

Thomas Hobbes  
Theorist of the Law

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This short article introduces the papers that follow on the topic of Thomas Hobbes as a theorist of the law. It provides an overview of Hobbes' reputation as a theorist of law in both domestic and international theory. The paper summarizes the papers that follow and suggests how they fit into the wider literature on Hobbes, legal theory and constitutional theory.

Keywords: Thomas Hobbes, legal theory, international legal theory, constitutional theory

The rule of law is an important indicator of the stability, security, and democratic nature of countries around the world. The World Bank, for instance, includes a measurement of the rule of law as one of six key indicators of good governance. Their basic definition of the rule of law captures 'perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.'<sup>1</sup> The consequences of these measurements, also provided by other institutions such as Freedom House and the UNDP, can play a crucial role in the economic success or failure of states in the existing globalized world order.

But what exactly is the rule of law? The above definition by the World Bank is what we might call a 'thin' definition, one that is really only about political life being lived in accordance with rules. A 'thick' description might be more substantive, including measurements of respect for rights, ensuring equal participation in legal and political life, and

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<sup>1</sup> See Worldwide Governance Indicators, <http://info.worldbank.org/governance/wgi/index.aspx#home>, accessed on 29 January 2015.

the nature of democracy. For instance, many countries in the world have a strong rule by law tradition, or one in which the law is used to enforce the power of the regime or leading elites surrounding the regime, and the system is upheld by corrupted judiciaries (Ginsburg and Mustapha 2008).

How do we evaluate the rule of law in political life? Should we rely on social science indicators alone, as the World Bank and so many other institutions do? Should we try to give more normative substance to the category of the rule of law? One way to start thinking about this problem is to turn to political theory and even to the history of political thought. In so doing, we might be able to better define not only the rule of law but the relationship of law and politics. For the rule of law is nothing more than an indication of what role law should play in political life, i.e., whether it should be a central and determining dimension of political life or if it should be a tool drawn upon by political elites when and if needed to shore up their power.

One theorist in the European tradition of thought who provides some surprising insights into this question is Thomas Hobbes. He has long been seen as a theorist with a rather simple and uninteresting conception of law, one that considers law as a tool for the sovereign to ensure order and peace. As he states in *On the Citizen*: ‘Legitimate kings therefore make what they order just by ordering it, and make what they forbid unjust by forbidding it. When private men claim for themselves a knowledge of *good* and *evil*, they are aspiring to be as kings. When this happens the commonwealth cannot stand (Hobbes 1998 p.132). Or, as he puts in his last work, one devoted solely to the nature of law: ‘A Law is the Command of him or them that have the Sovereign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, or what they must forbear to do (Hobbes 2005, p. 31).

But Hobbes is not as simple as this when it comes to the law. Law is central to Hobbes' understanding of political life, even if law does not serve as the means by which citizens can resist injustice or by which courts can discipline sovereigns. The sovereign may not be limited by law in the modern constitutional sense, but the law is that which makes the creation of the commonwealth possible, that which effectuates the sovereign's actions, and that which gives meaning and stability to political life for all those who have contracted together to create the commonwealth.

The essays in this collection look to Hobbes for new ways of understanding the relationship of law and politics. As these papers demonstrate, once we understand his perspective, Hobbes becomes a surprisingly helpful theorist, one whose conceptions of law and politics can reorient us away from staid debates about liberalism and human rights. Instead, Hobbes's insights force us to confront how law and politics relate in situations of instability, conflict, and possible war – that is, in situations that define most of the world today. This is not to say we turn to Hobbes because his 'realism' (whatever that might mean) is timelessly relevant; rather, we turn to Hobbes because his conception of law and politics shines new light on situations we confront today.

This introductory essay begins by suggesting how Hobbes's ideas challenged the existing natural law framework even while he articulates a theory of natural law that is his own. The following section explores the state of literature on Hobbes and the law. The final section reviews the papers in the collections, demonstrating how they contribute to the continuing relevance of Hobbes's insights on law and politics. While he might share certain elements that have come to define liberalism, Hobbes provides an important counter to the liberal hegemony in domestic and international political life. As will become evident from the papers that follow, there is no single thematic that unites them, other than a desire to bring to

light Hobbes's unique insights into current political and legal life, across domestic and international contexts.

### Hobbes's Legal Challenge

Thomas Hobbes' ideas were so controversial in his day, in large part because he moved the locus of debate around politics away from the natural law tradition. From the ancients through to the early modern period, natural law transcended the classical and Christian eras by providing a picture of political life as one reflective of the order in nature understood as both the reality around us and a divine reality. Sophocles gives a picture of a natural law that sits outside of what we might think of as the immediate natural world in his play *Antigone*. Antigone's resistance to King Creon's order to leave her brother unburied reflects the idea that there is a law that sits above human made codes. Similarly, in the Judeo-Christian scriptures, the prophets insist that the kings of Ancient Israel obey the laws of God. In the story of King David, the prophet Nathan forces David to realize the error of his ways on more than one occasion, perhaps most famously in the scene in which the king sends one of his generals to the front line in order to take his wife for himself. Nathan asks 'Why have you despised the word of the Lord to do what is evil in his sight?' (2 Samuel 12: 9). This prophetic role reminds even the anointed king of his duty to God.

Plato's idea of the law is similarly otherworldly, as is reflected in his dialogue, *The Crito*. In the famous description of Socrates refusal to escape his punishment, the protagonist explains that the 'the Laws' have shaped him and the city of Athens and so to abandon them now would be to violate his sacred duty. In his full length treatment of law, *The Laws*, Plato creates a political society in which the Laws serve as a means to create order and peace in society not only by regulating external behavior but by shaping its citizens' internal desires and very soul. The linking of virtue and law in Plato creates a political order in which all of

life is controlled through rules that reflect the unity of law and politics, creating a link between the natural world and the divine ideas that structure this world.

Aristotle provides a different, albeit related, understanding of the law. For Aristotle, the natural law is more directly rooted in the natural world around us, one that can be discovered through scientific investigations of the plant and animal worlds. His idea of the natural is, of course, different than our own, though recently some have argued that his approach to constructing a unified understanding nature, science, politics and ethics continues to define our relationship to the world (Leroi 2014). While he does not devote a single treatise to law, Aristotle's *The Politics* is ultimately about constitutional life understood through a natural law framework: 'He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast' (Aristotle 1946).

Cicero argued that the law must reflect the order of the universe, something similar to what Aristotle had argued, but more cosmic in scope. While not exactly a divine source for law, he famously presented an ordered universe in *The Republic*, especially in Scipio's Dream (Cicero 1998). Here Cicero describes a world in which both the stars and our human lives follow paths of order and perfect alignment with each other, giving us a model for how to order political life through law. The laws of nature should govern the entire world, both physical and human.<sup>2</sup>

Of course, human behaviour is not so easily ordered, a point Cicero well recognized. The tradition of natural law develops from this dilemma, one that sees how a perfect order ought to exist but sees how human beings, in pursuing their own interests, come into conflict with each other and with any kind of overarching order. Thomas Aquinas sought to refine these classical ideas in his treatment of law. Aquinas drew heavily on Aristotle, seeking to

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<sup>2</sup> C. S. Lewis argued in a series of lectures on Renaissance literature that Scipio's Dream was the idea of an ordered universe that captured the natural law idea in the classical and especially medieval eras (Lewis 1994).

combine him with the Christian scriptures. In Question 94 of the *Summa Theologia*, which includes a series of sub questions, Aquinas establishes a four part division of law: Divine Law, Eternal Law, Natural Law and Civil Law. Divine law is what comes to us through Scripture, while Eternal law is the logic of the universe. Natural Law is the Eternal Law as it is applied to individual people in the political and social realm. Civil Law is the body of laws that are passed by individual communities in their own governance. This law should correspond with the Natural Law, but Aquinas is quite aware that often it does not. While Natural Law should be something that is simply found in nature, it is also the case that Aquinas recognizes ‘unjust laws’ meaning that not all law is Natural Law, and that the idea of Natural Law can be used to discipline unjust laws. This means that Natural Law can serve the heuristic device of ‘teaching’ people what it means to be good. (Aquinas 2002).

Medieval theology became ever more specialized resulting in what came to be called the Scholastic movement. These thinkers focused on the technical details of not only natural law but the wider theology within which it was embedded. In the late medieval and early Renaissance periods, though, some of those theorists made advances on Aquinas’ thinking about law which took on a more international scope. For instance, Francisco de Vitoria drew upon the natural law tradition but used it to help understand the discovery of the new world. Ideas about the human person which were central to Aquinas’ formulations were called into question with the discovery of new peoples. In debates about whether or not to use force to convert the natives of the new world, Vitoria argued that while there was an obligation to spread the Christian faith, it was also necessary, according to natural law, to only use force in self-defense or to punish wrongdoing (Vitoria 1991).

Natural law developed in important ways through writers who explored the idea of war and peace. Following from Aquinas, perhaps one of the most important theorists of natural law is Hugo de Groot, or Grotius. His contribution to the Natural Law tradition and

the just war tradition are found in *The Rights of War and Peace* (sometimes translated as *The Laws of War and Peace*), written in 1625 while he was serving time in prison. Divided into three books, the text begins in Book I with an effort to redefine natural law. Famously, Grotius argued that natural law can be found through different sources including the rationality of the human person, divinely inspired guidance of religion, and evidence from history and current events. All of these sources provide insight into the proper behaviour of not just states but individual persons. In *The Rights of War and Peace*, Grotius became famous, or infamous at the time, for what came to be known as the ‘impious hypothesis’. Grotius stated that natural law would still be true even if there was no God. The very next sentence goes on to say that, of course, this is not true. At the same time, Grotius became known as the ‘secularizer’ of international law and the just war tradition with this one phrase.<sup>3</sup>

Indeed until the middle of the twentieth century ‘the prevailing doctrine, already firmly in place at the end of the seventeenth century and the beginning of the eighteenth through the work of Pufendorf, Thomasius, and Barbeyrac, was that Grotius was the initiator of the modern theory of natural law’ (Bobbio 1962, 1993, p 149). But in the last half a century the perspective gradually changed and among an increasing number of scholars the conviction spread that ‘modern natural law theory begins with Hobbes rather than Grotius’ (Bobbio 1962, 1993, 149).

It is beyond the scope of this essay to address the question of whether Grotius or Hobbes should be regarded as the founding father of modern natural law theory. The more modest aim of this brief excursion into the history of natural law is to remind the reader that

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<sup>3</sup> Many have argued that this misrepresents Grotius strong Christian beliefs, and a simple reading of the text of *The Rights of War and Peace* demonstrates that he draws heavily on the Christian tradition (Jeffrey 2006). But because of this phrase, and because of the way in which he expanded the foundations of natural law beyond the largely Christian context of the medieval natural law thinkers, he did play an important role in shifting our understanding of natural law.

Hobbes's theory represents a major change from ancient and medieval theories in so far as Hobbes's law of nature is no longer linked to the notion of a cosmic order, nor anchored to indisputable knowledge. For Hobbes God is 'unknowable' and 'nature' means something very different from what it meant to his predecessors: it is not identified with the rational order of the universe but related to phenomena that every man can observe (Letwin 2005). The unique traits of Hobbes's law of nature have led some readers to suggest that although 'Thomas Hobbes belongs, *de facto*, to the history of the natural law tradition', he also 'belongs, *de jure*, to the history of legal positivism' (Bobbio, 1993 p114)

#### Hobbes on Law: The State of the Literature

Although 'strictly speaking it is anachronistic to ask whether Hobbes was a legal positivist' (Lloyd 2001 p 285), many influential scholars have highlighted a significant connection between Hobbes and legal positivism. In 2001 David Dyzenhaus observed that Hobbes is 'generally regarded as the founder of the positivist tradition' in legal philosophy (Dyzenhaus 2001 p 461) and in 2005 Claire Finkelstein claimed that 'the traditional view of Hobbes on law holds that he is a legal positivist (...) a progenitor of Austinian positivism' (Finkelstein, 2005, p xiii).

Although dominant, the positivist reading of Hobbes has been disputed throughout the twentieth century. The original challenge is associated with the so-called Taylor and Warrender thesis that alerted readers to aspects of Hobbes's theory that cannot be accommodated within a legalist interpretation. A.E. Taylor contended that "Hobbes's ethical doctrine proper (...) is a very strict deontology, curiously suggestive, though with interesting differences, of some of the characteristic theses of Kant' (Taylor, 1938, p 408). Taylor claimed that only the hasty reader may fail to notice that Hobbes condemned the conduct of

princes ‘who unduly restrain the harmless liberty of the subject by a multiplicity of superfluous laws, allow law to be stultified by the imposition of inadequate penalties or made odious by the infliction of unnecessary severities, or poison its administration by conniving at the corruption of judges by bribes and presents’. (Taylor, 1938, p 415)

Howard Warrender argued that “Hobbes is basically a natural law philosopher” (Warrender 1962 p436) and that “[t]he sovereign does not create morality in any fundamental sense. The basic obligation of the citizens to obey the sovereign cannot itself be created by the sovereign’s fiat’ (Warrender 1962 p 440). For Warrender the citizen’s “basic obligation to obey the sovereign rests for each individual upon a private sphere of morality- an obligation to obey natural law as interpreted by himself” (Warrender 1962, p 441).

Although Taylor’s and Warrender’s interpretations did not convince many readers, a non-positivistic reading of Hobbes gained gradually ground during the second half of the last century, shedding light on the complex relationship between morality and politics, on the role of God, and on Hobbes’s commitment to peace. Moreover, a number of scholars emphasised the development of Hobbes’s legal thought from the *Elements of Law* to the *Dialogue*.

Arguably and interestingly, most interpreters that have focussed their attention specifically on Hobbes’s legal theory have questioned the connection between his understanding of law as command and that of legal positivism. For instance, Larry May challenged the association of Hobbes with Austin and claimed that ‘equity, not justice, is the dominant moral category in Hobbes’s political and legal philosophy’ (May, 1987 p 241); David Gauthier too contended that ‘Hobbes’s theory of law is inconsistent with any form of legal positivism’ (1990 p 8); Mark Murphy argued that Hobbes’s legal theory has ‘a false appearance of positivism’ (Murphy 1995, 872 ) and that ‘in matters of jurisprudence Hobbes was more a latter-day Thomas Aquinas than an early version of John Austin’ (Murphy 1995,

873). Even Michael Goldsmith argued that ‘although Hobbes provided some of the inspiration of John Austin’s later version of legal positivism, Hobbes’ theory varies in significant ways from that of Austin as well as from those of other legal positivists’ (Goldsmith 1996, p 4). In particular Goldsmith claimed that ‘whereas Austin makes the sanction or threat of penalty an essential characteristic of law, Hobbes does not’ (Goldsmith 1996 p 5) and highlighted the role of ‘equity’ in Hobbes’s construction (1996, p 13).

Most critics of a positivist reading of Hobbes’s legal theory have seen Hobbes’s discourse on the laws of nature in general, and on equity in particular, as crucially important to grasp his distance from legal positivism (Dyzenhaus 2001, p 470). Moreover many interpreters have highlighted a major difference between legal positivism and Hobbes in that for the latter but not the former political obligation precedes the issuing of laws (Finkelstein 2005, xiii).

Whether as a precursor of Austin or not, it is worth noticing that Hobbes’s legal theory has attracted limited attention until very recently. Indeed in 2005 Finkelstein brought attention to this phenomenon and conjectured that Hobbes’s legal theory was a casualty of the success of his political theory (2005 p xiii). In the last few years however, one can detect a new trend in Hobbesian scholarship and a fresh interest in his legal thought, facilitated by the excellent edition of *A Dialogue Between a Philosopher and a Student of the Common Laws of England* by Alan Cromartie (2005).

Indeed recently David Dyzenhaus and Thomas Poole (2012) have edited a valuable collection that discusses various aspects of Hobbes’s legal thought; Sharon Lloyd (2013) has also edited a volume that contains important explorations of Hobbes’s legal concepts, and Larry May (2013) has published a whole monograph focused on Hobbes’s legal theory. This latter work goes further than any other before in making Hobbes’s legal theory the centre of attention and in showing that Hobbes was influenced by, and in turn influenced, contemporary legal debates. May argues that Hobbes ‘allowed the moral wedge of equity

to be driven into his legal positivism' (2013, p. 83), that his commitment to equity prevented him from providing 'the kind of positivist account of law that Austin and Bentham advocated' (2013, p. 108) and drove him to take a position that anticipates ideas developed by Lon Fuller. According to May Hobbes sets the stage for a contemporary defence of international law and even for the International Criminal Court (2013, p 173)

### The Present Collection

The present collection of papers aims at offering a new orientation in both approach and aims. It does not compartmentalise Hobbes' theory into legal and political components; rather it shows that Hobbes's legal theory should not be interpreted in a narrow sense and that Hobbes's insights into public conscience, public reason, counsel, citizenship, justice and equity have much to offer to current debates on international law and constitutionalism.

All essays in this collection contribute answers to a number of key questions: What is the benefit of acquiring a deeper understanding of Hobbes's notion of law? How can a more accurate reading of Hobbes's theory enrich contemporary debates on 'rule of law', global law-making, and equity? To what extent has Hobbes influenced the way we conceive of global justice and international law today?

With the common aim of addressing the above questions, the papers use different approaches to Hobbes's theory, with some papers paying more attention to close reading of texts while others emphasizing the importance of context. The essays also provide very different answers to the above questions, with some papers emphasizing the value of Hobbes's constructive insights into law, while other papers highlighting the importance of Hobbes's challenges to current thinking. In spite of different approaches and different answers, all papers demonstrate that a careful re-examination of Hobbes's works that pays attention to his legal thought within the context of his political theory can enrich current discussion on global justice and global constitutionalism.

Larry May's paper brings forth the importance of public conscience in Hobbes's account of politics and law. In so doing, he connects this idea to the famous Martens Clause that played and continues to play a crucial role in international legal debates. The Martens Clause, part of the preliminary materials of the Hague Conventions, posits that humanity's 'public conscience' should play a role in international legal norms concerning warfare when treaties or conventions do not provide guidance. May argues that Hobbes also appeals to public conscience in his construction of the relationship between law and politics. Rather than the private conscience that might challenge the sovereign, the public conscience is that which reflects moral principles such as equity which May, here and elsewhere, argues is more important than justice in interpreting the law. May's paper thus elucidates an important component of Hobbes's theory and makes clear its relevance for international affairs.

Tom Sorell claims that, in an effort to clear Hobbes of charges of authoritarianism and legal positivism, a number of writers have exaggerated the role of equity in Hobbes's construct. *Contra* May, Sorell makes the case that equity is not as important as justice in Hobbes's argument. He distinguishes two senses of 'equity' in Hobbes and argues that inequity and heavy-handed rule can make it harder for the Hobbesian sovereign to discharge its principal duty, namely public safety. Therefore, according to Sorell, in Hobbes's argument equity assists a non-disabling exercise of sovereignty rather than a liberal exercise of sovereignty. It is in Hobbes's insights into security that Sorell sees the enduring value as well as the limitations of Hobbes's way of thinking about the nature and extent of the law, and about the purposes of submission to law and legislation.

Patricia Springborg makes the case that when he gave his first political work the title *The Elements of Law Natural and Politic*, Hobbes signaled an agenda to revise and incorporate continental Roman and Natural Law traditions for use in England. Springborg claims that Hobbes's use of natural law and revival of aspects of Roman law had a

considerable impact on the continent, to some extent through Pufendorf, and continues to resonate today. Springborg contends that in spite of some acknowledgement of Hobbes's contribution to European civil law, and specifically the German civil code, the larger legal context for his thought has not thus far been systematically addressed. Rather than a contributor to the common law tradition of England – against which he argued strongly – Hobbes can be seen as a theorist whose ideas can provide a new understanding of European legal codes and practices of justice.

Gabriella Slomp explores the nature of what Hobbes means by law making. She suggests that Hobbes's legal theory should not be interpreted in a narrow sense, and that special attention should be given to the concept of counsel, which Hobbes contrasts with command. While a law is a command in Hobbes's account, counsel is that advice given to the law maker. Slomp contends that 'counsel' is for Hobbes an integral part of the practical process of law-making, and that it is no coincidence that the chapter on Counsel in *Leviathan* immediately precedes the Chapter on Civil Laws. Slomp concludes her analysis by highlighting how the role of counsel in modern day international law might be seen in the way that NGOs such as the International Committee of the Red Cross play a crucial part in providing information and advice on international law making.

Maximilian Jaede explores Hobbes's ideas of citizenship, which he argues is very different from the current liberal account. Rather than having a right to citizenship, Hobbes argues that citizens are made by the sovereign, and can be unmade by them as well. Jaede reads across a number of texts in Hobbes's oeuvre to make his case. He highlights this active, making element of Hobbes's theory in order to demonstrate how his ideas about citizens depend very much on the first law of nature, the importance of creating peace. Jaede's insights point to how important it is in the current international legal order for modern day sovereign states to continue to retain this right of making and unmaking citizens, especially

as international criminals and terrorists seek to exploit legal loopholes in the sovereign state system. Hobbes's emphasis on the link between citizenship and peace, global peace, is one that Jaede's analysis brings to light.

Anthony Lang's paper provides a reading of Hobbes as a theorist of global constitutionalism. Unlike so much of the current literature on cosmopolitanism, which draws heavily on Kantian idealism or cosmopolitanism themes, Lang points to Hobbes strong individualism as providing a different way to see the global legal and political order. Lang draws from Hobbes *Leviathan* primarily, but also through a reading of the *Elements* and *Dialogue* to highlight the importance of Hobbes as a theorist of artifice and making, paralleling Jaede's emphasis on Hobbes as a maker of citizens. Lang then turns to readings of Hobbes by Larry May and Richard Flathman to draw out the importance of Hobbes's theories of law making at the international and global levels. Lang finds in Hobbes and his commentators resources for a global constituent power of sorts, but one that is disciplined by the need to continually advance peace in a world composed of individuals who can easily come into conflict. This chastened global constitutional order comes across as more viable than the cosmopolitan and Kantian derived alternatives.

Hobbes is not a theorist who compartmentalizes law and politics. Rather, for Hobbes, they are all of one piece, part of the form(s) of governance that make political life possible. The papers in this special edition do not advance a single argument or interpretation but together they bring about new ways of seeing Hobbes's relevance for the domestic, international and global political orders.

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