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SOVEREIGNTY AND SUBVERSION

Alice Ristroph*

BETWEEN those who advocate “too great liberty” and those who contend for “too much authority,” Thomas Hobbes found it difficult “to pass between the points of both unwounded.”¹ It does not appear that he cleared the gauntlet successfully. One of the many curiosities in Hobbes’s work is its provocation of two diametrically opposed, and seemingly inconsistent, criticisms. When *Leviathan* was first published some 350 years ago, Hobbes’s very name became an epithet in polite circles, evoking the horrors of atheism, libertinism, and worst of all, defiance to established authority.² Today, the same work that Hobbes’s contemporaries denounced as a “Rebel’s Catechism” is widely viewed as an unequivocal and misguided defense of an authoritarian and absolutist government.³ Hobbes’s descriptions of the need for a powerful sovereign are many and memorable enough to have eclipsed, over time, his endorsements of a few specific rights to resist the sovereign. But Hobbes’s contemporaries did not overlook the subversive strands of his work, and neither should we. In particular, there is much to be learned from the juxtaposition of Hobbes’s account of law—a command made with authority, to one obliged to obey⁴—and his account of punishment—an act of violence that the target has a right to resist.⁵ This juxta-

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¹ Thomas Hobbes, *Leviathan* 3 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) [hereinafter Hobbes, *Leviathan*]. I have modernized spelling, capitalization, and punctuation here and in the quotations throughout the rest of the piece.

² See generally Samuel I. Mintz, *The Hunting of Leviathan: Seventeenth-Century Reactions to the Materialism and Moral Philosophy of Thomas Hobbes* 40, 55 (1962) (noting initial widespread criticism of Hobbes for his “scepticism . . . general irreverence . . . [and] atheism,” and discussing contemporary warnings of the danger *Leviathan* posed to the authority of government and religion).

³ See John Bramhall, *The Catching of Leviathan, or the Great Whale, in Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes* 115, 145 (G.A.J. Rogers ed., 1995) (“Why should we not change the name of *Leviathan* into the *Rebells catechism*?”); David Dyzenhaus, *Hobbes on the Authority of Law, in Hobbes and the Law* 186, 186–87 (David Dyzenhaus & Thomas Poole eds., 2012) (describing “the orthodox view” of Hobbes as an authoritarian).

⁴ Hobbes, *Leviathan*, supra note 1, at 183.

⁵ *Id.* at 93.

position illuminates some recurring jurisprudential questions about the relationship of law to coercion, and the possibility of strictly descriptive, nonevaluative legal theory.

Hobbes's account of law, like his account of punishment, does not fit well into our existing scholarly categories. I shall argue that the fault lies in our categories, and not in Hobbes. He was neither a legal positivist nor a natural law theorist, at least not as we usually use these labels. He adopted neither a retributive nor a consequentialist justification of punishment. Yet his account of human interaction, particularly with respect to law and punishment, captures actual experience better than the more familiar alternatives. Moreover, the space for subversion in Hobbes's theory may make his account more normatively appealing than it has seemed to modern liberals.

The Article is organized around three questions about Hobbesian theory: What is law? What is its relationship to punishment? And what are the implications of Hobbes's theory for contemporary efforts to describe law or the relationship of law to punishment? The first of these questions has been tackled by Hobbes scholars, of course, but Hobbes's legal theory is still so widely mischaracterized, sometimes even by Hobbes scholars, that it is worth returning to his claims. The second question has received much less attention, perhaps because a right to resist punishment seems so discordant with the authoritarian Hobbes we know, or think we know. And the third question has received still less attention, for contemporary jurisprudence scholarship rarely cites anyone who wrote before Jeremy Bentham and John Austin. I hope to show that, in many instances, Hobbes has been misread;⁶ even more importantly, I hope to persuade scholars of jurisprudence that what Hobbes actually said is worthy of their engagement.

I. LAW AS COMMAND, RECONSIDERED

Hobbes favored brief and pithy formulations when he could offer them, and this predilection has helped produce the somewhat distorted understanding of Hobbes's work that prevails today. First, his most widely circulated one-liners tend to focus on human conflict and the need for violent suppression of bad behavior. "Covenants, without the

⁶ Were I writing a longer Article, or feeling more intemperate, I would advance the claim that the history of legal theory is a history of misunderstandings or misappropriations of Hobbes and his ideas.

sword, are but words.”⁷ “[I]n matters of government, when nothing else is turned up, clubs are trump.”⁸ And of course, in the state of nature, “every man is enemy to every man,” and “the life of man [is] solitary, poor, nasty, brutish, and short.”⁹ Hobbes said, and meant, these things; how much easier it is to repeat the quips than to see what else Hobbes said. Indeed, Hobbes’s fondness for quips like these and for concise, simple statements may have actually contributed to misunderstandings of his arguments, for in his work it is easy to read a few paragraphs on a given topic and think one has the whole picture. At the same time, in legal theory, thinkers who have borrowed from (and distorted) Hobbes are much more widely read than Hobbes himself, which further obscures his lessons. Thus, while Hobbes scholars have produced several careful and illuminating accounts of his theory of law,¹⁰ it is nonetheless worth disentangling (again) what Hobbes actually said from the ideas typically attributed to him in the legal academy.

“Law in general,” says Hobbes in *Leviathan*, “is not counsel but command; nor a command of any man to any man, but only of him, whose command is addressed to one formerly obliged to obey him.”¹¹ This sentence—usually just its first eight words—is cited often to link Hobbes to Austin, Bentham, and the tradition of legal positivism. For those already familiar with Austin’s theory of law as commands backed by sanctions, it is all too easy to assume Hobbes is saying the same thing. Austin linked command, sanction, and obligation in one tidy bundle: The power to punish disobedience was what made a command a

⁷ Hobbes, *Leviathan*, supra note 1, at 117.

⁸ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* 140 (Joseph Cropsey ed., Univ. of Chi. Press 1971) (1681) [hereinafter *Hobbes, Dialogue*].

⁹ Hobbes, *Leviathan*, supra note 1, at 89.

¹⁰ See, e.g., Dyzenhaus, supra note 3, at 186; Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 *Fordham L. Rev.* 1211 (2006); Mark C. Murphy, *Was Hobbes a Legal Positivist?*, 105 *Ethics* 846 (1995). Unfortunately, others have purported to expound “a Hobbesian conception of law” while barely referencing Hobbes. See Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 *Phil. & Pub. Aff.* 134, 134 (1980). Ladenson offers “a Hobbesian analysis of the notion of governmental authority” without citing or discussing Hobbes’s own lengthy discussion of authority as a bilateral principal-agent relationship between an author and a representative. *Id.* at 137.

¹¹ Hobbes, *Leviathan*, supra note 1, at 183.

command, and what generated obligation.¹² Many a scholar has read Hobbes on law through Austinian glasses.¹³

For Hobbes, though, command, sanction, and obligation are three independent and severable concepts. A command does not necessarily threaten punishment or produce obligation; indeed, it is distinctive for its absence of any appeal to the listener's self-interest. In the chapter before the oft-quoted discussion of law as command, the difference between command and counsel is stated clearly. Commands are orders to act or refrain from acting "without expecting other reason than the will of him that says it;" thus one who commands "pretends thereby his own benefit."¹⁴ Counsel, in contrast, is advice that purports to serve the interests of the person counseled—although Hobbes recognized that those who offer counsel may in fact have selfish or otherwise ill intentions.¹⁵ "Do it because it is good for you" is counsel; "do it because I said so" is a command. Thus a command is not an effort to induce compliance by threatening punishment; a command makes no reference to the listener's interests at all. Nor do commands themselves produce or presume obligation, as indicated by Hobbes's distinction between law and other commands: Law is not the command of any man to any other, but "only

¹² See John Austin, *The Province of Jurisprudence Determined* 21 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) ("A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded."); *id.* at 24 ("[C]ommand, duty, and sanction are inseparably connected terms . . . each embraces the same ideas as the others . . ." (emphasis omitted)). Contemporary scholars tend to equate "command theories" of law with an Austinian emphasis on sanction. See, e.g., Anthony J. Sebok, *Misunderstanding Positivism*, 93 *Mich. L. Rev.* 2054, 2109 n.213 (1995) ("To the extent that the command theory relies upon the rather unreal notion that every law is necessarily backed by a sanction, it is easy to see why Hart and any other positivist would reject it.").

¹³ See, e.g., Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* 83–84 (1953) (arguing that sanction was intrinsic to Hobbes's account of law because it is implied by the word "command"); Roger Berkowitz, *From Justice to Justification: An Alternative Genealogy of Positive Law*, 1 *U.C. Irvine L. Rev.* 611, 614 (2011) ("[A]s does Austin, Hobbes understands law as a command . . ."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 885–86 (1996) (linking Austin, Bentham, and Hobbes as a part of a single tradition framing law as commands). But see Mark C. Murphy, *Hobbes (and Austin, and Aquinas) on Law as Command of the Sovereign*, in *The Oxford Handbook of Hobbes* 4–7 (Al P. Martinich & Kinch Hoekstra eds., forthcoming 2015) (on file with author) (describing "a great gulf between Hobbes's and Austin's [command] theories of law").

¹⁴ Hobbes, *Leviathan*, *supra* note 1, at 176.

¹⁵ See *id.* ("[H]e that gives counsel, pretends only (whatsoever he intends) the good of him, to whom he gives it.").

of him, whose command is addressed to one formerly obliged to obey him."¹⁶

Strip away Austinian assumptions, and it should be clear that for Hobbes, to describe laws as commands is not to make any claim about sanctions, or obligations, at all. It is instead a claim about reasons for action, a claim related to and perhaps foreshadowing the now familiar Razian account of legal authority. Joseph Raz is often credited for developing the idea that law generates exclusionary reasons for action: The fact that a law has commanded a given action is itself a reason to exclude from consideration all other reasons for or against taking the action.¹⁷ That is the nature of a command according to Hobbes, or at least its aspiration. A command demands obedience simply by being issued, without attempting to persuade compliance and notwithstanding any inclinations of the listener to act otherwise. Raz would certainly distinguish his account from a Hobbesian one, but unfortunately Raz often relies on interpreters of Hobbes rather than Hobbes himself, and even interpreters as distinguished as H.L.A. Hart have injected Hobbes's theory with claims he did not make.¹⁸

So what role *do* obligations and sanctions play in Hobbes's account of law, if they are not implicit in the concept of a command? As an initial matter, it is important to notice that for Hobbes, *political* obligation is

¹⁶ Id. at 183.

¹⁷ See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* 30 (1979).

¹⁸ See Joseph Raz, *Authority and Justification*, in *Authority* 115, 116–19 (Joseph Raz ed., 1990) (relying on Robert Ladenson, *supra* note 10, and H.L.A. Hart, *Essays on Bentham* (1982)). Raz relies on Hart's account of Hobbes, which begins well enough: "The commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action . . ." Id. at 118–19 (quoting Hart, *supra*, at 253). But Hart then claims that the "expression of the commander's will . . . is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act." Id. at 119 (quoting Hart, *supra*, at 253). Raz objects: "Surely what counts, from the point of view of the person in authority, is not what the subject thinks but how he acts." Id. I suspect Hobbes would agree with Raz here, rather than Hart's reinterpretation. For Hobbes, "[c]ommand is where a man says, do this, or do not do this, without expecting *other reason* than the will of him that says it." Hobbes, *Leviathan*, *supra* note 1, at 176 (emphasis added), *cited in* Hart, *supra*, at 253. It seems quite clear that Hobbes's claim is not that after a command, reasons do not matter; instead, the claim is that a command asserts itself as the only reason that matters for action. Elsewhere, Hobbes makes explicit the very point Raz raises against Hart: Actions matter for legal compliance, not beliefs. "For if the law declared, be not against the Law of Nature . . . [a subject is] bound I say to obey it, but not bound to believe it: for men's belief, and interior cogitations, are not subject to the commands . . ." Id. at 198.

prior to law.¹⁹ Laws are a particular kind of command, made by one with authority to one formerly obliged to obey. The issuance of a law can create new, specific obligations (to pay taxes of a given amount, for example, or to refrain from ingesting specific intoxicants), but these legal obligations depend upon the prior general political obligation to obey. Of course, Hobbes had a specific account of the basis of political obligation and its limits, and that political account proves important to Hobbes's legal theory.²⁰

The theory of political obligation in *Leviathan* is well known, and less frequently distorted than Hobbes's theory of law, so I will summarize only briefly here. For Hobbes, all obligations, including the political obligation to obey the sovereign, arise from voluntary choice.²¹ When I renounce a right, or transfer it to another party, I take on an obligation.²² The right that each of us renounces in order to generate political obligation is a very broad right of nature to do whatever I deem necessary to preserve myself. This prepolitical right includes a right to use preemptive aggression.²³ The social contract is an agreement among all persons (save the sovereign) to transfer each person's natural right of self-

¹⁹ A few other readers have emphasized this point. See, e.g., Claire Finkelstein, *Hobbesian Legal Reasoning and the Problem of Wicked Laws*, in *Hobbes Today: Insights for the 21st Century* 49, 54 (S.A. Lloyd ed., 2013); David Gauthier, *Thomas Hobbes and the Contractarian Theory of Law*, 16 *Can. J. Phil. (Supp. Issue)* 5, 7–8 (1990).

²⁰ I flag here a broader methodological point to which we will return: There is reason to doubt the severability of legal theory from political theory, and reason to mistrust the claims of some thinkers to offer “purely descriptive” theories of law. Law—at least the kind of law that is the subject of jurisprudence, as opposed to the laws of physics, divine law, and Murphy's law—is the product of organized political entities. It both relies upon and helps maintain those entities, and it is doubtful that we can give an account of the nature of law without delving into the nature of the state. And if there are too many kinds of states to speak coherently of the nature of “the” state, there are probably too many kinds of law to speak coherently of “the” nature of law. Moreover, given that those who theorize law are also always members of organized political entities and participants in the social practices that constitute law, there is reason to question the characterization of any legal theory as “pure description.” But more will be discussed on these issues in Part III.

²¹ See, e.g., Hobbes, *Leviathan*, supra note 1, at 150 (“[T]here being no obligation on any man, which arises not from some act of his own; for all men equally, are by nature free.”).

²² *Id.* at 92–93 (“[W]hen a man has in either manner abandoned or granted away his right, then is he said to be obliged, or bound, not to hinder those, to whom such right is granted, or abandoned, from the benefit of it: and that he ought, and it is his duty, not to make void that voluntary act of his own . . .”).

²³ *Id.* at 87–88. It bears emphasis that Hobbes's right of nature is not just a right *to do* what is in fact necessary for self-preservation, but a right *to make the judgment* about how to best preserve oneself. *Id.* at 91.

governance to the sovereign.²⁴ The social contract thus obliges each person to obey the sovereign. And, as Hobbes is usually presented today, the sovereign's power to legislate and the subject's obligation to obey are each absolute, or nearly so. The sovereign is the sole legislator, and is not itself bound by the civil laws.²⁵ The sovereign is not a party to the social contract, and so cannot breach it; thus subjects cannot avoid their obligation to obey by accusing the sovereign of breach of contract.²⁶ In his discussions of political obligation, Hobbes often appeared much more concerned with refuting those who might advocate an excess of liberty than he was with quieting those who called for excessive authority.

It turns out, though, there are limits to subjects' obligations to obey, limits which are generated by Hobbes's account of human motivation and, I believe, by his normative principles. These limits to obligation then generate limits to what can count as law, and they force a wedge between law and punishment. Hobbes posited that though we could and should give up a right of self-governance, we could not renounce a core right to preserve ourselves in the face of immediate threats. All voluntary acts must aim at some good to the actor, and "therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred."²⁷ First among these inalienable rights is "the right of resisting them, that assault him by force, to take away his life" or even the right to resist "wounds, and chains, and imprisonment."²⁸ More generally, we cannot oblige ourselves to take self-destructive actions; Hobbes maintains that we cannot oblige ourselves even to take certain *potentially* fatal actions, such as serving in combat.²⁹ Scholars have puzzled over this claim: Is Hobbes saying that it is psy-

²⁴ Id. at 120. Hobbes imagines the social contract as a transfer of the right of self-governance, not the right of self-preservation. This distinction proves important, as explained below.

²⁵ Id. at 184.

²⁶ Id. at 122–23.

²⁷ Id. at 93.

²⁸ Id.

²⁹ There is some ambiguity as to whether this exception applies to all potential conscripts or only those who provide substitutes, as well as "men of feminine courage." See id. at 151 ("[A] man that is commanded as a soldier to fight against the enemy, though his sovereign have right enough to punish his refusal with death, may nevertheless in many cases refuse, without injustice; as when he substitutes a sufficient soldier in his place And there is allowance to be made for natural timorousness, not only to women (of whom no such dangerous duty is expected), but also to men of feminine courage.").

chologically or conceptually impossible to renounce a right of self-preservation?³⁰ Or just that it would never be rational to renounce that right?³¹ None of these explanations is completely satisfying, and I have suggested previously that Hobbes's claim here is at least partly a normative argument about how we *should* understand each other.³² Whatever the normative content of this claim of inalienability, it is clear that Hobbes took the claim seriously, with profound consequences for his political and legal theory.

Put simply, the inalienability of the right of self-preservation sets limits to obligation: We cannot oblige ourselves to submit to violence or to refrain from resisting it. "A covenant not to defend myself from force, by force, is always void."³³ This implies a right to resist punishment, a right held even by the guilty.³⁴ It also seems to generate content-based limits to what counts as law. Suppose an otherwise legitimate sovereign, seeking to save money on geriatric care, were to promulgate a putative law requiring those over ninety years old to commit suicide. Or suppose, slightly less morbidly, that a statute required honest and complete testimony from anyone the state chose to summon as a witness before a court, including a criminal defendant. Or suppose, most realistically of all, that a putative law required registration for military service and service if called. Do any of these commands have the status of law? Hobbes made clear that we are not obliged to obey these sorts of commands.³⁵ Without obligation to obey, the command seems to lack the status of

³⁰ See, e.g., Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan* 30–32 (2010) (explaining the conceptual and psychological interpretations of Hobbes's claim).

³¹ See, e.g., Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 *Pac. Phil. Q.* 332, 334, 338–39 (2001).

³² Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 *Calif. L. Rev.* 601, 628–30 (2009); see also Hobbes, *Leviathan*, *supra* note 1, at 93 (stating that if a man seems to transfer his right of self-preservation, "he is not to be understood as if he meant it").

³³ Hobbes, *Leviathan*, *supra* note 1, at 98.

³⁴ I discuss this right in more detail in Part II, but it bears emphasis now that the right to resist punishment is not in any way legally enforceable. Hobbes defined a right as a blameless liberty—a prerogative to act without violating principles of justice or morality. It is not at all a Hohfeldian conception of right, which implies a correlative duty for someone else. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 747–50 (1917).

³⁵ Hobbes, *Leviathan*, *supra* note 1, at 151 ("If the sovereign command a man (though justly condemned) to kill, wound, or maim himself . . . yet has that man the liberty to disobey. If a man be interrogated by the sovereign, or his authority, concerning a crime done by himself, he is not bound (without assurance of pardon) to confess it . . .").

law.³⁶ Notably, Hobbes would maintain that the sovereign has the *power* simply to kill nonagenarians, or those who refuse military service, or even those innocent of any criminal offense.³⁷ But power is not law.³⁸ To exercise a power requires no cooperation or participation from the subject. Power is indifferent, in Hart's terms, to the internal point of view.³⁹ Law, in contrast, requires a voluntarily assumed obligation; it is a two-way street rather than the product of unilateral action.⁴⁰ And according to Hobbes, there are some paths that subjects simply will not and cannot take—namely, the paths to obvious destruction.

Contemporary readers who care about “the law,” and not necessarily about Hobbes, may ask, *but was Hobbes right?* Surely the Selective Service Act's registration requirement is legally valid (even if unjust), as were specific conscription acts that required draftees to report for military service. But these objections are raised from the perspective of purely descriptive jurisprudence, and, as we will see in Part III, that is not necessarily a promising vantage point.

For now, I ask the reader to stay within Hobbes's project. We have seen so far that Hobbes did not argue that sanctions are intrinsic to the concept of law, and still more radically, he saw political and thus legal obligation as circumscribed by a right of self-preservation that actually

³⁶ See Murphy, *supra* note 10, at 850–52. If legal positivism is understood as the view that legal validity depends only on the source of a law, and natural law theory as the view that legal validity is at least partially dependent on the content of the law, then Hobbes seems a natural law theorist rather than a legal positivist. See *id.* at 849. I am not sure, though, whether it is useful to try to place Hobbes in either category, for reasons I elaborate on in Part III.

³⁷ See Hobbes, *Leviathan*, *supra* note 1, at 148, 151. Hobbes claims that a sovereign who kills an innocent subject does the subject no injury, or no wrong (though this brutal sovereign does violate the law of nature and does injury to God). *Id.* at 148. This claim bolsters the view of Hobbes as a totalitarian, of course, but it should be understood in the context of Hobbes's definition of “injury.” “Injury” refers to injustice, which in turn implies the violation of some prior covenant or agreement. See *id.* at 104. Since the sovereign does not contract with his subjects, he cannot “injure” them.

³⁸ See, e.g., *id.* at 153 (distinguishing power from law).

³⁹ See Hart, *supra* note 18, at 253.

⁴⁰ Another oft-quoted Hobbes quip on law: “It is not wisdom, but authority that makes a law.” Hobbes, *Dialogue*, *supra* note 8, at 55. The line is used to distinguish Hobbes from earlier natural law theorists, fairly enough, but it also must be understood in light of Hobbes's claims about authority. Authority is always artificial, in that it is a human artifice, and it requires persons, plural. One person cannot establish authority by himself. Cf. Hanna Fenichel Pitkin, *The Concept of Representation* 23 (1972) (discussing the artifice involved in authorizing a person to act on behalf of another).

gave subjects a right to resist punishment. A right to resist should lead us to ask: Could a Hobbesian sovereign even enforce Hobbesian law?

II. ENFORCEMENT

Readers have sometimes mistaken Hobbes to have a sanction-based theory of *law* because he seemed to endorse so strongly a sanction-based theory of *political power*. Political power is based on a covenant, the social contract, but again, “covenants, without the sword, are but words.”⁴¹ Hobbes was adamant that the role of the sovereign was not simply to legislate rules for conduct, but also to enforce them, chiefly by threatening punishment to the disobedient.⁴² Civil laws, “in their own nature but weak, may nevertheless be made to hold, by the danger, though not by the difficulty of breaking them.”⁴³ The function of sanctions is to encourage obedience, as is clear already in Hobbes’s definition of the term *punishment*: “[A]n evil inflicted by public authority, on him that has done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience.”⁴⁴ It is not clear, though, that this is a conventional deterrence argument. Hobbes sometimes spoke of punishment as a “danger” or a “terror,”⁴⁵ suggesting a deterrence function; however, he also advanced a more nuanced explanation in which punishment disposed “the will of men . . . to obedience” by providing assurances against exploitation to those who comply with the law.⁴⁶ Whether

⁴¹ Hobbes, *Leviathan*, supra note 1, at 117.

⁴² *Id.* at 120–21 (“[B]y this authority, given him by every particular man in the commonwealth, he has the use of so much power and strength conferred on him, that by terror thereof, he is enabled to conform the wills of them all, to peace at home, and mutual aid against their enemies abroad.”).

⁴³ *Id.* at 147.

⁴⁴ *Id.* at 214.

⁴⁵ *Id.* at 147 (“danger”); *id.* at 215–16 (“terror”); see also *id.* at 117 (claiming that one purpose of a commonwealth is to “tie [men] by fear of punishment to the performance of their covenants”).

⁴⁶ Alice Ristroph, Hobbes on “Diffidence” and the Criminal Law, in *Foundational Texts in Modern Criminal Law* 23, 31 (Markus D. Dubber ed., 2014). The details of this argument are not central to this Article, but I have set them forth elsewhere:

Hobbes describes a first-performer problem: each party to a contract is rightfully reluctant to perform his duties first, for the second party may then take the benefits of the agreement but refuse to perform *his* contractual obligations. It is not that either party is necessarily evil, or disinclined to keep promises; but each has no reason to keep promises without a system in place that guarantees that others will keep promises also. . . . Importantly, men seem to trust the institution of punishment regardless of

through simple deterrence, or also through providing assurances, sanctions encourage compliance.

A function or purpose of punishment is not necessarily a justification of it. Hobbes was confident that punishment served an important purpose; indeed, he often suggested that punishment, or at least a credible threat of punishment, was necessary to political stability. To a strict utilitarian, the usefulness of punishment might be enough to justify it, but Hobbes was not a strict utilitarian. So after defining punishment in terms of its function, he raised the separate question: “[B]y what door the right, or authority of punishing in any case, came in.”⁴⁷ And his answer, though unconventional, is consistent with the subject’s right to resist punishment. The sovereign’s power to punish is a manifestation of an extrapolitical, natural right to do violence against any potential threat.⁴⁸ Everyone but the sovereign gives up that right when they enter the social contract, but the sovereign is not a party to the contract and so retains the broadest natural right of self-preservation, a right that includes the right to use preemptive violence against apparent threats. On this account, the sovereign’s power to punish “is not grounded on any concession, or gift of the subjects,”⁴⁹ and thus there is no logical contradiction between the sovereign’s right to punish and the subject’s right to resist punishment.

Still, Hobbes’s account may seem implausible and internally inconsistent. First, it is not clear why the sovereign—a human construct who did not exist in the state of nature, an “artificial [person]” in Hobbes’s terminology⁵⁰—should have any *natural* rights, including a natural right to self-preservation. It may clarify things somewhat to rethink the concept of the state of nature, as I have suggested elsewhere,⁵¹ but Hobbes’s

whether it actually deters the would-be wrongdoer. The primary function of a system of punishment is to serve as a kind of psychological safety net, a reassurance from the sovereign to the person who is willing to keep his promises . . .

Id.

⁴⁷ Hobbes, *Leviathan*, supra note 1, at 214.

⁴⁸ Id. (“[B]efore the institution of commonwealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right, but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all . . .”).

⁴⁹ Id.

⁵⁰ Id. at 9.

⁵¹ Ristroph, supra note 32, at 614–15.

account of punishment still seems to rest on the attribution to the sovereign of a right that seems limitable to individual, mortal humans.⁵² I leave this issue aside here, for other apparent tensions in Hobbes's argument are more closely related to the questions of legal theory that motivate this Article.

For example, it is at times unclear whether Hobbesian subjects authorize the very punishments that they may rightfully resist. Hobbes linked law with political authority, as we saw in Part I: A law is a command made by one with the right to rule, to one formerly obliged to obey. Authority, in turn, is not a matter of superior physical strength but a voluntary relationship between a principal ("author," to Hobbes) and an agent. The scope of authority is a question of what has been authorized.⁵³ When each subject transfers his right of self-governance to the sovereign, he gives the sovereign a blank check and promises to pay *whatever* the sovereign demands. Or so it seems at many points in Hobbes's argument. With the initiation of the social contract, every subject is to "acknowledge himself to be [the] author of whatsoever [the sovereign] shall act, or cause to be acted, in those things which concern the common peace and safety."⁵⁴ Do not subjects then authorize their own punishments? Hobbes claimed just that on at least one instance, speaking of a subject that attempted to depose the sovereign: "[If he] be killed, or punished . . . for such attempt, he is author of his own punishment, as being by the institution [the social contract] author of all his sovereign shall do . . ."⁵⁵ And on at least two other occasions, Hobbes contemplated a subject's specific authorization of punishment. Each

⁵² Alice Ristroph, *Covenants for the Sword*, 61 U. Toronto L.J. 657, 661–68 (2011).

⁵³ See Hobbes, *Leviathan*, supra note 1, at 112.

⁵⁴ *Id.* at 120.

⁵⁵ *Id.* at 122. Hobbes continued, "And because it is injustice for a man to do anything, for which he may be punished by his own authority, he is also upon that title, unjust." *Id.* A few pages later, Hobbes expanded the argument, but seemed also to change it:

[B]ecause every subject is by this institution author of all the actions and judgments of the sovereign instituted, it follows, that whatsoever [the sovereign] does, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice. . . . [E]very particular man is author of all the sovereign does, and consequently he that complains of injury from his sovereign complains of that whereof he himself is author, and therefore ought not to accuse any man but himself, no nor himself of injury, because to do injury to oneself is impossible.

Id. at 124. In the first passage, the lawbreaker is unjust—to whom it is unclear—for inviting his own punishment; in the second, the lawbreaker faces no injury and should complain to no one, not even himself. Since Hobbes equated injury with injustice, the passages seem at odds.

time, the subject authorized his own punishment, but also retained a right to resist. “For though a man may covenant thus, *unless I do so, or so, kill me*; he cannot covenant thus, *unless I do so, or so, I will not resist you, when you come to kill me*.”⁵⁶

I do not think Hobbes resolved all the tensions in these claims. In what sense is the first proposition—*unless I do so, or so, kill me*—properly called a covenant? What would it mean for me to keep that covenant?⁵⁷ Moreover, framing authorization for punishment as a covenant with the sovereign is a contradiction of Hobbes’s claims elsewhere that subjects contract with one another, not with the sovereign.⁵⁸ On Hobbes’s own account, the sovereign who comes to kill the disobedient subject is indifferent to whether the subject has said *kill me* or not. We speak directly to the sovereign when we authorize him, but we do not covenant with him. The account makes a little more sense if we take the subject’s own malfeasance out of the picture, and imagine instead an authorization of the institution of punishment in general: *I authorize you to make laws for myself and other subjects, and to punish those who break the laws*. That proposition is not clearly inconsistent with the subject’s own self-preservation, so long as he expects to comply with the laws. And indeed, this is how some commentators read Hobbes on the authorization of punishment: We authorize one another’s punishments, rather than our own.⁵⁹

⁵⁶ Id. at 98; see also Thomas Hobbes, *De Cive: or The Citizen* 39–40 (Sterling P. Lamprecht ed., Appleton-Century-Crofts, Inc. 1949) (1651) (“It is one thing, if I promise thus: if I do it not at the day appointed, kill me. Another thing, if thus: if I do it not, though you should offer to kill me, I will not resist.”).

⁵⁷ Remember that according to Hobbes, we can contract only in our self-interest. On that view, it may make sense for me to contract, *I will obey you, and in exchange, you will not kill me*. Perhaps Hobbes would argue that this is the exact equivalent of *unless I do so, or so, kill me*. It seems to me, though, that the first formulation—*I will obey you*—actually alters the baseline rights of each party, while the second formulation simply states an option that the potential ruler already enjoys under Hobbes’s account of natural right. In contract terminology, there is no consideration in the exchange—*unless I do so, or so, kill me*—since the other party already has the right to kill me in the state of nature. Perhaps it should also be noted here that Hobbes defined a “covenant” as a subspecies of contract, one in which one party performs immediately and trusts the other party to perform at some point in the future. Hobbes, *Leviathan*, supra note 1, at 94. But it does not seem that this more precise definition helps establish *unless I do so, or so, kill me*, as a covenant.

⁵⁸ See, e.g., id. at 122 (“[T]he right of bearing the person of them all, is given to him they make sovereign, by covenant only of one to another, and not of him to any of them . . .”).

⁵⁹ See, e.g., David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* 148 (1969) (“Each man authorizes, not his own punishment, but the punishment of every other man. The sovereign, in punishing one particular individual, does not

We could explain this argument in terms of risk and certainty. A rational agent interested in self-preservation might reasonably consent to a system in which she still faces some risks of being harmed or even killed, so long as the system is less risky than the alternatives. When I authorize the sovereign and a system of punishment, I face the risk that I will be punished, but I can reasonably expect to avoid that outcome by complying with the law. Once I have broken the law and am facing punishment, though, it is no longer a question of probabilities. It is never in my interest to be punished, Hobbes would argue, and thus I may resist punishment without running afoul of my prior covenants or doing injustice to anyone.

Now, one might reject Hobbes's account for any number of reasons. One might dispute his understanding of human psychology; one might argue that consent is the wrong standard for political legitimacy, or that Hobbes counts too little or too much as valid consent; one might reject his radical individualism. One might argue that humane and limited punishments are actually a service to the condemned rather than threats to their self-preservation. Or one might argue that the sovereign's inevitable access to superior physical force renders the right to resist punishment uninteresting and inconsequential, nothing more than "the right to kick and scream on the way to the gallows."⁶⁰ My own view is that, notwithstanding its various tensions and unresolved puzzles, Hobbes's account of punishment is much more honest and insightful than prevailing alternatives, and I have suggested elsewhere ways in which this account could provoke fruitful rethinking of contemporary criminal law and criminal procedure.⁶¹ The inquiry of this Article is a bit more abstract: Does this curious account of punishment shed any light on the broad jurisprudential effort to describe the concept of law?

act on the basis of his authorization from that individual, but on the basis of his authorization from all other individuals.").

⁶⁰ James R. Martel, *The Radical Promise of Thomas Hobbes: The Road Not Taken in Liberal Theory*, 4 *Theory & Event*, no. 2, 2000, ¶ 35.

⁶¹ See, e.g., Alice Ristroph, *Criminal Law for Humans*, in *Hobbes and the Law*, supra note 3, at 97, 97–98 (observing that Hobbes's criminal law theory and claims about punishment are "the product of his unwavering attention to the humanity of the various persons who make, break and enforce the criminal law"); Ristroph, supra note 46, at 28 (noting that Hobbes's account of punishment "illustrates the strength of Hobbes's commitment to individual consent . . . [and his] unusual attentiveness to the fact that humans are embodied, vulnerable creatures"); Ristroph, supra note 32, at 622–23, 628–30 (suggesting Hobbes's account of punishment may better account for the treatment of defendants, especially with respect to defendant rights).

Far from being a crude precursor to Austin's sanction-based theory of law, Hobbes's account insists on a conceptual separation between law and the mechanisms of its enforcement. Obviously, Hobbes would not deny the practical necessity of sanctions—though I think he would probably dispute the necessity, and wisdom, of the *scale* of modern American punishment.⁶² Necessity does not imply normative legitimacy, however, and there is a legitimacy gap between law and the measures the sovereign may need to take to enforce it. As a subject, I can authorize the law itself. I can take full ownership of the sovereign's pronouncements of conduct rules and fully oblige myself to comply. I can even authorize decision rules—directives to public officials to impose sanctions on violators.⁶³ But I do not and cannot oblige myself to accept every possible application of those decision rules. From my perspective as the condemned, the act of punishment is not a valid exercise of political power but the triumph of superior physical force over me.

The conceptual separation between conduct rules and enforcement measures should not be taken as a denial that laws themselves, even just the conduct rules, are coercive. The question whether law is coercive has generated a fair amount of commentary, most of which reveals more about the authors' various theories of coercion than it does about the law.⁶⁴ Hobbes did not delve into the term coercion, but he recognized that laws would be experienced as burdens for many subjects much of

⁶² Further undermining his status as an absolutist and authoritarian, Hobbes urged minimalism with respect to punishment. For example, he identified forgiveness and mercy as commands of the laws of nature: "[U]pon caution of the future time, a man ought to pardon the offenses past of them that repenting, desire it." Hobbes, *Leviathan*, supra note 1, at 106.

⁶³ The conduct rules/decision rules terminology was popularized by Meir Dan-Cohen, but he drew the idea from Bentham, and Bentham probably got it from—whom else—Hobbes. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625, 626 & n.1, 627 (1984) (explaining the terms and tracing the distinction "in modern times" to Bentham, though also noting a similar idea in Talmudic law). Hobbes distinguished "distributive" laws, which determine the rights of subjects and "speak to all the subjects," and "penal" laws, "which declare what penalty shall be inflicted on those that violate the law, and speak to the ministers and officers ordained for execution." Hobbes, *Leviathan*, supra note 1, at 197.

⁶⁴ See, e.g., Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 *Am. J. Juris.* 71, 88–93 (1976) (proposing that legal systems need not be inherently coercive); Arthur Ripstein, *Authority and Coercion*, 32 *Phil. & Pub. Aff.* 2, 2–3 (2004) (arguing that the state's authority cannot be separated from its coercive power); Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 *U. Rich. L. Rev.* 1195, 1197 (2008) (suggesting that coercion is a central feature in explaining the law).

the time: He characterized civil laws as “artificial chains,” after all.⁶⁵ Political power is coercive, even if based on consent,⁶⁶ and law is an exercise of political power.

We speak colloquially of *breaking* the law. On prevailing accounts, though, the law is actually impervious to breakage: Those who depart from prescribed conduct rules merely set decision rules into action. Once sanctions are imposed, the law has been vindicated rather than damaged—or if it was once broken, it is now repaired. Hobbes offered an alternative account in which violations of conduct rules are more significant. Violations mean the sovereign will no longer act with complete authorization—unless he manages to overlook or forgive the violation, but those are risky propositions too. When a law is violated, it is broken in a way that punishment does not fully repair.

This is an account that emphasizes both the bilateral nature and the ultimate fragility of law. Law is bilateral, in that it is a command made with authority, and authority is bilateral. The commander must be authorized and the subject must have previously obliged himself to obey. Given that we can oblige ourselves to obey but not to accept the—perhaps necessary—consequences of disobedience, the health of law depends on continued cooperation. If cooperation is withdrawn, the system continues to function but it does so, at least in part, on the basis of a natural right to do violence, not on the basis of what Hobbes would properly call law. And indeed, Hobbes would remind us that law—what he called civil law, or the law of a commonwealth as opposed to divine law—is a human construct, as fragile and subject to decay as everything else that mortals make.⁶⁷

We are now in a position to consider the question raised and bracketed earlier: But was Hobbes right? I suspect many contemporary legal theorists would endorse the general proposition that law is a human construct, but they might fault Hobbes for circumscribing possible legal constructions with the inalienable right of self-preservation. To return to the examples used earlier, why *are* conscription acts not properly called

⁶⁵ Hobbes, *Leviathan*, supra note 1, at 147.

⁶⁶ We agree, in the social contract, to take the will of the sovereign as our own. But this agreement governs our actions, not our internal preferences. See discussion supra note 18. In particular cases the will of the sovereign is likely to depart from what an individual subject might choose, and under these circumstances the law is coercive by most understandings.

⁶⁷ Hobbes, *Leviathan*, supra note 1, at 221 (“[N]othing can be immortal, which mortals make.”).

law? Is it not obvious that, as a matter of pure description, these acts are laws, and that even an act commanding testimony from criminal defendants or suicide from the very aged could meet the criteria for legal validity? A normatively constrained account of law—especially one subject to Hobbes's peculiar normative constraints—seems so far from ordinary usage that we may wonder whether it is useful.

III. JURISPRUDENCE AND THE MANTLE OF NATURE

We have seen that for Hobbes a natural right of self-preservation sets boundaries to political obligation, and thus limits what can count as civil law. Does this make Hobbes a natural law theorist after all? There is something odd about trying to categorize Hobbes as either a legal positivist or a theorist of natural law, because both those terms have become associated with a set of claims about law as an independent concept or practice, one distinct from political affairs. Hobbes certainly made a great many claims about law that are consistent with core claims of legal positivists, and he made a few claims that are consistent with natural law theorists.⁶⁸ But in full measure, Hobbes's account of law does not attempt to explain law without a background account of its human participants and their relationships to one another. Law, as it interested Hobbes, was a feature of the commonwealth, and so the definition of law required an account of the commonwealth.⁶⁹ It required an account of political obligation and its limits, and this required an account of human nature. In contrast to many of those who read or dismiss him today, Hobbes was antidisciplinarian with respect to scholarly inquiry. To be a

⁶⁸ And so he has been located, by different readers, in both camps. See M.M. Goldsmith, *Hobbes on Law*, in *The Cambridge Companion to Hobbes* 274, 275 (Tom Sorell ed., 1996) ("Hobbes is not only a command theorist but also a legal positivist."); Dieter Hüning, *Hobbes on the Right to Punish*, in *The Cambridge Companion to Hobbes's Leviathan* 217, 226 (Patricia Springborg ed., 2007) ("Hobbes is a theoretician who grounds his system on the conditions of reason and rational thought, and is not a legal positivist . . ."); Murphy, *supra* note 10, at 849 (arguing that Hobbes was a natural law theorist).

⁶⁹ Hobbes did speak of "divine" law on occasion, and he referred to "the kingdom of God." See, e.g., Hobbes, *Leviathan*, *supra* note 1, at 245. I believe, however, that his remarks on these topics reinforce the interpretation offered here. For example, Hobbes claimed that only rational beings, capable of understanding speech and responding to rewards and punishments, could be true subjects. Thus to speak of a "kingdom of God" that included animals and plants was to use the word "kingdom" metaphorically. *Id.* Hobbes also distinguished power from law, *id.* at 153, and suggested that while God has power over all objects, only humans are subject to divine law. *Id.* at 245–46. I am grateful to Mark Murphy for pressing me to consider these points.

philosopher, he sought to learn science, and mathematics, and psychology. He certainly favored some methods of inquiry over others—he loved geometry, and had little use for “ancient authors”⁷⁰—but he sought facts wherever he could find them.⁷¹

Many commentators have misunderstood Hobbes on law because they have read him as though he spoke about law without also talking about politics.⁷² It should be clear from the earlier discussions that Hobbes did not try to disentangle law from political context. He was right to take that approach, I believe, for reasons that should become more evident shortly. In this final Part, I want to consider what light Hobbes’s work might shed on another debate in the field of jurisprudence, one that concerns a game we might call “Just the Facts Please,” or purely descriptive jurisprudence. Hobbes sought to describe law, but he recognized that both law and language are human constructs. Because the very act of description is, at least in part, an act of construction, there may be no such thing as “purely descriptive” jurisprudence.

Purportedly descriptive jurisprudence views law as a set of practices that can be observed and described from a neutral, disinterested vantage point. Hart famously described his project in these terms: “My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law”⁷³ Since Hart, many other theorists have sought to offer descriptions of law

⁷⁰ *Id.* at 490.

⁷¹ As captured by James Boyle:

[Hobbes] followed the path wherever it led. To understand society, you had to understand motion, and relationships, and universals, and essences, and sentiments, and optics, and who knows what else. So Hobbes wrote about them. He realized that most of the questions with which he was dealing resolved themselves into questions about epistemology—what is it to Know, to be Right? So he wrote about epistemology, and politics, and legal theory, and biblical interpretation. If we are only now beginning to see the connections between a theory of knowledge, a theory of interpretation, a theory of judicial review, and the legitimacy of the state, we cannot blame Hobbes.

James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. Pa. L. Rev. 383, 425–26 (1987).

⁷² Speaking not of Hobbes, but of mainstream legal philosophy, Lewis Kornhauser noted that “the philosophical debate over the concept of law treats the legal order as a largely autonomous set of norms rather than as an artifact of functioning institutions of the governance structure.” Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 Chi.-Kent L. Rev. 355, 375 (2004).

⁷³ H.L.A. Hart, *The Concept of Law* 240 (2d ed. 1994) (emphasis omitted).

that are independent of evaluations of it,⁷⁴ and many others have questioned whether purely descriptive jurisprudence is possible.⁷⁵ Those who do want to play “Just the Facts” seek to deliver the empirical truth about the particular human practice called law. Of course, the practice entails many judgments and claims that are not themselves empirical or fixed. Descriptions of law must capture its indeterminacies, its dynamisms, and its evaluative aspects. But, the descriptive legal theorist would say, it is possible to state the facts about law, even if law is not itself only about facts—or as Hart put it, “Description may still be description, even when what is described is an evaluation.”⁷⁶

Hobbes sought facts where he could find them, and he thought it crucial to begin inquiries into human affairs with an accurate statement of facts. To understand politics, it was necessary to understand human beings, and thus the early chapters of *Leviathan* set forth Hobbes’s materialist claims about persons and the world they live in, as well as his account of human psychology. He would eventually draw normative implications from his empirical claims, of course, but he thought it important to get the facts right first. As with humans, so with law, it might seem. Hobbes introduced his discussion of civil law with an apparent claim to offer straight description, albeit from a layman’s perspective: “[M]y design [is] not to show what is law here, and there; but what is law; as Plato, Aristotle, Cicero, and diverse others have done, without taking upon them the profession of the study of the law.”⁷⁷ This statement of purpose seems to aspire to descriptive jurisprudence, and it makes Hobbes’s suggestion that a natural right to self-preservation restricts the content of the civil law all the more curious.

To see what Hobbes was doing, what descriptive jurisprudence is doing, and whether the two are the same thing, it is helpful to consider closely the word that begins *Leviathan* and that peppers a great deal of

⁷⁴ See, e.g., Andrei Marmor, Legal Positivism: Still Descriptive and Morally Neutral, 26 *Oxford J. Legal Stud.* 683, 683 (2006) (contending that legal positivism is merely descriptive, not normative).

⁷⁵ Dworkin may be the best known critic of the “pure description” project, but in my view other theorists’ challenges are more interesting. See, e.g., Danny Priel, Evaluating Descriptive Jurisprudence, 52 *Am. J. Juris.* 139, 140 (2007) (suggesting that descriptive jurisprudence may be impossible); Jeremy Waldron, Can There Be a Democratic Jurisprudence?, 58 *Emory L.J.* 675, 677 (2009) (noting the “tacit sense that . . . general [descriptive] jurisprudence is largely an inbred word game, of little interest to those who are really interested in law”).

⁷⁶ Hart, *supra* note 73, at 244.

⁷⁷ Hobbes, *Leviathan*, *supra* note 1, at 183 (emphasis omitted).

legal theory: “Nature.”⁷⁸ Hobbes’s claim of a natural right of self-preservation is just one of many appeals he made to nature. He offered a detailed account of human nature, of course, and gave an infamous account of the misery and strife that characterized the natural condition of mankind. We exit this state of nature with the social contract (sort of): You can take humans out of the state of nature, but you cannot take (the state of) nature out of humans. Human psychology is not radically altered by political life, and so political institutions must recognize and address the same self-interests, passions, desires, and other human traits that characterized prepolitical man. The role of the natural in Hobbes’s work is perhaps best discerned by noticing what Hobbes usually juxtaposed to nature: the artificial, in the sense of human artifice—the things we make ourselves.⁷⁹ Nature precedes or transcends human artifice. It is what we do not get to choose, what we did not construct.

Invocations of nature also appear often in legal theory, but there they do somewhat different work. Natural law theories have a long heritage, if not very many vocal adherents at present. Curiously, or perhaps not, the rejection of natural law theory has coincided with the rise of naturalism, a philosophical approach that emphasizes materialism, empiricism, and scientific explanation.⁸⁰ As characterized by Brian Leiter, naturalism frames philosophy as “simply the abstract and reflective part of empirical science,”⁸¹ and a naturalized jurisprudence would offer an empirically grounded, descriptive account of law. Naturalized jurisprudence would state “Just the Facts”; for example, legal realism honors naturalism by offering “a descriptive and explanatory account of what input—

⁷⁸ Consider as well the first sentence of *Leviathan*: “Nature (the art whereby God has made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal.” *Id.* at 9. Many of Hobbes’s readers, both in his own era and in later ones, have suspected that for Hobbes, God did not actually have much to do with it. See, e.g., Bramhall, *supra* note 3, at 116–39 (arguing that Hobbes’s work was hostile to Christianity and indeed to all religion). Whether Hobbes was a believer or not, this sentence and Hobbes’s many other references to nature make clear that for Hobbes, nature stands in opposition to human artifice. We might imitate nature, but we do not construct it ourselves.

⁷⁹ See Hobbes, *Leviathan*, *supra* note 1, at 9–10.

⁸⁰ Cf. Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 Wash. U. Juris. Rev. 269, 279 n.25 (2012) (noting the confusion that arises because “natural law theories are sometimes called naturalistic, even though such theories are often the exact opposite of what most [philosophical] naturalists mean by the term”).

⁸¹ Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 Am. J. Juris. 17, 50 (2003).

that is, what combination of facts and reasons—produces what output—that is, what judicial decision.”⁸²

Does anything connect these various appeals to nature in Hobbes, in classic natural law theory, and in Leiter’s naturalized jurisprudence? In each case, the thinker who dons the mantle of nature disavows relativism and subjectivity. Nature, he claims, is beyond argument, beyond choice. It would be silly to argue about the temperature at which water boils. Natural law, for Hobbes as well as for earlier thinkers, is noncontingent; its content is determined by facts about the world rather than by the subjective preferences of any human ruler.⁸³ Naturalized jurisprudence is based on observable and verifiable facts about human practices. It is not a normative theory about what law should be. Nature, in all these contexts, seems a way to end or avoid arguments—to show the pointlessness of argument—by focusing on what is not subject to reasonable dispute.

For Hobbes, facts were the place to begin an argument; as we have seen, he thought it crucial to gather whatever empirical knowledge was available in order to construct his political theory. One of the central themes of Hobbes’s work, though, is the idea that many human disagreements cannot be resolved by facts. We fight about nonempirical questions—about what significance to attach to facts, or about what constitutes justice, or what counts as good.⁸⁴ That is why we need a sovereign: When the facts do not dictate an answer, the sovereign chooses one. We could not get ourselves out of the misery and conflict of the

⁸² Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex. L. Rev.* 267, 295, 315 (1997).

⁸³ Hobbes did say that natural law actually restrains our actions only once a sovereign is in place, and that subjects should rely on the sovereign’s interpretation of what natural law requires, rather than their own interpretation or even that of the moral philosopher’s. Hobbes, *Leviathan*, *supra* note 1, at 191 (“The interpretation of the laws of nature, in a commonwealth, depends not on the books of moral philosophy. . . . That which I have written in this treatise, concerning the moral virtues, and of their necessity for the procuring, and maintaining peace, though it be evident truth, is not therefore presently law; but because in all commonwealths in the world, it is part of the civil law: For though it be naturally reasonable, yet it is by the sovereign power that it is law . . .”). But the sovereign could not actually change the content of natural law.

⁸⁴ In correspondence with Hobbes, a young Frenchman suggested that the field of philosophy was itself a real-world manifestation of the state of nature, a war of all against all. “[T]here are so many teachers of doctrines, and so many different sects. Each thinks he has found the truth, and imagines that each and every one of the others is wrong . . .” Richard Tuck, *Introduction to Hobbes, Leviathan*, *supra* note 1, at ix, xxx (quoting a letter from François Peleau to Hobbes). We do not know if or how Hobbes replied to this suggestion.

state of nature simply by studying, and the difficulty is not just that it is impossible to research and learn in the midst of a war of all against all.⁸⁵ Even if we gather all the facts we can, no amassing of facts, no amount of empirical sleuthing will ever dictate the answers to life's persistent questions.⁸⁶

Descriptive jurisprudence does not claim to answer all of life's persistent questions, of course. As propounded by Hart and others, it just purports to answer questions about the concept, or even the *nature* (that word again!) of law. Law is a complex institution, as Hart argued, an array of identifiable practices that can be observed, studied, and explained.⁸⁷ Law includes practices designed to adjudicate disputes, including fundamental disputes about nonempirical questions, but we may describe the practices without ourselves taking sides on the disputed questions. Indeed, the institution of law may even rest on particular and contested ideological presuppositions, and the explanation of legal practices may require an account of the ideological presuppositions of the participants. In Hart's words again, though, "nothing in the project of a descriptive jurisprudence . . . preclude[s] a non-participant external observer from describing the ways in which participants view the law from such an internal point of view."⁸⁸

And yet, Hart's own work should make us doubt the extent to which jurisprudence can be purely descriptive. To be sure, there are practices widely recognized as law that the scholar can describe. But the interesting questions about law are not ones on which there is consensus. The "persistent questions" Hart identified at the outset of *The Concept of Law* are persistently disputed, and the disputes persist because the questions are not empirical: "How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?"⁸⁹ Law, like sovereignty, is a human artifice; it

⁸⁵ See Hobbes, *Leviathan*, supra note 1, at 89.

⁸⁶ Garrison Keillor fans may recognize the signature of Guy Noir, Keillor's beleaguered private eye: "one man [who] seeks the answers to life's persistent questions." Garrison Keillor, *Guy Noir: Script, A Prairie Home Companion* (Oct. 1, 2011), <http://prairiehome.org/script/guy-noir-october-1-2011/>. Close readers of Hart might also remember that "Persistent Questions" is the title of Part I of *The Concept of Law*. Hart, supra note 73, at 1.

⁸⁷ Hart, supra note 73, at 239 (describing law as a "complex social and political institution with a rule-governed . . . aspect").

⁸⁸ *Id.* at 242.

⁸⁹ *Id.* at 13.

has no *nature* in the Hobbesian sense. Law is not built by one person, or by a small group in agreement. It is the product of the efforts of many, and the participants in legal construction do not all agree about what they are building.

Moreover, Hobbes would remind us, not only law but also language is a human artifice. We choose how to use words, and we should do so deliberately and carefully. There is clearly an element of choice in labeling something as law. This does not mean that we are free to use the word however we please—we will get ourselves in a real mess if we do not strive for consistent usage.⁹⁰ But it does mean that “law” is not something that just exists in the universe, like an acid or a base, ready to be detected by scholars of jurisprudence with their philosophical equivalents of pH strips. Scholars may describe disputes about law, of course, but if they adjudicate these disputes, they are no longer engaged in pure description. And even if the scholar describes accurately a legal system’s own rule to resolve disputes about what counts as law—such as Hart’s rule of recognition—we can be sure that second order disputes about that rule will arise. And if the scholar maintains that no law exists if there is dispute about the rule of recognition, he has, once again, taken sides.⁹¹ Once Hart argued that international law was “*not worth the title of ‘law,’*”⁹² it should have been clear, even to him, that he was evaluating as he was describing. At some point, one has to choose what needs to be described, or what is worth being described. Indeterminacy is a feature not just of the content of law, but of the concept of law.⁹³

The conceptual indeterminacy of the very word *law* afflicts both those within a legal system and those who observe it from the outside, so the point raised here is distinct from another challenge Ronald Dworkin and

⁹⁰ Hobbes, *Leviathan*, supra note 1, at 28 (“[A] man that seeks precise truth had need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime-twigs; the more he struggles, the more belimed.”).

⁹¹ These objections to descriptive jurisprudence are similar to those raised by Ronald Dworkin at the beginning of *Law’s Empire*. Ronald Dworkin, *Law’s Empire* 3–11 (1986). Of course, to share Dworkin’s skepticism about descriptive jurisprudence is not to endorse his proposed alternative account. For more on these issues, see Brian Leiter, *Explaining Theoretical Disagreement*, 76 *U. Chi. L. Rev.* 1215, 1216 (2009), responding to Scott J. Shapiro, *The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed*, in Ronald Dworkin 22, 49 (Arthur Ripstein ed., 2007).

⁹² Hart, supra note 73, at 220 (emphasis added).

⁹³ See Liam Murphy, *Better to See Law This Way*, 83 *N.Y.U. L. Rev.* 1088, 1093 (2008) (“[I]f there is a concept of law that ‘we all share,’ it is indeterminate or partly ambiguous.”).

others have raised against descriptive jurisprudence—the claim that an account of law must emphasize or privilege the internal participant’s point of view rather than merely describe that point of view.⁹⁴ Setting aside the problem of conceptual indeterminacy, there is no reason (contrary to Dworkin’s assertions) that a hypothetical external, nonparticipant observer could not give an account of legal practices. But it is worth emphasizing that no such external observer exists. Did Hart think of himself as a “nonparticipant” in the legal system? If he entertained that illusion, he was able to do so only because the laws of Britain in the twentieth century were structured so that Hart did not feel their burdens. Or perhaps he felt the burdens acutely as a private citizen, but nevertheless adopted the nonparticipant’s view as a heuristic device.⁹⁵ In reality, every citizen of an organized society is a participant of a legal system, at least as a subject even if not as a litigant, practicing attorney, judge, or other public official. Law professors, of course, participate much more in the legal system than do most ordinary citizens, insofar as they claim expertise about either the content or concept of law as they teach or write.

With these reflections in mind, we might view a little differently the question, *but was Hobbes right?* Hobbes made factual claims, of course; he purported to base his entire argument on a specific (and perhaps flawed) empirical account of the world. But no reader has failed to understand that Hobbes was making an argument on the basis of the facts as he perceived them. Indeed, the fact that Hobbes was reacting to the political tumult of his time is central to most interpretations of his work. As for jurisprudence, although he scorned the claims of “subordinate judges” to ascertain the law by wisdom,⁹⁶ Hobbes himself undertook the jurisprudential project of providing a general account of law, as we have seen. But he never claimed to do so as a nonparticipant, and he never claimed to be disinterested. He addressed himself to sovereigns, and to his fellow subjects. He was in it, in the thick of things, and so are we all.

⁹⁴ See, e.g., Dworkin, *supra* note 91, at 13–14.

⁹⁵ Hart described himself as a “suppressed homosexual” at a time when homosexuality was socially condemned and to some extent, legally burdened. See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 61–62 (2004).

⁹⁶ Hobbes, *Leviathan*, *supra* note 1, at 187 (“[I]t is not that *juris prudentia*, or wisdom of subordinate judges; but the reason of this our artificial man the commonwealth, and his command, that makes law.”).

There are at least two ways to understand what Hobbes says about the natural right of self-preservation. It is possible that he was making a positivist claim, asserting that human psychology is such that a legal system will not work if it does not accommodate self-preservation. As I suggested above, however, I think we can also understand his claim as a normative one about what we should expect of each other. A natural right, after all, is a blameless liberty, so to assert a right for Hobbes is to set limits to blame. Were Hobbes to borrow Hart's terminology, he might have suggested that if commands fail to acknowledge or respect the subject's interest in self-preservation, they are "not worth the title of 'law.'"⁹⁷ But this means, as we have seen, that the necessary institution of punishment rests on the triumph of superior physical force, and not on the command-obligation combination that constitutes law.

Thus rereading Hobbes on law and punishment shows that his normative vision was very different—and in my view, much more attractive—than the authoritarianism or even totalitarianism with which he is too often branded. Hobbes did try to close the door against subversion; he leaned hard on that door, threw all his weight against it, and nearly shut it completely. But Hobbes was honest, and Hobbes would not cheat. Having embraced a theory of individual equality and natural liberty, he did the very best he could to give an account of political power consistent with those principles. He recognized the danger of subversion and of disobedience; he was acutely aware of the fragility of human constructs, including the social contract and sovereign power. And Hobbes believed that most of the time, the interests of the free and equal individual could be served well, or at least be served best, by a powerful sovereign. But when the going got tough, in instances when it became clear that the interests of the individual and those of the sovereign would collide, Hobbes would not cheat. He would not succumb to the temptation that would seduce Kant, and many liberals thereafter, and resolve the conflict by appealing to the individual's better self. Hobbes simply admitted that law is a pretty good system as long as individuals consent and comply, and when they do not, the ensuing and often necessary punishment is a regrettable re-emergence of the rule of might. And in that recognition, we have the germs of subversion, the seeds of resistance that Hobbes could not eradicate.

⁹⁷ Hart, *supra* note 73, at 220.
