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Hobbes’s third jurisprudence: legal pragmatism and the dualist menace[[1]](#footnote-1)

BLS Nelson

bsnelson@uwaterloo.ca

*Abstract: This paper explores the possibility that Hobbesian jurisprudence is best understood as a ‘third way’ in legal theory, irreducible to classical natural law or legal positivism. I sketch two potential ‘third theories’ of law -- legal pragmatism and legal dualism -- and argue that, when considered in its broadest sense, Leviathan is best viewed as an example of legal pragmatism. I consider whether this legal pragmatist interpretation can be sustained in the examination of Leviathan’s treatment of civil law, and argue that the pragmatic interpretation can only be successful if we can resolve two textual issues in that chapter. First, while Hobbes argues that law entails the existence of public (sharable) reasons, he does not adequately defend the view that the sovereign is the unique authority over such reasons in all cases, especially as far as they concern known collective emergencies. Second, Hobbes both affirms and denies that a sovereign can fail to do justice, which is paradoxical. Both problems are best resolved by legal pragmatism, though the second problem resists a fully satisfying resolution. The upshot is that, although Leviathan ought to be regarded as an episode of legal pragmatism, there are trade-offs on every reading.*

*Keywords: legal philosophy; jurisprudence; natural law; prudential obligations; Leviathan; environmental ethics; legal pragmatism; legal dualism*

There is no consensus in the Hobbes scholarship about whether *Leviathan* is best characterized as a work in natural law or in legal positivism. The literature has shoehorned that work into one or other dominant camps, based on the emphasis they place on passages that correspond to their favored reading. Hence, not long ago, the fashion was to read Hobbes as positivist, while more recently there has been a swing back towards reading him as a natural lawyer. Still, no matter which side one takes, it is not uncommon for scholars to acknowledge that *Leviathan* was an independent, creative, and singular effort.

Indeed*, Leviathan* offers a rich and unique legal theory that defies easy categorization. I will discuss four characteristics of the theory that contribute to that awkwardness of fit.[[2]](#footnote-2) First, *for subjects*, it has a *prudential point* – the aim is to produce an account of law that ties the requirements of justice and law to appropriate directions for action. Second, his formulation of law has a *dual character*. In his view, a legal obligation is equally grounded in our reasons for compliance (*in foro externo*) and reasons to have confidence in the act of compliance (reasons *in foro interno*)*,* and these two conditions are individually necessary and jointly sufficient to provide subjects with legally and morally binding guides for action. Third, it is an attempt at a *post-classical natural law theory*. The *internal* aspect of law explains our tendencies towards action which compel our conditional empathy and solidarity, without implying that such traits are themselves legally or morally obligatory, absent the right conditions of the context. Fourth, it is a *proto-positivist theory*. The sovereign is the supreme agent of the law, having moral and legal rights and powers but no moral and legal obligations or disabilities to anyone but themselves. Any apparent deontological constraints on the conduct of the sovereign are *merely* prudential, which I call a kind of ‘sovereign self-care’.

What did Hobbes do to inspire so many potential readings? Hobbes’s beliefs about lawclash most prominently with positivist and classical natural law approaches in Chapter 26, *On Civil Law*. In that chapter, Hobbes makes it clear that his hope is to direct action, and his conception of justice prizes stability over moral excellence. Hence, he is a legal pragmatist in the broadest sense. However, in the course of that discussion, it also becomes clear that there are good reasons to think that the practical theory of law in *Leviathan* faces serious challenges. First, Hobbes argues that law entails the existence of public reasons for deference (binding both *in foro externo* and *in foro interno*), and that the criterion for legal validity (the tacit or explicit will of the sovereign) is both grounded and motivated in those reasons*.[[3]](#footnote-3)* Yet, he does not adequately defend the view that the sovereign uniquely functions to satisfy the role of steward of the common order in extreme cases. Second, Hobbes both affirms and denies the view that a sovereign can fail to do justice. Lacking resolution of both these passages, *Leviathan* will not have the resources to resist the possibility that the internal and external criteria for legal validity are fundamentally at odds.

The aim of this paper is to investigate the possibility that *Leviathan* is better understood as a case of legal pragmatism as opposed to classical natural law or positivism. The argument has two steps. In the first step (§1-2), I consider the respects in which *Leviathan’s* treatment of civil law resists the dominant traditions, and which suggest that he is best understood as a legal pragmatist. Then I reflect on two interpretive puzzles which put the legal pragmatist’s reading through its paces (§3-4). I conclude that, while both puzzles can be overcome by reading Hobbes as a legal pragmatist, there is nevertheless a plurality of possible readings, and trade-offs to each.

The structure of the paper is as follows. In §1, I consider the main elements of his vision of civil law. I argue that (a) a useful account of the internal and external *fora* must distinguish between *prima facie* and *ultima facie* prudential duties; (b) his account of the ‘social contract’ lacks some essential normative properties of a contract; (c) his account of the state of nature is a model, not myth or theory. In §2, I consider the ways that his jurisprudential theory contrasts with the classical natural law and legal positivist theories, in light of the distinctions in §2. Specifically, I argue in §2.1 that his depiction of law cannot be understood as classical natural law because it is predicated on practical models and not theories of the metaphysical and moral right, and argue in §2.2. that it cannot be understood as legal positivism because it expresses the conditions for valid law in terms of collective obligations to obey authorities, and these collective obligations are premised on irreplaceable *ultima facie* reasons for action. Throughout, it is assumed that there is indeed some unequivocal set of conditions for legal validity in the offing.

Owing to these peculiarities, his theory is best understood as legal pragmatism, in its widest sense. In §3, I introduce two textual puzzles that are directly related to his theory, and consider solutions based on §1-2. Both of these puzzles relate to practical issues (concerning obvious environmental catastrophe and sovereign injustice, respectively). The stakes are these: if *Leviathan* succeeds at solving both textual puzzles, then it is best conceived of as a successful case of wide legal pragmatism -- but if it does not succeed, then the theory will be vulnerable to criticisms offered by legal dualism. Although he does mostly succeed, his success is far from perfect. Even so, the theory in *Leviathan* is of enduring interest because it occupies a space which helps us to situate Hobbes in the legal pragmatist canon, and provides us with some important tools which we need in order to protect against the dualist menace.

*Definitions*

Before we get on with the discussion, we should clarify the four major depictions of law that are at issue: legal positivism, classical natural law, legal pragmatism (in its widest sense), and legal dualism.

Legal positivists trace the validity conditions of law to its relationship with its sources, either in norms of a legal culture (e.g., Hart’s rules of recognition), or in the rulings of an independent power to whom customary deference is given (e.g., Austin’s sovereign), or in the authority of a legal system whose normativity is taken for granted (e.g., Kelsen).[[4]](#footnote-4) Whatever their diverse opinions, positivists are of one mind in their judgment that the correctness or incorrectness of law *cannot be reductively explained* in terms of our other *moral* or *metaphysical* beliefs. The sources thesis follows from the need to distinguish between the evaluative and explanatory aspects of jurisprudence by separating facts about the validity and operations of a legal system from the discussion of their moral merits or demerits. To be sure, there is considerable disagreement over the role of moral norms in juridical interpretation. For ‘inclusivist’ positivists, the judge’s interpretations of law might depend on their understanding of the law’s moral merits, at least so long as the judge also makes some coherent sense of what has been said in the rulings of the sources of law.[[5]](#footnote-5) For ‘exclusivist’ positivists, the correct interpretations of law can only issue from rules of interpretation that are themselves explicitly endorsed by those sources.[[6]](#footnote-6) Whatever their disagreements, for all positivists the validity of law is determined by its sources. It is no small measure of the success of the positivist perspective that it is amenable to a social science of law, since social sources can be identified through empirical investigation.

Classical natural law theory binds the conditions of legal validity to antecedent beliefs concerning the right, insofar as ‘the right’ is understood as a morally and metaphysically loaded concept.[[7]](#footnote-7) The classical natural lawyer holds that the human law is a precise instantiation of laws of the greater normative universe. This involves two major proposals: first, that law is rooted in precepts, not principles; second, that it is a function of clear theoretical convictions about human nature and action (and not, e.g., a best guess at managing expectations). So, for the classical natural lawyer, the precept to obey one’s rulers can be rephrased as a requirement to do good, albeit under a longer description and with suitable caveats. So, for Aquinas, the dictates of the rulers are always *expressions* of justice and the right, hence human law; and it is generally unlawful to disobey such directives since the nature of the right tells us that there is a strong presumption that rulers are indeed giving expression to the good and the right in normal conditions. Yet legal dispensations must be offered to those who disobey the rulers during abnormal conditions, since law primarily governs normal conditions.[[8]](#footnote-8) Moreover, in some very rare limiting cases, it is legally permissible to engage in insurrection against those tyrants who violate divine and natural law.[[9]](#footnote-9) In consequence, for a classical natural lawyer, an unjust law is at best not law *strictly speaking* (law *qua* law), and at worst it is no law at all.[[10]](#footnote-10) It is from such considerations that classical natural law can be justly described as a theory for whom the legal ‘is’ derives from truths about moral and metaphysical ‘oughts’ (and ‘ises’).

To be sure, laws of nature rest at the core of this characterization of classical natural law, and in the Thomistic idiom they are steeped in a particular sort of religious orthodoxy. However, one might argue, one need not be religious to be a natural lawyer.[[11]](#footnote-11) Indeed. But the important point is just to take Aquinas as the exemplar or fixed point, so as to notice the section of conceptual space that is potentially not covered by legal positivism, on the assumption that there is some permissible range of theoretical disagreement over normative moral theory. When we do so, we notice that one of the striking motivations behind his view is that the ‘law’ is itself a law of nature, and that this metaphysical precept partly constitutes what counts as a sort of ‘natural law theory’ in the classic and distinctive vein. To remove any reference to laws of human nature, and laws of nature, is to depart from one of the more interesting elements of the classical aspects of that tradition.

When considered in its widest sense, ‘legal pragmatism’ is a ‘third view’ in philosophical jurisprudence.[[12]](#footnote-12) Much like its philosophical counterpart, wide legal pragmatism delights in reconciling perceived dualisms (e.g., between classical natural law and positivism, or between empiricism and rationalism). The project of reconciliation depends on the choice to adopt a ‘practical point of view’ – that is, for any philosophical disagreement, *we must ask whether that disagreement makes any difference to our experience of (and action in) the world*, and if we cannot, then we owe it to ourselves to wonder if there really is any serious problem at all.[[13]](#footnote-13) At the core of legal pragmatism is a concern with resolving the problems of a public by achieving minimally good consequences. The aim of law is to make consequences predictable and stable under agreed-upon conditions.[[14]](#footnote-14)

Similar to natural lawyers, and unlike positivists, legal pragmatists are open to the possibility that facts can partly determine the validity of law -- and hence accept that the legal ‘is’ is constrained by practical norms. If agents of an institution make rules that a public can foresee would lead to legal chaos – that is to say, if they make absurd judgments -- then those rules are no law at all. In contrast, inclusive legal positivism must hold that a morally or factually absurd verdict can only be regarded as a legal nullity insofar as the right source (e.g., a later Court) recognizes it as such; and an exclusive positivist holds that, even then, the Court’s invalidation must conform to standing rules of interpretation from the correct source.[[15]](#footnote-15) Yet the legal pragmatist is also unlike the classical natural lawyer, in that the pragmatist denies that substantive (non-sourced) reasons for a given interpretation of a rule shall make a difference to its legal effect unless those reasons are grounded in a strict empirical science (i.e., a science that is reluctant to explain phenomena in terms of unobservables). Moreover, the law is conceived of as a relatively modest moral qualities, more akin to a technology or instrument than as a determination of right conduct by a virtuous reasoner.

In conceptual space, a *legal dualist* is located at the antipode of the pragmatist’s position. Just as the philosophical dualist, René Descartes, argued that there was an irreconcilable difference between mind and body, the legal dualist argues that we cannot explain either of the internal and external *fora* of law in terms of the operations of the other. Instead, the dualist supposes that these *fora* coexist as separate but appropriate discourses within a single jurisdiction, each with their own independent criteria for legal validity, and producing their own idiosyncratic sense of the ways that legal rights and obligations are coordinated. The law of the theory is distinct from the law of practice. In this sense, legal dualism is an unwelcome and disturbing variety of legal pluralism, as it attributes two irreconcilable and ineliminable structures of law within a single jurisdiction.

Why would anyone adopt such a seemingly monstrous and cynical view? On the one hand, a modest legal dualist could offer a potential explanation of troubled governments (i.e., where law *de jure* is at odds with law *de re)*. Unlike other legal theories, the legal dualist would not blush when they recognize these essentially defective or bifurcated legal regimes as systems of law. Further, an especially ambitious legal dualist could assert that all states are better understood as conflicts between incommensurable but overlapping systems -- for instance, by noticing that there is an inherently agonistic tension in at least some (if not all) forms of government. This sort of legal dualist would say that in every jurisdiction there is a gap between word and deed, though the gap is wider in some jurisdictions than others.[[16]](#footnote-16)

Legal dualism is a potential ‘third theory’, in the sense that it cannot be fully reconciled with the clearest expressions of the natural law and positivist traditions. Like legal positivism, legal dualism agrees that we cannot conclusively infer a legal ‘is’ from a non-legal ‘ought’ -- both doctrines agree on the separability thesis. However, unlike positivism, dualism holds that the facts about law are always bifurcated into practical and theoretical branches, and is skeptical of the pursuit of a unified theory. The dualist’s account has more in common with classical natural law than with positivism insofar as the dualist tries to make sense of legal order from the point of view of *rule of law*. Yet, unlike other theories (including positivism), the dualist argues that this separation between law and conventional morality owes to the fact that *the very idea of legal validity is equivocal --* thatthe project of looking for unique, identifiable, and determinate conditions of law is misguided.[[17]](#footnote-17) For (says the dualist), it is *just perceptually obvious* that the law of the streets is one thing, and the law on the books is another. Like both the classical natural lawyer and legal pragmatist, the legal dualist agrees that sources do not exhaust law, since (for them) a theory of law is supposed to be about the different kinds of reasons we comply with orders. Yet, unlike the classical natural lawyer, the dualist does not believe that the positive aspects of law (e.g., the sovereign’s general command) can be explained in terms of its higher theoretical principles (e.g., the principles of nature). For wherever we find any unity to our legal rules, it shall be only be unity within the structures of one or another discourse – one based on reasons for action (the law of deeds and commands), and one based on considered beliefs about reasons for action (the law of words, rights, and principles). Like legal pragmatism, dualism holds that neither external social sources nor internal moral convictions are individually sufficient to fix the conditions for valid law. However, while the pragmatist believes these criteria can be reconciled into a single account by treated as individually necessary and jointly sufficient, the dualist denies the presupposition that a criterion of unequivocal legal validity can ever be satisfied. In this way, the legal dualist actively repudiates the central theoretical aim of *Leviathan,* which is to propose a decisive means of adjudicating political and legal problems by unifying the natural and civil parts of law. It replaces the eponymous leviathan with a hydra of two heads.

The differences between the four views are perhaps easiest to digest when considered in terms of a toy case. Imagine, if you will, a state where the enforcement arm of the government produced system-wide incentives for patterns of conduct that the higher courts and broader public considered unconstitutional or criminal: e.g., systemic racial injustice. Suppose, also, that the higher courts had only periodic (but nevertheless significant) success in reining in enforcement. Such a state is, in an important sense, legally defective. Glossing over complexities for the sake of illustration, I think (all other things being equal) that we might expect the various legal theories to arrive at the following verdicts. The conscientious legal positivist would say that there is no law just in case the general habits of obedience to the sovereign, the rule of recognition, or rule of identification have been disrupted. The classical natural lawyer would say that the law belongs to whichever party has moral authority, considering facts about human nature and their convictions related to political morality. The legal pragmatist would identify the law with the determinations of whichever party was most likely to achieve stability through centralized rule, irrespective of moral proprieties or antecedent notions about the correct social source. And the legal dualist would deny that there is a single unequivocal criterion for legal validity available to explain the facts of the state, effectively refusing to choose between the arms of government. There is, instead, the law-of-aspirations and law-of-facts, and the responsibility of a people is to determine which of the two kinds of law aligns with the requirements of critical morality.[[18]](#footnote-18)

1. DISTINCTIVE ELEMENTS OF WIDE LEGAL PRAGMATISM

Throughout *Leviathan*, Hobbes’s account of state legitimacy relies on the idea of an original covenant. The point of the original covenant is to subordinate the will of subjects to the verdicts of an external arbiter, the sovereign office. Ostensibly, by laying down their hands in joint deference to the sovereign, citizens gain a means of efficient resolution of civil disputes. The hoped-for aim of this general acquiescence is a system of civil law that would allow citizens to leave a state of natural conflict and to pursue a life buoyed by peace and security, or a common order.

Hobbes asks us to look at legal theory from a *prudential* perspective, i.e., where the terms of valid law are grounded in normative facts about the obligations that citizens have to conduct themselves in an orderly way. In the first instance, it is the covenant that produces our obligations to obey the law. Thus, natural rights provide subjects with a basis for accepting the discretion of the sovereign as an arbiter in civil disputes. However, Hobbes also thinks the law, considered as a body, is a force that produces order by way of its capacity to induce awe and compel obedience.[[19]](#footnote-19) Indeed, since the production of order is a central aim of law, it demands that common acquiescence. Those rights become legally binding on subjects only after the sovereign office is instituted, and impose no legal obligations on the sovereign herself.

In this section, I consider two features of the Hobbesian contract that force a shift in focus towards wide legal pragmatism, and away from legal positivist and classical natural law interpretations. First, I articulate a sense in which Hobbes’s so-called “natural law” is appropriately regarded as *normative*. Because the natural aspects of his jurisprudence are normative criteria for legal validity, Hobbes cannot be regarded as a positivist, as he goes beyond the sources thesis. Second, I consider the oddities of the social contract and state of nature thought-experiments. I resolve these features by suggesting that advancements in philosophy of science permit us to make anachronistic improvements to our understanding of what Hobbes had in mind, even though some of the distinctions were not ones available to him. Once this more fine-grained conceptual vocabulary is made available to us, I suggest that the inferential role that the state of nature plays in *Leviathan* is as a *model*, not as a *political* *myth* or *scientific* *theory*. Because the state of nature and original covenant are models, not a metaphysical theories or myths, Hobbes’s jurisprudence only holds insofar as it is useful to condition our expectations about how others shall act -- i.e., without any pretense that ‘utility’ implies metaphysical or moral ‘truth’. Since the original covenant is not regarded as a premise with metaphysical or moral truth, the argument to which it contributes cannot be a classical natural law theory. These features of his political theory are best understood as attempts to ground ultimate prudential obligations of subjects to the law from the practical point of view.

1.1 DEGREES OF REASON

When Hobbes refers to the laws of nature in *Leviathan,* he equivocates between two meanings -- either the natural principles that guide the private actions of rational people or the unwritten positive laws that govern their public actions.[[20]](#footnote-20) The former reading is a holdover from *On* *the Citizen*, where the natural law was tied to the dictate of practical reason, a fallible capacity to handle truths related to what is required for survival.[[21]](#footnote-21) In that previous work, the “legal” part of natural law owed to the mere fact that there is a standard of correctness which distinguishes right and wrong in such cases: “…that wrong which is done, we say it is done against some law.” [[22]](#footnote-22) In contrast, *Leviathan* required that law entail publicly accessible reasons for action, e.g., rules held in force by the sovereign.

One way of trying to explain the difference between natural ‘law' and the unwritten positive law is to talk about natural laws as *descriptive* and positive laws as *evaluative*.[[23]](#footnote-23) The descriptive reading gets some plausibility from the fact that Hobbes sometimes favored language which suggested the natural laws are mere qualities that produce dispositions to behave. In that sense, he suggests that the laws of nature in the state of nature “are not properly laws”. [[24]](#footnote-24) However, the descriptive reading is awkward, as Hobbes also uses the normative language of ‘right’ and ‘virtue’ in connection with these natural characteristics, and these both imply standards for correct (or best) rational action, even if they fall short of having peremptory force.

Here is how we might split the difference. We may say that Hobbes’s view implies a prudential deontology which is composed of reasons for action and locate the goodness of the reasons on a spectrum. On the one end of the continuum, reasons are *prima facie reasons* (necessarily take on the *form* of being reasons for action); on the other end are *ultima facie* reasons (decisively sufficient to direct action, thus having the *peremptory* force of a genuine imperative). In between the two are *pro tanto* (minimally but defeasibly good) reasons for action. Natural obligations are at least *prima facie* reasons for action, and usually do not go beyond *pro tanto* status*.* Yet moral and legal reasons are and must be *ultima facie* reasons*,* and are only morally and legally binding in the context where a sovereign is in power. Hence: “For though [the desire for procuring and maintaining peace] be naturally reasonable, yet it is by the sovereign power that it is law; otherwise, it were a great error to call the laws of nature unwritten law”.[[25]](#footnote-25) At best, we can say that *prima facie* reasons for action reflect our *legal interests*, but this is not to say anything about whether or not they bind the courts.

Robert Ladenson provides a different reading of Hobbesian jurisprudence. In his view, the law implies that the sovereign’s “right to rule” is a justification-right, i.e., does not imply correlative duties of a population to obey the dictates of their rulers.[[26]](#footnote-26) Yet that reading departs significantly from Hobbes, who *explains* the powers of the current sovereign by reference to the original ‘contractual’ acquiescence.[[27]](#footnote-27) Ostensibly, that original contract entailed and required both common subjection (i.e., transfer of powers) and entailed a joint obligation to obey the sovereign.[[28]](#footnote-28) If there is a mere ‘justification-right’ in Hobbesian legal theory, it is exercised on behalf of citizens towards their sovereign, i.e., the citizen’s *right to be ruled justly,* sincethe sovereign has no legal obligation to satisfy any such right. But this is to just to flip Ladenson’s interpretation on its head.

The power of the ‘rights-based’ reading is the realization that, intuitively, a ruler sometimes seems unworthy of civil obedience. Yet, Hobbes’s *prima facie* natural duties have a vexed relationship with the moral status of the laws. For him, justice is only possible in the context of the commonwealth. And the verdicts of the courts only *sometimes* seem to be just.[[29]](#footnote-29) That said, the law is always necessary (and, on some readings, sufficient) to meet the *actual* demands of justice: “For … nothing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice, or injury”.[[30]](#footnote-30) Civil obedience is genuinely prudentially required, except in cases where one’s individual life is put in jeopardy by sovereign persecution. But even here, one’s flight from justice would be prudential, not moral, because it concerns only the individual.

Natural rights are normative not legal, while unwritten laws are both normative and law. For Hobbes, the difference between unwritten civil laws and natural ‘laws’ can be understood by taking note of the difference between *the authorship* of a rule and the *authority* whose approval makes the rule legal. Natural virtues or ordinances of *prima facie* reason are natural in their genesis because they are authored and displayed independently from any sovereign office. They are also natural because they are the sorts of precepts of reason that are apt to be thrown to the winds when passions take hold. In contrast, unwritten laws are *ultima facie* reasons, deriving their legal authority from the sovereign, even though they are *authored by* the population of reasonable people. So, he says, “Every subject is by this institution author of all the actions, and judgments of the sovereign instituted”.[[31]](#footnote-31) Both contrast with written laws, which are both authored by and authorized by the sovereign office.

In summary, Hobbes’s talk about “natural law” is fraught with ambiguity, as he mixes descriptive and normative articulations of those norms. One way of resolving the ambiguity is to say that his account of the laws of nature is merely descriptive, but this seems untenable. Another way of resolving the equivocation is to say that the right to rule is a justification-right, which implies that subjects have no duties to obey the sovereign, which is surely false for Hobbes. It is better to say that he thinks natural laws are normative guides to action for subjects (i.e., norms of deference), but possess a less significant *force,* being merely *prima facie* reasons. Meanwhile, the demands of justice and law have the force of *ultima facie* reasons. By taking this view, we can say that there is no sense in which the sovereign's right to rule fails to be realized in subjects’ collective obligation to trust the rulers, and also to say that on those occasions where the sovereign has murderous designs, the person has no duty to obey the sovereign.[[32]](#footnote-32) It is most productive to think of the difference between Hobbesian natural ‘law’ and unwritten positive law as a difference in authorship, though only the unwritten positive laws have authority in the context of a commonwealth since only they have the status of *ultima facie* reasons for collective action.[[33]](#footnote-33) These *ultima facie* or peremptory prudential reasons are binding on the actions of a collective, and nothing less than *ultima facie* duties can make law possible.

1.2 MODELS, MYTHS, AND THEORIES [[34]](#footnote-34)

There are two essential concepts at the roots of the *Leviathan* -- the idea of a *social contract* and the idea of *the state of nature*. Both have an explanatory role in his theory. However, neither are quite what they seem. The contract is best interpreted as a ‘pseudo-contract’, and the state of nature thought-experiment is a model, not myth or theory.[[35]](#footnote-35)

The contents of the original covenant potentially diverge from the present sovereign’s will. For instance, as a premise in his defense of the tenth law (*modesty*), Hobbes thinks it is unreasonable to suppose that anyone would ever divest themselves of an equitable claim to resources when entering into the original contract (like self-control, air, water, etc).[[36]](#footnote-36) All the same, by right of transfer, it is legally possible for the sovereign office to squander a body of natural resources in practice, even if a collective right to those resources were ostensibly retained by subjects in theory. The original contract might have had clauses and exceptions (so to speak), but the sovereign decides which clauses have sufficient normative force to be ultimately legally binding.

Barring the exception of political revolution, there are no externally imposed limits to the legal powers of the sovereign office. There are two reasons for the broad and expansive authority of the office. First, *the sovereign* has *never* made an agreement *with the people, i.e.,* a covenant that spells out the limits of the powers of the rulers.[[37]](#footnote-37) The sovereign functions as an external arbiter brought in by a contract between subjects and subjects. If the sovereign had ever been in a contract with the subjects – say, a contract to govern impartially, or not to usurp a particular body of resources – then it would follow that the sovereign could be legitimately usurped or ignored. Hobbes rejects this possibility with full force. Second, the nature of the contract between all and all does not, and cannot, place any effective constitutive limits on the powers of the sovereign. After all, both the contract and the office of the sovereign is preserved even after conquest or revolution. [[38]](#footnote-38) Such unusual chains of succession could ‘renegotiate’ any supposed provisos built into the original agreement.

Insofar as there is a divergence between the original contract and the *present* sovereign office, it is the will of the present sovereign that constitutes the commonwealth. In this sense, for Hobbes, there are no strict legal rules for succession. The absence of rules of change is one major difference between Hobbesian and Hartian legal theory.[[39]](#footnote-39) The only limits on sovereign power are self-imposed limits reflecting *the prudential* duties of the sovereign to herself, listed in chapter 30.[[40]](#footnote-40) For Hobbes, the sovereign’s legal powers stretch just as far as their political ones. In that sense, the idea that a present sovereign might make a decision *ultra vires* is implausible at best.[[41]](#footnote-41)

Hobbes explains the genesis of state and its legitimacy in terms of a ‘contract’ or ‘covenant’. The ‘contract’ functions in Hobbes’s account to gesture at the face-value reasons that subjects have to trust their rulers. Hobbes thought that the reasons for trust bottomed out in the consent of the governed. But he made use of the notion of consent in a rather expansive sense, in the state of nature: e.g., to include consent under duress.[[42]](#footnote-42) Since the original contract occurs in (and takes one out of) the state of nature, it follows that coercion could have been used to compel subjection to it beforehand. Moreover, that original covenant does not need to be unanimous.[[43]](#footnote-43) Thus, by implication, the original “contract” could be the coercion of a majority by the minority.

Since most of us think that *contractual agreements to act* are a different kind of thing from *coercion to act*, we might disagree that Hobbesian theory was “contractualist”. Moreover, the contract can spell doom to a population through the mismanagement of natural resources, and still not be voided (except once the population dies). To emphasize the normative salience of his unusual conception of the social contract, I refer to it as a “pseudo-contract”.

 Hobbes’s pseudo-contract occurs as a reaction to the state of nature. Ostensibly, in their natural condition, human actors are disposed to act in certain ways. They are born equal in their potential powers, because each person potentially possesses comparative advantages and disadvantages. These comparative (dis-)advantages mean that everyone is at equal risk of hardship in a competition for resources. Where there is equal hope in securing resources, conflict arises. Such battles need not be at the level of full-scale dramatic engagements -- the point is that all can be expected to prefer to engage in conflict than to cooperate.[[44]](#footnote-44)

Hobbes thinks that the ‘state of nature’ helps to explain the law, but what kind of role does the state of nature thought experiment have in his explanation? If we were to ask Hobbes, he would likely say that the state of nature postulate is a *theorem* which has definite signification and draw analogies to the geometers.[[45]](#footnote-45) But I would like to say that the state of nature is better understood as a *practical* *model* as opposed to a *scientific theory* or a *political* *myth*. Scientific theories are either deductive consequences of axioms or well-supported empirical hypotheses and thereby held as true. Myths compel us into taking actions which serve the interests of the myth-maker and their ideology while making no justifiable claim to being grounded in historical facts and held as true.[[46]](#footnote-46) Both contrast with *models*, which are abstract descriptions of (potentially idealized) cases, constructed around the analysis of a limited and well-defined set of relationships, usually grounded in observations that are most salient only to particular kinds of jurisdiction, and sometimes used in order to reason in practice about general facts (e.g., in ethnocentric fashion).[[47]](#footnote-47) Unlike myths or theories, models do not even pretend to be either true or false when used in the context of the general study of phenomena – they are only better or worse, useful or useless. This distinction is important to make since models are productive in science, and hence fit best with Hobbes's social-scientific aspirations, without erroneously relying upon strict correspondence with historical reality. Models bear on the facts without necessarily corresponding to them.

It is not clear how the state of nature model is grounded in plain facts which held as a generalization. For one thing, by his own admission, Hobbes does not seem to believe that there was ever a uniform state of war between all parties at all times. Nor is there much textual evidence that Hobbes aspired to be rigorous in his task as a historian. Yet Hobbes believes that the state of nature model is partly recommended by factual-historical considerations: a) from an inference about the past that is based on observations of civil war; b) by second-hand observation of some pre-agricultural societies living in the Americas; and, (c) observation of war between nations.[[48]](#footnote-48) But (a) is a retrodiction, not evidence; (b) is a particular case, hence at best it is imperfect inspiration for the ‘state of nature’ model, not as a proper generalization; and (c) is strictly irrelevant to a discussion of intra-state law.

Since the state of nature postulate is ostensibly based on evidence, and it generates a space of practical reasons that make a justifiable difference to how we act, it isn’t a political myth. Yet it is plausible to say that the evidence is insufficient to direct those consequences, and inappropriate to call the state of nature ‘true’. So, it is best to conclude that it is a model whose aim is to spell out the facts about *what you can reasonably expect* in the absence of sovereign governance.[[49]](#footnote-49)

1. CODEPENDENT ASPECTS OF WIDE LEGAL PRAGMATISM

It is easy to read Hobbes as a transitional figure between the natural and positivist conceptions of law. In this section, show that the dual constraints in his depiction of law – *in foro interno* and *in foro externo* – could, in principle, permit him to offer a third view, the practical theory. For Hobbes, these restrictions of conscience and effect are codependent. It is only in their joint satisfaction in practice that we find enough conceptual room to speak of morality and law, jointly or severally.

There is a tendency to want to read Hobbes as an ally to natural law.[[50]](#footnote-50) I take it that this reading issues in part from the fact that Hobbes was interested in tying the validity of law to prudential obligations that are rationally sufficient to direct the actions of a population of unproblematized individual agents. The ‘nature-like’ tendency in his thought can be captured by talking about natural laws as *prima facie* prudential duties, which also motivated parts of Thomistic natural law.

But Hobbes was not a classical natural lawyer.[[51]](#footnote-51) For one thing, Hobbes’s pseudo-contract had no commitments to any divine foundations of law, i.e., foundations based on the divine right of kings. Second, since morally sufficient reasons for action are subordinated to the sovereign will, the principles of nature mainly show up during an inquiry into unwritten law. This contrasts with the Thomist’s divine law, where sovereign right is both generally grounded in -- and sometimes legitimately curtailed by -- claims of divine and moral rectitude.[[52]](#footnote-52) Hence, Hobbes thinks morality is necessary but not generally sufficient to make law, while the Thomistic version of natural law regards divine morality as generally sufficient for legality, once civic leadership is given its due.[[53]](#footnote-53) And, third, Hobbes’s jurisprudence resists being assimilated into a moral theory of law, and hence natural law, because his articulation of the laws of nature is normatively defeasible, hence fall short of moral sufficiency in the absence of coordination through adjudication.[[54]](#footnote-54)

Yet Hobbes was not a legal positivist, either. For the principles of nature provided a necessary teleological point to both the sovereign’s laws and the social contract itself. Hence, when they are *considered as mere reasons,* they are best seen as independent of the sovereign’s will, being prior to it, and forming the explanatory basis for law’s origins and force. This, because Hobbes would like his theory to be adequately motivated during inquiry, not imposed by definitional fiat.[[55]](#footnote-55) It is because of his theory's explanatory richness that Hobbes refrained from a strict endorsement of the *sources thesis* that is distinctive as a positivist criterion of legal validity, according to which social acquiescence is sufficient for law.[[56]](#footnote-56) Hobbes believes in social sources as *a* criterion but does not believe it is *the sole* criterion.

So Hobbesian legal theory has a dual quality. On the one hand, it is ‘post-natural’, deviating from the divine metaphysical and moral requirements of the Catholic tradition of natural law. On the other, it is ‘proto-positivist’, endorsing sovereign supremacy without endorsing the idea that social sources are sufficient to establish legality. Over the course of the next two subsections, we will examine these two dimensions to see how they fit together in practice.

2.1 POST-CLASSICAL-NATURAL LAW

For the natural lawyer, the eternal, divine, animal, and natural aspects of law provide an account of the prudential bindingness of civil law. Such theorists should be disappointed by Hobbes’s approach to the study of religion and civil law for two reasons. First, because Hobbes’s discussion of religion is framed in terms of a discussion of *pre*-civil society, i.e., the state of nature, it does not bear directly on civil law. Second, Hobbes believes that the state has its own unique kind of sublime aura that is distinctive from that of the divine order. This treats the sovereign ‘mortal god’ as relatively modular, in contrast with Aquinas, who places God at the top of the deferential chain.

Hobbes had mixed feelings about religion. On the one hand, he is against the rule of superstition over our lives, and believes that religion is largely a response to the handicaps in human cognition that we usually associate with superstition: i.e., our proclivity to anthropomorphize, to be ignorant of secondary causes, to revere things that are feared, and our carelessness about making predictions. That explains why many believe that humans are made in God’s image.[[57]](#footnote-57) These remarks are decidedly unsympathetic to treating the state of nature or pseudo-contract as political myths. But we should also not overstate Hobbes’s skepticism towards religion. He suggests that there are two kinds of religion: the true and false (i.e., “divine politics” and “human politics”). Both are about control and obedience – even *true* religion involves a degree of regimentation. Yet true religion is about securing obedience to divine command, while false religion is about securing obedience by using God’s name in vain.[[58]](#footnote-58) Acknowledging the reality of true religion allows Hobbes to avoid the accusation that he is an unbeliever and its subsequent historical stigma. So, it is only *in the discussion of true religion* that we can see Hobbes as sympathetic to political mythology. And even so, he generally placed religion in the theoretical background.

Another difference between Hobbes and Aquinas is that Aquinas’s divine laws are presided over by charismatic personalities like Moses, Abraham, and Christ.[[59]](#footnote-59) But for Hobbes there was no original covenant, where (e.g.) subjects transferred their rights to empower Christ. Unlike the sovereign, charismatic religious personalities do not, or need not, take on the airs of civil arbitrators. In such cases, the sovereign arbiter is *God,* and these are His representatives.[[60]](#footnote-60) Instead, subjects defer to these divine representatives because they have a reputation for holiness: through wisdom, sincerity, and love.[[61]](#footnote-61) Such persons can exist in the state of nature (in the state of perpetual struggle), but for Hobbes, these figures cannot be expected to bring the state of mutual war to an *end*.

 Natural law theory accounts for the validity of laws in terms of moral obligations. This is a more promising area in which we might think of Hobbes as a natural lawyer since, for Hobbes, justice presupposes peace in a civil order. Yet for Hobbes, justice is a condition that only occurs in civil society, and it is not a property of mere deliberation or personal virtue (any more than it is something that we find among nonhuman animals).[[62]](#footnote-62) This contrasts with Aquinas, for whom justice was the perpetual *will* to do right to everyone, and hence a virtue.[[63]](#footnote-63)

This picture of justice as inextricably communal leaves a large gap in the Hobbesian worldview. We might reasonably ask: what about people who seem to be obeying moral rules in the state of nature; aren’t *they* moral? For example, consider the negative formulation of the Golden Rule: *Do not do unto others as you would not have them do unto you*. [[64]](#footnote-64) We might ask, can’t people obey the golden rule in the state of nature, and if so, aren’t they moral agents? And it has to be emphasized that Hobbes says *no*. He *denies* that such actors would be agents of justice, though they surely may *appear* to be just. The reason is that justice must bind both internally and externally (*in foro interno* and *in foro externo*), meaning the rules of justice provide reasons for action through their role in shaping a working system of incentives and impediments which are both intrinsically and extrinsically motivating.[[65]](#footnote-65) Since the principles of nature are only binding internally in the state of nature, and not always externally, they are not laws. At best, the principles only appear to be laws.

Most of what Hobbes calls “the maxims of nature” in Ch. 14-15 coherently abide by the description he chose for them. These principles lay the foundations for Hobbes’s theory of the state, and they are lexically ordered; so, principles 3-17 are supposed to be derived from principles (1-2), or solicitude and transfer. They precondition a population to consent to a social contract but are not themselves determined by social sources, and in that sense harken back to classic depictions of natural law.

Most of the latter maxims are not strong enough to play any constitutive role in the practice of law. They cannot do that kind of work, being mostly general and fallible descriptions of how people are liable to act. But some are also *normative*, in the sense of providing people with reasons for action -- even being essential to such varied operations in government as the interpretation of statutes and a criterion for legality of the common law.[[66]](#footnote-66) They are mainly normative in the sense of being *usually* a source for appropriate kinds of reasons -- albeit with the exception of the governmental requirement to hear evidence, which we will discuss in §3.[[67]](#footnote-67)

The sovereign shall always seem to be the bearer of justice. The natural principles provide us with a myopic view of what the agents of law look like. But the actual law may be something else -- ostensibly grounded in the natural principles, but with comprehensive discretion allotted to the sovereign to fashion practical meaning out of the principles. Which is just to say that the rights of nature are ultimately dependent upon their *application* in the domain of social fact, and that is where moral reality is to be found.

 In conclusion, Hobbes thinks that our obligation to obey the law is, in the first instance, a matter of collective prudence. Obligations from religion and justice have a secondary role in his theory. Religion’s role is mainly in *pre*-civil society, i.e., the state of nature. It is doubtful that he would treat the state of nature or social contract as political myths, preferring to regard appeals to religion in those terms. Yet there is significant overlap between natural law and Hobbesian theory. For Hobbes has the resources to concede that charismatic religious personalities are good enough to produce a temporary peace, though he denies that such peace may endure.

2.2. PROTO-POSITIVISM

We usually attribute two theses to the family of doctrines known as legal positivism. They are that a) the authority of law derives from its sources; b) that law is not necessarily a moral venture.[[68]](#footnote-68) Different accounts place different emphases on one thesis or another depending on the theorists under examination.[[69]](#footnote-69) But we will concentrate on the sources thesis since it is the most distinctive.

The *sources* thesis informs us that all valid legal claims are grounded in a state of society, not in the merits of the system.[[70]](#footnote-70) To say the same thing, every flavor of legal positivist believes that legal validity is forged *in foro externo*, as the ‘ought’ of law is grounded in the ‘is’ of one narrowly conceived kind of public reason, e.g., patterns of compliance to an independent power. For the positivist, there is no *legal* point in appealing to any deeper reasons for compliance. Once our spade uncovers the social contract or its equivalent, one hits the bedrock of legal theory.

Hobbes does not believe that social sources are sufficient to establish legal validity. But it is not obvious how the Hobbesian jurisprudence could substantially resist the reduction to positivism. That is to say, it is not obvious what explanatory or normative *stakes* are involved in denying the sufficiency of sources. *What is it* that we think we have irredeemably lost when we transition from Hobbes to soft positivists like Hart or Kelsen?

The answer turns on how broad-minded we have to be when thinking about the legal requirements for maintaining the stability of government. Hart accounted for the stability of law in terms of constitutive selection criteria which he called rules of change. Hart identified these secondary rules in terms of the practices of governmental officials (primarily the courts). So, these rules could potentially disqualify an illegitimate aspirant of the highest government office from being recognized as ‘sovereign’ during periods of interregnum.[[71]](#footnote-71) A government is stable in case the norms of the judicial culture remain intact. Hobbes, in contrast, was less concerned with the individual occupant of the sovereign office as he was in making sure that sufficient civil peace existed to preserve any identifiable office at all. For Hart, the law could still exist even during a period of civil strife, just in case there was a sufficiently coherent practice observed in the besieged government. For Hobbes, in contrast, civil strife erodes and destroys the sovereign office through the dissolution of the commonwealth. Hobbes’s broad-minded conception of stability is *public*, in the sense of being a union of reasons binding *in foro interno* and *in foro externo.*

Now, to be sure, one might wonder how such differences of opinion concerning the nature of stability convey a sense in which Hobbes is doing a better job at providing public reasons. Indeed, Hobbes was sometimes utterly unclear about how the public could identify the sovereign office, and sometimes said it would simply be *supposed*.[[72]](#footnote-72) Even so, Hobbes does identify two qualities of the sovereign which are open to public view. First, the sovereign is characterized by their prudential function, which is to act as the steward of the commonwealth.[[73]](#footnote-73) Second, a sovereign must have the powers to determine who counts as respectable in a society, best deserving of honors and offices.[[74]](#footnote-74) These two qualities, together, form the basis of rules of identification which are not present in Hart.[[75]](#footnote-75)

First, the sovereign is charged with self-care, and their duties to self-care are weighty prudential but extra-legal obligations to preserve the state of the commonwealth. Thus, much of Hobbes’s attention was devoted to statecraft, articulating the *legal interests* of the sovereign without attributing to them any *legal duties* or *infirmities*. That advice ran the gamut, addressing the issues of distributive justice to domestic and foreign policy.[[76]](#footnote-76) The general point was to aid the sovereign in her rule and to encourage the sovereign to allow the commonwealth to live up to its name. Most importantly, the sovereign must be wary of the possibility of an internal collapse of the state, either due to major dissonance (e.g., civil war) or minor ills (e.g., tax evasion, the ascendancy of corporations, populism, income inequality, expansionism).[[77]](#footnote-77)

The strategies of sovereign self-care depend on the constitution of the office and practices related to succession. For Hobbes, there are three: aristocracy, democracy, and monarchy.[[78]](#footnote-78) Yet the only form of government that has a shot at having any stable rules of succession is the aristocracy, as democracy has no such rules, and monarchy faces special difficulties.[[79]](#footnote-79) Uncoincidentally, the importance of aristocracy to the law is related to the second quality of the sovereign power, which is the capacity to allocate honors, titles, and offices, along with norms of respect.[[80]](#footnote-80)

There are at least two reasons why we cannot say that these regulatory norms are akin to Hart’s secondary rules, i.e., where social sources are sufficient for the law. For one thing, though the rules refer to social phenomena (e.g., who has honors, who is in office), these references to social facts are not constitutive of the office of the sovereign, so much as they are guides in figuring out who occupies that office. For another thing, the office is constituted both in its teleological aims *and* in its social composition. The most forceful argument to that effect is that, during a period of succession, so long as there is an enduring civil peace, there may be multiple competing practices of recognition and change. In such circumstances, Hobbes is free to say that *as a matter of law* we are bound to extra-social criteria to determine the occupant of the sovereign office. If we happen to be in a civil state that enjoys a uniform practice of recognition and change, then that is all well and good. But there is no reason why the fate of law must be tied to such an assumption, so long as there is a civil peace. Respectable disagreements about the constitutive norms of law need not be fatal to the office of the sovereign so long as practical expediencies can be identified and deployed.

 To conclude. Hobbes himself does not believe that social sources are sufficient to establish the terms of legal validity, but how does he resist a reduction? The answer depends on how we think about the legal requirements for maintaining the stability of law. Hart accounted for the stability of law by identifying it in terms of rules of change recognized within the legal culture (especially, the judiciary), while Hobbes identified it in the fact of stability of government in general. The practical slant to the Hobbesian theory explains Hobbes's curious emphasis on the sovereign's obligations of self-care: these rules are what it takes to maintain the orderly government in fact and to maintain conditions of government where subjects can identify orderly governance.

 The prudential point of view implies that constitutive questions about who counts as sovereign are inextricably tied to questions about *how subjects can identify -- and be held in thrall by -- the sovereign office*. Hobbes proposes a few solutions. First, the sovereign could be characterized by their prudential function, which is to act as the steward of the common order in the role of final arbiter. Second, a sovereign must have the powers to determine who counts as respectable in a society, best deserving of honors and offices, and who give a populace counsel about orderly and respectable behavior – in effect, acting as the juridical equivalent of ‘experts’ of the sovereign will.[[81]](#footnote-81) Both are practical criteria, drawing upon norms about how a public perceives the source of order, and partly constituted by the teleological aims of the rules. Neither of these features has much to do with Hart's secondary rules, as Hart’s rules are known primarily to officials, and they can apply during periods of civil strife – they are not suitably public reasons, in the sense of binding both *in foro interno* and *in foro externo*.

1. TWO PUZZLES

In the previous sections, I argued that Hobbesian jurisprudence is best understood as putting forward a pragmatic theory of law. In §1, I suggested that we ought to consider Hobbes’s elementary conceptual tools in terms of their practical guidance they provide. In §2 I evaluated the contrasts and affinities between the practical theory and natural and positive law.[[82]](#footnote-82) In this final section, I consider two puzzles rooted in §1-2: first, that the ‘post-natural’ aspect of his thought is insufficiently motivated, and second, that his ‘proto-positivism’ is locked in a contradiction. Both are broadly situated in the area of unwritten civil law, i.e., rules consistent with equity and held in force by the will of the sovereign, without being expressly authored by her.

3.1 THE KNOWN COLLECTIVE EMERGENCY

The first principle of nature, the principle of solicitude (or *jus natural*), is the normative foundation of the Hobbesian political project. It functions as a maxim that depicts an essential feature of the human experience. By this principle, “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.” [[83]](#footnote-83)

The principle of solicitude is the most remarkable of the natural virtues since it is the fundamental precept from which the rest are supposed to spring. It is also interesting because, if there is any natural rule that truly *deserves* the name of “natural law” in Hobbesian philosophy, it is the first rule. The Hobbesian rule of solicitude occupies the same foundational role in his philosophy that the conservation principle occupied in Thomistic philosophy, and shared similar content as rights.[[84]](#footnote-84) Why does Hobbes hesitate to honor it with the literal status of natural law?

There are two reasons why the rule of solicitude might provide us with reasons for action that are *legally* binding, in the sense of providing a collection of people with ultimate prudential reasons for action. First, it is granted by both Aquinas and Hobbes that the right to life and liberty can grant a prudential exception from the sovereign’s rules in extreme conditions, though for Aquinas the exceptions are emergency dispensations or divine revelations, and for Hobbes, they are rights to self-defense when threatened with execution.[[85]](#footnote-85) In other words, both acknowledge that the solicitude principle has robust practical force, to the point where it is impossible to avoid calling it a *ultima facie* reason for action. The difference is that, for Hobbes, the rule of solicitude is not a *public* reason (binding *in foro externo*). It binds only individual action.

Indeed, it is hard to argue that the rule of solicitude is not an ultimately binding reason for individual prudential action. Hobbes is explicit on this point: if the sovereign ever wishes to put you to death, then you are thereby placed in a state of war with the commonwealth, and you can do whatever you need to do to secure your liberty.[[86]](#footnote-86) Hobbesian subordination to the sovereign is not threatened by that concession, since while we might place some limits on the conditions wherein the law of solicitude is *applied (i.e., in transfer)*, the *rule itself* can never be dismissed.

But second, it can be argued -- *contrary* to Hobbes’s actual views -- that the first principle *is* binding in some circumstances (both *in foro interno* and *in foro externo*), and therefore can provide us with prudential reasons for collective action in some circumstances. That is, it could be argued that the rule of solicitude directly obliges us to observe legal limits to the sovereign’s powers, just in case the sovereign fails to satisfy the duties of self-care implied in the tenth natural law, i.e., to prevent foreseeable ecological disasters in the common land. That is to say that when Hobbes claimed that the present sovereign was not bound by environmental provisos in the original contract related to collective goods (as we saw in §1.2.), his claim was insufficiently motivated. Or so one might think.

When we talk about *existential* threats, the first thing called to mind is the threat of common environmental disaster that is typical in religious apocalyptic works of literature. A drought, flood, or plague that foreseeably afflicts both of us in our homestead is *our* problem, not just *mine* and not just *yours*. And, intuitively, that is just to say that it is binding *in foro externo, in* public *for* the public. It is a clear collective problem, at least on some conceivable occasions.

Now, to be sure, I have a very specific range of cases in mind. There are plenty of near-miss cases that are of no interest to us, or do not qualify as ‘known collective emergencies’. Indeed, the history of civilization is littered with obtuse millenarians, led by superstition and unjustifiable prognostication. So, *mere belief* in emergency, causing alarm, is not significant to make a collective existential threat. Instead, let us limit our consideration only to those toy cases where there is, as a matter of fact, a clear collective problem; that this problem is known by all those experts who engage in good faith examination of objective evidence; that subjects operating in good faith who consult with the experts result in consensus belief that something ought to be done; and that there is a reasonably clear consensus on what sorts of policies need to be done to overcome the disaster. And, finally, let us suppose the sovereign forbears from doing the thing that needs to be done, either due to indifference, disbelief, or absence of political will.

Notice that even when existentially motivated, ecological threats have nothing to do with the (non-)existence of the sovereign office, who can neglect them at leisure without loss of their legal powers. Hence there might be reasons to suppose that the first rule is not just a *ultima facie* reason for action, but also a natural human law, at least in these contexts of a commonly recognized existential threat.[[87]](#footnote-87) We should not be surprised by the persuasive authority of experts in emergencies to challenge the edicts of the sovereign office. In such cases, the directive to act according to the demands of collective prudence derived *in foro interno* and *in foro externo,* and so fit with Hobbes’s motivation for his account of law, seemingly without conforming to the criterion of sovereign command.

Hobbes could respond in various ways, corresponding roughly to our surveyed legal theories:

1. *Legal positivism: make an analogy to divine ‘law'*. The first strategy would be to dismiss intellectual authorities in the same way in which we dismissed divine charismatic authorities. The analogy would have some textual basis since, in his remarks on the nature of miracles, he notes that Biblical figures like Moses are taken to be the cause of natural disasters.[[88]](#footnote-88) He could (justifiably) argue that such figures and their ecological analogs could not bring a decisive *end* to the war of all and all, and so continue to distinguish them from the sovereign.

Yet Hobbes believes that the sovereign’s mastery over civil law is made *effective* in securing compliance through that office’s capacity to inspire awe. Since the sovereign has no hope of maintaining the commonwealthin the case of perceived ecological collapse, those who do have mastery over nature would seem to retain the final veto, for practical purposes. So, there is little prudential reason to deny that the sovereign is obligated to heed their counsel and act accordingly.

1. *Legal dualism: ecological threats are justification-rights*. One way of denying the lawfulness of the rule of solicitude would be to invoke the distinction between *claim-rights* and *justification-rights* introduced in §1.1.[[89]](#footnote-89) Using that distinction, we might think that perhaps the rule of solicitude is a justification-right (not binding on others), as opposed to a single unified criterion for legal validity which produces a coherent set of claim-rights. That is, perhaps I have a natural right to live, but you do not have a natural obligation to not kill me. Since the natural right does not imply a correlative duty, it is not a *public* reason for action in the relevant sense, as its normativity lacks the coordinated character of public reasons. It is a right, but only in the sense of being a *liberty*.[[90]](#footnote-90)

But this could not apply to the matter at hand. We are considering a special range of cases, where robust ecological threats *do* threaten the settled community in their habitat. There is no point in denying that such collective existential threats provide at least *prima facie* reasons for both joint action and belief about joint action independently of actual individual or cultural desires or beliefs. The question is whether they automatically provide *ultimate* reasons for action insofar as they are *perceived* to be genuine. And the answer seems to be ‘yes’: since my claim on the use and protection of a precious collective resource (e.g., water) is that you have a duty to protect the very same precious resource, on the assumption that your duty also justifies your right to use it. Coordinated joint prudential obligations look like revisions of the pseudo-contract, once it is understood as a practical model we can rely upon to structure our expectations, and they originate in our rights. There is no point in offering scholastic complexity in such dire circumstances.

1. *Classical natural law: environmental dethronement*. The plain fact that sufficiently robust threats to an ecological system provide reasons for action that are binding on subjects in practice is also a prudential threat to the sovereign office. So, if the civil peace is disrupted, then so is the sovereign. Hence, one might say that if a political ruler fails to act on a sufficiently robust ecological threat, it must turn out that, in retrospect, they were not *sovereign*. It would then follow that, whoever directs action toward the resolution of the emergency, becomes sovereign by an unusual route, as the rule of the unwise king is retroactively annulled.

This is an unlikely story. For one thing, as we have seen, the sovereign has no legal duties of that (or *any*) kind, they not being bound by any exceptions or provisos in the original contract related to natural ecology. For another, Hobbes was happy to speak of deposed kings, so it would be a strange ‘natural-law’-like conceptual innovation to appeal to retroactive dethronement. And, finally, it must be recalled that the demands of prudence are always about managing future expectations. A practical theorist of law does not seem to have the resources to make revisionist reassignments of the sovereign office.

1. *Legal pragmatism: insist that legal reasons must be interpreted as rational commands*. The sovereign’s rules are distinctive, not just because they have the right *force*, but also because their reasons have the right *form*. The rule of solicitude is a principle of nature, and Hobbes believes that these rules apply only internally (*in foro interno)*. If he can maintain that opinion by *stipulation* -- e.g., by treating *in foro externo* as meaning through *command* -- then it would technically suffice as an answer to the puzzle. So, perhaps Hobbes might say that nature is a source of prudential reasons, but whose directions are best understood in terms of *liberties*, not *commands*.[[91]](#footnote-91)

This reading faces two obstacles. For one thing, as we have seen, Hobbes is already in the habit of discussing natural rights as “forbidding” some varieties of conduct independently from sovereign command. For another, one could imagine cases where the preponderance of evidence is so overwhelming that rule of solicitude *necessarily* applies both internally and externally, independently of sovereign opinion – i.e., both as a sufficient guide to the conscience and as an incentive-bearing rule.

But these obstacles are not decisive. For Hobbes might argue that the natural scientists only gain sufficient credibility to provide advice with *ultima facie* force because the sovereign antecedently bestowed sufficient honors upon them, which provide them with the practical powers to sound the alarm. Since they can be expected to cause political troubles when ignored, the sovereign is obliged by prudence to attend them, and subjects are obliged by law to attend to them. If the sovereign does not attend to emergencies, then either it signals the oncoming dissolution of the commonwealth and a return to the state of nature, or signals that the practical transfer of right must be placed into the hands of scientific experts through an unusual chain of succession. And since these consequences arise solely from the contingencies of practice, all of this can be inferred without supposing that we have found a radical exception to the chain of normative authority -- i.e., that the individual dissenter has an in-principle right of insurrection analogous to Aquinas’s treatment of Daniel and the pharaohs. So, to me, (4) seems like a plausible resolution of the puzzle.

In this section, I have suggested that the capacity for non-sovereign leaders to help a collective avoid environmental devastation are conceptually sufficient to satisfy Hobbes’s demands that laws be collectively binding *in foro interno* and *in foro externo --* despite the fact that Hobbes would likely disagree. However, this is not something that a wide legal pragmatist reading of Leviathan needs to worry about. For, in the kinds of cases we are interested in – where there is a genuine collective existential threat, known to all reasonable people, vouched by respectable experts – then, from a practical point of view, insofar as there is a sovereign, that sovereign shall act on the threat. Although it is conceptually possible to imagine a suicidal sovereign, a suicidal ruler is not the kind of sovereign we will ever confront in experience. For the set of public reasons that establish the validity of law depend on conditions for the acquisition of knowledge related to action, insofar as their expectations are to be legitimately guided, and on the assumption that the respectable classes have a prudentially apt perspective. Hence, *Leviathan* is able to commit to the requirement of sovereign command, even when that command is expressed by non-sovereign experts.

Now, to be sure, my argument has been posed as an exploration, and is not decisive. So, it is at least possible that clever arguments might be devised which seek to leverage the observations made in (4) to the defense of a classical natural law theory. However, they would need to resolve the legal pragmatist’s central, probing question: *what difference does the theoretical disagreement make to how we understand the effects of this case*? Whether one assents to the pragmatist’s thesis or not, it should be acknowledged as a powerful defense – especially if it can be shown that the wide legal pragmatist is able to make sense of civil law in *Leviathan* in ways that others do not.

3.2. THE JANUS-FACED SOVEREIGN

For Hobbes, *all* civil laws are meant to be consistent with the principles of nature. Which is to say, following §2 above, that we can say that Hobbes believes that the civil law and the natural principles are *codependent*. So he says: “For whatsoever law is not written… is therefore also a law not only civil, but natural.”[[92]](#footnote-92) It is clear that, for him, nature and the sovereign are both essential to any characterization of the prudential point of civil law. What remains to be seen how these two sources of law intersect. Most problematically, we know that the sovereign is the *sole* legislator; second, that the sovereign is effectively *immune to civil laws*, since it may change thoselaws at will (insofar as they can get away with it, politically); and third, that any norms or conventions only become law because the sovereign *indicates a tolerance* for them by its inaction, or tacit consent.[[93]](#footnote-93)

Hobbes says that natural 'law' and civil laws are equal and compatible since both are simply different *parts of the law in general*.[[94]](#footnote-94) To support this idea, he suggests that civil law and natural 'law' are codependent. On the one hand, all civil laws derive from natural qualities, in the sense that the commonwealth originates out of the natural, rational tendency to desire peace over war and chaos, and hence there can be no civil law except for that which is necessitated by the desire for stability. On the other hand, these natural virtues become genuine laws only in civil society, either by dictate of the sovereign or through her acquiescence.

There are two ways of understanding the codependence between two parts of law. The stronger reading would be that the two aspects of the law are *coextensive* (or, to use his phrase, “of equal extent”), going so far as to contain one another.[[95]](#footnote-95) Later scholars refer to this as the “mutual containment thesis” (hereafter MCT).[[96]](#footnote-96) The point of the MCT is to say that *any instance of natural law will also be an instance of civil law,* and vice versa: if we speak properly about natural law, we must say it is just one feature of every civil law, as civil law determines the best ways of making sense of the natural law.[[97]](#footnote-97) MCT can be contrasted with a weaker codependency thesis, which holds that the natural and positive parts of the law are *mutually entangled practices*, but do not hold in a relationship of conceptual necessity.

Both claims can be challenged by natural lawyers and positivists alike. One might reject the MCT by saying that one part of the law normatively overridesthe other (e.g., for positivists, the dictate of the sovereign has veto power over natural virtues). Or one might reject the codependency thesis by claiming that the natural principles undermine the sovereign rule, instead of contingently supporting and nourishing it as Hobbes assumes. The former claim is about the constitution of the commonwealth, and the latter is about the mechanisms for change. Our present concern is with the possibility of the former since the latter was addressed in §3.1.

The MCT has the potential to cripple Hobbes’s theory from the inside. For Hobbes admits that any judge – *including the sovereign judge* -- who seeks to put someone to death without hearing evidence is in violation of natural “law”, and hence is – *as a matter of fact* -- an unjust judge. “For all judges, *sovereign and subordinate*, if they refuse to hear proof, refuse to do justice...”[[98]](#footnote-98) (emphasis mine) The only plausible reading of this sentence is to regard it as a reference to the ultimate office of state, given that it was written by a man who conspicuously attaches special significance to the lexeme 'sovereign'. Indeed, Hobbes ‘doubles down’ in his phrasing, declaring that an unjust rule is “no law of England”.[[99]](#footnote-99) Yet if this were true, then it would apparently turn out that the natural and civil laws are not of “equal extent”, and hence problematize the idea that they are two parts of the civil law. As a result, it would erase the distinctiveness of Hobbes's approach by defaulting back to natural law.[[100]](#footnote-100)

It is of course always possible to just say that Hobbes made a mistake, or ‘slip of the pen’. But this is unlikely, since his choice of language were reasonably precise, and indeed, bold. The more plausible interpretation is that, when faced with asserting the consequences of his theory, his hand trembled. Hence, it is a genuine textual puzzle. That said, there are at least a few ways that Hobbes might clarify his position:

1. *Legal dualism: divorce just verdict from just authority*. On first glance, we might say that Hobbes's best option would be to double down on the distinction between the justice of *authorities* and the justice of *verdicts*. For, in his view, the verdictsare justified even while he concedes that those verdicts arise out of *unjust authority* in that case. By saying that the verdicts are just, Hobbes preserves the view that the sovereign cannot *act* unjustly against his or her citizens. In effect, this strategy proposes that we should observe a strict difference between the kind of justice that operates over the law of words (i.e., beliefs about action and authority) and the law of deeds (i.e., the justice of what the judge does and gets away with).

Though it has some superficially attractive features, this is actually a terrible reading. For elsewhere he claims that the tacit or explicit consent of the sovereign is sufficient to establish the just authority of any judge over their subjects.[[101]](#footnote-101) It follows that the sovereign can *fail* to have a just authority *by virtue of its having* a just authority, which is paradoxical at best. It is in this sense that the sovereign judge appears to be ‘Janus-faced’, being both just and unjust at once. But this is just to say that *Leviathan* attempts to be a coherent intellectual project, and happens to have run into a hard textual problem.

1. *Legal positivism: presuppositions and focal meaning*. Recall, the moral authority of the sovereign depends on the tacit *presumption* by a multitude that the sovereign shall interpret and enforce the natural principles, which include duties to adjudicate fairly and attend to evidence.[[102]](#footnote-102) But while that may be the motive force that causes the multitude to lay down their arms, the actual existence of the sovereign office only *presupposes* the original covenant with its attendant hopes. And the multitude itself is of no significance until it is unified, and only unified when unified in deference to a representative (i.e., the sovereign).[[103]](#footnote-103) In sum: perhaps the authority of the sovereign is *presumed to be* coextensive with the principles of nature for the purposes of the model, but may not be coextensive with them *as a practical fact*. So, conceptually speaking, the sovereign *qua* sovereign never makes an unjust verdict; but this is to say nothing about every case in practice. Sadly, whatever its virtues, this is an unsatisfying resolution of the paradox, since Hobbes *does* claim that the sovereign’s verdicts would be *just*.[[104]](#footnote-104)
2. *Classical natural law: rebel.* Perhaps Hobbes means to say that a sovereign that refuses to hear evidence in the arbitration of a verdict is effectively declaring war on the accused, as a tyrant. Though that would be a rather extreme reading of the situation, it would allow us to infer that *the verdict is just insofar as it bears on other subjects*, even while the *sovereign is not a just arbiter over the accused*, since they are in a state of war with the accused. Hobbes could be found guilty of being overly elliptical, but not incoherent. Perhaps, in other words, the man who is found guilty for fleeing an unjust judge is in a legal position that resembles Daniel’s orientation to the pharaohs, by virtue of his natural rights returned to him.

Unfortunately, this is a rather extreme reading of the category of cases in question. For even if we agreed with Susanne Sreedhar that Hobbes endorsed a wide swath of resistance rights, we do not need to suppose that all refusals to hear evidence in court will inflame such rights.[[105]](#footnote-105) Since his language is universally quantified (“…for all judges…”), it will be difficult to evade defeaters.

1. *Legal pragmatism: Ulysses in England*. Finally, we might think that his puzzling remarks about the unjust sovereign might only apply to the ways that *England in particular* has conceived its own legal system. Hence, as Klimchuk notes in a closely related passage on equity and forfeiture, a judge who arrives at their verdict on the basis of presumption and not evidence has rendered a verdict that is “no law of England”.[[106]](#footnote-106) Might the startling claim – “For all judges, sovereign and subordinate, if they refuse to hear proof, refuse to do justice” – be just a claim about *English* judges, put into an exaggerated or generalized form?

It is possible. It must be emphasized that Hobbes’s theory is not necessarily anti-constitutional: for while the sovereign is surely not bound to any antecedent contract with *the people* (there being no such thing), the sovereign is indeed capable of binding its own conduct in a process I referred to as ‘sovereign self-care’. Like Ulysses and the mast, the sovereign is capable of binding itself to its own standing rules, albeit only for a limited time, and *only so long as the rules are conceived of as rules which are good for the sovereign*. Hence, Hobbes’s observation about the unjust sovereign judge could be simply an observation about the way that the *sovereign state of England* ‘takes care of itself’, insofar as it was constituted at the time of his writing. So, the man who flees the unjust judge has not necessarily had his rights returned to him, and yet we can still talk about a sense in which his conduct is lawful, on the assumption that the sovereign consents in England.

This reading has a few virtues: first, it makes some sense of the universal quantifiers, as “…all judges…” comes to be understood as an elliptical reference to *all English judges*. It also saves the central theoretical aspirations of the text, while only doing minimal damage to his choice of words. The downside is that, so long as this is an appropriate reading for the passages in Chapter 26, it might also be a limitation on the scope of the theory, as it introduces some plausibility to the notion that *Leviathan* is an *Anglocentric* theory of law first and foremost. But then again, this is one of the things that the legal pragmatist expects of any proposal -- a ‘theory’ that is grounded in a few sets of relationships found in narrow idealized contexts, realized in a fallible way, and deployed only insofar as it is useful.

In short, the ‘post-natural’ and ‘proto-positivist’ aspects of *Leviathan* both provide equally suggestive and mutually exclusive hermeneutical resources for making sense of this specific type of case. Despite the fact that, at every point, Hobbes evinces an attitude of pragmatism in his unflagging faith that persistent dualisms can be overcome, *Leviathan* fails to provide a satisfactory, general, and explicit account of the potential of an unjust sovereign. The upshot is that the wide legal pragmatist’s reading of *Leviathan*, (4), is pretty far from being a *fait accomplit*. And yet it does seem to fare better than the readings that are rooted in classical natural law (3) and positivist (2) traditions, in terms of charity, coherence, and fidelity to what is written.

1. CONCLUSION

In this essay, I have offered several reasons to think that the classical natural and positive theories of law cannot make sense of Hobbes’s discussion of civil law. In the first and second sections, I suggested that natural law and positivist readings cannot succeed because Leviathan treats thought-experiments as models, but binds legal validity to both norm- and source- conditions (respectively).

This conviction carries forward to the treatment of the two puzzles, the first related to environmental catastrophe, and the second to the unjust sovereign judge. First, while Hobbes argues that law entails the existence of public reasons, he does not adequately defend the view that the sovereign is the unique authority over reasons in cases of known environmental collapse. I suggested that, by reading Hobbes as a wide legal pragmatist – for whom non-practical disputes fade into insignificance – we can successfully resolve the puzzle in a way that natural and positive law theories apparently cannot. Second, Hobbes both affirms and denies the view that a sovereign can fail to do justice, which is paradoxical. I suggested that even the wide legal pragmatist cannot resolve this paradox entirely. However, the legal pragmatist’s reading has a clear virtue: it leaves the central theoretical preoccupations of *Leviathan* untouched, while also conceding that some of the most fascinating consequences of that work only have a disappointingly narrow range of application.

The upshot is that *Leviathan’s* legal theory should be admired for its distinctiveness as a third way, and noted for its aspirations as a form of wide legal pragmatism, whatever its faults and imperfections. Still, to be sure, the argument in this essay is best understood as a statement about *Leviathan,* andnot about Hobbes’s mode of thought in general. I concentrate solely on *Leviathan* as a self-contained text owing to its richness and historical primacy, and my worries about the puzzles with Leviathan are not meant to be decisive objections against the prospects of a Hobbesian third theory in some other guise.[[107]](#footnote-107) Nor, finally, am I ultimately pessimistic about the prospect of a Hobbesian jurisprudence. I only wish to point out some of the challenges he faced, and to warn against one decidedly surreal outcome, legal dualism, that might gain credibility if we fail to improve upon his project.

1. This paper is long in coming, and could not have even made it to a first draft without the patient, kind, and rigorous tutelage of Dennis Klimchuk. I also benefited greatly from the generous feedback of Brian Orend on a previous version of the paper. Finally, I thank four anonymous reviewers for their thoughtful comments and critiques, and to the care and discretion of the editors who looked over various iterations of the paper. [↑](#footnote-ref-1)
2. Thomas Hobbes, *Leviathan*, by ed. Edwin Curley (Hackett, 1994). [↑](#footnote-ref-2)
3. Here, the concept of ‘public reason’ is only taken to imply that some reasons are sharable and contestable in public fora. Not all conceptions of public reason necessarily capture Hobbes’s ‘in foro externo’ or ‘in foro interno’. I thank an anonymous reviewer for this point.

In particular, the phrase ‘public reason’ calls Rawls to mind. The Rawlsian conception of public reason is narrower in scope, as it implies a system of common reason directed at the common good that *all* reasonable people would assent to under hypothetical conditions. See John Rawls, “The Idea of Public Reason” in *Political Liberalism* (Columbia University Press, 2005). The difficulty, of course, is that the Rawlsian conception of public reason depends on his depiction of political justice which is embedded in a particular (liberal) political culture. This can be reasonably contested by anyone whose political theory is constitutively sensitive to historical fluctuations between the public and the private -- variations which were (e.g.) illustrated in Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) at p.22-78. Still, if the reader prefers Rawls’s usage of the phrase ‘public reason’, then they may substitute all of my uses of the term with an appropriate neologism, like ‘public-facing reasons’. [↑](#footnote-ref-3)
4. Leslie Green, "Legal Positivism (Spring 2018)", *The Stanford Encyclopedia of Philosophy* (Accessed 03 09, 2019) URL= <https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/> [↑](#footnote-ref-4)
5. Wil Waluchow, "The Many Faces of Legal Positivism," (1998) *The University of Toronto Law Journal* 48 (3). [↑](#footnote-ref-5)
6. Joseph Raz, "Authority and Justification," (1985) *Philosophy & Public Affairs* 14 (1). [↑](#footnote-ref-6)
7. Thomas Aquinas, Summa Theologica, Vols. I-II, in *Basic Writings of Saint Thomas Aquinas,* by Anton C. Pegis (ed.), (Random House, 1944). (Hereafter, *ST*.) [↑](#footnote-ref-7)
8. Aquinas, ST, 2-1.96.1.; 2-1.96.6. [↑](#footnote-ref-8)
9. Aquinas, ST, 2-2.67.1. [↑](#footnote-ref-9)
10. The ‘focal meaning’ reading owes in large part to: J. Finnis, *Natural Law and Natural Rights,* 2nd ed. (Oxford University Press, 2011). The ‘no law at all’ reading is better attributed to Augustine, not Aquinas. Still, we need to make sense of Aquinas’s rather strong statement that tyranny is a perversion of law (Aquinas, ST, 2-1.95.2), and violations of divine law by human authorities (see ft. 50 below). [↑](#footnote-ref-10)
11. But beware the devil in the details. For example, as an anonymous reviewer pointed out, an act-utilitarian theory of law could be devised where the law *just is* whatever turns out to be the policy with best effects, and where the pursuit of such policies is the foundational moral commandment. The problem with this view is that act-utilitarianism does not contain any of the theoretical complexities of Thomism, and in particular, his explicit recognition of the powers of authorities and their function in a broader comprehensive teleological system. As a result, an act-utilitarian of this stripe would flirt with legal nihilism, since we lose all sense that the requirements of law make any appeal to authorities whatsoever. And it is worth noting, of course, that not even Bentham held such a view of legislation. [↑](#footnote-ref-11)
12. The phrase is meant to evoke the many tendencies in the history of philosophy of law that are consistent with themes found in the American pragmatist tradition. Here, I follow the programmatic expression of legal pragmatism introduced by Charles Barzun. See: Charles L. Barzun, "Three Forms of Legal Pragmatism," (2018) *Washington University Law Review* 95 (5). The prefix, ‘wide’, is added to the phrase in order to distinguish Barzun’s sense from the received meaning in philosophy of law, which uses ‘legal pragmatism’ to refers to the kind of depiction of law advocated by influential American jurist Richard Posner. Barzun includes Posner as a pragmatist, but makes the category more general, subsuming three strains of legal thought: instrumentalist (e.g., Richard Posner), quietist (e.g., Ronald Dworkin), and holist (e.g., David Souter). [↑](#footnote-ref-12)
13. The practical point of view should not be conflated with the much-discussed “practical difference thesis”, which is a criticism of inclusive positivism which holds that it handicaps the law from making a practical difference in the ways people deliberate. The practical point of view is a conditional restriction on which theories are viable; the practical difference thesis is a critical claim levied against a particular strain of positivism. They relate in the sense that, insofar as the practical difference thesis is true, inclusive positivism must be inconsistent with the practical point of view. See, Scott Shapiro, “On Hart’s Way Out,” (1998) *Legal Theory* 4: 469. [↑](#footnote-ref-13)
14. I take Deweyan remarks on law as especially important. Notably, Dewey suggests a kind of legal pragmatism that leans on satisficing consequentialism, not optimizing. See, especially: John Dewey, *The Public and its Problems* (Swallow, 1927) at p.53-7. [↑](#footnote-ref-14)
15. Raz, 1985, ibid. [↑](#footnote-ref-15)
16. Modern Russia is the clearest example of a jurisdiction where a distinction is actively observed between the theoretical law and practical law. See: Kathryn Hendley, “Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia” (2011-2) *Wisconsin International Law Journal*, 29(233). [↑](#footnote-ref-16)
17. There are at least three senses in which scholars refer to legal dualism: as an approach to (A) *general jurisprudence,* (B) *particular institutions,* or (C) *particular kinds of institutions*. I am mainly interested in the lengths that Hobbes must go to avoid (A).

Advocates of (A) hold that, for some appreciably broad spectrum of political systems (e.g., the 21st century nation-state), each political system is governed by two systems of law which have potentially incommensurable standards of legal validity. So, e.g., we might distinguish between the ‘higher’ substantive requirements of a constitution when understood as a project in political justice, and the practical effects of law determined by sources. In this respect, legal dualism is a special case of legal pluralism. See: Margaret Davies, "Legal pluralism," in Peter Cane & Herbert M. Kritzer, eds, of *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).

Advocates of (B) only offer an observation about the normative features of particular, peculiar jurisdictions. For example, the Canadian legal system explicitly labels itself as a form of ‘legal dualism’, as it honors the traditions of civil and common law within separate provinces. See: Government of Canada, *Legal Dualism and Bilingual Bisystemism (*2018*)*, Accessed 2019, URL= < <https://www.justice.gc.ca/eng/csj-sjc/dualism-dualisme/index.html> >

Advocates of (C) argue that particular kinds of political systems are best served by a dialectical conception of law. For example, John Rawls argues that the law of modern constitutional democracies is best explained by, and endorsed as, two overlapping but incommensurable normative systems operating over a single jurisdiction. Hence, Rawls argues that, if we are interested in judicial review of the court of last resort, then we ought to think of law as the principled interpretation of statutes and precedents, properly conceived through a relatively thick and substantial vision of public reason. In contrast, the ‘lower law’ which applies customs and statutes according to convention and legislation is exclusively source-based. See: Rawls, 2005, ibid. [↑](#footnote-ref-17)
18. Some might wonder how the legal dualist would confront patently unjust laws, e.g., a moral dissident in apartheid South Africa. In such cases, the law of words and the law of deeds seem to coincide, creating a single unjust system; for the Courts and the police all agree in segregation and subjection. Yet in these cases, the dissenting dualist can simply rebut the Court and legislature’s capacity to provide guidance with respect to the law-of-aspiration, while acknowledging that the apparent reality that sovereign is generally effective in doing whatever it wants, and legal in that sense. [↑](#footnote-ref-18)
19. Hobbes, *Leviathan*, Ch.13, p.75 [↑](#footnote-ref-19)
20. Hobbes, *Leviathan*, Ch.14, p. 79; Ch.26, p.177-181. [↑](#footnote-ref-20)
21. Thomas Hobbes, *De Cive,* ed. Howard Warrender, (Clarendon Press, 1983) at p.52ft. [↑](#footnote-ref-21)
22. Hobbes, *On* *the Citizen*, p.52 [↑](#footnote-ref-22)
23. Gary B. Herbert, "The Non-Normative Nature of Hobbesian Natural Law," (2009) *Hobbes Studies* 22 (1). [↑](#footnote-ref-23)
24. Hobbes, *Leviathan*, Ch. 26, p.174 [↑](#footnote-ref-24)
25. Hobbes, *Leviathan*, Ch. 26, p.180-1 [↑](#footnote-ref-25)
26. Robert Ladenson, "In defense of a Hobbesian conception of law," (1980) *Philosophy & Public Affairs* 9 (2) at p.138-141.

Feinberg, Joel, "The Nature and Value of Rights," (1970) *The Journal of Value Inquiry* 4 at 243-257. [↑](#footnote-ref-26)
27. For a challenge to the ‘contractualist’ reading see Sharon A. Lloyd, "Duty Without Obligation," (2017) *Hobbes Studies* 30 (2). [↑](#footnote-ref-27)
28. Ladenson could concede this since he was interested in crafting a ‘*Hobbesian’* account, not *Hobbes’s* account. [↑](#footnote-ref-28)
29. Hobbes, *Leviathan*, Ch.26, p.182 [↑](#footnote-ref-29)
30. Hobbes, *Leviathan*, Ch.21, p.138 [↑](#footnote-ref-30)
31. Hobbes, *Leviathan*, Ch.18, p.112 [↑](#footnote-ref-31)
32. The ‘obligation to trust the judgment of our rulers’ is a phrase from Skinner. see:

Quintin Skinner. “On trusting the judgment of our rulers.” In R. Bourke & R. Geuss, Eds., *Political Judgement: Essays for John Dunn* (Cambridge University Press, 2009), at pp.113-130.

Trust plays a recurring and explicit role in Hobbes’s *Leviathan*: see Chs.4, 5, 7, 10-12, 14, 15, 18-20, 22, 24, 30. For further discussion, see: Deborah Baumgold, “‘Trust’ in Hobbes’s political thought,” (2013) *Political Theory*. 41(6) at p.838-855. [↑](#footnote-ref-32)
33. These terms can be illustrated by the gradations of normative force that distinguish between ‘counsel’ (*pro tanto*) and ‘command’ (*ultima facie*). For edifying discussion, see Ross Harrison, "The equal extent of natural and civil law," in David Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge University Press, 2012) [Kobo eBook]. [↑](#footnote-ref-33)
34. This is not an exhaustive list. So, for example, Elinor Ostrom conceives of the idea of a ‘framework’ as distinct from both models and theories. For her, a framework has the wider scope of a theory but lacks predictive power. Since the contrast with models and theories depends only on proper scope, for critical purposes, I run frameworks together with theories, though in other contexts they deserve to be given a separate treatment. See: Elinor Ostrom, *Governing the Commons* (Cambridge University Press, 2015) at p.214-6. [↑](#footnote-ref-34)
35. I take it that models are special cases of thought-experiments that are used to tell us something about broader systems with interacting parts. I thank an anonymous reviewer for pressing me to clarify this point. [↑](#footnote-ref-35)
36. Hobbes, *Leviathan*, Ch.15, p.97. [↑](#footnote-ref-36)
37. Hobbes, *Leviathan*, Ch.18, p.111-2. [↑](#footnote-ref-37)
38. Hobbes, *Leviathan*, Ch.17, p.109-10. [↑](#footnote-ref-38)
39. HLA Hart, *The Concept of Law* (Clarendon Press, 1961) at p.50-78. [↑](#footnote-ref-39)
40. Hobbes, *Leviathan*, Ch.30, p.219-233. [↑](#footnote-ref-40)
41. Hobbes, *Leviathan*, Ch.22, p.146-7. This does not prevent us from noting that a sovereign is free to rule that they have breached their own will, and in that sense, there is nothing that prevents a subject from suing the sovereign for breach of the law. But it is only by the will of the sovereign that such admissions of fault in government are made, and only in light of the sovereign’s prudential self-obligations (what I call “sovereign self-care”). I thank an anonymous reviewer for this point. For Hobbes on publicity, and the ability to sue the sovereign, see:

Thomas Poole, “Hobbes on law and prerogative,” in David Dyzenhaus & Thomas Poole, eds, *Hobbes and the Law* (Cambridge University Press, 2012) [Kobo eBook]. [↑](#footnote-ref-41)
42. Hobbes, *Leviathan*, Ch.14, p.86. [↑](#footnote-ref-42)
43. Hobbes, *Leviathan*, Ch.18, p.112. [↑](#footnote-ref-43)
44. Hobbes, *Leviathan*, Ch.13, p.77-8. [↑](#footnote-ref-44)
45. This is a point about the epistemology of Hobbes emphasized in Harrison, "The equal extent of natural and civil law." [↑](#footnote-ref-45)
46. Henry Tudor, *Political myth* (Macmillan, 1972) at p.17, 125.

Hobbes here contrasts with Schmitt, who waxes enthusiasm over the role of myth in politics and celebrates Leviathan's sovereign as a mythological personage. See: Carl Schmitt, *Political Theology,* translated by George Schwab (University of Chicago Press, 1985) at p.47-8. [↑](#footnote-ref-46)
47. Mary S. Morgan. *The World in the Model: How Economists Work and Think* (Cambridge University Press, 2012) at p.14-17. [↑](#footnote-ref-47)
48. Hobbes, *Leviathan*, Ch.13, p.77-8 [↑](#footnote-ref-48)
49. Hobbes, *Leviathan*, Ch.17, p.107 [↑](#footnote-ref-49)
50. See: Annabel S Brett, *Changes of State,* (Princeton, 2011) at p.9, 71-2; and

Alan Cromartie, "Unwritten law in Hobbesian political thought," (2000) *British Journal of Politics and International Relations* 2(2) at p.177. [↑](#footnote-ref-50)
51. Another way of revitalizing natural law theories is to think of them as attempts to construct agency in a collective context; so, see: Brett’s *Changes of State,* above; and Richard P. Hiskes, *The Human Right to a Green Future,* (Cambridge: Cambridge, 2009) at p.6-10. [↑](#footnote-ref-51)
52. *ST*, 2-1.93.4.2; 2-2.67.1. [↑](#footnote-ref-52)
53. This point is contested by Murphy, who asserts that “Aquinas… explicitly claims that precepts derived from the natural law do not attain the status of civil law until issued by the civil sovereign...”. (848) Mark Murphy, 1995, “Was Hobbes a Legal Positivist?” (1995) *Ethics*, 105.

Murphy cites the *Summa*, 1-2.95.3. Unfortunately, that passage contains no reference to the sovereign will as necessary to law, nor any reference to the sovereign powers at all. Indeed, the passage is largely an attempt to simplify Isidore’s conception of positive law by articulating it in terms of *its naturalistic role* in fostering religion, discipline, and the common good.

As mentioned above, John Finnis argues that the natural law tradition is not on the hook for the view that an unjust law is no law at all, since most natural lawyers have been interested in the focal meaning of law. This is plausible. However, whatever we say about this, we have to take pains to recognize cases like Daniel and the Pharaohs as ones where the sovereign fails to make law. (Aquinas, ST, 2-2.67.1) For discussion, see John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2011) at p.354-366. [↑](#footnote-ref-53)
54. The upswing in the ‘natural Hobbes’ reading owes, in large part, to the work of David Dyzenhaus. More recently, Michael Cuffaro also sees Hobbes as a natural law theorist. Similarly, Michael Sevel argues that Hobbes is a natural law theorist insofar as he is doing metaphysics of law. I think Hobbes’s fallibilism is one reason to question his classification as a natural lawyer. See: David Dyzenhaus, “Hobbes and the legitimacy of law,” (2001) *Law and Philosophy*, 20(5). See also Michael Sevel, “Hobbes: Patriarch of Legal Positivism, or Reinventor of Natural Law?” in ed. S.A. Lloyd, *The Continuum Companion to Hobbes* (Continuum, 2012); and Michael Cuffaro, “On Thomas Hobbes's Fallible Natural Law Theory,” (2011) *History of Philosophy Quarterly* 28 (2) at 175-190. [↑](#footnote-ref-54)
55. A point made eloquently, though perhaps unfairly, in: James Boyle, “Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism” (1986) *University of Pennsylvania Law Review*, 135, at 396-400. [↑](#footnote-ref-55)
56. Joseph Raz, "Legal Positivism and the Sources of Law," in Aileen Kavanagh & John Oberdiek, eds, *Arguing About Law* (Routledge, 2009) at p.117-121. [↑](#footnote-ref-56)
57. Hobbes, *Leviathan*, Ch.12, p.63-7. [↑](#footnote-ref-57)
58. Hobbes, *Leviathan*, Ch.12, p.67. [↑](#footnote-ref-58)
59. Ibid. [↑](#footnote-ref-59)
60. Hobbes, *Leviathan*, Ch.12, p.67-71. [↑](#footnote-ref-60)
61. Hobbes, *Leviathan*, Ch.12, p.71-2. [↑](#footnote-ref-61)
62. Hobbes, *Leviathan*, Ch.15, p.99-100. [↑](#footnote-ref-62)
63. *ST*, 2-2.58.1. [↑](#footnote-ref-63)
64. Hobbes, *Leviathan*, ibid. [↑](#footnote-ref-64)
65. Hobbes, *Leviathan*, ibid. [↑](#footnote-ref-65)
66. Dennis Klimchuk, "Hobbes on Equity," in David Dyzenhaus and Thomas Poole eds, *Hobbes and the Law* (Cambridge University Press, 2012) [Kobo eBook]. [↑](#footnote-ref-66)
67. Hobbes, *Leviathan*, Ch.26, p.182. [↑](#footnote-ref-67)
68. Joseph Raz, "Legal Positivism and the Sources of Law," in Aileen Kavanagh & John Oberdiek*,* eds*, Arguing About Law* (Routledge, 2013) at p.117-121. [↑](#footnote-ref-68)
69. Sean Coyle, "Thomas Hobbes and the Intellectual Origins of Legal Positivism," (2003) *Canadian Journal of Law and Jurisprudence,* 16 (2) at p.243. [↑](#footnote-ref-69)
70. John Gardner, "Legal Positivism: 5 1/2 Myths," in Aileen Kavanagh & John Oberdiek*,* eds*, Arguing About Law* (Routledge, 2013). [↑](#footnote-ref-70)
71. Hart, *The Concept of Law*, p.53-4. [↑](#footnote-ref-71)
72. Hobbes, *Leviathan*, Ch.26, p.178. [↑](#footnote-ref-72)
73. Hobbes, *Leviathan*, Ch.30, p.219-20. [↑](#footnote-ref-73)
74. Hobbes, *Leviathan*, Ch.18, p.115-6. [↑](#footnote-ref-74)
75. But they are presented in Jules Coleman’s mode of thought as ‘identification rules’. This is reason to consider Coleman’s incorporationism as having closer affinities to wide legal pragmatism than to the positivist tradition. Still, at this point, classifications become controversial. For background, see, Jules Coleman, “Reason and Authority,” In R. George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1995); and Wil Waluchow, 2001, “Legal positivism, inclusive versus exclusive,” In E. Craig, ed, *Routledge Encyclopedia of Philosophy* (Routledge, 2001). [↑](#footnote-ref-75)
76. Hobbes, *Leviathan*, Ch.24, p.160-63. [↑](#footnote-ref-76)
77. Hobbes, *Leviathan*, Ch.29, p.210-219. [↑](#footnote-ref-77)
78. Hobbes, *Leviathan*, Ch.19, p.119-122. [↑](#footnote-ref-78)
79. Hobbes, *Leviathan*, Ch.19, p.124-5. [↑](#footnote-ref-79)
80. Hobbes, *Leviathan*, Ch.18, p.116-118. [↑](#footnote-ref-80)
81. I do not mean to suggest that the two powers exist independently of each other, since it is entirely plausible to say that the entitlement of honors is just one of the many powers possessed by the sovereign in the pursuit of a common order. However, they both contribute the resources to the resolution of the first puzzle, at least, which is why I itemized them separately. I thank an anonymous reviewer for pressing me on this point. [↑](#footnote-ref-81)
82. These contrasts do not imply an exhaustive examination of the tensions in Hobbesian thought. So, I pass over questions related to meta-ethical theory generally, though some have been given a plausible treatment elsewhere: see, George Duke, "Hobbes on Political Authority, Practical Reason and Truth," (2014) *Law and Philosophy*, 33. [↑](#footnote-ref-82)
83. Hobbes, *Leviathan*, Ch.14, p.80. [↑](#footnote-ref-83)
84. By ‘conservation principle’, I mean the natural lawyer’s maxim *that things which are a means to the preservation of human life are to be protected, and obstacles to human life are to be avoided*. (ST, 1-2.94.2) [↑](#footnote-ref-84)
85. Hobbes, *Leviathan*, Ch.14, p.87-8.

See also: Susanne Sreedhar, *Hobbes on Resistance* (Cambridge University Press, 2010) at p.53-88.

Sreedhar discusses a robust range of potentially legitimate exercises of dissent (or “resistance rights”). Further, Sreedhar argues that Hobbes is best understood as permitting rebellions that are based on necessity and not ideology. (p.132-167) One might plausibly regard known collective emergencies in terms of resistance rights, so long as they are understood in this fashion. [↑](#footnote-ref-85)
86. Hobbes, *Leviathan*, ibid. [↑](#footnote-ref-86)
87. The aim of securing a healthy environment may be among the most basic of our political obligations. Indeed, many courts have recognized the validity of some such deontology. See:

David R. Boyd, "The implicit constitutional right to live in a healthy environment," (2011) *Review of European Community & International Environmental Law,* 20(2) at 171-9;

and Hiskes, *The Human Right to a Green Future,* 6-10. [↑](#footnote-ref-87)
88. Hobbes, *Leviathan*, Ch.37, p.296-8. [↑](#footnote-ref-88)
89. Ladenson, *In Defense of a Hobbesian conception of law*, p.137. [↑](#footnote-ref-89)
90. Hobbes, *Leviathan*, Ch.14, p.79-80. [↑](#footnote-ref-90)
91. Hobbes, *Leviathan*, Ch.26, p.173.

‘Liberty’ is now sometimes regarded as a close synonym to ‘privilege’ in legal scholarship, especially in connection to Hohfeld’s famous taxonomy of juridical opposites and correlatives. But we should not assimilate Hobbesian terminology into the Hohfeldian classification scheme, since Hobbes seems to regard liberty as the ‘right of nature’, which is both a privilege and a power. For further discussion, see: Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," (1917) *Faculty Scholarship Series, Paper 4378*, URL= <<http://digitalcommons.law.yale.edu/fss_papers/4378>>

Mark Andrews, “Hohfeld’s Cube,” (1983) *Akron Law Review,* 16(3), p.473. [↑](#footnote-ref-91)
92. Hobbes, *Leviathan*, Ch.26, p.177. [↑](#footnote-ref-92)
93. Hobbes, *Leviathan*, Ch.26, p.185. [↑](#footnote-ref-93)
94. Hobbes, *Leviathan*, Ch.26, p.174-5 [↑](#footnote-ref-94)
95. Hobbes, *Leviathan*, ibid, and discussion in Harrison, "The equal extent of natural and civil law" in *Hobbes and the Law*. Though I am sympathetic to Harrison, I am unsure that MCT can be straightforwardly resolved in terms of an is/ought distinction, given the Janus-faced sovereign. [↑](#footnote-ref-95)
96. Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton University Press, 1986) at p.248- 254. [↑](#footnote-ref-96)
97. MM Goldsmith, "Hobbes on law," In Tom Sorell, ed, *Cambridge Companion to Hobbes* (Cambridge University Press, 1996) at p.274-304. [↑](#footnote-ref-97)
98. Hobbes, *Leviathan*, Ch.26, p.182 [↑](#footnote-ref-98)
99. See Klimchuk, “Hobbes on Equity,” *Hobbes and the Law* [Kobo eBook]. [↑](#footnote-ref-99)
100. An anonymous reviewer helpfully suggested that we might wish to read Hobbes as really saying that judges may be inequitable, but never unjust. Given the evidence cited above, this is not clear. At best, we might think that a strong justice/equity distinction may have been Hobbes’s intent, and conclude that this was a slip of the pen. But even if that is the case, the distinction cannot be properly said to be a determinate implication of Leviathan, given what is directly entailed by what was explicitly said during a crucial passage. [↑](#footnote-ref-100)
101. Hobbes, *Leviathan*, ibid. [↑](#footnote-ref-101)
102. Hobbes, *Leviathan*, Ch.26, p.181-2. [↑](#footnote-ref-102)
103. Hobbes, *Leviathan*, Ch.16, p.103-4. [↑](#footnote-ref-103)
104. Hobbes, *Leviathan*, Ch.26, p.182. [↑](#footnote-ref-104)
105. Sreedhar, *Hobbes on Resistance*, p.53-88. [↑](#footnote-ref-105)
106. Klimchuk, “Hobbes on Equity”. [↑](#footnote-ref-106)
107. The approach of focusing exclusively on *Leviathan* has some built-in limitations. So, for example, Larry May might be right in suggesting that we better understand Hobbes by consulting the *Dialogue*. I thank an anonymous reviewer for this point. See: Larry May, *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford University Press, 2013). [↑](#footnote-ref-107)