the best overall results.<sup>27</sup>

The yardstick provided by Hobbes is, of course, in the political arena. The act consequentialism in Hobbes’s political doctrine is evident in the “acts” of moving to civil society, and of structuring civil government. Most of his ideas in this branch of consequentialism overlap with the other two branches. As already

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22. See *infra* text accompanying notes 83–88, 135–40, 146–69.

23. See *infra* text accompanying notes 191–96.

24. See *infra* text accompanying notes 197–204.

25. See *infra* text accompanying notes 55–62, 188–97, 254–57.

26. SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 1 (1994).

27. MULGAN, *supra* note 3, at 3.

pointed out, Hobbes did not consciously adopt consequentialism; rather his doctrine as a whole shows many affinities with it.<sup>28</sup>

As this Article explains more fully below, Hobbes is very much an ethical subjectivist insofar as he defines value in terms of subjective preference. Given Hobbes's "psychological egoism"—the doctrine that man is driven by selfish desire—"good" is defined in terms of individual self-interest and "bad" in terms of what the individual is averse to.<sup>29</sup> Thus, civil society is an individual "good" that all rational individuals find beneficial. This, in turn, means that civil society embodies "individual rationalism."<sup>30</sup> However, since the individual lives *in community with* all other subjects of society, each of whom believes himself to be better off living within a political order than without it, the civil and political order embodies *collective* rationality.<sup>31</sup>

What is the genesis of this collective rationality? How is it established? Why is it established? What is the nature of this rationality as reflected by the sovereign order? These (and related) issues are discussed in the ensuing sections. The next two sections, respectively, explain the genesis and mode of manifestation of collective rationality through Hobbes's theory of a "covenant" between each individual subject and the sovereign. This "contractarian" view of civil society is essentially consequentialist in outlook.

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28. Consequentialist approaches may be contrasted with approaches that are deontological. In contrast to consequentialism, deontologists do not believe that the normative value of an action can be judged on the basis of whether it promotes the best outcome from an agent-neutral perspective. Darwall, *supra* note 4, at 2. In other words, if an individual judges an action as "right," that judgment is not derived from the consequences of the action, but occurs prior to any assessment of the action's potentially good consequences. Darwall, *supra* note 15, at 3–4. Thus, unlike consequentialists, deontologists believe that judgments are made from a moral, agent-relative position. *Id.* at 1–2. Deontologists justify this conclusion by arguing that normative judgments depend upon many considerations in addition to consequence, such as one's relations with others in society, one's sense of the sanctity of an obligation, and how an action will impact others. *Id.* at 4–6. Like consequentialism, deontology contains several branches, including contractualism (relations with others) and intuitionism (sanctity of obligations). *See id.* at 3.

29. JEAN HAMPTON, HOBBS AND THE SOCIAL CONTRACT TRADITION 22–24 (1986). Hampton adds the characteristic of "shortsightedness" to that of egoism. *Id.* at 80–89. *See generally* Mark C. Murphy, *Hobbes' Shortsightedness Account of Conflict*, 31 S. J. PHIL. 239–53 (1993).

30. HAMPTON, *supra* note 29, at 239–47.

31. *Id.*

## II. THE GENESIS OF RATIONALITY: HOBBS AND CONTRACTARIANISM

Consequentialist social theory has many affinities with contractarian theory. The latter is essentially based on a pre-supposed social contract between the citizen and government. As a political theory, contractarianism is a rejection of anarchism in favor of establishing the conditions for the legitimate exercise of political coercion.<sup>32</sup> There are several overlapping versions of this approach such as “political,” “moral,” “analytic” and “normative” contractarianism.<sup>33</sup> Kraus presents a three-stage schema for the contractarian argument, which all versions of contractarianism share. A specific hypothetical scenario of interacting individuals in an original pre-political condition is posited as the starting point. The individuals can be given particular characteristics ranging from the general to the specific, for example, rationality, egoism, shortsightedness, risk aversion, intellect, etc.<sup>34</sup> For the purposes of this Article, the first characteristic of rationality is important because, as this Article demonstrates, Hobbes attributes a measure of rationality to all individuals.<sup>35</sup>

Rationality can be defined narrowly as utility maximization, so that the (rational) individual is viewed as a maximizer of his utility function.<sup>36</sup> Depending on the characteristics that the individuals have under the first hypothetical scenario, they will then seek out (i.e., “contract” for) a set of social arrangements to pursue a particular political or moral agenda. This is the second phase of the schema that Kraus has in mind.

The third and final phase of the contractarian argument is the overall justification of the contractual arrangement. In the Hobbesian context, rational individuals can appreciate that life in their hypothetical, pre-political condition is, or would be, nasty, brutish and short on account of their individual egoism, shortsightedness and general unwillingness to cooperate. As rational individuals, they would prefer to live cooperatively, but no one would find it rational to comply with the terms of cooperation.<sup>37</sup> They therefore conclude that the best (if not the

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32. JODY S. KRAUS, *THE LIMITS OF HOBBSIAN CONTRACTARIANISM* 254 (1993).

33. *Id.* at 2–3.

34. *Id.* at 4; HAMPTON, *supra* note 29, at 82.

35. GREGORY S. KAVKA, *HOBBSIANS POLITICAL AND MORAL THEORY* 85 (1986) (“The idealized individuals of Hobbes’ theory are . . . assumed to be rational.”).

36. KRAUS, *supra* note 32, at 5, 258.

37. *Id.* at 197.

only) way of preventing war of every man against every man is to transfer their right to individual self preservation to the sovereign by way of a perpetual "covenant." This is the only rational strategy of survival.<sup>38</sup> The political sovereign is the individually as well as the collectively rational solution, and is therefore morally legitimate, which is essentially the conclusion that the third phase of the contractarian argument is designed to validate.

In other words, the moral legitimacy of the sovereign is inferred from the second schema argument that rational individuals will submit to a political sovereign, given their perilous pre-political natural condition. The third and final prong of the contractarian argument thus reduces morality to mere rationality which, in turn, is harnessed to establish the moral legitimacy of the political sovereign.<sup>39</sup> A number of theoretical devices can be used to buttress the legitimacy of the Hobbesian political sovereign, among them rational choice theory and game theory. Each is outlined below.

#### *A. Legitimation Through Rational Choice Theory*

A similar argument of legitimacy is made in the context of rational choice theory: Individuals in the state of nature can rationally conclude to pursue a joint cooperative strategy with which most ideally rational individuals would not only agree but would also comply. Thus, in rational choice theory, there is a fundamental connection between agreement and compliance.<sup>40</sup> In other words, there would be no point to agreeing if there is no guarantee of compliance. This guarantee is provided by the sovereign. Still proceeding with rationality as utility maximization, the rational individual thus expects to maximize his net expected utility. However, in a *political* union the individuals must accept some constraints on their utility maximizing behavior on the theory that they will actually be better off with constraints than without them. These constraints are essentially moral in nature. This then is another way of deriving morality from rationality.<sup>41</sup>

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38. KAVKA, *supra* note 35, at 210 (asserting that the terms of the new political association would specify certain economic measures, government powers, and individual liberties).

39. See HAMPTON, *supra* note 29, at 32. For a searching critique of the reductive argument as well as the argument of validation, see KRAUS, *supra* note 32, at 73–103. According to Kraus, the latter argument "rests on dubious empirical claims concerning the intrinsic nature of humankind . . ." *Id.* at 102; see also DAVID GAUTHIER, *MORALS BY AGREEMENT* 84 (1986).

40. GAUTHIER, *supra* note 39, at 178.

41. *Id.* at 84.

However, this morality is neither individual nor natural; rather, it is mutual and conventional. This conventional morality constrains natural behavior. It maximizes individual advantage by applying the weakest constraints on natural behavior. The latter type of behavior, as seen below, is dictated by the principle of might, not right. However conventional reason will triumph over natural reason in the end.

For Hobbes, deliberation is the use of reason to obtain desired ends. That which is against desire is also against reason. The measure of the reasonableness of an action is therefore the extent to which it conduces to the agent's desires. This is a universal principle of human motivation applying both in the pre-political as well as in the post-political order. In the pre-political state of nature, the individual could only look to his own reason to determine what was "right reason." The gauge of what is "right" is what conforms with one's own reason. Thus the right of nature is a rational not a moral conception.

Yet the natural condition is one of permanent war; and this is not conducive to life. Indeed, it jeopardizes life as *the* primary good. So just as the state of war is not advantageous to man, so the right of nature (which is a license to war) is also not advantageous. As long as the natural right endures there can be no security. Therefore, it is in the individual's self-interest to lay down the right to nature. This is not an ordinance of morality; rather, it is a dictate of reason, affording the greatest net individual utility. When the right to nature is laid down, individual behavior is necessarily constrained. It marks the emergence of obligation. It is in this way that the laws of nature provide for the rational introduction of a morality that is neither individual nor natural, but rather mutual and conventional. This conventional (or "contractarian") morality consists of a set of conventions distinguishing right from wrong, not in terms of what is inherently good or bad, but in terms of what maximizes the greatest net utility for all, the *conditio sine qua non* being that *every* other subject adheres to the new conventional morality.

This type of "moral contractarianism" evidences a rational motivation to comply with the rules of morality. A substantive theory of morality would thus explain how ideally rational persons come to agreement on the distribution of the cooperative surplus generated by their cooperative strategy.<sup>42</sup>

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42. KRAUS, *supra* note 32, at 263. For a critique, see *id.* at 270; GAUTHIER, *supra* note 39, at 84, 154, 200–32.

*B. Legitimation Through Game Theory*

In addition to rational choice theory, the choices facing man in the hypothetical Hobbesian state of nature can also be analyzed under game theory. As the foregoing has demonstrated, rational choice theory focuses on *individual* action directed at maximizing utility functions, with the individual making certain rational decisions to maximize his utility largely without taking into account choices made by others. Traditional game theoretic analyses make the latter an integral part of the puzzle. The distinction between rational choice theory and game theory can be summed up as the difference between a rational actor treating his environment as a given—only estimating how his actions will affect it—and a rational agent making choices depending on what other rational agents will do.<sup>43</sup>

All games incorporate three fundamental elements. First, there exist two or more rational agents, each with a choice of strategies. Second, each agent's strategy has an outcome. Lastly, each strategy leads to a pay-off, measured by the value of a particular outcome.<sup>44</sup> Game theory can also incorporate more nuanced concepts like coercive societal norms, which Hobbes proposes as a solution to the problem which Hollis calls the "Leviathan Trap."<sup>45</sup> The greater the incorporation of nuanced concepts the more complex the game, such that game theory can become quite complicated.

The result of a "game" that simulates a grouping of two or more subjects in a Hobbesian political society can justify concepts such as absolute authority of the sovereign and its status as the sole legitimate source of coercion. Imagine an agreement in which each man says to every other man that he will give up his right to self-governance on the condition that the other does the same.

Each man thus has a choice between cooperating and not cooperating under the proposed arrangement. Each will rationally

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43. See J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979). A model often used is the standard single-play prisoner's dilemma in which at least two rational actors have to make a choice that would maximize individual utility such that everyone is better off without anyone being worse off. In the original example two prisoners are interrogated separately and each is offered a reduction of sentence (three months) if he confesses but the other does not. The latter would have a ten year sentence. If he does not confess but the other does he will get ten years in prison while the other gets a three month sentence. If neither confesses both get a one year sentence. If both confess, both will get an eight year sentence. In this scenario confession would be the best strategy.

44. MARTIN HOLLIS, *THE CUNNING OF REASON* 30 (1987).

45. *Id.* at 36.

rank his overall preferences under the following game theoretic model: (1) non-cooperation while other subjects cooperate, (2) everyone cooperates, (3) nobody cooperates, and (4) cooperation while other subjects do not cooperate. Cooperation becomes a man's dominant strategy—in the above game it will be chosen by every man because it avoids the worst result and makes the best result possible. That cooperation would always be chosen shows that rational agents make strategic choices based on the expected actions of other men. There is thus a rational appreciation that each agent benefits more under a cooperative strategy than he loses by refraining from a non-cooperative/competitive strategy. Further, it justifies Hobbes's solution that subjects be kept in constant awe of sovereign power in order to enforce the cooperation strategy.<sup>46</sup>

### C. Conclusion

The above contractarian views of Hobbesian political sovereignty have been deliberately oversimplified. They can be (and have been) re-described with much greater richness and sophistication.<sup>47</sup> The essential point of the foregoing recitation is to draw out the parallels between consequentialism and the various approaches to contractarianism. All these approaches are instrumental; all are motivated by considerations of utility; all are applicable in the Hobbesian context; all suggest that Hobbes viewed man as only minimally rational and that this minimal rationality is what drives him to the covenant with his fellow men. The particular characteristics of minimal rationality in the Hobbesian context is demonstrated by the fact that Hobbes posits no intuitive pre-political assumptions of morality as a basis for human interaction. Indeed, human interaction in the Hobbesian pre-political state of nature is entirely unfettered by moral constraints, and Hobbes makes no normative assumptions beyond minimum rationality for the political bargain struck between the subjects on one hand, and between the subjects and the sovereign on the other.<sup>48</sup>

Whether viewed through a consequentialist or contractarian lens, it becomes apparent that Hobbes's conception of the state of

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46. *Id.* at 36–39; see also David Gauthier, *Why Ought One Obey God? Reflections on Hobbes and Locke*, 7 CANADIAN J. PHIL. 425, 436 (1977).

47. See generally KRAUS, *supra* note 32; HAMPTON, *supra* note 29; DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL THEORY OF THOMAS HOBBS* (1969); KAVKA, *supra* note 35; see also GAUTHIER, *supra* note 39; HOLLIS, *supra* note 44.

48. KRAUS, *supra* note 32, at 35–36.

nature is more hypothetical than historical.<sup>49</sup> The hypothesis is essentially that even the minimally rational man will understand that he will be “better off” living in civil society than living without it. Thus civil society is individually rational in an agent-relative sense; that is, each individual can maximize his individual utility. Hobbes then builds a collectively rational case for civil society by arguing that *everyone* is better off, i.e., that civil society is *mutually* advantageous once the all powerful sovereign is in place.<sup>50</sup> Another way of expressing the collective rationality (and therefore utility) of civil society is through the hypothesis that individuals actually living in civil society with a political organization would be “worse off” if they dismantled it and returned to the state of nature.<sup>51</sup>

Yet one might ask *why* is society better off under civil government? The answer is to be found in Hobbes’s psychology of man as a self-interested egoist who has a natural urge to pursue pleasure and avoid pain.<sup>52</sup> Rationality at the individual level is directly traceable to individual egoism.<sup>53</sup> However, it has been argued that the Hobbesian conception of individual rationality goes *beyond* simple maximization of utility functions, in that humans are “healthy deliberators” who prefer to make choices in light of all relevant facts, free from distorting influences and unaffected by deteriorating mental or other physiological processes.<sup>54</sup> If that is the case, individuals will have an even more acute if not sophisticated understanding of the beneficial consequences of civil society.

### III. THE MODE OF MANIFESTATION OF COLLECTIVE RATIONALITY

According to Hobbes the creation of a political society with a unitary sovereign authority is an objective necessity, for as discussed below, it is only in political society that man’s search for security and self-aggrandizement is best pursued. Hobbes believed that a permanent framework for peace and security is only created if men unite under a political sovereign.<sup>55</sup> While this union is an

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49. See *infra* text accompanying notes 169–73, 184–89, 218.

50. See HAMPTON, *supra* note 29, at 239–47.

51. See KRAUS, *supra* note 32, at 68 for a critique of this hypothesis.

52. *Id.* at 22–23. But see KAVKA, *supra* note 35, at 29 (arguing that “psychological egoism,” the doctrine that the Hobbesian man is selfish, is erroneous).

53. KRAUS, *supra* note 32, at 57.

54. HAMPTON, *supra* note 29, at 40.

55. Under this union men agree

expression of collective rationality, it is also in accordance with the laws of nature.

Hobbes distinguishes between two fundamental laws of nature. The first is a consequence of man's natural pre-political condition of "war of every one against every one."<sup>56</sup> From this condition Hobbes derives a "general rule of reason" that every man ought to seek peace and to defend himself when peace is threatened.<sup>57</sup> This Hobbes refers to as the "fundamental law of nature."<sup>58</sup> The "second law of nature," which is derived from the first, comprises the will to lay down one's arms on condition that others do the same.<sup>59</sup> As the foregoing has demonstrated, this contractarian bargain is based on self-interest. But, it also reflects the 17th century conception of a certain harmony between "reason" and "nature."<sup>60</sup> This conception reflected the orthodox Christian doctrine of nature as the creation of God, with reason as a God-given faculty which man uses naturally.<sup>61</sup> The laws of nature are thus discoverable by reason; indeed, God impels (if not compels) man to obey the laws of nature through his irresistible power, given that he cannot speak directly to humans.<sup>62</sup>

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to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much to say, to appoint one man, or assembly of men, to bear their person; and every one to own, and acknowledge himself to be author of whatsoever he that so beareth their person, shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgments, to his judgment. This is more than consent, or concord, it is a real unity of them all, in one and the same person. . . .

THOMAS HOBBS, *LEVIATHAN* 112 (Michael Oakeshott ed., 3d ed. 1966) (1651). See Alan Ryan, *Hobbes's Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS'S LEVIATHAN* 208, 226 (Tom Sorell ed., 1996) (discussing how in political society man contracts "out of war and into peace").

56. HOBBS, *LEVIATHAN*, *supra* note 55, at 85.

57. *Id.*

58. *Id.*

59. *Id.*

60. ALOYSIUS MARTINICH, *THE TWO GODS OF LEVIATHAN* 121 (1992).

61. "God declareth his laws . . . by dictates of natural reason . . . [H]e governeth . . . by the dictates of natural right reason." HOBBS, *LEVIATHAN*, *supra* note 55, at 233–34.

62. *Id.* at 234; Gauthier, *supra* note 46, at 435; see also Tom Sorell, *Hobbes's Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS'S LEVIATHAN* 150 (Patricia Springborg ed., 2007). Sorell asserts that the basic symmetry between God's commandments and man's self-interest is a "master-precept" running through Hobbes's thought. It must be noted that I am adopting a theistic interpretation of Hobbes's philosophy. Although this interpretation

The political sovereign is created by covenant, the means whereby men extend their obligations by taking new ones upon themselves.<sup>63</sup> Hobbes describes the nature of this covenant by stating that it is,

. . . as if every man should say to every man, I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.<sup>64</sup>

This, concludes Hobbes, is the creation “of that great LEVIATHAN or rather, to speak more reverently, of that *mortal god*, to which we owe under the *Immortal God*, our peace and defence.”<sup>65</sup> This kind of sovereignty (i.e. one by agreement among the citizens) is called *sovereignty by institution*.<sup>66</sup> The other kind of sovereignty referred to by Hobbes is *sovereignty by acquisition* and is one that is established by force.<sup>67</sup> The third kind of sovereignty is *paternal dominion*, acquired through tacit consent.<sup>68</sup>

Under Hobbes’s doctrine, a political authority is a person or body of persons whose decisions must be regarded as though they were reasonable by virtue of their source.<sup>69</sup> However, the citizen does not take moral responsibility for the decisions of the

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seems to have the greatest currency in scholarly circles, it is by no means the only one. A number of scholars have argued that Hobbes was an atheist at heart and that his numerous references to God and to divine law are merely rhetorical tropes designed to appease his critics (or the Church) or are ironic declarations to suggest the opposite of what they seem to say at face value. Perhaps the strongest argument for the atheistic view is the argument that Hobbes’s materialist philosophy (which conceives of the entire universe to be made of *bodies*) does not admit the possibility of a non-material being such as the Christian God. See Douglas M. Jesseph, *Hobbes’s Atheism*, 26 *MIDWEST STUD. PHIL.* 140, 144, 150, 151 (2002); see also DAVID BERMAN, *A HISTORY OF ATHEISM IN BRITAIN: FROM HOBBS TO RUSSELL* (1988); GAUTHIER, *THE LOGIC OF LEVIATHAN*, *supra* note 47; SAMUEL I. MINTZ, *THE HUNTING OF LEVIATHAN: SEVENTEENTH-CENTURY REACTIONS TO THE NATURALISM AND MORAL PHILOSOPHY OF THOMAS HOBBS* (1962).

63. HOBBS, *LEVIATHAN*, *supra* note 55, at 112.

64. *Id.*

65. *Id.*

66. *Id.* at 113.

67. *Id.*

68. *Id.* at 130 (describing paternal dominion as acquired “from the child’s consent, either express, or by other sufficient arguments declared”).

69. See *id.* at 113 (defining a political union or “commonwealth by institution” as one in which one person or assembly of persons is given the authority to represent every one).

sovereign, for under Hobbes's doctrine, one person cannot take moral responsibility of the sinful acts of another.<sup>70</sup> Yet by holding that the decisions of the sovereign are to be regarded as inherently reasonable and to be binding on all subjects except the sovereign,<sup>71</sup> Hobbes sweeps away the entire notion of constitutional guarantees or restrictions laid upon the exercise of sovereignty by that law. However, it should be remembered that under Hobbes's scheme the authority of the civil sovereign is explained as deriving neither from the civil law nor from sovereign command, but from the authorization of the actions of the sovereign by each citizen, so that all forms of government are ultimately democratic.<sup>72</sup>

With his transfer of rights and authorization of the sovereign's actions, the individual under Hobbes's theory undertakes an obligation of non-resistance to the sovereign and indemnifies the sovereign from accountability to the individual.<sup>73</sup> Apart from acquiring this moral status, the sovereign must also be allowed to have a power sufficient to keep the subject in awe so that the former may not only occupy a privileged position, but may also elicit active cooperation from the subject.<sup>74</sup>

Whatever the *type* of sovereignty, the power of the sovereign cannot be transferred to another without the former's consent;<sup>75</sup> the obligation of non-resistance always prevails.<sup>76</sup> In each case the sovereign remains the sole judge of what is necessary for peace.

70. THOMAS HOBBS, DE CIVE 129–30 (Sterling Lamprecht ed., 1949) (1642) (“Whatsoever any man doeth against his conscience, is a sin; for he who doth so, contemns the law. But we must distinguish. That is my sin indeed, which committing I do believe to be my sin; but what I believe to be another man's sin, I may sometimes do without any sign of mine. For if I be commanded to do that which is a sin in him who commands me, if I do it, and he that commands me be by right lord over me, I sin not . . .”).

71. See HOBBS, LEVIATHAN, *supra* note 55, at 115; see also HOBBS, DE CIVE, *supra* note 70, at 142 (“[T]hey who among men obtain the chiefest dominion, cannot be subject to laws properly so called . . .”).

72. HOBBS, LEVIATHAN, *supra* note 55, at 116 (explaining the authorization of the sovereign's actions by each citizen).

73. See *id.* at 115 (“[B]ecause every subject is . . . author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice.”).

74. See HOWARD WARRENDER, THE POLITICAL PHILOSOPHY OF HOBBS 112 (1961) (discussing Hobbes's theory of the sovereign's power, yet remarking that Hobbes's sovereign also relied upon the cooperation of his citizens).

75. HOBBS, LEVIATHAN, *supra* note 55, at 113 (“And consequently they that have already instituted a commonwealth, being thereby bound by the covenant, to own the actions, and judgments of one, cannot lawfully make a new covenant among themselves, to be obedient to any other, in anything whatsoever, without his permission.”).

76. *Id.* at 114.

He is the sole legislator and the supreme judge of controversies and of the times and occasions of war and peace.<sup>77</sup> The sovereign also has the “right *inter-alia* to choose magistrates, commanders, ministers and to determine rewards and punishments.”<sup>78</sup>

#### IV. THE UTILITARIAN SCOPE OF SOVEREIGN OBLIGATION

Hobbes’s theory of “covenant” requires unquestioning obedience by the subject to the commands of his sovereign.<sup>79</sup> If the command is in conflict with natural law, and is therefore iniquitous, the iniquity concerns only the sovereign who issued the command, and he, according to Hobbes, will have to answer for it to God.<sup>80</sup> On the question of the relationship between natural law and civil law, Hobbes does not go as far as other natural law philosophers who have asserted that not only is civil law “derived” from natural law, but is invalid if it is considered to be in conflict with higher law.<sup>81</sup>

Declares Hobbes:

The office of the sovereign, be it a monarch or an assembly, consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people*; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him.<sup>82</sup>

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77. *Id.* at 117–18.

78. *Id.* at 118; *see also* WARRENDER, *supra* note 74, at 125.

79. *See* HOBBS, LEVIATHAN, *supra* note 55, at 114–15 (describing the power of the sovereign within the covenant).

80. A. E. Taylor, *The Ethical Doctrine of Hobbes*, 13 PHIL. 406, 414 (1938).

81. Augustine is an example of a natural law philosopher who held that civil law is invalid if in conflict with higher law: *Non videtur esse lex quae iusta non fuerit* (It would seem that a law that is not just is not law). ST. AUGUSTINE, ST. AUGUSTINE ON FREE WILL (Carrol Mason Sparrow trans.), 49 UNIVERSITY OF VIRGINIA STUDIES 9 (1947). *See also* RONALD HAMOWY, THE ENCYCLOPEDIA OF LIBERTARIANISM 351 (2008).

82. HOBBS, LEVIATHAN, *supra* note 55, at 219 (emphasis added). In *De Cive*, Hobbes similarly echoes the duty of the sovereign to submit to divine law:

Now all the duties of rulers are contained in this one sentence, the safety of the people is the supreme law. For although they who among men obtain the chiefest dominion, cannot be subject to laws properly so called, that is to say, to the will of men, because to be chief, and subject, are contradictories; yet is it their duty in all things, as much as possibly they can, to yield obedience unto right reason, which is the natural, moral, and divine law. But because dominions were constituted for peace’s sake, and peace was sought after for safety’s sake, he, who being placed in authority, shall use his power otherwise than to the

Although no single individual or human court can question the validity of the civil law, even if it is considered to conflict with the natural law, Hobbes's doctrine does not grant the sovereign absolute and limitless powers.<sup>83</sup> Hobbes's sovereign is accountable in equity to God and must therefore strictly observe the natural (or moral) law. He is bound to command and forbid always with a view to promoting the overall public good so that everyone may "live delightfully," ends that are *entirely* secular and utilitarian consequentialist in nature.<sup>84</sup>

In *De Cive* Hobbes also requires that the sovereign must not restrain the "harmless liberty" of the subject by imposing superfluous, inadequate or unnecessarily severe penalties or by tolerating corruption among his judges.<sup>85</sup> All such misconduct is *iniquity* and sin.<sup>86</sup> It is as if the sovereign was bound by a divine covenant not to break the natural law in the same way that the covenant in civil society is to obey without question the civil law—the breach of either covenant leads to sanctions against the law breaker—the sanction under the former is supernatural in essence while that under the latter is secular or temporal in nature. Yet the supernatural sanction against the sovereign is grounded on an entirely secular and utilitarian purpose, thus placing Hobbes squarely in the utilitarian consequentialist camp of the deontological/consequentialist divide.<sup>87</sup> The accountability of the

safety of the people, will act against the reasons of peace, that is to say, against the laws of nature.

HOBBS, *DE CIVE*, *supra* note 70, at 142. Here again one sees the familiar seventeenth century conflation of "reason," "nature" and God. *See supra* text accompanying notes 60–62.

83. *See* HOBBS, *LEVIATHAN*, *supra* note 55, at 172–89 (noting that the sovereign enjoys vast power and may even violate the law of nature; however, Hobbes notes that the sovereign is subject to "equity," which is the higher (natural) law of God).

84. HOBBS, *DE CIVE*, *supra* note 70, at 143. Indeed, Hobbes devotes an entire chapter in *DE CIVE* titled "Concerning the Duties of Them Who Bear Rule," at 141–54, and in *LEVIATHAN*, *supra* note 55, at 117–20. Hobbes charges the sovereign with a variety of mundane tasks such as of providing for the common peace and defense of society, the promulgation of rules of property, criminal laws and punishments, the provision of a judicial system and the appointment of counselors, ministers, magistrates and other officers.

85. HOBBS, *DE CIVE*, *supra* note 70, at 152–54 ("It is a great part of that liberty, which is harmless to civil government, and necessary for each subject to live happily, that there be no penalties dreaded, but what they may both foresee and look for . . ."). *See also id.* at 151–54.

86. *See id.* at 153 (noting that sovereigns "sin, if they entertain any other measure in arbitrary punishment, than the public benefit").

87. ISAAK DORE, *EPISTEMOLOGICAL FOUNDATIONS OF LAW* 183 (2007).

sovereign is not a good in itself; it is a good because it serves the utilitarian consequentialist goal of good governance.<sup>88</sup>

#### V. THE CONSEQUENTIALIST NECESSITY OF THE DIVINE COVENANT

Taylor argues that it is contradictory to say on one hand that Hobbes's sovereign is guilty of iniquity (by oppressing his subjects) when, on the other hand, the original covenant imposes no limits on sovereign power.<sup>89</sup> But if the idea of a divine covenant (together with its utilitarian consequentialist underpinnings) is accepted, Taylor's concern with a covenant between sovereign and subject becomes irrelevant.<sup>90</sup>

Under Hobbes's doctrine, not only is it irrelevant to search for a covenant between the sovereign and his subjects for purposes of deciding the validity of the acts of the sovereign, but infractions by the sovereign of natural law precepts are breaches of a *covenant* (a divine covenant) and every such breach is by definition iniquitous

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88. See discussion *infra* Part VII; see also HOBBS, DE CIVI, *supra* note 70, at 22 (“We do not . . . by nature seek society for its own sake, but that we may receive some honour or profit from it . . .”).

89. Taylor's argument is essentially that no limits can be imposed on a power that is by definition illimitable:

Now since Hobbes also attempts to reduce all *iniquity* in the end to breach of an express or implied contract, and since he also, as we all know, makes it so capital a point that the parties to the original contract by which civil society was created are not the “sovereign” and the “subject” (who only come into existence in virtue of the contract itself), but the individual items of a “dissolute multitude” which is not yet a society and has no legal personality, we might find a difficulty here. If the original contract, which must not be broken, imposed no conditions of any kind upon the future sovereign's arbitrary exercise of the power to command and forbid, how can he be said to be guilty of *iniquity* if he chooses to issue a host of grandmotherly commands, to enforce them savagely, or to neglect enforcing them, or if he winks at the bribery of his judges? He never covenanted with his subjects that he would not do these things; if he does them, then he breaks no “covenant,” and cannot be iniquitous, if iniquity and breach of contract are the same thing. Hence it is not unnatural that Hobbes should have been suspected of meaning no more by all his talk about the “duties” of sovereigns than that a sovereign who acts in the ways he condemns is likely to draw unpleasant consequences on himself.

Taylor, *supra* note 80, at 415–16.

90. It is of no consequence then to argue, as does Taylor, that since the sovereign never covenanted with his subjects, he cannot be accused of breaking a covenant (or for that matter of being iniquitous). *Id.* at 416.

(contrary to Taylor's interpretation of Hobbes) in the same way as what the civil law forbids is by definition unjust.<sup>91</sup>

This argument is, however, not without difficulty. It may be argued that although it is proper to say that what the civil law forbids is "by definition" unjust because the forbidden act would then, presumably, be defined under the civil law, not only is the "covenant" undefined but also even those acts forbidden to the sovereign are undefined.

The argument is unpersuasive for two reasons. First, even the civil "covenant" is postulated rather than defined so that the lack of definition of the "divine covenant" is not indicative of its non-existence,<sup>92</sup> and second, Hobbes himself provides ample guidelines to judge the equity or iniquity of particular acts of the sovereign. In *De Cive*, he devotes an entire chapter, "Concerning the Duties of those who bear Rule."<sup>93</sup> In this chapter Hobbes argues that a prince violates his duty by unduly restraining the liberty of subjects, enacting a multiplicity of superfluous laws, imposing penalties on subjects that are either inadequate or too severe, or by conniving with the corruption of judges through bribes.<sup>94</sup> Furthermore, Hobbes's sovereign must ensure the "safety" and general welfare of his subjects ("establish the welfare of the most part"), govern through laws that are "universal," and ensure the general happiness ("contentment") of all.<sup>95</sup>

These considerations are, in fact, consistent with the last part of Taylor's above-quoted criticism of Hobbes. It reads as follows: "Hence it is not unnatural that Hobbes should have been suspected of meaning no more by all this talk about the 'duties' of sovereigns

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91. See HOBBS, *DE CIVE*, *supra* note 70, at 153 ("But where the punishment is defined, either by a law prescribed, as when it is set down in plain words, that he that shall do thus or thus, shall suffer so and so; or by practice, as when the penalty, (not by any law prescribed, but arbitrary from the beginning) is afterward determined by the punishment of the first delinquent (for natural equity commands that equal transgressors be equally punished); there to impose a greater penalty than is defined by the law, is against the law of nature.").

92. See HOBBS, *LEVIATHAN*, *supra* note 55, at 114 (noting that men "covenant" when they form a government, but not precisely defining this covenant).

93. See HOBBS, *DE CIVE*, *supra* note 70, at 141–54.

94. *Id.* at 152–54.

95. See *id.* at 142–43; see also THOMAS HOBBS, *HUMAN NATURE AND DE CORPORE POLITICO* 172–73 (JCA Gaskin ed., Oxford 1994) (1640); HOBBS, *LEVIATHAN*, *supra* note 55, at 219 ("But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself.").

than that a sovereign who acts in the ways he condemns is likely to draw unpleasant consequences on himself.”<sup>96</sup>

The reference to “unpleasant consequences” clearly incorporates the idea of *some* kind of sanction, and, since this sanction cannot be applied by secular authority (for under Hobbes’s scheme there is no temporal authority beyond the sovereign), the sanction must be of spiritual or divine character.<sup>97</sup> If this is so then it provides another reason for reading into Hobbes’s scheme the concept of a divine covenant as defined above.

This interpretation is further supported by Hobbes’s own distinction between “counsel” and “law”:

[C]ounsel is a precept in which the reason of my obeying it is taken from the thing itself which is advised but command is a precept in which the cause of my obedience depends on the will of the commander. For it is not properly said that thus I will and thus I command, except the will stands for a reason. Now when obedience is yielded to the laws, not for the thing itself, but by reason of the adviser’s will, the law is not a counsel but a command, and is defined thus: law is the command of the person, whether man or court, whose precept contains the reason of obedience . . . is duty, what by counsel is free-will.<sup>98</sup>

Chapter XIII of *De Cive* (“Concerning the Duties of those who bear Rule”) must be read with this distinction in mind. Hobbes could not have used the word “Duties” to imply “free-will” or something other than law. However, in spite of this, Taylor makes this rather bewildering statement:

If Hobbes had meant, then, the sovereign who does the various things which he condemns in a sovereign is acting in an *ill-advised* way, doing what he is likely hereafter to be sorry for, and nothing more, he ought, according to his own definitions, to have called the ‘precepts’ of *De Cive*, XIII, simply counsels not duties.<sup>99</sup>

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96. Taylor, *supra* note 80, at 416.

97. For an endorsement of the notion that the sovereign is immune from secular sanction, see M.M. Goldsmith, *Hobbes on Law*, in THE CAMBRIDGE COMPANION TO HOBBS 274, 278 (1996) (“For Hobbes the sovereign is not only supreme but also unlimited.”).

98. HOBBS, DE CIVE, *supra* note 70, at 155.

99. Taylor, *supra* note 80, at 416.

If “counsel” is “free-will” and if the reason for obeying it is taken “from the thing itself which is advised”<sup>100</sup> then it is clear that such reason cannot exist in anything external to “the thing itself.” The reason cannot therefore exist in natural law. Thus if all the acts of the sovereign are based on counsel and free-will, the reason for his acts cannot be found in natural law. The logical conclusion of Taylor’s argument is that this natural or moral law, which Hobbes himself regards as having a brooding omnipresence,<sup>101</sup> is reduced to a meaningless concept because its *raison d’etre* is negated.

It must further be borne in mind that Taylor asserts that breaches of the above “precepts” by a sovereign are “likely to draw unpleasant consequences on himself.”<sup>102</sup> If the “unpleasant consequences” ought to be understood as implying divine sanctions, the reason for obeying any precept is external to it, i.e., is based on fear of “unpleasant consequences” for which the sovereign, to use Taylor’s words, “will have to answer . . . to God.”<sup>103</sup> It becomes obvious therefore that the sovereign is himself *bound* by the “precepts” of his rule, that each precept is a *duty* rather than “counsel,” because the reason for obeying it is not in the thing itself which is advised but because every duty is, under Hobbes’s scheme, a command or a law “of that person (whether man or court) whose precept contains in it the reason of the obedience. . . .”<sup>104</sup>

Having implicitly denied that the reason for obeying sovereign duties lies in an external source, Taylor proceeds to locate what he considers to be the real source of obedience of “precepts” or “counsels” mentioned above.<sup>105</sup> His argument is highly cogent, but it appears to suggest that the source or reason for obedience is essentially secular in nature, thereby again denying the law of nature one of its chief *raison d’etre*.

Being of the view that Hobbes had not “laid all the stress he should have done”<sup>106</sup> on certain aspects of the (civil) “covenant,” Taylor proceeds to restate (and to some extent reconstruct) Hobbes’s theory of the covenant as follows: The sovereign is

100. HOBBS, *DE CIVE*, *supra* note 70, at 155; *see supra* text accompanying note 98 (quoting the relevant passage from *De Cive*).

101. *See* HOBBS, *DE CIVE*, *supra* note 70, at 59 (describing the laws of nature as “nothing else but certain conclusions understood by reason”); *see also* HOBBS, *LEVIATHAN*, *supra* note 55, at 102–03 (describing the laws of nature as universal precepts of reason understood by all men).

102. Taylor, *supra* note 80, at 416.

103. *Id.* at 413.

104. HOBBS, *DE CIVE*, *supra* note 70, at 155.

105. *See* Taylor, *supra* note 80, at 416–17.

106. *Id.* at 417.

created by a voluntary transference to him of what, in the “state of nature,” had been the personal right of each of his future subjects.<sup>107</sup> What is transferred by each subject “to the sovereign . . . [is] the right to prescribe at his discretion” what the subjects can do and cannot do.<sup>108</sup> However, Taylor points out, “the purpose of this transference [is] the promotion of the safety and commodious living of each (subject).”<sup>109</sup> The subject does not renounce his claim to safety and comfort when he renounced his claim to judge at his own discretion how it may be attained.<sup>110</sup> The “renunciation” is not made by a contract between the sovereign “of the one part” and the “people” of the other part, but by a contract between each individual man and every other, in which the sovereign is a beneficiary, but not a party.<sup>111</sup> Taylor quotes Hobbes: “In the conveyance of right, the will is requisite not only of him that conveys, but of him also that accepts it. If either be wanting, the right remains.”<sup>112</sup>

In this way, Taylor asserts the sovereign is a “beneficiary under the bargain” to whom the “rights” of each subject are transferred and “he accepts the transfer” and thereby undertakes that the powers transferred to him “are to be exercised for the preservation and commodity of all” subjects.<sup>113</sup> This, however, does not affect the conclusion that no subject can call the sovereign to account for his actions. This is because all subjects are deemed to have authorized the sovereign to issue whatever commands he chooses and cannot question any of his commands on the ground that his commands are not conducive to the ends for which the transfer of right was made. This, in turn, flows from the fact that each subject has agreed that it was the *sovereign* who was to be the sole judge on such matters.<sup>114</sup>

By “accepting” the rights transferred to him the sovereign becomes a “party” to the covenant.<sup>115</sup> Taylor’s restatement thus leads to the following conclusions:

- (1) that the sovereign is a party to every contract between each individual citizen and every other;
- (2) that as such he has certain rights and duties arising directly from the totality of contracts;

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting HOBBS, *DE CIVE*, *supra* note 70, at 34).

113. *Id.*

114. *Id.* at 417–18.

115. *Id.* at 418.

- (3) that each contract is secular in nature;
  - (4) that one of the sovereign's duties is not to commit iniquity;<sup>116</sup>
  - (5) that the sovereign must promote "the safety and commodious living" of all subjects;<sup>117</sup>
  - (6) that an act which goes contrary to this duty is iniquitous.<sup>118</sup>
- Taylor thus asserts:

Hence iniquity on [the sovereign's] part, too, though not an offence of which any court can take cognizance, could be brought, at a pinch, without any departure from the main lines of Hobbes's thought, under the head of breach of the great law that "men perform their covenants once made."<sup>119</sup>

However, contrary to Taylor's claim, this *is* in fact a serious departure from the main lines of Hobbes's thought for numerous reasons: First, as Hobbes himself was shown to have pointed out earlier, a secular source can define only that which is "just" and "unjust" whereas the distinction between "equity" and "iniquity" is made under the natural law.<sup>120</sup> It is therefore misleading to assert an act is "iniquitous" *because* it prevents "safety and commodious living." That act may be iniquitous only if any of the "duties" of the sovereign under natural law (as summarized above) were breached. Second, Taylor suggests that the duty of the sovereign arises from the principle that men must keep their covenants once made;<sup>121</sup> it is obvious that Taylor is referring to the civil covenant to which he (Taylor) has made the sovereign a "party." The source of the duty appears then, to be entirely secular, thus rendering superfluous all those duties of the sovereign which Hobbes asserts as flowing from the natural law and which he describes in Chapter XIII of *De Cive*.<sup>122</sup> Third, there appears to be a glaring inconsistency between Hobbes's view (as restated by Taylor) that the sovereign cannot be called to account for his acts to any of his subjects<sup>123</sup> and Taylor's earlier statement that a sovereign who contravenes his duties is likely to draw unpleasant consequences for himself.<sup>124</sup> As argued above, this statement is not objectionable

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116. *Id.*

117. *Id.* at 417.

118. *See id.* at 418.

119. *Id.*

120. *See* HOBBS, LEVIATHAN, *supra* note 55, at 187.

121. *See* Taylor, *supra* note 80, at 417–18.

122. *See* HOBBS, DE CIVE, *supra* note 70, at 141–55 (outlining the sovereign's duties which flow from the natural law).

123. Taylor, *supra* note 80, at 417.

124. *See id.* at 416.

if by “consequences” one means divine sanctions.<sup>125</sup> However, by virtue of Taylor’s secular contract to which even the sovereign is a “party,”<sup>126</sup> it would seem that the consequences are also secular, in which case the logical inference is that the sovereign is answerable to his subjects, although the way in which he is so answerable is left undefined by Taylor.<sup>127</sup> If this is so, it contradicts the view (which even Taylor accepts as being properly attributable to Hobbes)<sup>128</sup> that Hobbes’s sovereign is not accountable in any way to any secular authority. Fourth, the theory that the sovereign is party to each covenant between each individual and every other is inconsistent with the following statement of Hobbes in *Leviathan*:

[B]ecause the right of bearing the person of [the citizens], is given to him they make sovereign, by covenant only of one to another, and not of him to any of them; there can happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretence of forfeiture, can be freed from his subjection. That he which is made sovereign maketh no covenant with his subjects beforehand, is manifest; because either he must make it with the whole multitude, as one party to the covenant; or he must make a several covenant with every man. With the whole, as one party, it is impossible; because as yet they are not one person: and if he make so many several covenants as there be men, those covenants after he hath the sovereignty are void; because what act soever can be pretended by any one of them for breach thereof, is the act both of himself, and of all the rest, because done in the person, and by the right of every one of them in particular.<sup>129</sup>

Fifth, as seen above, under Hobbes’s concept of sovereignty the citizens contract among themselves with a view “to appoint[ing] one man, or assembly of men, to bear their person.”<sup>130</sup> Thus the sovereign cannot be either a party or a beneficiary under a covenant to which the subject is a party, for since the sovereign bears the person of the subject, the sovereign would be covenanting with himself. Finally, under Taylor’s theory, the sovereign would have to be regarded as owing an obligation *to his*

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125. See *supra* text accompanying note 91.

126. See *supra* text accompanying note 115.

127. See Taylor, *supra* note 80, at 415–18.

128. *Id.* at 416.

129. HOBBS, *LEVIATHAN*, *supra* note 55, at 114.

130. *Id.* at 112; see *supra* text accompanying notes 55–69.

people, on the premise that the sovereign acquires rights and obligations from the contract between himself and each citizen.<sup>131</sup> Hobbes consistently denies that the sovereign owes duties to his people and instead asserts that the sovereign is not accountable to his subjects.<sup>132</sup> Moreover, such a theory would also lead to the conclusion that if all the citizens agreed, they should be capable of dissolving their respective contracts with each other so that their obligation to obey the sovereign—which arises *from* these covenants—would be *caduc*. Such a conclusion is again patently inconsistent with the most fundamental tenets of Hobbes's concept of sovereignty and civil obligation.

The divine covenant, then, not only avoids the above inconsistencies and *culs de sac*, but also remains faithful to Hobbes's goal of ensuring that the sovereign diligently focuses on providing the "contentments of life" at the society-wide level.

#### VI. CONSEQUENTIALISM AND DEISM

The argument so far has been that it is preferable not to hold Hobbes's sovereign a party to any secular contract but, instead, to hold him accountable in equity to God with natural law as the sole source of this obligation; that the divine covenant best serves Hobbes's utilitarian political agenda; that there is nothing logically inconsistent between postulating the existence of a divine covenant between sovereign and God and the body of Hobbes's utilitarian doctrine; that in fact this conclusion is implicit in Hobbes's theory of obligation relating to the sovereign; and finally, that the "precepts" which the sovereign obeys are "commands" rather than "counsels."

Surprisingly enough, Taylor ultimately endorses this thesis: "If the fulfilling of the law of nature is a duty in the sovereign, it follows that the law of nature is a *command*, and a command the reason for obedience whereto is that it is the precept of a 'person' with the *right* to command."<sup>133</sup> Taylor then inquires what kind of person is it whose commands are to be obeyed, and proceeds to answer the question as follows: It is "[n]ot the 'natural person' of any man, since Hobbes denies the existence of any universal monarch of the earth; not a 'court' composed of many 'natural persons' since there is no such 'court' with jurisdiction over the

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131. See Taylor, *supra* note 80, at 418.

132. See HOBBS, *DE CIVE*, *supra* note 70, at 142; HOBBS, *LEVIATHAN*, *supra* note 55, at 115.

133. Taylor, *supra* note 80, at 418.

independent princes of the world.”<sup>134</sup> He then concludes significantly: “I can only make Hobbes’s statements consistent with one another by supposing that he meant quite seriously what he so often says, that the ‘natural law’ is the command of God, and to be obeyed *because* it is God’s command.”<sup>135</sup> In another passage Taylor states, “in no other way can we make his explicit statements about the connection between the notions of a *duty*, a *command*, and a law inherent with each other. A certain kind of theism is absolutely necessary to make the theory work.”<sup>136</sup>

It may be further pointed out that Hobbes maintains a dichotomy between subjects and sovereign on one hand and sovereign and God on the other. At the first level Hobbes’s position has already been described.<sup>137</sup> At the second level Hobbes states: “The inequality of subjects, proceedeth from the acts of sovereign power; and therefore has no more place in the presence of the sovereign, that is to say, in a court of justice, than the inequality between kings and their subjects, in the presence of the King of kings.”<sup>138</sup> Subsequently Hobbes observes that

[T]he same law that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard to one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice but in the conscience only: where not man, but God reigneth . . .<sup>139</sup>

Not only is the sovereign conscience reliant on divine inspiration but, as Hobbes points out, the sovereign is *accountable* to God:

The office of the sovereign, be it a monarch or an assembly, consisteth in the end for which he was trusted with sovereign power, namely, the procuration of “the safety of the people”; to which he is obliged by the law of Nature, and to render an account thereof to God, the author of that law, and to none but Him.<sup>140</sup>

This should be sufficient evidence of Hobbes’s thought to rebut the countless misinterpretations of his doctrine, some of which were discussed above. A common misinterpretation arises from

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134. *Id.*

135. *Id.*

136. *Id.* at 420.

137. *See supra* text accompanying notes 55–78.

138. HOBBS, *LEVIATHAN*, *supra* note 55, at 226.

139. *Id.* at 232.

140. *Id.* at 219.

Hobbes's assertion of the "inequality of subjects" before the sovereign and their inability to question his acts. It has often been wrongly concluded from this that a *de facto* ruler is always justified in all his acts; that since the distinction between good and bad arises from the dictates of princes, the commands of princes are *ipso facto* the criterion of right and wrong for those whom they are strong enough to command; that a ruler, being himself the source of morality, cannot be immoral.<sup>141</sup> This is one of the trends which is representative of "Hobbism."<sup>142</sup> The view that Hobbes's sovereign is incapable of immorality has already been shown to be erroneous.<sup>143</sup>

Another popular trend in "Hobbism" is that it is futile to appeal to law for protection of popular rights.<sup>144</sup> In support of this theory, it may be argued that not only are there no popular rights, but since the sovereign is placed in a position of such omnipotence *vis-a-vis* his subjects, his personal whim is above the law.<sup>145</sup>

141. See Taylor, *supra* note 80, at 418.

142. Sterling P. Lamprecht, *Hobbes and Hobbism*, 34 AM. POL. SCI. REV. 31, 33, 46 (1940).

143. See *supra* text accompanying notes 80–83, 86, 103, 120, 136. Lamprecht asserts:

A sovereign, as much as any other man, is subject to the law of nature or the dictates of reason; indeed he has greater responsibilities to these laws than other men because he is by function the person who "hath taken into his hands any portion of, mankind to improve." "The duty of a sovereign," said Hobbes, "consisteth in the good government of the people." Good government involves provisions to increase the number of the people, to preserve peace at home, to provide defense against attack from without, and generally to safeguard "the commodity of living."

Lamprecht, *supra* note 142, at 47.

In this way, Lamprecht argues that it is wrong to view Hobbes's sovereign as being incapable of immorality. The ultimate source of obligation is, of course, the law of nature and the ultimate duty to account is owed to God. HOBBS, HUMAN NATURE AND DE CORPORE POLITICO, *supra* note 95, at 172 ("[A]lthough the acts of sovereign power be no injuries to the subjects who have consented to the same by their implicit wills, yet when they tend to the hurt of the people in general, they be breaches of the law of nature, and of the divine law; and consequently, the contrary acts are the duties of sovereigns, and required at their hands to the utmost of their endeavor.").

144. Lamprecht, *supra* note 142, at 33.

145. To this argument Lamprecht addresses the following reply:

[S]ocial problems often admit of no settlement by conference, by compromise, by *mutual* reconciliation of conflicting claims. In such cases, we have to choose between open strife and imposed settlement. . . . To deny that civil authority is entitled to determine policy even when it cannot give adequate demonstration of the soundness of that policy is to "make it impossible for any nation in the world to preserve themselves from civil war."

However, careful reading of Hobbes shows that this view is erroneous for two reasons. First, the obligation of the subject not to break his faith once given is grounded in social necessity, for only then can “the good of the people” be advanced.<sup>146</sup> The need for a strong civil authority (i.e. the sovereign) with power to impose solutions when compromise is impossible and to prevent civil war also appears to be formulated on essentially sociological lines.<sup>147</sup> To quote Lamprecht:

Some thinkers have put their trust in educational schemes; others, in reliance upon natural reason; many in supplications for divine grace; some, in appeal to law; a credulous few, in the automatic balance of a welter of independent forces into an eventual happy synthesis. Hobbes brushed such solutions aside. Education is prone to corruption; reason is weak; divine grace is a bone of contention and a cause of controversy; law is often flouted when it is good and enforced when it is bad; . . . The only technique of order is discipline, discipline imposed from above, discipline that comes from power that cannot be challenged by either passion or ignorance. Sovereignty is thus the *sine qua non*, not merely of peace, but also of all excellence,<sup>148</sup> both for individual men and for social groups.<sup>148</sup>

If this interpretation of Hobbes is correct, it follows that his thought has strong utilitarian but also sociological undercurrents rather progressive for his time.<sup>149</sup>

However, sociological and utilitarian arguments were not considered by Hobbes to be by themselves sufficient for his theory of government.<sup>150</sup> Side by side with such arguments is the concept of *divine* accountability.<sup>151</sup> All of which combine to provide the full consequentialist rationale for the divine covenant.<sup>152</sup> This is the second reason why a capricious or whimsical sovereign would be

*Id.* at 48 (quoting THOMAS HOBBS, LIBERTY, NECESSITY AND CHANCE 289) (emphasis added).

146. See HOBBS, HUMAN NATURE AND DE CORPORE POLITICO, *supra* note 95, at 111, 172.

147. HOBBS, LEVIATHAN, *supra* note 55, at 109 (describing how Hobbes intended the sovereign to keep control of “the natural passions of men” for war).

148. Lamprecht, *supra* note 142, at 39.

149. *Id.*

150. HOBBS, DE CIVE, *supra* note 70, at 141–42.

151. See *id.* (describing the concept of divine accountability).

152. *Id.*

incompatible with Hobbesian doctrine. This Lamprecht does not sufficiently emphasize.<sup>153</sup> Says Hobbes in *De Cive*:

For although they who among men obtain their chiefest dominion, cannot be subject to laws properly so called, that is to say, to the will of men, because to be chief, and subject, are contradictories; yet it is their duty in all things, as much as possibly they can, to yield obedience unto right reason, which is the natural, moral, and divine law.<sup>154</sup>

Thus Hobbes's theory of divine obligation is utilitarian and consequentialist in essence. The *raison d'être* of this obligation is that the sovereign "hath taken into his hands (a) portion of mankind to improve."<sup>155</sup> It is not a duty owed *in abstracto* but has as its objective an entirely secular goal. This focus upon utilitarian consequentialism is the unifying trend in Hobbes's doctrine. All his main lines of thought on the question of sovereignty and the place he assigns it within the wider doctrine of the law of nature (with God as its author) show this unity of purpose. The same purpose is reflected in the duties assigned by Hobbes to the civil sovereign. These duties are outlined next.

#### VII. THE CONSEQUENTIALIST DUTIES OF THE SOVEREIGN

Under Hobbes's theory of civil society, civil government is "not instituted for its own, but for the subjects' sake."<sup>156</sup> The basic concern of the sovereign, according to Hobbes, ought to be the preservation of the safety of the people.<sup>157</sup> This duty however does not relate merely to the preservation of life but also for the means to live well.<sup>158</sup>

The duties of the sovereign are aimed at securing three inter-related objectives:

153. See Lamprecht, *supra* note 142, at 39–42.

154. HOBBS, *DE CIVE*, *supra* note 70, at 142.

155. HOBBS, *HUMAN NATURE AND DE CORPORE POLITICO*, *supra* note 95, at 173.

156. HOBBS, *DE CIVE*, *supra* note 70, at 142.

157. See *id.* ("Now all the duties of rulers are contained in this one sentence, the safety of the people is the supreme law.").

158. See HOBBS, *LEVIATHAN*, *supra* note 55, at 219 ("But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself."); HOBBS, *DE CIVE*, *supra* note 70, at 143; HOBBS, *HUMAN NATURE AND DE CORPORE POLITICO*, *supra* note 95, at 172; see also WARRENDER, *supra* note 74, at 181 (discussing the duties of the sovereign).

### A. Security

The sovereign under Hobbes's theory must preserve peace from both domestic and foreign dangers.<sup>159</sup> To this end his duty involves the creation and maintenance of adequate armed forces and military intelligence, as well as finances to pay for these services. The sovereign is also charged with preventing the emergence of "perverse doctrines" and political factions in order to forestall acts of sedition.<sup>160</sup> Thus says Hobbes in *De Cive*:

[S]ome things there are which dispose the minds of men to sedition, others which move and quicken them so disposed. Among those which dispose them, we have reckoned in the first place certain perverse doctrines. It is therefore the duty of those who have the chief authority, to root those out of the minds of men, not by commanding, but by teaching; not by terror of penalties, but by perspicuity of reasons.<sup>161</sup>

These sovereign duties constitute another example of utilitarian consequentialism since they are obviously concerned with the creation of those conditions in society that promote human flourishing on the basis of mutual security. The emphasis on "teaching" and on "perspicuity of reasons" and the avoidance of the "terror of penalties" all suggest that the Hobbesian sovereign is not the brutish dictator that he is sometimes made out to be, and that the citizen is not the hapless subject who lives in abject fear for his life.

### B. Prosperity

It is also the responsibility of the sovereign to pass laws which will lead to the increase of wealth, deter needless waste of resources, and encourage thrift and industry.<sup>162</sup> Examples given by Hobbes are laws that encourage husbandry and fishing and laws "whereby all inordinate expense, as well in meats as in clothes, and universally in all things which are consumed with usage, is forbidden."<sup>163</sup> Hobbes contemplates the welfare of all subjects—

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159. HOBBS, LEVIATHAN, *supra* note 55, at 116; HOBBS, DE CIVE, *supra* note 70, at 144; HOBBS, HUMAN NATURE AND DE CORPORE POLITICO, *supra* note 95, at 173; *see also* WARRENDER, *supra* note 74, at 181.

160. HOBBS, DE CIVE, *supra* note 70, at 145–46, 149; *see also* WARRENDER, *supra* note 74, at 181–82.

161. HOBBS, DE CIVE, *supra* note 70, at 146.

162. *See id.* at 150–51; *see also* HOBBS, HUMAN NATURE AND DE CORPORE POLITICO, *supra* note 95, at 174.

163. HOBBS, DE CIVE, *supra* note 70, at 151.

the able-bodied as well as the poor and the weak: “And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the charity of private persons, but to be provided for, as far forth as the necessities of nature require, by the laws of the commonwealth.”<sup>164</sup>

### C. Equality of Treatment and Liberty

In *Leviathan* Hobbes says that:

The safety of the people, requireth further, from him, or them that have sovereign power, that justice be equally administered to all degrees of people, that is, that as well the rich and mighty, as poor and obscure persons . . . ; so as the great, may have no greater hope of impunity, when they do violence . . . to the meaner sort, than when one of these, does the like to one of them: for in this consisteth equity to which, as being a precept of the law of nature, a sovereign is as much subject, as any of the meanest of his people.<sup>165</sup>

In addition to promoting equal administration of justice, the sovereign is also required to distribute burdens equally to all subjects:

Now in this place we understand an equality, not of money, but of burthen, that is to say, an equality of reason between the burthens and the benefits. For although all equally enjoy peace, yet the benefits springing from thence are not equal to all; for some get greater possessions, others less; and again, some consume less, others more . . . subjects ought to contribute to the public, according to the rate of what they gain . . .<sup>166</sup>

The sovereign must also not enact unnecessary laws, for these may harm the liberty of the individual;<sup>167</sup> he must ensure the proper application of rewards and punishments and, finally, must ensure that his counselors, judges and other public officers are not corrupt.<sup>168</sup>

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164. HOBBS, *LEVIATHAN*, *supra* note 55, at 227; *see also* WARRENDER, *supra* note 74, at 182 (noting that Hobbes’s individualism does not imply *laissez-faire* economics).

165. HOBBS, *LEVIATHAN*, *supra* note 55, at 225; *see also* WARRENDER, *supra* note 74, at 182–83.

166. HOBBS, *DE CIVE*, *supra* note 70, at 148.

167. *Id.* at 152.

168. *Id.* at 153–54.

It is thus quite clear that all the duties of the sovereign regarding the promotion of security, prosperity, equality and liberty—the basis or reason for which is the good of the community, an entirely secular goal—are derived from the natural law of God. It is equally clear that if the sovereign fails to promote these duties, he is accountable in equity to God

#### VIII. CONSEQUENTIALISM, THE STATE OF NATURE AND THE LAW OF NATURE

Hobbes uses the idea of a “state of nature” as an analytic device to reinforce the foregoing principles.<sup>169</sup> For Hobbes, the state of nature was not a historical period from which man moved away; rather it was an ever-present potential danger in every society.<sup>170</sup> Without proper vigilance, even civil society can “degenerate” into civil war.<sup>171</sup> Strong civil authority was the best, if not the only, safeguard against this danger.<sup>172</sup> In fact, Hobbes specifically observes of the state of nature that “[I]t may per adventure be thought, there was never such a time, nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. . . .”<sup>173</sup>

Adopting the position of Woodridge,<sup>174</sup> Lamprecht suggests that the state of nature is analogous to the scientific description of a body as continuing in a state of rest or of uniform motion unless influenced by outside forces.<sup>175</sup> Actually, of course, there is no such uniformity because all bodies are continually influenced by external forces.<sup>176</sup> So Hobbes’s concept of man in the state of nature suggests that this state does not and did not exist in reality; that all men are continually influenced by social forces which lead to the establishment of the state (the great leviathan). The state is

169. Lamprecht, *supra* note 142, at 40–41.

170. *Id.* at 41.

171. HOBBS, LEVIATHAN, *supra* note 55, at 83; *see also* Lamprecht, *supra* note 142, at 41.

172. Lamprecht, *supra* note 142, at 41; KAVKA, *supra* note 35, at 123 (“The state of nature is used, in Hobbesian theory, as a model of what would happen to us if central political authority were removed . . .”), 84 (stating that Hobbes’s theory is “essentially a hypothetical theory concerning what (counterfactually) would happen if the social and political ties between persons were suddenly dissolved”).

173. HOBBS, LEVIATHAN, *supra* note 55, at 101; *see also* WARRENDER, *supra* note 74, at 240.

174. *See* FREDERICK J.E. WOODBRIDGE, HOBBS: SELECTIONS xx–xxi (1930).

175. Lamprecht, *supra* note 142, at 41.

176. *Id.*

an “artificial” body (but a body nevertheless) which men establish as “a consequence of their natural motions in conflict.”<sup>177</sup> The concept implies the sociability of man, yet at the same time it throws into sharp relief the gravity of the problem of securing a stable and good society since men are viewed as not easily submitting to discipline; they are in continual need of being controlled.<sup>178</sup>

Yet it is wrong to assert that the strong civil authority advocated by Hobbes is such that the sovereign is incapable of immorality. Under Hobbes’s doctrine, justice and right begin only where law exists.<sup>179</sup> Hobbes is therefore speaking in legal, not in moral terms, so that:

[I]n the absence of law, might makes right, not in the sense that might proves wisdom or virtue to be resident in him who exercises the might, but in the sense that might, when irresistible, is the beginning of a regime in which the distinction between ruler and subjects is emerging . . . .<sup>180</sup>

It is clear therefore that Hobbes’s concept of man in a state of nature is intimately linked to the utilitarian/consequentialist goals of his theories of sovereignty and sovereign obligation, all of which are offered by Hobbes as the solution of what he perceived to be an essentially social and empirical problem.<sup>181</sup>

It is this “empiricist” approach which led Hobbes to conclude that civil government cannot coexist with a state of nature; this is indeed an ordinance of what Hobbes calls “the second law of nature.”<sup>182</sup> Where there is no central power in society which can guarantee that others will be forced to obey the law of nature, a

177. WOODBRIDGE, *supra* note 174, at xxi.

178. *Id.* at xxii; *see also* Lamprecht, *supra* note 142, at 42 (“Thus the idea of man in a state of nature, while not a psychologically adequate analysis of human nature (which it was not Hobbes’ purpose to give), is just that analysis of man that is most relevant to the political problem with which Hobbes is grappling.”).

179. Lamprecht, *supra* note 142, at 42–43.

180. *Id.* at 43.

181. Lamprecht says of Hobbes:

He did not derive the law of nature from innate imprints, from common consent, or from a sort of timeless contemplation of human nature. All such methods of deriving it looked to the past, and Hobbes looked to the future. He derived the law of nature from human needs, from a consideration of the best means of getting from an unsatisfactory present to a particular kind of desired future. Hence he showed how to give empirical content to a law which until his time had been uselessly abstract.

STERLING P. LAMPRECHT, *THE MORAL AND POLITICAL PHILOSOPHY OF JOHN LOCKE* 38 (1918) [hereinafter LAMPRECHT ON LOCKE].

182. *See supra* text accompanying note 59.

man is not under obligation to that law himself.<sup>183</sup> In the *Leviathan* Hobbes asserts that the

miserable condition of war . . . is necessarily consequent . . . to the natural passions of man, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and [the] observation of [the] laws of nature. . . .<sup>184</sup>

This statement has two further implications. First, it confirms that under Hobbes's scheme, the state of nature was not a historical stage of evolution but simply an analytical tool to describe what Hobbes saw as man's natural tendency to strife and war unless checked by a superior authority.<sup>185</sup> On this view the Hobbesian state-of-nature concept merely serves as a "surrogate" for an experiment that is impossible to conduct.<sup>186</sup> The concept tries to envisage or predict what post-political anarchy would resemble without actually dissolving political ties. Second, it demonstrates the irrelevancy of the criticism often leveled against Hobbes that it is anomalous that the law of nature had no force in the state of nature.<sup>187</sup> The question of the status or the force of the law of nature in the state of nature does not even arise if the state of nature is treated as a conceptual tool rather than an evolutionary doctrine. In this regard, it is necessary to recall that the law of nature is not only elevated to an objective moral standard for all civil governments but, under Hobbes's scheme, it is an eternal law binding *in foro interno* at all times. Indeed, Hobbes elevates the law of nature to a "dictate of right reason."<sup>188</sup>

The law of nature binds *in foro externo* only when one knows that it is safe to assume that every other person will obey it. This obedience is guaranteed by civil government.<sup>189</sup> Says Hobbes, "[t]herefore, notwithstanding the laws of nature (which everyone hath then kept, when he has the will to keep them, *when he can do it safely*) if there be no power erected, or not great enough for our

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183. See HOBBS, *LEVIATHAN*, *supra* note 55, at 109 (discussing man's condition in the state of nature).

184. *Id.*

185. See *supra* text accompanying notes 169–173.

186. KRAUS, *supra* note 32, at 192.

187. For such a criticism see LAMPRECHT ON LOCKE, *supra* note 181, at 35.

188. See text accompanying *supra* notes 60–62, and *infra* notes 254–57; HOBBS, *LEVIATHAN*, *supra* note 55, at 123, 262; see also WARRENDER, *supra* note 74, at 53–54.

189. This is the "contractarian" legitimation of the political sovereign through rational choice. See *supra* text accompanying notes 32–55 (discussing legitimation strategies through rational choice theory and game theory).

security; every man will, and may lawfully rely on his own strength and art, for caution against all other men.”<sup>190</sup>

It is thus Hobbes’s “general rule of reason” and “first law of nature” “*that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.*”<sup>191</sup> This implies that the absence of obligation to obey the law of nature operates only where there is no guarantee of reciprocal obedience by one’s fellow men.<sup>192</sup>

This is far from a categorical denial of the force of the law of nature in those aberrations of man when, due to ineffective civil organization, he is allowed to slip into his natural tendencies. The absence of obligation does not mean that the law of nature has no moral value at all in these conditions; indeed, Hobbes says it “binds the conscience” *in foro interno* always.<sup>193</sup> “The laws of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place . . . ,” says Hobbes.<sup>194</sup> It is the conflict between this desire on the one hand and the disruptive tendency of unregulated behavior on the other that leads man to bring about a state of civil government, a state in which the desire is translated into and protected by human laws.<sup>195</sup> Hobbes says that before the state of civil government is achieved, the laws of nature possess “qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws. . . .”<sup>196</sup> This language suggests that under civil government, social obligations (the need for which was felt even before the state of civil government was brought into being) are given a different expression, that this change is only *formal* not substantive, since civil laws express (at least in theory) the substantive content of the antecedent natural law obligations.

The grounding of obligation in civil society is the principle of reciprocity.<sup>197</sup> Thus, says Hobbes in *De Cive*: “[f]or one man,

190. HOBBS, LEVIATHAN, *supra* note 55, at 109 (emphasis added).

191. *Id.* at 103–04; *see supra* text accompanying notes 56–62.

192. WARRENDER, *supra* note 74, at 58–59.

193. *See* HOBBS, LEVIATHAN, *supra* note 55, at 103.

194. *Id.*

195. LAMPRECHT ON LOCKE, *supra* note 181, at 36.

196. HOBBS, LEVIATHAN, *supra* note 55, at 174; *see also* WARRENDER, *supra* note 74, at 166 (discussing the relationship between natural and civil law in Hobbes’s thought).

197. HOBBS, LEVIATHAN, *supra* note 55, 86. The reliance (if not the insistence) on reciprocity is but part of the game theoretic calculus that reciprocally cooperative behavior in civil society leaves one better off; in other words, there is a rational appreciation that the benefits of civil society outweigh those without it. *See supra* text accompanying notes 43–46.

according to that natural equality which is among us, permits as much to others, as he assumes to himself . . . ,”<sup>198</sup> or the corollary: *quod tibi fieri non vis, alteri ne feceris*.<sup>199</sup> In this sense, Hobbes’s contention that the law obliges always *in foro interno* means that there is *always* an obligation to maintain a favorable disposition towards obedience of its dictates and towards peace, whereas the obligation to act strictly as the law commands is qualified by the degree of *reciprocal* security enjoyed by the agents concerned.<sup>200</sup> If one of the preconditions for law is mutual security through reciprocal behavior it follows that there is no reason to conclude that legal constraints on behavior are operative only in civil society.<sup>201</sup> It is true that there are less constraints in the absence of civil government than when there is a civil government, but this is not because of any *a priori* assumption as to the non-applicability of the law of nature in such a condition; rather, it is because life is basically insecure since there is no authority that can guarantee reciprocal obedience to laws.<sup>202</sup> The need for this greater individual freedom in favor of self-defense and self-preservation is indisputable under these conditions given Hobbes’s materialistic and egoistic psychology of man.

A corollary to this argument is, of course, that just as it is untrue to say that man is free from obligation in the absence of civil government, it must be accepted that he may free himself from particular obligations—even *civil* obligations—to avoid patent mortal danger—something which always upsets expectations of mutual and reciprocal security.<sup>203</sup> In the *Leviathan*,

198. HOBBS, DE CIVE, *supra* note 70, at 25.

199. HOBBS, LEVIATHAN, *supra* note 55, at 85.

200. See WARRENDER, *supra* note 74, at 74–75. Indeed, as Warrender points out, there may be certain laws of nature that bind *in foro interno* always, regardless of reciprocity, as when, for example, they are “safe” to follow on a unilateral basis, or when their observance does not pose personal danger even though the overall condition is one of insecurity.

201. *Id.* at 75.

202. See *id.* at 58 (“[I]f any law is to be valid law, or in other words to *be* law and oblige, it must operate in a context in which the validating condition of ‘sufficient security’ may be said to be fulfilled.”).

203. In Hobbes’s own words,

The end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his power, is the security which he expecteth thereby, of protection and defense from those to whom he doth so relinquish it. And a man may then account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves; and without that security there is no reason for a man to deprive himself of his own advantages, and make himself a prey to others. . . . How far

Hobbes actually uses the word “reciprocal” to describe the nature of the civil contract.<sup>204</sup>

As for the precise nature of the obligations that bind *in foro interno*, Hobbes asserts that man must “endeavour for peace” and maintain a “readiness of mind to observe them whensoever their observation shall seem to conduce to the end for which they were ordained.”<sup>205</sup> The laws of nature require

[N]o more but the desire and constant intention to endeavour and be ready to observe them, unless there be cause to the contrary in other men’s refusal to observe them towards us. The force therefore of the law of nature, is not *in foro externo*, till there be security for men to obey it; but is always *in foro interno*, wherein the action of obedience being unsafe, the will and readiness to perform, is taken for the performance.<sup>206</sup>

Obligations *in foro interno* are thus not dependent on the principle of reciprocity.<sup>207</sup> The individual is always obliged to endeavor peace or to be ready for favorable opportunities in which he may create peace.<sup>208</sup> It is only when he takes specific action that the reciprocity of others can be considered by the actor.<sup>209</sup> The

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therefore in the making of a commonwealth, man subjecteth his will to the power of others, must appear from the end, namely security. For whatsoever is necessary to be by covenant transferred for the attaining thereof, so much is transferred, or else every man is in his natural liberty to secure himself.

HOBBS, HUMAN NATURE AND DE CORPORE POLITICO, *supra* note 95, at 111–12.

204. According to Hobbes,

Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some *good to himself*. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred.

HOBBS, LEVIATHAN, *supra* note 55, at 86 (emphasis in original). Hobbes then asserts: “As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby at any good to himself.” *Id.* at 86–87.

205. HOBBS, DE CIVE, *supra* note 70, at 56.

206. HOBBS, HUMAN NATURE AND DE CORPORE, *supra* note 95, at 97.

207. See *infra* notes 224, 226 (containing relevant quotations from DE CIVE and LEVIATHAN).

208. HOBBS, DE CIVE, *supra* note 70, at 55.

209. *Id.* at 58.

latter phase, i.e. when *action* is taken, marks the stage of action *in foro externo*.<sup>210</sup>

Although man must strive for peace in a society without civil government, this does not imply a duty to renounce force in the face of impending harm.<sup>211</sup> However, man may not act contrary to the laws of nature unless he has a good faith belief that action is required on grounds of self-preservation: “[I]f any man pretend somewhat to tend necessarily to his preservation, which yet he himself doth not confidently believe so, he may offend against the laws of nature. . . .”<sup>212</sup> This shows that not everything one does in a society without civil government is justified or excused; it only means that a specific act or a series of acts cannot be proscribed that could be a *bona fide* means to self-preservation, while each individual continues to be accountable for his acts to his own conscience and to God.<sup>213</sup>

It should of course be remembered that, in a society without civil government, the test for the principle of reciprocal security is subjective, since, as noted earlier, the individual is accountable only to his own conscience and to God.<sup>214</sup> By contrast, the test in

210. *Id.*

211. WARRENDER, *supra* note 74, at 56 (explaining that there is no “duty to here and now throw away our arms, without suitable guarantees that this will not simply leave us as a prey to others”).

212. HOBBS, *DE CIVE*, *supra* note 70, at 28; *see also* WARRENDER, *supra* note 74, at 60.

213. Further confirmation is given in *De Cive* for the assertion that man is not free from all obligation even in a war-ravaged society without civil government: “But there are certain natural laws, whose exercise ceaseth not even in the time of war itself; for I cannot understand what drunkenness, or cruelty, (that is, revenge which respects not the future good) can advance toward peace, or the preservation of any man.” HOBBS, *DE CIVE*, *supra* note 70, at 56. Thus in cases of drunkenness and “revenge which respects not the future good” or, as Hobbes adds elsewhere, revenge “glorying in the hurt of another, tending to no end,” HOBBS, *LEVIATHAN*, *supra* note 55, at 100, there is a strong presumption against such conduct even in the absence of civil government. *See* WARRENDER, *supra* note 74, at 61–62.

214. *See supra* text accompanying notes 188–94. The duty to endeavor peace in the pre-political condition is almost Kantian in essence. The duty is for its *own* sake; that is, the duty is not discharged when the individual’s conduct is “in accordance with law,” when he *intended* a different or contrary result, or when the result was so by chance. If this interpretation is correct, then Hobbes’s thought (at least on the concept of duty in the pre-political condition) is more deontological than consequentialist. *See also* Taylor, *supra* note 80, at 408, 415, 423 (arguing that the citizen’s duty to obey the law arising from the civil “covenant,” and the sovereign’s duty to obey the natural (or moral) law are absolute duties, and thus deontological in character). Indeed there is language in *De Cive* supporting Kantian-style absolutism on the question of duty to obey the law: “Although a man should order all his actions so much as belongs to

civil society has a strong empirical (if not objective) content, because in such a society there is a code of positive law, prescribing determinate public obligations emanating from a determinate human lawmaker and judged by a civil magistrate along predetermined lines.<sup>215</sup> The nature of obligation of man in society (with or without civil government or with an impotent or ineffective civil government) may therefore be restated as follows: in any given instance of human interaction which takes place on the basis of mutual security, the individual is always obliged;<sup>216</sup> in any other instance he is obliged unless he sincerely believes his own personal safety to be in jeopardy at which point he is released from the obligation that would otherwise have constrained his behavior.<sup>217</sup> In the latter kind of case the principle of reciprocal or mutual security defines *a class of persons* rather than historical stages of man's evolution; persons who are not only in an insecure position from an objective standpoint but also whose own individual subjectivities genuinely lead them to perceive danger in particular situations.<sup>218</sup>

This once again suggests that it is an oversimplification to construe Hobbes's theory of obligation as meaning that the state of nature marks a historical stage in man's evolution or that while in that stage there is/was *no* force constraining the behavior of man. It also reinforces the view that Hobbes's concept of the state of nature was a mere analytical device serving his utilitarian consequentialist ends. The same ends are served by rights and obligations after the transition to full-fledged civil society is made, as the discussion below demonstrates.

#### IX. DISTINCTIVE CHARACTERISTICS OF RIGHT AND OBLIGATION IN CIVIL SOCIETY

Hobbes's conception of civil society suggests that life in civil society is more secure and safe,<sup>219</sup> that the individual is deemed to

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external obedience just as the law commands, but not for the law's sake, but by reason of some punishment annexed to it, or out of vain glory; yet he is unjust." *Id.* at 409 n.1. *See also infra* note 240 (quoting LEVIATHAN).

215. *See supra* notes 84–85.

216. *See supra* text accompanying notes 188.

217. *See supra* text accompanying notes 189–92.

218. *Id.*

219. *See* HOBBS, LEVIATHAN, *supra* note 55, at 112 (describing Leviathan as "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 may use the

have given up his right of self-preservation *vis-à-vis* the sovereign,<sup>220</sup> that civil law has such an overwhelming effect in all aspects of life, that the individual is always obliged, and that there is little room for subjective evaluation of the individual's fears.<sup>221</sup> Thus a code of civil law inspired by natural law, and enforced by the courts of a strong monarch whose power is absolute should, under Hobbes's scheme, create reciprocal expectations of universal conformity to a given set of behavior patterns.<sup>222</sup> Furthermore, the scope for breach through subjective evaluation is greatly reduced in civil society.<sup>223</sup> It would however be incorrect to hold that the potential for breach is altogether eliminated.<sup>224</sup> More particularly, the individual does not completely give up his right to self-defense and self-preservation in civil society.<sup>225</sup> This becomes apparent if the instrumental purpose of civil society is examined: The individual contracted to give up his right of self preservation in order to enhance his security; therefore, he cannot be presumed to have obligated himself to do anything that is contrary to this purpose.<sup>226</sup>

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*strength and means of them all, as he shall think expedient, for their peace and common defence*").

220. See *id.* (“[A]s if every man should say to every man, *I authorize and give up my right of governing myself, to this man . . .*”).

221. WARRENDER, *supra* note 74, at 65 (“[I]n a secure ‘situation,’ the agent is always obliged to obey the law. . .”).

222. See HOBBS, LEVIATHAN, *supra* note 55, at 97 (“The names of just, and unjust, when they are attributed to men . . . signify conformity, or inconformity of manners, to reason.”).

223. See WARRENDER, *supra* note 74, at 86 (explaining that Hobbes endorsed the view that the individual's subjective interpretation of law only takes precedent when there is no sovereign authority).

224. HOBBS, DE CIVE, *supra* note 70, at 39 (“No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body.”).

225. *Id.*; see also HOBBS, LEVIATHAN, *supra* note 55, at 202 (“In the making of a commonwealth, every man giveth away the right of defending another; but not of defending himself.”).

226. HOBBS, LEVIATHAN, *supra* note 55, at 86–87 (“As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any good to himself.”), 202–03 (“[N]o man is supposed bound by covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person. . . . Also he obligeth himself, to assist him that hath the sovereignty, in the punishing of another; but of himself not.”). In *De Cive*, Hobbes reaffirms the existence of as well as the limits to the right of self-defense in civil society:

No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body. For there is in

The fact that the political covenant provides the potential for the expansion of the obligations of the citizen only helps to underscore the basic purpose of more effectively providing for individual security and self-preservation, for it is only under the civil system of universally applicable and enforceable law that the optimum conditions of security can prevail.<sup>227</sup>

The second question that arises in civil society is the scope of permissible unilateral breaches based on subjective evaluations. In the absence of civil government the individual can refuse to perform a covenant entered into with another if the former develops a reasonable fear or suspicion of the latter.<sup>228</sup> The test is (as indicated previously) subjective in that it is for the individual to decide whether he is in a position of insecurity.<sup>229</sup> By contrast, the effect of the political covenant, far from restraining an individual to act in self-defense in the face of patent danger, is to restrain him from action on *suspicion* of danger—in other words, the political covenant narrows the scope of “just suspicion.”<sup>230</sup> The rationale for denying the individual the right to repudiate covenants on the basis of a suspicion that the other party will not perform his part of the covenant is that the power of the sovereign in civil society is such that it will eliminate such insecurity due to the sovereign’s ability to enforce covenants and thereby guarantee their performance.<sup>231</sup> It

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every man a certain high degree of fear, through which he apprehends that evil which is done to him to be the greatest; and therefore by natural necessity he shuns it all he can, and it is supposed he can do no otherwise. . . . by the contract of not resisting, we are obliged, of two evils to make choice of that which seems the greater; for certain death is a greater evil than fighting. But of two evils it is impossible not to choose the least.

HOBBS, *DE CIVE*, *supra* note 70, at 39–40. The right of self defense is narrowly circumscribed in that it is available only in cases of mortal danger. In the same passage Hobbes also seems to allow self defense for “wounds, or some other bodily hurts” but then seemingly qualifies this by saying that this applies to wounds which one is not “stout enough to bear.” *Id.*

227. See HOBBS, *LEVIATHAN*, *supra* note 55, at 112 (noting that civil society via the Leviathan provides citizens with security and “peace at home, and mutual aid against their enemies abroad”).

228. See *id.* at 89 (“If a covenant be made, wherein neither of the parties perform presently, but trust one another; in the condition of mere nature, which is a condition of war of every man against every man, upon any reasonable suspicion, it is void . . .”).

229. See WARRENDER, *supra* note 74, at 39.

230. See *id.* at 32–33, 38–45, 114–18.

231. HOBBS, *LEVIATHAN*, *supra* note 55, at 89–90 (“But in a civil estate, where there is a power set up to constrain those who would otherwise violate

would appear that if the sovereign were weak or ineffective or for any reason unable to guarantee secure conditions of life, the individual would, under Hobbes's scheme, have the right to act upon suspicion or in prevention of danger by repudiating his obligations under a contract, or by conducting a preventive war.<sup>232</sup>

There are three general areas in which the individual in civil society may subjectively depart from or breach his covenant:

- (a) where the sovereign has lost effective control and can no longer guarantee expectations of reciprocal security;<sup>233</sup>
- (b) where one party to a covenant reasonably fears that another party thereto is about to break the covenant and the sovereign will not, for whatever reason, enforce the covenant;<sup>234</sup>
- (c) where any person or authority (including the sovereign) does or commands to be done any act that threatens the life of a citizen.<sup>235</sup> The latter has, in such cases, the right to refuse to obey the command and, if necessary, to fight back in self-defense, *provided that he genuinely fears harm*.<sup>236</sup>

It can be seen, therefore, that even in civil society the element of subjective evaluation of one's own fears is not completely eliminated.

It must however be remembered, as described above, that obligations in conscience (*in foro interno*) are deemed to be binding at all times regardless of the existence or nonexistence of civil government and regardless of the principle of reciprocity.<sup>237</sup> Thus the fact that a human legislator has not legislated on a particular matter does not mean that individuals may behave as

their faith, that fear is no more reasonable; and for that cause, he which by the covenant is to perform first, is obliged to do so.”).

232. In Warrender's words,

But if the citizen should claim exemption from his obligation on the ground that he suspects that the sovereign has not the power to enforce the agreement and then on the ground that his fellow citizen is not to be relied upon, it would appear that Hobbes would have to concede such a claim, though he would be entitled to insist that the suspicions or fears of the agent must be bona fide if his obligation is to be set aside.

WARRENDER, *supra* note 74, at 117–18. This admission is not fatal to Hobbes's thesis, but it does imply that the difference between the State of Nature and civil society is not so radical as he sometimes suggests. *Id.*

233. This conclusion is implicit in the passage in *Leviathan* quoted in *supra* note 231.

234. HOBBS, *LEVIATHAN*, *supra* note 55, at 89–90.

235. *Id.* at 91–92; *supra* notes 225–26.

236. *See supra* text accompanying notes 205–06, 211–12.

237. *See supra* text accompanying notes 188, 205–10.

they wish.<sup>238</sup> Thus obligations *in foro interno*, not conditioned on reciprocity, arise in two fields: The first is during man's pre-political natural condition when he is under the sway of the "first law of nature," i.e., when he is subject to the quasi-Kantian *duty* to endeavor peace for the *sake of duty* itself rather than merely in accordance with it. The second field is that which is left unregulated by the civil law.<sup>239</sup>

The concept of obligation *in foro interno* thus applies to Hobbes's doctrine as a whole (including his theory of civil government) and not just to his concept of the state of nature. If obligations *in foro interno* bind always, then such obligations are not discharged by actions which conform to the law where the individual did not actually *intend* to obey it.<sup>240</sup> In the latter instance the individual continues to be accountable to his own conscience and to God, who is the judge of intentions as well as acts.<sup>241</sup> This applies equally to societies without civil government as well as to those under civil government.<sup>242</sup> With regard to civil law, specific performance in conformity therewith *per se* satisfies that law regardless of the intentions of the actor.<sup>243</sup> This is because Hobbes's doctrine requires that the sovereign cannot be given the capacity to impose obligations which he cannot enforce.<sup>244</sup> Since a human judge cannot inquire into the individual conscience he is to concern himself only with the external acts of his subjects.<sup>245</sup> This does not mean that the individual has necessarily discharged all his obligations by merely acting in conformity to the civil law. He is to be regarded only as having fulfilled his obligations under "civil law *qua* civil law."<sup>246</sup> Intentions continue to be pertinent and for this the individual remains accountable to his conscience and to God.<sup>247</sup>

238. WARRENDER, *supra* note 74, at 71.

239. On the quasi-Kantian duty, see *supra* text accompanying notes 212–16 and *infra* text accompanying notes 254–58. On the "first law of nature," see *supra* text accompanying notes 58 and 191.

240. See HOBBS, LEVIATHAN, *supra* note 55, at 103 ("And whatsoever laws bind *in foro interno*, may be broken, not only by a fact contrary to the law, but also by a fact according to it, in case a man think it contrary. For though his action in this case, be according to the law; yet his purpose was against the law. . . ."); see also *supra* note 214.

241. WARRENDER, *supra* note 74, at 72.

242. See *id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. See *supra* text accompanying notes 188–94, 212–13.

In this regard, Hobbes's doctrine has a powerful appeal to the modern concept of individual and societal internalization of norms. Modern social-anthropologists and psychologists have developed the concept of internalization of norms—which in Hobbesian terms may be described as the acceptance of norms by the inner conscience as inherently just law—as a very effective guarantee for a secure and stable legal order.<sup>248</sup>

#### X. NATURAL LAW AND THE RIGHTS AND OBLIGATIONS OF SOVEREIGN AND SUBJECT

The theme of a “higher” eternal law permeates almost all aspects of Hobbes's philosophy. This “natural law” is antecedent to civil law and civil society, and is also, according to Hobbes, the *moral law*.<sup>249</sup>

One of the premises of this higher law is that every individual living in civil society must be deemed to have explicitly or tacitly “covenanted” to accept and obey the commands of his ruler or sovereign.<sup>250</sup> The individual must in fact adopt the commands of the sovereign “as if they were his own.”<sup>251</sup> The idea of such a “covenant” is not however as *a priori* as it might appear for, as the foregoing has demonstrated, civil life is the result of a rational calculus and is made up of a web of compensatory and reciprocal interactions,<sup>252</sup> so that the existence of a constant state of “war of every man against every man”<sup>253</sup> is of advantage to no one. Thus the obligation of the subject not to question his sovereign is an expression of collective rationality and is grounded on considerations of social necessity.

It is however also remarkable that Hobbes anticipates Kant by asserting the “imperative” character of the moral law, which he claims to be the “dictate of right reason.”<sup>254</sup> Thus the law of nature

248. LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 271, 344–45 (1974).

249. HOBBS, *DE CIVE*, *supra* note 70, at 142.

250. HOBBS, *LEVIATHAN*, *supra* note 55, at 109; *see supra* text accompanying notes 59–62.

251. HOBBS, *LEVIATHAN*, *supra* note 55, at 107.

252. *See supra* text accompanying notes 32–63, 197–202; *see also* Taylor, *supra* note 80, at 411. *But see* WARRENDER, *supra* note 74, at 74 (criticizing Taylor's overreliance on the notion of reciprocation).

253. HOBBS, *LEVIATHAN*, *supra* note 55, at 79.

254. HOBBS, *DE CIVE*, *supra* note 70, at 32; *see also* Taylor, *supra* note 80, at 409, 411. The parallel with Kant is striking indeed. The latter asserted that the transition from the natural to the civil condition was a matter of duty, which reason dictated. He viewed the civil condition itself as a “condition of right” because there was an objective, eternal, and universally binding principle of

is defined as the “dictate of right reason, conversant about those things which are either to be done or omitted for the constant preservation of life and members, as much as in us lies.”<sup>255</sup> Another definition given by Hobbes is that “A Law of Nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved,”<sup>256</sup> and that it is a law “by which men are commanded to endeavour peace.”<sup>257</sup>

An essential of natural law is its imperative character, thus making it possible to derive the following Kantian-style maxim: “Even in the ‘state of nature’ the ‘fundamental law’ is not ‘men cling to life and are reluctant to leave it’; but ‘I *am to* do what will, so far as I can see, preserve my life, and I am *not* to do what I judge will imperil it.”<sup>258</sup>

The higher or imperative law implies, according to Hobbes, that *obligation* is not created by the sovereign when he enacts laws and penalties.<sup>259</sup> The moral obligation to obey the natural law is a pre-political antecedent to civil society, which explains why Hobbes calls this obligation the “first” law of nature.<sup>260</sup> Again, the antecedent character of natural law underscores the utilitarian consequential as well as the reciprocal nature of obligation under the moral law. When this law commands a man “to endeavour peace” he needs to seek peace only from him who is willing to be at peace with him.<sup>261</sup> There is therefore no superior common protector of peace and a man has to judge for himself whether his desire for peace with another is reciprocated by the latter.<sup>262</sup> Thus

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right that was knowable to the human mind. IMMANUEL KANT, *Fundamental principles of the Metaphysic of Morals*, in KANT’S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 20 (Thomas Kingsmill Abbot trans., 6th ed. 1909). For further discussion, see DORE, *supra* note 87, at 415–17 (2007).

255. HOBBS, DE CIVE, *supra* note 70, at 32.

256. HOBBS, LEVIATHAN, *supra* note 55, at 80.

257. *Id.*

258. Taylor, *supra* note 80, at 411.

259. *Id.*

260. HOBBS, LEVIATHAN, *supra* note 55, at 80. See *supra* text accompanying note 58.

261. HOBBS, LEVIATHAN, *supra* note 55, at 80.

262. See *supra* note 226. The following passage from *Leviathan* is rather telling of Hobbes’s consequentialist ethic:

Whensoever a man transferreth his right, or renounceth it, it is either in consideration of some right reciprocally transferred to himself, or for some other good he hopeth for thereby. For it is voluntary act: and of

the pre-political disposition towards civil society is not (in contrast to Kant) an *a priori* principle but is grounded in experience and necessity.

The imperative and antecedent character of Hobbes's theory of natural law as well as the reciprocal nature of his concept of obligation is also borne out by his theory of rights. Rights consist of a variety of entitlements, duties and liberties,<sup>263</sup> which fall into two main categories, namely, rights as entitlements and rights as liberties.<sup>264</sup> Under the first category, rights are duty-imposing entitlements.<sup>265</sup> A right in this sense refers to the duties others owe to the possessor of the right in question.<sup>266</sup> It is particularly apt in describing the relation between sovereign and subject.<sup>267</sup> For instance, the sovereign has the right to levy taxes and the subject has the duty to pay them.<sup>268</sup> However, in a more general sense, the scope of the sovereign's "rights" depends essentially upon the duties-formula between subject and sovereign.<sup>269</sup> In other words,

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the voluntary acts of every man, the object is some good to himself. And therefore there be some rights which no man can be understood by any words, or other signs, to have abandoned or transferred. As first a man cannot lay down the right of resisting them that assault him by force to take away his life, because he cannot be understood to aim thereby at any good to himself. The same may be said of wounds, and chains, and imprisonment, both because there is no benefit consequent to such patience, as there is to the patience of suffering another to be wounded, or imprisoned, as also because a man cannot tell when he seeth men proceed against him by violence whether they intend his death or not. And lastly the motive and end for which this renouncing and transferring of right is introduced is nothing else but the security of a man's person, in his life, and in the means of so preserving life, as not to be weary of it. And therefore if a man by words, or other signs, seem to despoil himself of the end, for which those signs were intended, he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted.

HOBBS, LEVIATHAN, *supra* note 55, at 81–82.

263. See generally HOBBS, LEVIATHAN, *supra* note 55, ch. XIV; HOBBS, DE CIVE, *supra* note 70, ch. II.

264. WARRENDER, *supra* note 74, at 18.

265. *Id.* In Warrender's words:

Whatever can be said in the rights formula can be said in the (other people's) duties-formula, and therein stated more precisely. . . . Any serious examination of this alleged right would have to be a scrutiny of the duties-formula that corresponds to it. . . . [S]uch rights are merely the shadows cast by duties . . . .

*Id.* at 18–19.

266. *Id.*

267. *Id.*

268. HOBBS, DE CIVE, *supra* note 70, at 145–46.

269. WARRENDER, *supra* note 74, at 19.

the proper question to answer is not whether the sovereign has the right to do something, but what duties the subject has *vis-à-vis* those rights. This brings clarity to and avoids certain misunderstandings of the nature and scope of the rights of the sovereign. It shows that, strictly speaking, the obligation of the subject to obey the sovereign is not as absolute and universal as it is often made out to be. Thus, for example, the subject is not obliged to follow a command that he commit suicide.<sup>270</sup> In sum, in this first sense, Hobbes used the term “rights” to specify other people’s duties in the context of what the latter are obliged to do. Hence, this concept of “rights” is nothing more than a jural corollary of the Hobbesian concept of obligation.

The foregoing discussion confirms first the basic utilitarian goal of the Hobbesian commonwealth (sovereignty by institution) in which sovereign right *will* generally prevail and in which the subject *has* a general duty to obey the commands of his sovereign, the basis for both being the beneficial consequences of establishing the commonwealth. Second, in certain rare cases the subject has no duty to obey because he does not get “any good to himself” and because submission would undermine the very reason for which he agreed to submit to the sovereign. This is more clearly brought out in Hobbes’s second category of rights as liberties.

The second sense in which Hobbes uses the concept of “right” is that it is something one cannot be obliged to renounce.<sup>271</sup> A right in this sense is a freedom or exemption from obligation.<sup>272</sup> It represents the antithesis of duty. Thus a person possesses “true liberties” in relation to those things that he cannot be obliged to do.<sup>273</sup> This also exemplifies Hobbes’s “right to all things” in his

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270. HOBBS, LEVIATHAN, *supra* note 55, at 82. “No man can be understood by any words, or other signs, to have abandoned, or *transferred* . . . the right of resisting them, that . . . take away his life.” *Id.* (emphasis added to highlight that Hobbes clearly had the sovereign in mind since the “transfer” is to the sovereign). The transfer to the sovereign of the right of self-preservation was effected in order to enhance the subject’s security. Thus, he cannot be presumed to have obligated himself to do anything contrary to this purpose. *See supra* notes 226, 262.

271. *Id.*

272. Hobbes declares in *Leviathan*:

For though they that speak of this subject use to confound *jus* and *lex*, *right* and *law*, yet they ought to be distinguished, because right, consisteth in liberty to do, or to forbear; whereas law, determineth, and bindeth to one of them: so that law, and right differ as much, as obligation, and liberty, which in one and the same matter are inconsistent.

HOBBS, LEVIATHAN, *supra* note 55, at 80.

273. WARRENDER, *supra* note 74, at 20.

state of nature.<sup>274</sup> The “right to everything” does not imply that men are entitled to everything but that they cannot be obliged to renounce anything.<sup>275</sup> For example, a right to life or self-preservation does not signify that the individual is *entitled* to life, in the sense that other men (or the sovereign) have a duty to spare him; it signifies instead that the individual cannot be obliged to renounce his life and he may resist attempts on his life.<sup>276</sup> But if fellow citizens have a duty to refrain from killing the individual, this duty will derive from the *civil law* prohibition against murder, *i.e.*, obliging people to “endeavour peace” in concrete ways.<sup>277</sup> In this way civil law strives to harmonize itself with the precepts of the antecedent law of nature.

More importantly however, Hobbes’s utilitarianism is also very evident in the realm of what he designates as “true liberties,” or rights which the subject cannot be obliged to renounce. The right to life and limb (self-preservation) is a well worn example. Yet there is a zone of *other* incommensurable rights which Hobbes considers essential to life:

As it is necessary for all men that seek peace to lay down certain rights of nature; that is to say, not to have liberty to do all they list, so is it necessary for man’s life, to retain some: as right to govern their own bodies; enjoy air, water, motion, ways to go from place to place; and all things else, without which a man cannot live, or not live well.<sup>278</sup>

Were the sovereign to command acts inconsistent with these minimal life-sustaining requirements the subject may refuse to obey.<sup>279</sup>

It has been seen that all consequentialist social theories are intentionalist and purposive. Hobbes’s intentionalism has been demonstrated above through his numerous references to the “good”

274. HOBBS, *LEVIATHAN*, *supra* note 55, at 80.

275. WARRENDER, *supra* note 74, at 20.

276. HOBBS, *DE CIVE*, *supra* note 70, at 39–40.

277. *Id.* “[I]n a civil state, where the right of life, and death, and of all corporal punishment is with the supreme; that the same right of killing cannot be granted to a private person.” HOBBS, *LEVIATHAN*, *supra* note 70, at 40.

278. HOBBS, *LEVIATHAN*, *supra* note 55, at 95. This corresponds roughly to what H.L.A. Hart calls the “minimum content of natural law,” especially as it concerns the human need for “survival” (*perseverare in esse suo*). H.L.A. HART, *THE CONCEPT OF LAW* 191–98 (2d ed. 1994).

279. “[T]hough commanded by the sovereign, [the subject] may nevertheless, without injustice refuse to do . . . .” HOBBS, *LEVIATHAN*, *supra* note 55, at 133.

“reciprocity” “benefit” “consequence,” etc.<sup>280</sup> The following passage is expressly intentionalist:

It followeth therefore, that No man is bound by the words themselves, either to kill himself, or any other man; and consequently, that the obligation a man may sometimes have, upon the command of the sovereign, to execute any dangerous or dishonourable office, dependeth not on the words of our submission, but on the intention; which is to be understood by the end thereof. When therefore our refusal to obey frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse; otherwise there is.<sup>281</sup>

The qualifier at the end of this passage (“otherwise there is”) is an explicit recognition that the subject’s submission to the sovereign is conditional upon the “intention” or “the end for which sovereignty was ordained.” If the sovereign’s commands contradict this intention, the subject may legitimately refuse to obey them. Such refusable commands would include not just those which deny minimum life-sustaining values but also those which endanger the State or the commonwealth itself, for destroying the state would clearly contradict the purpose of the covenant.

Thus “true liberties” and “duty” are inversely related.<sup>282</sup> A liberty exists where the subject *cannot* be obliged. On this question Hobbes is concerned with the rights of the subject *vis-à-vis* the sovereign rather than the right of the sovereign against his subject. The latter has been settled by the covenant in which the subject has transferred his right of self-preservation to the sovereign and accepted the general duty of non-resistance to his commands.

The inverse relationship between liberty and duty clarifies the former question of the rights of the subject *vis-à-vis* the sovereign. It shows that the individual cannot be obliged to obey commands that destroy the purpose of the covenant. In other words, the inverse relationship simply makes certain contracts illegal, for example, a contract to kill yourself, or a contract not to resist someone trying to kill you.<sup>283</sup>

Also important to note in the zone of the inverse relationship is that the rights of the subject against his sovereign do not impose correlative duties on the sovereign; i.e., the subject does not have

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280. See *supra* notes 204, 226, 262.

281. HOBBS, *LEVIATHAN*, *supra* note 55, at 134.

282. WARRENDER, *supra* note 74, at 194.

283. See *supra* notes 224–26.

entitlements that impose duties upon the sovereign.<sup>284</sup> As demonstrated above, the inverse relationship only means that the subject cannot be made to renounce certain rights and may resist commands that tend in this direction. In other words, his general duty of non-resistance to the sovereign is held in abeyance in this zone of protected liberties.

The zone of protected liberties marks the outer limits of the abeyance of the duty of non-resistance. Beyond it the subject resumes his duty of non-resistance to the sovereign. Viewed in this manner, the right of the sovereign to govern and mete out punishments is not “given” to him by the subject but is derived from the natural “right to everything” which is renounced by the subject under the covenant (which renunciation gives rise to the duty of non-resistance.) As Hobbes observes in *Leviathan*:

It is manifest therefore that the right which the Commonwealth hath to punish is not grounded on any concession, or gift of the subjects. But . . . before the institution of Commonwealth, every man had a right to everything, and to do whatsoever he thought necessary to his own preservation . . . And this is the foundation of that right of punishing which is exercised in every Commonwealth. For the subjects did not give the sovereign that right; but only, in laying down theirs, strengthened him to use his own as he should think fit for the preservation of them all: so that it was not given, but left to him, and to him only; and, except the limits set him by natural law, as entire as in the condition of mere nature, and of war of every one against his neighbour.<sup>285</sup>

In this way Hobbes maintains that the subject gives the sovereign no right to punish, but makes his power more effective by resigning his own right to resist, except where he is himself put in mortal danger, or where the sovereign has lost the power to protect his subjects.

Apart from these limited cases, the subject remains bound by all the laws of the sovereign who, in turn, remains the supreme commander and law giver who is not accountable to the subject and owes no duty to him.<sup>286</sup> However unpalatable this omnipotence

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284. See WARRENDER, *supra* note 74, at 195–96 (“Thus the subject has a right to defend his life, but the sovereign has not necessarily a duty to spare it, and the sovereign has a duty to observe natural law, but the subject has no right to exact that observance.”).

285. See HOBBS, *LEVIATHAN*, *supra* note 55, at 190–91; see also WARRENDER, *supra* note 74, at 197.

286. HOBBS, *LEVIATHAN*, *supra* note 55, at 110.

of the sovereign may seem, under Hobbes's theory the existence of such a power is a condition of sovereignty, while the exercise of sovereignty is a condition for the existence of civil society which, in turn, is the *sine qua non* for the maintenance of those peaceful and secure conditions of life which assure the best prospect for self-preservation and the individual advancement of every person.<sup>287</sup> The pragmatism inherent in Hobbes's doctrine suggests that not only is civil government an eventual necessity, but without a civil sovereign, an even greater and more repressive power may emerge: "And whosoever thinking sovereign power too great, will seek to make it less, must subject himself, to the power, that can limit it; that is to say, to a greater."<sup>288</sup>

The same pragmatism involving a choice between the lesser of two evils appears to be reflected in Hobbes's theory of punishment. Commenting on the omnipotent power of the sovereign to enforce his law through punishments, Hobbes observes:

It is not enough to obtain this security, that everyone . . . do covenant with the rest . . . *not to steal, not to kill*, and to observe the like laws, for the pravity of human disposition is manifest to all, and by experience too well known how little (removing the punishment) men are kept to their duties through conscience of their promises. We must therefore provide for our security, not by compacts, but by punishments; and there is then sufficient provision made, when there are so great punishments appointed for every injury, as apparently it prove a greater evil to have done it than not to have done it. For all men, by a necessity of nature, choose that which to them appears to be the less evil.<sup>289</sup>

Yet Hobbes is careful to point out that each choice made by man is always through a utilitarian calculus. According to Hobbes, the voluntary acts of men have as their object some utility, or, at least, the avoidance of what is hurtful. It is the nature of man that he is compelled to choose that course of action which seems best for himself out of the alternatives before him.<sup>290</sup> Thus not only are voluntary acts (rights) taken with a view to attaining some gain, but utility is also the basis of *obligation*. All obligatory actions

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287. *Id.* at 137.

288. *Id.* at 157.

289. HOBBS, *DE CIVI*, *supra* note 70, at 72–73.

290. *See id.* at 24.

must be at least *capable* of being regarded by the individual concerned as in his best personal interest.

Viewed in contractarian terms, the political sovereign is legitimized as collectively rational because its power of coercion guarantees cooperation by everyone. Thus cooperation becomes individually rational. It eliminates the uncertainty that might otherwise result due to a recalcitrant subject considering himself to be better off by not cooperating.<sup>291</sup>

#### CONCLUSION

Hobbes's political philosophy is not deontological. He poses no founding principles for political society as inherently good; indeed he makes no claim that the good is even knowable. Instead his philosophy rests on an entirely utilitarian consequentialist edifice. His conceptual approaches to the nature of civil society, the scope and content of sovereign obligation, the divine covenant, the state of nature, and the dictates of right reason which compel the move to civil society are instrumentalist in nature, designed to ensure "safety and commodious living" for all.

Hobbes's theory of political society is based upon a theory of duty, and his theory of duty belongs essentially to the natural law tradition. Hobbes thus regards the laws of nature as eternal and unchangeable and, as the commands of God, they oblige all men who reason properly to believe in an omnipotent being under whose jurisdiction they must subject themselves in order to pursue individual goals under secure conditions. Without such a power, Hobbes regards man as having a natural tendency to slip into a

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291. KRAUS, *supra* note 32, at 63. Kraus states:

[P]olitical authority is collectively rational because it can transform what otherwise would effectively be a single-play prisoner's dilemma into a game in which cooperation is individually rational. By penalizing noncooperation (e.g., breach of contract) with coercion, political authority can provide even shortsighted individuals with incentives for complying in what otherwise would be a standard, single-play prisoner's dilemma in the absence of the state's sanction for breach. In addition, coercion can serve as a deterrent to those whose desire for glory disrupts and distorts their reasoning process. Even these individuals will no longer mistakenly estimate themselves to be better off not cooperating than cooperating. For a state sanction punishing noncooperation can dramatically increase the probability and magnitude of harm associated with it. Thus, the collective rationality of political authority is demonstrated by showing that political authority will prevent conflict and enable cooperation among individuals who, because of their shortsightedness, necessarily will experience conflict and noncooperation in its absence.

*Id.*

state of nature, a postulate for which he does not seek historical justification but rather for which he cites examples of domestic and international anarchy to show that his postulate has validity in current circumstances and is also potentially applicable to future situations. Thus the state of nature may occur at any point in the historical life of a collection of people, *i.e.*, before or after the institution of civil government. It is thus not an evolutionary doctrine but an analytic device designed to promote security, prosperity, equality and liberty.

The eternal and unchangeable laws of nature do not, however, always oblige in the same way and the principles which control the manner of their application vary with different circumstances: thus one set of principles governs man in society without civil government; another set applies to relations between men living in political societies; a third set of principles governs the obligations of the sovereign, and there is yet a fourth set governing the exceptions which suspend the normal duties of the subject to the sovereign. Yet in every situation the duties of men in the state of nature and the duties of both sovereign and subject in civil society are a consequence of a continuous obligation to obey the beneficial laws of nature. Therefore even the civil law of the sovereign does not create the duties of his subjects, his law merely expresses in a different *form* the antecedent law of nature.

The duty of the citizen to obey the civil law springs from the fact that he has made a valid covenant of obedience and that under natural law valid covenants must be honored. At the same time however, the scope of the civil law is not unlimited and although its authority remains beyond challenge in its own field, there are some classes of action, which cannot be regulated by civil law, and here the private conscience is the sole guide to action. The civil magistrate cannot take cognizance of the intentions of the citizen except where they are made manifest by deeds or words. But the secret intentions of men are also subject to natural law. Thus in the following instances civil law is incapable of replacing the private conscience so that action is governed by private interpretation of the law of nature:

- (1) where the sovereign has lost effective control (for example, due to civil war, foreign invasion etc.) and can no longer guarantee conditions of mutual security;
- (2) where a party to a covenant is reasonably feared to be about to break the covenant and the sovereign will not, for whatever reason, enforce the covenant;
- (3) where any person or authority (including the sovereign) does or commands any action that threatens the life of the citizen.

In any of these instances, however, the sovereign may apply sanctions (including death) against the citizen for disobeying him because (a) in doing so the sovereign cannot commit any "injury" to the subject who has authorized all his actions; and because (b) he commits no "iniquity" against natural law provided that in his opinion the act is justified. It can be seen therefore that the action of both sovereign and subject can be justified in these limited circumstances, even though the subject takes a course of action which the sovereign punishes.

Although Hobbes takes as the purpose of the covenant the maintenance of political society in which the citizen has no liberty to disobey sovereign commands, his theory of self-preservation must concede to the individual the right to disobey a command which threatens his life. Hobbes's theory of sovereignty may, in view of the foregoing discussion, be summarized in a series of propositions:

- (1) The political sovereign is created by covenant which is the means whereby men renounce their right to govern themselves individually and transfer that right to a single person or a body of persons who will guarantee security, prosperity, equality and liberty.
- (2) The subjects strengthen the power of the sovereign to the extent that they renounce their right of self-preservation.
- (3) The power of the sovereign is strengthened to the extent that the subjects give up their right to resist the sovereign.
- (4) There are certain basic life-sustaining values that the subjects cannot renounce.
- (5) The civil covenant remains valid on the condition that there exist conditions of mutual security subsequent to the covenant being entered into.
- (6) Only the unfettered exercise of sovereign power can ensure that these conditions prevail with the requisite degree of permanency and certainty.
- (7) The free exercise of sovereignty becomes a condition of the continuing validity of the political covenant and, therefore, of the existence of civil society.
- (8) In view of this, no exercise of sovereignty can be a breach of any secular covenant and hence no subject can be injured by the sovereign.
- (9) The sovereign is, in any case, not a party to the covenant and cannot therefore break it.
- (10) The sovereign is however bound by natural law to a system of divine obligations which require of him not merely to safeguard the lives of his subjects, but also to

provide for them other “contentments of life,” or the means to live well.

- (11) Stable civic order is, in the final analysis, ensured by men internalizing social norms *in foro interno*. The power of the sovereign to punish must be directed to this end. The purpose of punishment must not be revenge but some social good, including reformation of the offender so that norms are eventually internalized and accepted not out of fear of repressive sanctions but out of a belief in their inherent utility.

In this sense, it is clear that Hobbes is a moralist in so far as he, far from holding might to be right, believes that might in the context of political sovereignty has to be based upon right, “right” being understood as consequential utility.