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THOMAS HOBBS'S *A DISCOURSE OF LAWS*

by Noel B. Reynolds (1 September 1994)

ABSTRACT:

The recent discovery that an anonymously published 1620 essay was an early writing of Thomas Hobbes invites investigation of his early thinking. Hobbes relied on mostly classical sources to advance a basically conventionalist theory of law and to anticipate twentieth century analyses of the principles of rule of law such as that made famous by F. A. Hayek.

KEY WORDS: rule of law, Thomas Hobbes, legal theory, constitutionalism, natural law, legal positivism, covenant, convention

INTRODUCTION

Thomas Hobbes is widely interpreted by students of legal and political philosophy to be the author of a ferocious legal positivism. Against the competing divine right and natural law theories of his times, he asserted baldly that the will of the sovereign was law, and that even though a king might have acquired his position by conquest or coercion, the covenant made by fearful subjects to obey was binding upon them. Law is will, not reason. And civil laws "are to

be used by the subjects for distinguishing right from wrong."¹ This approach proved to be the grandfather of the highly successful legal positivism of the nineteenth and twentieth centuries. It first made its appearance in Hobbes's *Elements of Law Natural and Politic*, which he completed in May of 1640. It developed a great deal in his later works, principally in *De Cive* and *Leviathan*.

Other Hobbes interpreters see him more as founder of a modern liberalism that respects and promotes the individual, with law as the basis of his liberty. Civil association is artificial and founded in agreement, and is a device calculated to resolve the human predicament. It is supreme, but limited by the conditions of the original agreement.² With the recent discovery of earlier Hobbes writings, we can now say that the second interpretation seems to fit better with the understanding of law he endorsed in his early thirties.

The history of these early writings is briefly this: In 1620 a London publisher brought out an anonymous collection of Baconesque essays and longer discourses under the title *Horae Subsecivae*. Though attribution varied a great deal in the following centuries, solid evidence finally emerged for linking most of them to Lord William Cavendish, the second Earl of Devonshire, who from 1608 to the early 1620s was the tutee of Thomas Hobbes, recent graduate of an Oxford hall. The position of those who were beginning to see the tutor's hand behind these writings was strengthened by Leo Strauss's announcement that a Cavendish library manuscript containing ten of the *Horae* essays was written in Hobbes's own hand. As doubts grew about the ability of Cavendish to author essays of this quality himself, several Hobbes scholars began to

¹ Laurence Berns, "Thomas Hobbes," in *History of Political Philosophy*, Third Edition, edited by Leo Strauss and Joseph Cropsey, Chicago: University of Chicago Press, 1987, 412.

² Oakeshott, Michael. 1975. *Hobbes on Civil Association*. Oxford, Basil Blackwell.

suggest that these essays might contain Hobbes's long-sought-for early writings. Certainly, it was an exciting prospect; but how to prove it?

When Arlene Saxonhouse first brought this issue to my attention, I decided to raise it with John Hilton, who had recently retired from his career in physics and had since developed possibly the most powerful statistical methodology for performing wordprints (authorship or attribution studies). Because the database Hilton and his early associates had developed for establishing statistical parameters in wordprinting was drawn largely from English literature, he readily agreed to conduct a joint wordprint study on the *Horae Subsecivae*. The result was a surprise to all concerned. Most of the essays were definitely not authored by Hobbes. But three of the long discourses at the end (43 percent of the total text) cannot be statistically distinguished in any way from undisputed Hobbes writing. The first of these presents systematic reflections on human nature in the form of a loose commentary on the beginning seven chapters of Tacitus's *Annales*. The second is a long reflection on politics, religion, and human nature, occasioned by the visit of Hobbes and Cavendish to Rome, probably in 1614.³ The third and somewhat shorter piece, *A Discourse of Laws*, systematically sets forth what can be said about law in human societies.⁴

In this paper I will introduce historians, political scientists, and legal scholars to this third discourse and its possible implications for our understandings of Thomas Hobbes's thinking on

³ Noel Malcolm, *De Dominis (1560–1624): Venetian, Anglican, Ecumenist and Relapsed Heretic*, London: Strickland & Scott, 1984, 120, n. 280.

⁴ These three discourses are now available in a modern edition published with explanatory and interpretive essays in Thomas Hobbes, *Three Discourses: A Critical Modern Edition of Newly Identified Work of the Young Hobbes*, edited with explanatory essays by Noel B. Reynolds and Arlene W. Saxonhouse, Chicago: University of Chicago Press, 1995.

legal and political theory. I will also present an analytical summary of the contents of the *Discourse of Laws* and indicate the more obvious sources of classical and contemporary influence. I will end with a summary of the discourse's teaching on law which readers can compare with the available interpretations of the mature Hobbes.

ANALYTICAL SUMMARY OF A *DISCOURSE OF LAWS*

The discourse begins as both analysis and apology for law. Praise and analytical definitions are woven together. The discourse ends with a defense of the common law of England, apparently against the attacks of those who favor Roman civil law. In between we find an analysis of punishment, a typology of laws, an account of the origins of law, guidelines for wise lawmakers in varied circumstances, and an analysis of change in laws—all interspersed with paragraphs explaining and praising the rule of law in various ways.

Even in this discourse written twenty years before works Hobbes published in his own name we find the same confident voice that characterizes his mature writings. Michael Oakeshott has described Hobbes's philosophical writing as didactic and argumentative rather than contemplative and exploratory. "What he says is already entirely freed from the doubts and hesitations of the process of thought."⁵ This confident and declaratory style already characterizes Hobbes's philosophical writing by the time he composes the *Discourse of Laws*, as its readers will discover in the opening sentences. Nor does Hobbes's self-assurance wane as the analysis develops. Any preparatory period of experimentation and hypothesizing is in the past. Readers are offered a comprehensive and final statement, without any attention being drawn to possible

⁵ Michael Oakeshott, *Hobbes on Civil Association*. Oxford, Basil Blackwell, 1975, 14. The essay quoted here was first published as an introduction to the Oxford edition of Hobbes's *Leviathan* in 1946.

doubts or alternative analyses. It is the readers who are put on trial to determine whether they can appreciate the merits of the work, and not *vice versa*.

It may be noteworthy that the opening pages of the *Discourse of Laws* analyze law in the opposite causal direction from what appears in Hobbes's later writings. This may turn out to be particularly significant, for as Oakeshott has noticed, "Hobbes tells us that his early thinking on the subject took the form of an argument from effect (civil association) to cause (human nature), from art to nature."⁶ But as Oakeshott goes on to note, Hobbes actually develops his argument in the reverse direction in all known writings, moving from cause to effect. This later autobiographical statement of Hobbes's may provide us with a direct reference to the *Discourse of Laws*, published within a couple of years of Hobbes's thirtieth birthday. The *Discourse of Laws* begins with a portrayal of law as the true basis of civil association and moves systematically to an explanation of the necessity of law in terms of human nature, the very order Hobbes had advertised as characterizing his early thinking, but which Oakeshott finds conspicuously absent in all Hobbes's known writings.

⁶ Ibid., 28. Oakeshott is referring to Hobbes's preface to *Philosophical Rudiments*, the English translation from *De Cive*. See Thomas Hobbes, *The English Works of Thomas Hobbes of Malmesbury*, edited by William Molesworth, London: John Bohn, 1839, II: *xiv*, where Hobbes says, "Concerning my method, I thought it not sufficient to use a plain and evident style in what I have to deliver, except I took my beginning from the very matter of civil government, and thence proceeded to its generation and form, and the first beginning of justice. For everything is best understood by its constitutive causes. For as in a watch, or some such small engine, the matter, figure, and motion of the wheels cannot well be known, except it be taken insunder and viewed in parts; so to make a more curious search into the rights of states and duties of subjects, it is necessary, I say, not to take them insunder, but yet that they be so considered as if they were dissolved; that is, that we rightly understand what the quality of human nature is, in what matters it is, in what not, fit to make up a civil government, and how men must be agreed amongst themselves that intend to grow up into a well-grounded state." Cf. II: *vi*. These two types of reasoning are explained in *Leviathan* as alternative forms of philosophizing at IV:367.

The analysis begins with the straightforward assertion that laws are "the straight and perfect rule," by which "right and wrong are discerned, and distinguished one from another" (105).⁷ Societies of law enjoy both public and private benefits from this function. On the one hand, law produces "the general good and government of the state;" on the other it yields "the quiet and peaceable life of everyone in particular." The nature and effects of laws being so identified, it can be seen that "the true end of all laws is to ordain, and settle an order, and government amongst us." Without further explanation, our author concludes an obligation—"we are rather bound to obey, than dispute" the laws. They are our princes and captains and the rules "by which all the actions of our life be squared and disposed" (105).

This rule of law is not, however, seen as oppressive, but rather as the greatest human benefit. Laws are the people's "bulwarks and defenses," keeping them in safety and peace, protected from all injustice, and making them both good and happy. Without the limits imposed by authoritative rules, confusion would reign. Right and wrong, the just and unlawful, "could never be distinguished, overthrowing all cooperative human activity."⁸ Right would be perverted by power, and all honesty swayed by greatness" (106). "Justice is the true knot that binds us to unity and peace amongst ourselves" and discourages the violence that would prevail if men measured their courses "by the square of their own benefit and affections" (106).

The discourse invokes a number of classical sources, as will be discussed further in the next section of this paper below. The first of these is Plato, who saw the weaknesses of human

⁷ The parenthetical citations throughout are to the page numbers of the Hobbes text in the 1995 edition, where the language and spelling of the "Discourse of Laws" has been modernized. The page numbers in brackets within quotes are the page numbers of the original *Horae Subsecivae*.

⁸ The claim that law distinguishes right from wrong is also present in *Leviathan*, chapter 26.

nature which would make men indistinguishable from unreasonable creatures without the remedy of laws. Men are not naturally able to know the requirements of the common good. And even should this problem of ignorance be solved in some Utopia, "the necessity of Laws is absolute" because men's affections and manners are commonly depraved and subject to "unruly and unreasonable desires." This internal danger explains Heraclitus's aphorism to the effect that a city should first protect its laws and then its walls (106–7).⁹

Hobbes further credits Demosthenes with the insight that laws are the soul of the commonwealth.¹⁰ Without due administration of laws the city declines. Again, the explanation is human nature. As societies contain more of the worse sort than the good, only laws can restrain from ill and confirm the good, producing happy concord and civil union (107). For Hobbes, this is all made clear in a borrowed metaphor that he invokes three times in this short discourse: the laws are the sinews which hold the people together. As with the body, they are "not merely useful, but necessary" (107).¹¹

Having concluded the first explanation of legal society and its benefits as a remedy for the defects of human nature, Hobbes moves on to a discussion of punishment, which, as he has

⁹ Heraclitus (c. 536–470 BCE.) was an Ionian philosopher whose thought emphasized that the natural universe is in constant flux. Hobbes refers here to Fragment 93: "The people [of a city] should fight for their laws as they would for their city walls." I use here the new translation of Daniel W. Graham (editor and translator), *The Texts of Early Greek Philosophy: The Complete Fragments and Selected Testimonies of the Major Presocratics, Part I*, Cambridge University Press, 2010, p. 175.

¹⁰ Demosthenes (c. 384–322 BCE.) was an Athenian orator and statesman.

¹¹ This favorite image may be borrowed from the work of a fifteenth-century English jurist—John Fortescue's *De Laudibus Legum Anglie*, or some earlier source. The connection would be more evident had S. B. Chrimes, the editor and translator of the best edition of *De Laudibus*, chosen to render the Latin *nervus* as "sinews" rather than "nerves" (1942, 31). Hobbes also uses the "nerves" imagery in *Leviathan*, chapter 29.

already pointed out, is necessary to repress the audacity of men through fear and terror (105–6). This section follows the pattern set in the *Horae*'s longer "Discourse on the Beginning of Tacitus," by offering a few paragraphs of elaboration after quoting a sentence from the early sections of Tacitus's *Annales*. "In some few matters severity was used, by that means to cause quietness in the rest."¹²

The seven arguments for punishment of offenders begin (108-9) with appeals to rational calculation and end with more general observations on the benefits of a system of consistently applied laws. Punishment gives encouragement and satisfaction to honest men and bridles the worst with fear. Failure to punish would reverse these effects. Dependable execution of laws also discourages corruption and bribery by which the rich and the great override truth with power. At the same time it gives confidence to the poor and preserves them from the miserable oppression that results when the weak have no means left for redress of offenses (108). The "greatest honor and reputation of a kingdom or commonwealth" is "to have justice equally distributed and people obedient to laws." Both the person and the reputation of the king are safer when justice "keeps the fountain free from corruption, infection, or [515] danger" (109).

Finally, it is this equal administration of justice "that enriches and secures the subject in all Kingdoms, gives him his right, protects him from wrong, increases commerce, and proclaims traffic throughout all the world: whereas if Justice were not duly administered, there would follow a diminution of our substances, a general disconsolation in our life, and a certain separation from all trade with strangers." Put simply, God seldom blesses "that Country, where

¹² This is Hobbes's translation of *Annales*, 1.9.21–2. Publius Cornelius Tacitus (c. 55–117 CE) was a Roman historian.

Justice [is] either neglected, or abused." Arguing against anarchists, he concludes that "a man had better choose to live where no thing, than where all things be lawful." It is "more dangerous, to live in an Anarchy than under a Tyrant's government: for the violent desires of one, must necessarily be tied to particulars, in a multitude they are indefinite." Like the other sections of the discourse, the discussion of punishment ends with a general statement of the necessity of laws for all good things. "The first degree of goodness is obedience to Laws which be nothing else but virtue, and good order of life, reduced unto certain rules." The "body Politic cannot subsist without a soul to animate, to govern, to guide it, and that is Law proceeding from the reason, counsels, and judgment of wise men" (109).¹³

Leaving this section, Hobbes goes on to recognize a three-fold legal typology, including the law of nature, which we share with all living creatures, the law of nations, which is common to all men in general, and municipal law, which is particular to each country. Moving immediately again to argue the benefits of laws, Hobbes points to the necessity of law for the existence of private property. Law corrects nature, restraining men who are "naturally affected and possessed with a violent heat of desires, and passions, and fancies" (110). Thus,

Laws be the true Physicians and preservers of our peaceable [521] life and civil conversation, preventing those ill accidents that may happen, purging and taking away such as have broken forth, and sowing peace, plenty, wealth, strength, and all manner of prosperity amongst men. (111)

Continuing the medical metaphor, Hobbes asserts that severe and just laws easily dissolve ill

¹³ The metaphor of "soul" as the civil power, the animating power of the commonwealth, can also be found in *Leviathan*, chapter 29.

customs and correct longstanding problems.

Using Proverbs 6:23 as text, Hobbes briefly introduces magistrates and judges as dispensers and interpreters of the law, which binds them as well. "Laws . . . ought to be the rulers of men, and not men the masters of law" (111).

Returning to his Platonic beginning, Hobbes offers an account of the origins of laws, saying they were first invented "to give rules to the good" and "to repress the audacity of those [523] unbridled spirits" (111). The origins of laws can also be reduced to a multi-leveled typology, for laws are introduced either to deal with a current necessity or a need foreseen. For each of these Hobbes advances several possible causes. In any case, the sense of ill that all men have spurs them to improve their situations through careful attention to the laws (112).¹⁴

The infinite variety of human laws have been drawn from certain fountains of natural justice and equity. As rivers running through different soil pick up different color and taste, so specific laws reflect their geographical location and the genius of the people. But wise men everywhere follow the same guidelines in making laws adapted to their time and place: 1. Laws should serve the common good, rather than the particular good; 2. Laws must be possible to obey; 3. Laws should be fitted to a particular state; and, 4. Laws should only rarely be changed (112–13).¹⁵

The statement that all laws are derived from "certain fountains of natural Justice and equity" could easily be read as a strong statement of natural law in the tradition of Cicero,

¹⁴ This primary motivation to embrace and care for law may clearly anticipate *Leviathan's* fear as the primary impetus for social contract.

¹⁵ While Hobbes quotes the medieval compiler Isidore (560–636 CE) here on the dangers of frequent changes in the law, the four points he makes in the "Discourse" follow closely the logic and language of Gratian's *Decretum*, Distinctio 4.c.2 and 4.c.3.

Thomas Aquinas, or Francisco Suarez. Such a reading would indeed raise concerns about internal contradictions in Hobbes's analysis. Elsewhere, law is always characterized as human artifact. It may be the standard of right and wrong conduct—but it is manmade. And in the spirit of skeptics of that generation, Hobbes repeatedly points to the variety of laws and customs among and within nations. So how are we to understand these "fountains of natural Justice and equity?"

One explanation which fits the text and the more austere natural law tradition of the later Hobbes would equate the "fountains of natural Justice" from the first sentence of the paragraph with the guidelines which "in the making of Laws, wise men have always had . . . in consideration," mentioned in the last sentence of the same paragraph (112–13). Another more contemporary way of putting the point would be to say that there are certain standards inherent in the very idea of law, which can produce justice and equity, and which are understood by wise lawmakers, but are often transgressed by the wicked or unwise. Understood in this way, Hobbes's list of guidelines become standards or principles of the rule of law. And their absence can be equated with tyranny. Contemporary legal theorists still refer to such standards as "principles of Natural Justice" and see them functioning as "the inner morality of law."¹⁶

The fourth guideline of wise lawmakers triggers an extended discussion of the delicate matter of knowing when laws should be changed. While recognizing that stability of laws is

¹⁶ See H. L. A. Hart, *The Concept of Law*, Oxford University Press, 1961, 202 and Lon L. Fuller, *The Morality of Law*, rev. ed., Yale University Press, 1964. The close logical connection between Fuller's analysis and Hobbes's is emphasized by the occurrence of two of Hobbes's guidelines in Fuller's list—possibility and stability. Hobbes's uses of "fountains" of justice in the later works may fit this definitional standard for law, as they are associated with causal necessity in human nature and physical nature.

essential, Hobbes advances two justifications for changing laws: to make them more clear and complete, and to accommodate diversities of times and persons. This may be occasionally necessary because "old and ancient customs . . . do induce a kind of harshness . . . ; for the wilful retaining of a custom against the present reason of the time, is altogether unequal." However, these justifications for limited revision of laws do not extend to "fundamental laws" which will "in no case admit innovation" (114). He quotes Livy to show the shifts between war and peace as obvious justifications for change in law, time being the greatest innovator of all (114).¹⁷ Returning to the medical metaphor, Hobbes judges that a multiplicity of laws indicates "a diseased and distempered Commonwealth" (115).

Without transition, Hobbes turns next to a discussion of the connection between reason and law, arguing that these two are twins, being inseparable. He quotes Cicero to the effect that law is nothing more than an extension of reason.¹⁸ Because reason begets, corrects, and preserves the laws, our duty to reason requires us to obey them. Disobedience to law betrays a brutish or savage nature, not endowed with reason (115).

Hobbes next raises what may have been a contemporary issue—why "all Countries do differ, and vary so much in their customs, and Laws." His answer is that these differences arise from the different orders and customs of the first inhabitants. He advances as his examples the recent colonization efforts in Bermuda and Virginia, which would have been well known to him as he had met with the governing boards of these enterprises as representative of his patron, Lord

¹⁷ Livy (59 BCE–CE 17) was a Roman historian.

¹⁸ This comes from *De Legibus*, 1.6.18. A translation reads: "That very reason, when it is confirmed and established in the mind of man, is law." Cicero (106–43 BCE) was a Roman orator, statesman, and philosopher.

Cavendish, one of the sponsors (115–16).¹⁹ He excuses himself, however, from a survey of all famous authors and inventors of laws, and chooses instead to examine "the growth of Law amongst the Romans" because it is best known. He proceeds to identify five stages beginning with the will or commands of the original princes, shifting to and from unwritten custom and written statutes, and culminating in the will and power of the emperors, all of which constitute the civil law (116–117).

Because some have cast aspersions on English laws "in being different and contrary to the original beginning of the civil Law," Hobbes goes on to draw a number of parallels between seven kinds of Roman law and English law, written and unwritten, demonstrating that they are not so different as critics might think. These parallels include popularly approved statutes, statutes from the Commons, decrees of the Star Chamber, royal proclamations, local regulations, judicial opinions, and unwritten law or customs like the common law (117–18).²⁰ It may be worth noting that this same comparison between English and Roman law reappears in a slightly expanded form near the end of *Leviathan*, chapter 26.

The great force of ancient customs is the last question Hobbes raises in this discourse. He explicitly assumes that such customs have passed critical review, even possibly by the Roman censors, before being approved as necessary and without offense, making them the laws of "greatest weight and consequence." Furthermore, according to Dionysius's testimony, Romulus strengthened and confirmed the first republic more with unwritten than written laws, hoping, like

¹⁹ For evidence that these references may date the composition of this discourse to within five years of its 1620 publication, see Noel Malcolm, "Hobbes, Sandys, and the Virginia Company," *The Historical Journal*, 1981, 24:297–321 at 321.

²⁰ It is very likely that Hobbes took this list also from *The Institutes of Justinian*, I.2.3–10.

Lycurgus, to "leave them only engraven in the memory of his Citizens" (118).²¹

Hobbes goes on to assert that where any law "has had any long continuance in practice," it is called "ancient custom" and is the same "in power and authority" as written law, citing Ulpian from Justinian's *Digest* for justification.²² Hobbes finds this makes great sense because we esteem and obey laws only when it is believed that they are "allowed and made by the Judgement of the people" (118–19). This logic of consent justifies the English attribution of equal power and authority to the ancient customs underlying common law as to parliamentary statutes. However, in returning to this issue at the end of his long career, Hobbes no longer is willing to allow established custom an equal rank with positive law.²³

HOBBS'S CLASSICAL SOURCES

Because the picture scholars have been able to construct of Thomas Hobbes's intellectual development has necessarily derived from his mature works, great emphasis has been placed on his discovery of the geometric method and his encounter with continental thinkers in the 1630s and 1640s. However, the newly discovered Hobbes discourses show what some have also argued—that the younger Hobbes was educated in the sixteenth-century tradition of humanism

²¹ Dionysius of Halicarnassus (first century BCE) was a Greek critic and historian living in Rome. Hobbes was probably referring to his *History of Archaic Rome*. See Emilio Gabba, *Dionysius and The History of Archaic Rome*, Berkeley: University of California Press, 1991. Romulus was the legendary founder of Rome, included in Dionysius's *History*. Lycurgus (ninth century BCE) was a legendary Spartan lawgiver.

²² I.3.33. Justinian I (483–565 CE) was the Byzantine emperor (527–565) who presided over the codification of the Roman law. Ulpian (170–228 CE) was a Roman jurist whose work was a source for Justinian's *Institutes* and *Digest*.

²³ This later view is spelled out clearly in Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, edited by Joseph Cropsey, Chicago: University of Chicago Press, 1971.

with its reliance on the Greek and Roman classics and its emphasis on skepticism and stoicism, and an aversion to Aristotle.²⁴ “A Discourse upon the Beginning of Tacitus” shows Hobbes engaging in a standard form of commentary used by a large number of his contemporaries. In particular, it demonstrates that Hobbes was buying into the more skeptical developments of the humanist movement as influenced by Justus Lipsius of the Netherlands and his intellectual soul-mate, Michel de Montaigne. Tacitus was particularly appealing to these late humanists precisely because his understanding of human politics fit the emerging modern experience so well, with its clear awareness of treachery, deceit, and manipulation. While the optimistic vision of a Ciceronian republic continued to hold great appeal, the practical obstacles erected by human nature seemed to dominate center stage in their thinking. Hobbes's *Discourse of Laws* fits comfortably into this model as well.

The *Discourse of Laws* contains a dozen direct references to classical, medieval, and Biblical sources. But the dependence on the classics would appear to go much further. While the first direct reference is to Plato and appears on the fifth page, this entire opening section can be referenced to Plato's *Laws*, though even at this earlier period we can also see Hobbes putting his own spin on things. His heavy use of the classics does not translate into a slavish acceptance of classic conceptions or values.

²⁴ See, e.g., Quentin Skinner, *Visions of Politics*, vol. 3, *Hobbes and Civil Science*, Cambridge UP, 2002, who has used these newly discovered Hobbes essays to establish Hobbes early dedication to the humanist curriculum, both in his own studies and in his teaching of the young Cavendish earls that came into his tutelage. While Skinner finds Hobbes almost slavishly following the standard humanist programme, he also sees evidence that this seems to stem more from his desire to meet accepted educational standards than from intellectual conviction. See pp. 46 ff., and especially pp. 55–56 where Skinner analyzes “Upon the Beginnings of Tacitus” and “A Discourses of Laws” in some detail.

The opening sentence which identifies the nature of all laws to be the rule by which right and wrong are discerned and distinguished reminds us of Plato's discussion of the aim or standard of laws, right and wrong (the just and the unjust).²⁵ And while Hobbes's language appears to imply a more conventional view of right and wrong, the first option Plato discusses is the interest of the strong. Hobbes goes on to identify order and peace as the "true end of all Laws," a sentiment which is widely recognized to permeate Plato's writings. The idea that the laws should be our princes and captains is developed in the center of the discourse with the quotation from Solon to the effect that the best governed city is one in which the people obey the magistrate and the magistrate obeys the laws.²⁶ Plato endorses a version of this tradition when he says "wherever the law is lord over the magistrates, and the magistrates are servants to the law, there I descry salvation and all the blessings that the gods bestow on States" (715d).²⁷ In Plato, Hobbes would also have found ample support for his assertions that the laws are the peoples' defenses, that they can make the people both good and happy, and that they provide peace by threatening punishments for the law breakers.

The paragraph in which Hobbes alludes to Plato reflects the precise logic and even language of Plato's *Laws*, suggesting that of Plato's works, minimally the *Laws* was well known to him.

Plato affirms the necessity of [509] Laws to be so great and absolute that men

²⁵ Cf. Plato, *Laws* 714 b–c.

²⁶ Solon (640–559 BCE) was an Athenian statesman and lawgiver.

²⁷ When not quoting Hobbes, the translations are from the Loeb edition: Plato, *Laws*, R. G. Bury, Cambridge, Harvard University Press, 1926. Cf. 713e, and, especially, the *Seventh Letter*, 334 c–d, where Plato clearly states his teaching that no city should be subject to human masters, but to laws. See also 336d and 337c–d.

otherwise could not be distinguished from unreasonable creatures: for no man naturally is of so great capacity, as completely to know all the necessities, and accidents which be required for a common good: and then if a man could suppose in any so perfect a knowledge, yet is that man not to be found, that either absolutely could, or would do all that good which he knows: so that in an Utopia of such men as be not, yet the necessity of Laws is absolute. (106)

The passage from the *Laws* reads:

It is really necessary for men to make themselves laws and to live according to laws, or else to differ not at all from the most savage of beasts. The reason thereof is this,—that no man's nature is naturally able both to perceive what is of benefit to the civic life of men and perceiving it, to be alike able and willing to practise what is best. (875a)

As intellectual historians subject this discourse to more detailed analysis, further sources of classical and contemporary influence will doubtless emerge. Within the limits of this paper, a few others can be mentioned.

While Hobbes uses Tacitus merely to introduce his discussion of punishment, we know from the *Discourse Upon the Beginning of Tacitus* that he shared the interest in Tacitus with other humanists of his generation. He also followed Lipsius in the way he used classical texts to support his own ideas, without the care of the earlier generations of Renaissance humanists to establish precise textual meanings. The *Discourse of Laws* follows Tacitus in many ways. While Hobbes never endorsed Tacitus's view that primitive man "was naturally good," having "no evil

desires,"²⁸ he did always seem to share Tacitus's view of men after they "ceased to be equal" when "egotism replaced fellow-feeling and decency succumbed to violence." Hobbes's discourse assumes the resulting dichotomy of political structures described by Tacitus and other classical writers:

The result was despotism—in many countries, permanently. Some communities, however, either immediately or when autocratic government palled, preferred the rule of law. Laws were at first the simple inventions of simple men. The most famous laws are those designed for Crete by Minos, for Sparta by Lycurgus, and the more extensive and sophisticated code which Solon gave Athens.²⁹

Tacitus's *Annals* document the decline of the rule of law in Imperial Rome, from the rise of Tiberius.³⁰ The historian makes it clear, however, that equitable law ceased after the Twelve Tables were written. From that time the laws had deplorable purposes, creating class-warfare, banishing leading citizens, and granting unconstitutional powers. Legislation increased, focusing on personal rather than national issues, and corruption reached a climax. Even though Pompey was chosen in his third consulship to bring in reforms, "his cures were worse than the abuses; and he broke his own laws."³¹

This brief section makes perfectly clear the republican or rule-of-law perspective that informs all of Tacitus's interpretation of Roman legal history. It is a view that fits the other classical sources cited in this Hobbes discourse, and one which Hobbes also endorses in an

²⁸ Tacitus, *The Annals of Imperial Rome.*, translated by Michael Grant. London: Penguin, 1989, 132.

²⁹ Ibid.

³⁰ Roman emperor, 14–37 CE.

³¹ Tacitus, 133. Pompey (106–48 BCE) was a Roman general and triumvir.

informed and matter-of-fact way. He sees the rule of law as the most rational way for human beings to organize their lives together, with all the advantages that can bring. And like Tacitus, he suffers no illusions that rule of law is a permanent, incorruptible solution to the human predicament.

Hobbes's reference to Heraclitus derives from Diogenes Laertius, and is modified in structure sufficiently to suggest that it may be offered from memory.³² Heraclitus's statement that "the people [of the city] should fight for their laws as they would for their city walls" is based on his view that the law is the common rational element of a city, and that it is nourished by divine law.³³ Hobbes concludes from this that if men "take away the power of Laws, ... who is it that can say, This is my House, or my Land, or my money, or my goods, or call any thing that is his, his own" (110).³⁴

Hobbes ends his discussion of change in the laws with a distinction between temporary and fundamental laws and his judgment that innovations changing the latter should never be admitted.³⁵ The distinction itself, as well as the example used to demonstrate the appropriateness of some change in temporary laws, is taken from Livy.³⁶ In this discourse Hobbes regularly lines up with the classical thinkers who emphasize the importance of stability in law for the freedom

³² Diogenes Laertius (third century BCE) was a biographical doxographer whose work provides most of the available material on pre-Socratic philosophers. Hobbes appears to be referring to the passage found in Diogenes Laertius, *Lives of Eminent Philosophers*. 2 vols. Translated by R.D. Hicks, Cambridge: Loeb Classics Library edition, 1925, ix, 2.

³³ See Fragment 93, *supra* n. 9.

³⁴ Cf. Gratian, *Decretum*, Distinctio 8.c.1.

³⁵ Hobbes makes the same distinction between fundamental and temporary laws in *Leviathan*, chapter 26.

³⁶ See Livy, *Ab Urbe Condita*, 34.6 where the immediate context is a discussion of a proposed repeal of the recent law governing the wearing of purple by women. Hobbes also may have drawn from Thomas Aquinas here, *Summa Theologiae*, 1.2.aa.97.1.

and welfare of the citizens.

Hobbes quotes Cicero twice, first from his *Laws* to defend the identity of law and reason. While Hobbes emphasizes Cicero's point that our reason is a law directing us what to do and to avoid doing, even going to the point of identifying our duty to obey the law with our duty to obey reason, he does not go all the way with Cicero, who grounds justice in nature. Rather, he emphasizes the variations in laws from one country to another—in contrast to Cicero's natural law approach, which focuses on the universality of legal rights and wrongs. The second quotation, significantly modified, but recognizable from Cicero's *Republic*, praises those eminent men who preserved the ancient customs and institutions of their ancestors.³⁷

This praise for the ancient ways is consistent with the description of law given above as a system of “inner morality” and may anticipate Hobbes’s “morality of natural reason” in *Leviathan*, chapter 47, which presumes a human nature that is self-preservative and which relies on rational calculation to attain preservation and felicity. Hobbes’s language in the discourse seems consistent with such a system of law as reason. “Reason has the predominant power in our natural bodies” (109), which “we have engrafted in our natures” (115), and is that which “‘squares’ (105–06) and ‘measures’ (106) men’s benefits and affections by ‘clear’ (113), ‘equal’ (106, 114, 115), ‘straight’ (105), ‘perfect’ (105, 111, 113), and ‘exact’ (111) ‘rules’ (105, 106, 109, 110, 111, 119).”³⁸ Hobbes’s early use of these geometric terms is consistent with his

³⁷ Cicero, *De Republica*, 5.1 (fr.).7–10: “... ante nostram memoriam et mos ipse patrius praestantes viros adhibebat, et veterem morem ac maiorum instituta retinebant excellentes viri.” Augustine exactly reproduced this quote in his *City of God*, II.21, on which Hobbes may have relied, inasmuch as the palimpsest of *De Republica* was discovered in the Vatican library and published more than two hundred years later, in 1822. Hobbes seems to prefer his own Latin, unless he relied on a text other than Augustine’s.

³⁸ Lowery, 67.

later works.

THE INFLUENCE OF HOBBS'S CONTEMPORARIES

While it is evident from this discourse that young Thomas Hobbes did fit comfortably with the humanists of the late sixteenth and early seventeenth century, it will require the efforts of period specialists to nail down specific influences on Hobbes's early writings. Existing studies which show Hobbes's link to contemporaries after 1620 are not likely to be upset in any major way. But advancing the date of the first publication will force more attention on writings available to Hobbes before that time. For example, the case for Grotius as a key influence depends on materials published after the *Horae*.³⁹ Though Grotius had written *De Jure Praedae* while Hobbes was still in school, only the twelfth chapter was published, and not the sections containing Grotius's systematic analysis of law which emphasized will, agreement, and right of self-preservation. These ideas were in the air, but it is not likely that Grotius is Hobbes's source for them in this discourse.

The more obviously available influence during Hobbes's formative years would have been Francisco Suarez, whose *De Legibus ac Deo Legislatore* was published in 1612 and whose *Defensio Fidei Catholicae adversus Anglicanae Sectae Errores* was published in 1613 in response to King James's defense of the oath of fealty and letter to Christian princes. Suarez's straightforward defense of Catholicism and his reassertion of Thomistic natural law and the Platonic four-fold division of laws (eternal, divine, natural, and human) might make a connection to Hobbes seem far-fetched. But students of this question will also notice that

³⁹ Grotius (1583–1645) was a Dutch jurist whose theories of natural and positive rights and law formed bases for international law.

Hobbes's three-fold division of laws is really an expansion of Plato's natural and human laws, with little variation from their classical definitions. Natural law is what men and animals have in common. Human laws are divided by Hobbes between "the Law of Nations, which is common to all men in general: and the Municipal Law of every Nation, which is peculiar and proper to this or that Country" (110).⁴⁰ And against the divine right claims of Protestant kings, Suarez maintains the medieval view that God vests the right of government in a whole people who then have the right to form governments and select magistrates. Hobbes would endorse both this conception of valid legal authority and Suarez' rejection of the right to slay tyrannical rulers, except as required for self-preservation—the most fundamental of all rights.

But however much Hobbes might have been aware of or influenced by Suarez and other late defenders of medieval views, it is clear that his direct connections were with Suarez's opponents, particularly on issues dividing Anglicans and Catholics.⁴¹ From their days in Italy, Hobbes and Cavendish had maintained contact with the Venetian anti-papalist Fulgenzio Micanzio—and possibly even Paolo Sarpi. Hobbes cast his lot with the Renaissance humanists who were skeptical of traditional Christianity and of moralistic approaches to politics in general. They were republican in temperament, admiring Venice as the last hold-out of Italian republicanism in a century of Spanish imperial domination, and studying Tacitus and Thucydides for coldly realistic accounts of the checkered history of law under republican governments. Hobbes's sympathy for medieval notions of law in this discourse does not extend to the

⁴⁰ Hobbes's dependence on Plato here appears to be mediated through *The Institutes* of Justinian, I.2.1–2.

⁴¹ Malcolm, *De Dominis*, 47–54, demonstrates convincingly that Hobbes and his patron Cavendish were in direct contact with De Dominis, a former Italian archbishop and ecumenist, cooperating principally in preparing translations of Bacon's essays for publication in Italy.

schoolmen's metaphysics or the corruption of religion associated with them. Hobbes's distance from metaphysical scholasticism is made clear in his "Discourse of Rome," which was published with the "Discourse of Laws" in the *Horae Subsecivae*.

In his early years, as later in *Leviathan*, Hobbes's castigation of scholasticism and papal corruption is consistent with his apparent affinity for a general Christian primitivism—with a scientific bent. In "Rome" he identifies foolish and profane superstitions in 'this clear Sunshine of Christianity' (83). His skepticism is clearly directed toward traditional Christianity as represented by the Roman prelates, who "challenge temporal jurisdiction or superiority, when their charge is only to instruct" (97). This is consistent with the observation in *Leviathan* that "the independency of the primitive Christians,... if it be without contention,... is perhaps the best."⁴²

Christian primitivism in the seventeenth century "appealed to the first, original state that preceded the Catholic betrayal," in which "the church's degeneration into a new 'Popish religion,... a meere device of mens braines,' was complete."⁴³ Primitivists were intent on restoring a "natural simplicity of divine originals" to Christianity much as Hobbes was intent on establishing his perspicuity in "the natural sciences, and of the morality of natural reason,"⁴⁴ which reason is law — "the eternal law of God."⁴⁵ They also rejected the mystical pomp, ceremony, and icons of the papacy. But while Hobbes only criticized Roman display and pomp, and the methods of 'the Artifice of these popish traders, that they are fain to sell their

⁴² Hobbes, *Works*, 3:696. Cf. 644 and 659.

⁴³ Theodore D. Bozeman, *To Live Ancient Lives: The Primitivist Dimension in Puritanism*, Chapel Hill, N.C., University of North Carolina Press, 1988, 18, 23.

⁴⁴ Hobbes, *Works*, 3:696–697.

⁴⁵ *Ibid.*, 264.

commodities by this false light, and to set a gloss upon their Religion, by these and such like Illusions' (87; cf. 94–98), primitivists were further disposed to physically destroy the Roman church's statuary, painting, stained glass images, and liturgical vestiture.⁴⁶

The "Discourse of Laws" does not reflect the influence of powerful writers known to Hobbes in the 1610s nearly so much as it reflects the spirit and content of late sixteenth-century humanist interest in the classics. The striking nominalism, materialism, and secularism which Hobbes's later works share with Sarpi, whose thought would have been known to Hobbes at least from 1614, is less evident and important in the 1620 discourse.⁴⁷ This might be evidence that the discourse is an earlier composition, even possibly a school exercise written in the previous decade.

The eclectic nature of the discourse is emphasized by one fairly detailed, but unacknowledged borrowing from his senior contemporary and later employer, Francis Bacon. In 1605 Bacon wrote:

For there are in nature certain fountains of justice, whence all civil laws are derived but as streams; and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains.⁴⁸

Hobbes's version of the metaphor reads:

There are certain fountains of natural Justice and equity, out of which has been taken [525]

⁴⁶ Bozeman, 32–33.

⁴⁷ See David Wootton, *Paolo Sarpi: Between Renaissance and Enlightenment*, Cambridge: Cambridge University Press, 1983, 14–16, 36–37, 51.

⁴⁸ Hobbes, *Works*, 3:475.

and derived that infinite variety of Laws, which several people have apted to themselves: and as several veins and currents of water, have several qualities and tastes, in respect of the nature of that ground and soil, through which they flow and run: so these Laws and the virtue of them, which be fetched from an original fountain, receive a new kind of application, and tincture, in respect of the situation of the Country, the genius and nature of the people, the fashion and form of public actions, divers accidents of the time, and sundry other occurrences, I will not stand to repeat. (112–13)

Though Hobbes does more with these images of fountains of justice and laws as veins of water, taking their "tincture and taste" from the soils through which they run, the basic conception and phrasing are obviously borrowed quite directly.

However, Hobbes was no slavish follower of Bacon, as this same discourse demonstrates. It is true that Hobbes's view that a multiplicity of laws is evidence of a diseased polity echoes a prominent theme of Bacon's. And his reasoned support for legal change could be seen as helpful to Bacon's legal reform project. But at the end of the discourse, Hobbes takes up a defense of the ground and foundation of English laws against the aspersion cast upon them for "being different and contrary to the original beginning of the civil Law" (116–17). This must be taken as a reference to a contemporary English dispute, and readily applies to the debate between Edward Coke, defender of English common law, and Bacon, the self-proclaimed reformer of "the multiplicity and incertainties" of English laws, along the cleaner, more systematic lines of Roman civil law.⁴⁹ Hobbes's refutation of the Baconian "aspersions" cast on English law consists in

⁴⁹ See the account of this failed Baconian reform project in Julian Martin, *Francis Bacon, the State, and the Reform of Natural Philosophy*, Cambridge: Cambridge University Press, 1992, 106–129.

demonstrating a significant number of major parallel institutions in Roman and English law and culminates in a defense of common law by reference to Roman use of unwritten laws and customs, which were also praised by Roman lawyers and historians, and Romulus himself who seemed to agree with certain famous Greek preferences for unwritten law.

A DISCOURSE OF LAWS AND THE INTERPRETATIONS OF HOBBS

The interpretations of Hobbes are so numerous and varied that it is not possible to deal with them all in this kind of paper. Furthermore, it is not possible to know for sure how much these newly discovered discourses written by the young Hobbes should affect our understanding of the mature Hobbes. Most scholars would agree that we should at least try to find an interpretation that allows for unity of thought and values through the career of a writer, using changes of view as an explanation only when it has been acknowledged by the writer or can otherwise be convincingly documented. The burden of proof will be on those interpretations which find serious inconsistencies between earlier and later writings.

The young author of the "Discourse of Laws" is a skeptic in many ways, though not toward religion generally. Although he appreciates the gift of reason which distinguishes men from brutes, he sees every individual human to be lacking in knowledge and in the ability or will to "do all that good which he knows" (106). Though he readily cites Plato and Cicero, he does not invoke any transcendent moral realm to determine the content or purpose of human laws. Laws are human artifacts and vary significantly from one time or place to another. But they are also the measure of right and wrong. While this could easily be read as the kind of relativism found in Lipsius, Montaigne, and Sarpi, it could also be the view that God has left men in a situation such

that law and convention, for all their problems, are the most workable standards of right and wrong available to men in society.

Anticipating Hume, the young Hobbes emphasizes repeatedly the great advantages that come to human beings in subjecting themselves to law, advantages which significantly outweigh the risks of injustice and legal failure—which are also quite real. The laws provide peace and order, the framework for good and honest lives. Laws "are the people's bulwarks and defenses," and they make men "good and happy."

All men, the rulers included, are obligated to obey the laws, "the very rules by which all the actions of our life be squared and disposed." That obligation arises from reason: the "duty we owe to Laws, is nothing else but obedience to reason." Reason begets, corrects, and preserves the laws. The laws correct and improve on nature. Laws serve the good by showing men "how to live peaceably and regularly one with another" and by repressing "the audacity of those unbridled spirits who . . . thrust themselves into all kinds of outrage and disorder," ignoring the guidance of reason. The evils of disorder are so great that it would be better to live under tyranny than anarchy. Limited liberty for all is better than total liberty for all.

The principles of rule of law are recognized and articulated in the discourse as guidelines by which good and bad societies can be distinguished, and by which men can be guided in establishing and maintaining the good. Rule of law is a happy achievement of some human societies, is not self-maintaining, and is unfortunately quite vulnerable to all forms of abuse and corruption. Principles specifically recognized by the young Hobbes include the following:

1. Rulers and magistrates must also obey the law.
2. Laws are to serve the common good, not private interests.

3. Justice is to be administered equally to rich and poor, the powerful and the weak.
4. Dependable and routine punishment for violation of laws is necessary.
5. Laws are to be administered moderately, avoiding creation of unnecessary private misery.
6. Laws should be adjusted to fit the particular people, time, and place to which they apply.
7. Laws must be possible of being obeyed.
8. Laws should only rarely be changed, and only to make them more complete, clear, positive, and profitable.
9. Fundamental laws should never be changed.
10. Laws should not be multiplied unnecessarily.
11. Long established custom is approved by the judgment of the people and is of equal authority with statutes.

A more complete listing might include a specific requirement for generality in rules and a prohibition on ex post facto legislation. But such complete lists of these principles are not known before the twentieth century.⁵⁰ What remains implicit and inchoate in this discourse is the developed theory of authority that marks Hobbes's later writings, with its acceptance of the royal prerogative and emphasis on sovereignty. It has been noted before that Hobbes's first open statements defending prerogative were made from the safety of France. And if it is not too subtle a point, Hobbes's listing of the royal prerogative as a source of English law could not have been

⁵⁰ See Noel B. Reynolds, "Law as Convention." *Ratio Juris* 2, no. 1 (March 1989):105–120. for a contemporary articulation of a conventionalist rule of law theory.

intended to please parliamentarians, even in 1620. When Hobbes invokes this same list in *Leviathan*, chapter 26, he moves the royal prerogative to the head of the list.

CONCLUSION

Analysis of these essays shows that the young Hobbes drew heavily on classical sources in the manner of sixteenth century humanists. It also shows him favoring the methods and views of the skeptics in this movement such as Lipsius, Montaigne, and Sarpi. This early writing already postulates an unequivocal conventionalist account of law, but one which sees itself fully supporting the classical tradition of rule of law without Stoic appeals to natural law for justification. To the extent that we are willing to assume consistency between these early discourses and Hobbes's mature writings, we may find in the "Discourse of Laws" more support for Oakshott and like-minded interpreters than for those who find in Hobbes a dangerous relativism and defense of tyranny.

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