

BEHEMOTH AND HOBBS'S "SCIENCE OF JUST AND UNJUST"

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A. Why may not men be taught their duty, that is, the science of just and unjust, as divers other sciences have been taught, from true principles, and evident demonstration; and much more easily than any of those preachers and democratical gentlemen could teach rebellion and *treason*?¹

Introduction

This essay advances the following set of arguments – although not necessarily in this order. First that we must take seriously Hobbes's claim in *Behemoth* that "the science of *just* and *unjust*" is a demonstrable science, accessible to those of even the meanest capacity. Second that *Leviathan* is the work in which this science, intended as a serious project in civic education, is set out. Third, that Hobbes is prepared to accept, like Plato and Aristotle, "giving to each his own," as a preliminary definition of justice, from which however, he draws some very un-Aristotelian conclusions. Fourth, that although in Hobbes's theory "*just* and *unjust*" are equivalent to "lawful and unlawful," this is far from being a simple statement of legal positivism, but rather the conclusion of a practical syllogism. The first term of this syllogism is that *jus*, or right, is the foundation of justice; the second term is that justice only obtains between men in the state of society; and the third term, or conclusion, is that, because justice can only obtain where *jus* or right, has been converted into *lex*, or law, justice is therefore synonymous with lawful, injustice with unlawful. Fifth, that the impediments to this demonstrable science of justice being univer-

¹ *Behemoth, or The Long Parliament*, ed. Ferdinand Tönnies (London, 1889, facsimile ed., ed. Stephen Holmes, Chicago: University of Chicago, 1990), p. 39. All citations are to *Behemoth* are to the Tönnies ed. I wish to gratefully acknowledge the facilities and support extended to me during my fellowship, 2002–3, at the Swedish Institute for Advanced Study in the Social Sciences, Uppsala, when this was written.

sally accepted, on Hobbes's account, are twofold, explained in terms of religion and the role of preachers and educators produced by the universities, on the one hand, and by the activity of "democratical gentlemen" and classical republicans dominating parliament, on the other. Sixth, that Hobbes's account of the transition from *jus* to *lex*, specified in terms of a transition from the state of nature to that of civil society, although Epicurean in origin, is much closer to a conventional civil law position than is usually noted.

Behemoth may be seen as an extended disquisition on "the science of *just* and *unjust*," inserted into a history of the Long Parliament and the conduct of the English Civil War from 1640 to 1660. Indeed, so literally does Hobbes intend his claim that the English civil war is to be read as the miscarriage of justice as a science, and one which requires the reform of the universities, hitherto so delinquent in their duty to teach this science, that he takes, as he admits, a long digression from the history of the civil war to set it out.² In the Dedication to Henry Bennet, Lord Arlington, Hobbes had already presented "his four short dialogues concerning the civil war" in the following terms: "the first contains the seed of it, certain opinions in divinity and politics. The second hath the growth of it in declarations, remonstrances, and other writings between the King and Parliament published. The two last are a very short epitome of the war itself, drawn out of Mr. Heath's chronicle."³

Behemoth, like the other late works that it most closely resembles,⁴ the *Dialogue between a Philosopher and a Student of the Common Laws of England*,⁵ the *Historia Ecclesiastica*,⁶ and the 1668 Appendix to the Latin *Leviathan*,⁷ is cast in dialogue form. The dialogue, like the invective, from which it was some-

² Ibid., pp. 40–59. The interlocutors, having discussed at great length the rise of the universities, the student concludes (p. 59): "I am therefore your opinion, both that men may be brought to a love of obedience by preachers and gentlemen that imbibe good principles in their youth at the Universities and also that we never shall have a lasting peace, till the Universities themselves be in such manner, as you have said reformed."

³ Ibid., p. iv.

⁴ Ibid., Hobbes's *Dialogue of the Civil Wars of England*, was completed around 1668, and is therefore contemporaneous with the final form of the Latin *Leviathan*.

⁵ Drafted in 1666, published in 1681.

⁶ Aubrey reports on the progress of the poem from 1659 and we have a record of its completion in the account books at Chatsworth in 1671, but it was first published in 1688. See the forthcoming edition by Patricia Springborg and Patricia Stablein (Oxford: Clarendon edition of Hobbes's *Complete Works*).

⁷ For translations of the 1668 Latin Appendix, see Thomas Hobbes, *Leviathan*, with selected variants from the Latin edition of 1668, ed. with Introduction and Notes by Edwin Curley (Indianapolis: Hackett, 1994), pp. 498–548; as well as George Wright's excellent translation with notes, "Thomas Hobbes: 1668 Appendix to *Leviathan*," *Interpretation* 18, no. 3 (1991): 324–413.

times indistinguishable, was a favoured literary form of the Renaissance. In all three cases the dialogue is conducted between two interlocutors A and B. If, as Edmund Curley cautions in the case of the 1668 Appendix, we cannot assign either A or B as a personal spokesman for Hobbes, who is referred to by both in the third person, this is not the case with *Behemoth*, where A is a teacher who seems clearly to represent Hobbes, and B is an unidentified pupil.⁸ These three works taken together not only contextualize *Leviathan*, cast in the classical form of a philosophical treatise, but they also cast important light on its theses. Moving between genres, as he does in the late dialogues, Hobbes buttresses the claims of *Leviathan* with the legal case method of the *Dialogue concerning the Common Law*, the ecclesiology of the *Historia Ecclesiastica*, presented in Latin hexameters, and the historiography of *Behemoth*.

In all three, as we shall see, Hobbes is concerned with heresy as false opinion, with sectarianism as a form of sedition, and with democracy as the pretension to power that carries these seeds of destruction with it. Heresy was on Hobbes's mind. His desire to vindicate himself against the charge of heresy in general, and charges that the parliament was prepared to lay against him in 1666–7 with respect to *Leviathan*, specifically, had precipitated a flood of works in those years, abating around 1670. These works, all of which address heresy more or less directly, comprise his *Historia Ecclesiastica* (written between 1659 and 1674, but published only in 1688); *A Dialogue between a Philosopher and a Student of the Common Laws of England* (drafted in 1666, but published only in 1681); Hobbes's *Answer* to Bishop Bramhall's *The Catching of Leviathan*, published together with his *An Historical Narration Concerning Heresy* (1668); the Latin *Leviathan*, including a new Appendix (1668); and other short manuscripts on heresy (1668). To this series of works, *Behemoth* (completed in 1670, but published only in 1679) belongs; and it is here that Hobbes explicitly stakes his claim to authorship of a "science of *just* and *unjust*" as the lesson to be learned from civil war and the means to alleviate its causes.

As in the case of *Leviathan*, *Behemoth* is the Hebrew name for beasts from the book of Job and, even if not in this case Hobbes's chosen title,⁹ it plays

⁸ As we can gather, for instance, by A's reference to his Hobbes's patron, William Cavendish, as "My Lord of Newcastle," see *Behemoth*, p. 122. In the case of the *Historia Ecclesiastica*, the distribution of the dialogue, which is in any case uncertain on textual grounds, also cannot be assigned with confidence.

⁹ *Behemoth* was not the name Hobbes's gave it, and was not the title of the first three unauthorized 1679 editions printed abroad. In August 1679 Hobbes complained to Aubrey "I have been told that my booke of the Civill Warr is come abroad, and I am sorry for it, especially because I could not get his majesty to license it, not because it is ill printed or has a foolish title set to it, for I believe that any ingenious man may understand the

an important role in his lexicon.¹⁰ *Behemoth* is, however, plural for *Behema*, defined in Cooper's *Thesaurus* of 1565 as "the dyvell, and signifieth a beaste."¹¹ The plural is significant, for *Behemoth* to Hobbes represents the many-headed hydra of democracy, or government by opinion. The opinions that are so dangerous involve the conjunction of philosophy and divinity, which in turn breed sects, and the Greek word for sect is *haeresis*, the same as heresy. So, for instance, when, in the 1668 Appendix to the Latin *Leviathan*, A asks B, "What is heresy?", B answers, "The term is Greek, meaning the doctrine of any sect." And when A asks, "What is a sect?", B answers, "A sect is a number of men who follow the same master in the sciences, one whom they have chosen for themselves, at their own discretion." "Heresy is a word which, when it is used without passion, signifies a private opinion," the teacher claims in *Behemoth*. "So the different sects of the old philosophers, Academicians, Peripatetics, Epicureans, Stoics, etc. were called heresies."¹² This, it turns out, is the nub or it and, for Hobbes, the greatest failing of sectarianism, like democracy, is the fact that it represents choice by those who have no authority to choose.

Beginnings are significant and Hobbes chooses for *Behemoth* a Machiavellian opener:

A. If in time, as in place, there were degrees of high and low, I verily believe that the highest time would be that which passed between the years 1640 and 1660. For he that thence, as from the Devil's Mountain, should have looked upon the world and observed the actions of men, especially in England, might have had a prospect of all kinds of injus-

wickednesse of that time, notwithstanding the errors of the presse." See Hobbes, *Correspondence*, vol. 2, ed. Noel Malcolm, p. 772. Malcolm notes, p. 773, note 4, that Hobbes's complaint about the title could not refer to *Behemoth*, which was not yet used, but might rather refer to the famous lines from Lucretius, *De Rerum Natura*, 83, 101, which Voltaire believed would last as long as history, and which the editors of the pirated editions had appended: "Religio pepercit Scelerosa atque impia Facta," and "Tantum Religio potuit Suadere Malorum" ("religion was the mother of wicked and impious deeds," and "Such was the evil which religion led men to commit." See Malcolm p. 773, note 4). However, in the 1688 printed edition of Hobbes's *Historia Ecclesiastica*, more or less completed, it appears, at the same time as *Behemoth*, both the names *Leviathan* and *Behemoth* appear in conjunction, although not in the Grund ms, which the copyist tells us was made from the copy in "My Lord Vaughan's library," probably the presentation copy. They appear as an interpolation in the 1668 printed edition the Harleian 1844 Ms, corrected to the 1688 printed edition.

¹⁰ See Hobbes's *Historia Ecclesiastica* (1688 printed ed., line 1229), where with reference to the machinations of the Pope he comments: "Leviathan, like Behemoth, had again taken the hook in the nose; both the king and the people were slaves."

¹¹ See Cooper, Thomas and Sir Thomas Elyot, *Thesaurus Linguae Romanae & Britannicae* (London 1565).

¹² *Behemoth*, pp. 8-9.

tice, and of all kinds of folly, that the world could afford, and how they were produced by their dams hypocrisy and self-conceit, whereof the one is double iniquity, and the other double folly.¹³

Hobbes's perspective is strikingly reminiscent of Machiavelli who begins the *Prince* 1.2 by offering a short defense of why he, an ordinary citizen, should know more than rulers about the art of ruling, in terms of the analogy of a person standing on a mountain, as best positioned to survey the landscape below, compared with a person standing below, as best positioned to survey the mountain. From which he concludes, "to comprehend fully the nature of people, one must be a prince, and to comprehend fully the nature of princes one must be an ordinary citizen."

The pupil, B, of *Behemoth*, responds in the same idiom: ¹⁴

B. I should be glad to behold that prospect. You that have lived in that time and in that part of your age, wherein men used to see best into good and evil, I pray you to set me (that could not then see so well) upon the same mountain, by the relation of the actions you then saw, and of their causes, pretensions, justice, order, artifice and event.

Machiavellian *topoi* on the role of good men, good arms and good laws, as well as the problem of Christianity, as a religion of salvation, compared with the civil religions of antiquity, dominate *Behemoth*.¹⁵ Hobbes's historiography of the English civil war is less concerned with the detail, which in exile in France he was not present to observe, than with these principles, as he notes, acknowledging, "I shall only make use of such a thread, as is necessary

¹³ Ibid., p. 1. See Springborg, "Review Article: The View from the 'Divell's Mountain'; Review of Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*," *History of Political Thought*, 17, 4 (Winter 1996), 615–22.

¹⁴ *Behemoth*, p. 1.

¹⁵ See Patricia Springborg, "Hobbes on Civil Religion," Proceedings of the Conference on *Pluralismo e religione civile*, Università del Piemonte Orientale, Vercelli, Italy, May 24–25, 2001, ed. Gianni Paganini and Edoardo Tortarolo (Milano, Bruno Mondadori, 2003, pp. 61–98). Hobbes's indebtedness to Machiavelli has often been underestimated. *Leviathan* chapter 2, "Of Man," for instance, includes an allusion to the centaur, compounded of horse and man, which suggests Machiavelli's trope of the centaur as reflecting the duality of human nature in the *Prince* chapter 18. It is a trope which Machiavelli goes on to rework in the famous metaphor of the wolf and the fox, a notion famously re-described by Hobbes himself in the concept *homo homini lupus*. Nor could Hobbes have been unaware of his patron, William Cavendish, Duke of Newcastle's famous princely mirror, his *Advice to Charles II*, which so closely follows Machiavelli's *Prince*. (See *Ideology and Politics on the Eve of Restoration: Newcastle's Advice to Charles II*, transcribed by Thomas P. Slaughter. Philadelphia: American Philosophical Society, 1984.)

for the filling up of such knavery, and folly also, as I shall observe in their several actions," "in what is intended only the story of their injustice, impudence and hypocrisy."¹⁶

On the subject of good men and good laws, he considers first how it was that in such short span of time the people were seduced from support of their king, "a man that wanted no virtue... in the well governing of his subjects," and how "the people were corrupted generally, and disobedient people esteemed the best patriots."¹⁷ He gives a preliminary catalogue of "the seducers" and then goes on to consider the role of arms, and control of the military, as well as the specific laws in terms of which the corruption of sovereignty was made possible. "The seducers were of divers sorts," the teacher claims, and proceeds to give a catalogue that includes ministers, first Papists, then Presbyterians and third, Independents, Fifth-monarchy-men, Quakers and Adamites, all of whom claimed an independent, and in some cases a democratic, authority.¹⁸ Fourthly came the parliamentarians characterized by the educated gentry, classical republicans if not democrats, citing Greek and Roman precedents for "popular government... extolled by the glorious name of liberty, and monarchy disgraced by tyranny."¹⁹ Fifth were "the city of London and other great towns of trade, having in admiration the great prosperity of the Low Countries after they had revolted from their monarch, the King of Spain," and who thought that they likewise might profit from a change of government.²⁰ Sixth were those who thought they could profit from war; and seventh and last, "the people in general... so ignorant of their duty... or what necessity there was of King or Commonwealth... they had no rule of equity, but precedents and custom... whence crept in the pretences of that Long Parliament, for a democracy."²¹

Parliament is characterized variously, as in the power of "democratical gentlemen... whose design of changing the government from monarchical to popular ... they called liberty,"²² as "attempting the change of government

¹⁶ *Behemoth*, pp. 119–20. For the details, he refers his pupil to "the history written at large," presumably Clarendon's *History of the Rebellion*. See, Edward Hyde, First Earl of Clarendon, *The History of the Rebellion and Civil Wars in England, begun in the Year 1641. With the precedent Passages, and Actions, that contributed thereunto, and the happy end, and Conclusion thereof by the King's blessed Restoration, and Return upon the 29th of May, in the Year 1660* (Oxford, 1660).

¹⁷ *Behemoth*, p. 2.

¹⁸ *Ibid.*, pp. 2–3.

¹⁹ *Ibid.*, p. 3.

²⁰ *Ibid.*, pp. 3–4.

²¹ *Ibid.*, pp. 4–5.

²² *Ibid.*, p. 26.

from monarchical to democratical,"²³ as ruled by "Presbyterians and democrats,"²⁴ and as "animated by the democratical and Presbyterian English."²⁵ It is the thread of the triple threats of heresy, sectarianism and democracy on which the argument is chiefly strung, leading the student to conclude:

I see by this, it is easier to gull the multitude, than any one man amongst them. For what one man, that has not his natural judgment depraved by accident, could be so easily cozened in a matter that concerns his purse, had he not been passionately carried away by the rest to change of government, or rather to a liberty of every one to govern himself?²⁶

The pupil summarizes the lessons Hobbes drew from Thucydides, of whom he claimed in his *Autobiography*: "There's none that pleas'd me like Thucydides. /He says Democracy's a foolish thing,/ Than a republic wiser is one king."²⁷ It is in this context that the teacher in *Behemoth* is prompted to ask:

A. Why may not men be taught their duty, that is, the science of just and unjust, as divers other sciences have been taught, from true principles, and evident demonstration; and much more easily than any of those preachers and democratical gentlemen could teach rebellion and treason?²⁸

The student is skeptical:

B. But who can teach what none have learned? Or if any many have been so singular, as to have studied the science of justice and equity; how can he teach it safely, when it is against the interest of those that are in possession of the power to hurt him?²⁹

And the teacher replies:

A. The rules of just and unjust sufficiently demonstrated, and from principles evident to the meanest capacity, have not been wanting; and notwithstanding the obscurity of their author, have shined, not only in this, but also in foreign countries, to men of good education.³⁰

²³ Ibid., p. 27.

²⁴ Ibid., p. 30.

²⁵ Ibid., p. 31.

²⁶ Ibid., p. 38.

²⁷ Hobbes's Verse Autobiography, lines 84–86, reproduced in *Leviathan*, Curley ed., p. lvi.

²⁸ *Behemoth*, p. 39.

²⁹ Ibid., p. 39.

³⁰ Ibid., p. 39.

Hobbes, as interlocutor A, undoubtedly refers to his own *Leviathan*, and its continental reception. Moreover, he presages the important role of education in inculcating the "science of the just and the unjust," and the delinquency of the universities which, he claims, have failed in the task:

And, therefore, the light of that doctrine has been hitherto covered and kept under here by a cloud of adversaries, which no private man's reputation can break through, without the authority of the Universities. But out of the Universities, came all those preachers that taught the contrary. The Universities have been to this nation, as the wooden horse was to the Trojans.³¹

It is as a project for the universities, or a theory of civic education, that Hobbes presents his "science of *just* and *unjust*." *Leviathan*, as Hobbes made clear, was intended as a text for university instruction, and there, as in the *Historia Ecclesiastica*, he gives substantially the same account of the development of the universities as initially papal foundations intended for religious indoctrination which might, however, be reformed to serve the state.³² As it stands, however, when men had "grown weary at last of the insolence of the priests," they turned instead to "the democratical principles of Aristotle and Cicero, and from the love of their eloquence fell in love with their politics, and that more and more, until it grew into the rebellion we now talk of."³³ Hobbes implies that university reform is now imperative, and it is not difficult to see the entire project of *Leviathan* and *Behemoth* as an exercise in civic education.

Hobbes is careful to distinguish the republican Aristotle, ushered in by the Renaissance, from the Aristotelianism of the Schools. And while it is against the Aristotelianism of the Schoolmen that he directs most of his ire, the republican Aristotle, famous in the *Politics* for the definition of citizenship as the right to rule and be ruled, is a specific target in *Behemoth*:

The virtue of the subject is comprehended wholly in obedience to the laws of the commonwealth. To obey the laws, is justice and equity, which is the law of nature, and, consequently, is civil law in all nations of the world; and nothing is injustice or iniquity otherwise than it is against

³¹ Ibid., p. 40.

³² The *Historia Ecclesiastica*, lines 1847–82, closely parallels the account in *Behemoth*, pp. 40–41, of the rise of the universities, beginning with Paris and followed by Oxford, as papal instruments and seats of theology.

³³ *Behemoth*, p. 43.

the law. Likewise, to obey the laws, is the prudence of a subject; for without such obedience the commonwealth (which is every subject's safety and protection) cannot subsist.³⁴

Hobbes refers in this context to Aristotle's doctrine of the mean, which he derides as the rule of mediocrity: "In sum all actions and habits are to be esteemed good or evil by their causes and usefulness in reference to the commonwealth, and not by their mediocrity."³⁵ And he seems to lay the fall of the monarchy to the door of the theory of mixed government, or "mixarchy," the classical republican doctrine of government balanced between monarchical, aristocratic and democratic principles, to be found first in Aristotle, that captivated not only the Civil War parliamentarians but also the King's counsellors.³⁶ A doctrine shared by Clarendon and royalists, as well as by republicans, the theory of mixed government called for divided sovereignty and ineffective government, in Hobbes's view, a topic to which he many times returns in the course of *Behemoth*.

The possibility of a "science of just and unjust"

Two commonplaces about Hobbes's political theory have obscured the significance of Hobbes's important claim in *Behemoth* that "the science of *just* and *unjust*" is a demonstrable science, and that the principles of this science are "evident to the meanest capacity." The first concerns his nominalism and the second his legal positivism. Hobbes is deemed a nominalist by virtue of his subscription to the principle that right and wrong, good and bad, just and unjust do not exist in nature but are judgments of men. And he is deemed a

³⁴ Ibid., p. 44.

³⁵ Ibid., p. 45.

³⁶ The official theory of the "balanced" or "mixed" constitution of "three estates," king, lords and commons, was set out in the *Answer to the XIX Propositions*, issued in June 1642 on behalf of Charles I and against his parliamentary opponents. Recent scholars have debated to what degree this is an expression of classical republican theory. At the time the statement was read less as empowering king or commons than as empowering bishops, the lords spiritual, and counterpart to the lords temporal, of the second estate, under attack in the parliament of 1640–41. Clarendon supported the independent authority of the Anglican church and was the principal advocate of "mixarchy." He was the unnamed target of Hobbes's attacks on the doctrine, and its role in the fall of Charles I, in *Behemoth*. See Michael Mendle, *Dangerous Positions: Mixed Government, the Estates of the Realm, and the Answer to the XIX Propositions* (Tuscaloosa, AL: University of Alabama Press, 1985); and the review of Mendle by Richard Tuck, *Journal of Modern History* 59, no. 3 (1987): pp. 570–72.

legal positivist by subscribing to the view that "justice is whatever the law says it is" and an "unjust law" is simply an oxymoron.³⁷

But such a simple understanding of Hobbes's position defies his notion of "the science of just and unjust," variously expressed as the "true science of equity and justice" (EW 6, 251), the "true principles of duty" (EW 6, 253), the "causes and grounds of duty" (EW 6, 363), the "science of the laws of nature" (EW 3, 146), the "science of virtue and vice" (EW 3, 146), and the "true doctrine of the laws of nature" (EW 3, 166).³⁸ It is noteworthy that among modern accounts of Hobbes's science of justice and its sources, one of the most succinct and compelling is that of Reinhart Koselleck, student of Carl Schmitt, legal theorist of the Third Reich whose *Leviathan*³⁹ heralded a new and disturbing *Realpolitik* in the principles of *Freund und Feind*, an extrapolation from Hobbes's characteristic use of the old aphorism *homo homini lupus*.⁴⁰ Emphasizing the Civil War context for Hobbes's political theory, Koselleck notes that Hobbes, in his search for a fundament on which to ground peace and security, rejects "the laws and customs of one's country," as a starting point, on which Descartes, by contrast, had insisted. Hobbes devoted chapter 11 of *Leviathan*, "Of the Difference of Manners," to a polemic against "Custom and Example," or *jus gentium*, as adequate to such a task. As early as *De Homine* (10.5), Hobbes had insisted that politics and ethics, or the science of just and unjust, equality and inequality, is a science demonstrable *a priori* ("politica et ethica, id est scientia justitiae et injustitiae, aequi et iniqui, demonstrari a priori potest"), precisely because it is we who make cases of justice, just as to be sure we make the laws and pacts themselves ("justitiae causas, nimirum leges et pacta ipsi fecimus").⁴¹ If civil war is due initially to the failure of philosophers and theologians to put truth above sectarianism ("non partium, sed pacis studio"), as Hobbes diagnoses in *Behemoth*, it is only in the

³⁷ Among legal theorists, the Viennese Hans Kelsen is most well known for the "hard positivist" position that positive law needs no further justification: there are no universal facts about morality, or objective measures of what the law ought to be like. The origins of positive law are explained either in terms of command theory (Jeremy Bentham, John Austin), or social convention theory (Kelsen, H.L.A. Hart). The latter see Hobbes as a legal positivist in this sense.

³⁸ For the purposes of easy comparison I list the references according to Molesworth.

³⁹ Carl Schmitt, *The Leviathan in The State Theory of Thomas Hobbes* (1938), trans. George Schwab and Erna Hilfstein. (London, 1996).

⁴⁰ See the seminal piece by François Tricaud, "'Homo homini Deus,' 'Homo homini Lupus': Recherche des sources des deux formules de Hobbes," in *Hobbes-Forschungen*, ed. R. Koselleck, and R. Schnur (Berlin, 1969), pp. 61–70.

⁴¹ See Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, Mass.: MIT Press, 1988 ed.), chapter 2, "Hobbesian Rationality and the Origins of Enlightenment," pp. 23–24, and notes.

course of the experience of war that sectarian interests, of individuals, parties and churches are progressively unmasked to disclose desire and fear ("appetitus et fuga") as the ultimate causes of war and peace.⁴²

Indeed, one may argue, the monsters from the book of Job, *Leviathan* and *Behemoth*, make their appearance in the titles of Hobbes's works precisely to signal two things: first that right and wrong, good and bad, just and unjust are judgments that only men can make; and second that *Leviathan*, a human artifice constructed on the basis of fear, is indeed a mortal god, and *Behemoth*, civil war, is the story of its mortality.⁴³ If the main support for the state is the power of reason that brings it into being, the main threat to the state is religion, also born out of fear. It is primarily due to religion, in the form of priestcraft, and its specific bearer, the universities, he claims, that the science of justice has been subverted and the realm imperiled. Hobbes's position on reason as the power to make the state and religion as the power to unmake it, is classically Epicurean and does not involve the simple nominalism or legal positivism that have been ascribed to him. Understanding Hobbes as a latter day Epicurean allows us to take seriously his "science of just and unjust." It gives us important hints about the provenance of some of the characteristic features of his theory, notions of the state of nature, contract, the role of fear, religion as a prophylactic, and right reason as a route to peace. And it allows us to see the ingenuity with which Hobbes advances "the science of just and unjust" along Epicurean lines.

There was a long tradition of treating justice as conventional, which included not only the sceptics but also the dogmatists, and even Aristotle had remarked that justice was a matter of law and custom and not by nature. But Epicurus managed successfully to combine the view of justice as conventional with emphasis on the therapeutic value of philosophy, which presupposed an objective measure of human betterment, or the Good. The notion that justice was conventional, arising from pacts between men, is explicitly elaborated in the important Sentences (*Ratae Sententiae*) XXXI to XL of Epicurus' *Principal Doctrines* (*Kuriiai Doxai*).⁴⁴ So RS XXXI states: "the justice which arises from nature is a pledge of mutual advantage to restrain men from harming one another and save them from being harmed"; RS XXXII states: "For all living things which have not been able to make compacts not to harm one another or be harmed, nothing ever is either just or unjust; and likewise too

⁴² Koselleck, *op. cit.*, p. 24, citing *Leviathan*, book 1, ch. 6.

⁴³ See Job 30:29, verses 40 and 41, 42:6, etc.; see also Patricia Springborg, "Hobbes's Biblical Beasts: *Leviathan* and *Behemoth*," *Political Theory* 23, no. 2 (1995): pp. 353–75.

⁴⁴ For *Ratae Sententiae* XXXI–III, I have used the English translation of Cyril Bailey in *Epicurus, the Extant Remains* (Oxford: Clarendon Press, 1926), p. 103.

for all tribes of men which have been unable or unwilling to make compacts not to harm or be harmed"; and *RS XXXIII* states: "Justice never is anything in itself, but in the dealings of men with one another in any place whatever and at any time it is a kind of compact not to harm or be harmed."

Justice may be conventional, but Epicurus reserves for harm and benefit a privileged status. If justice concerns benefit and injustice concerns harm, nevertheless justice "arises from nature," even though if it is always mediated through compacts and is not, therefore, available to men in the natural state. This is precisely the structure of Hobbes's own theory. He may seem to repeat arguments that suggest the appellations good, bad, just and unjust are arbitrarily chosen terms, and that there is no measure by which to determine the difference in meaning between them. So, for instance, in the *Historia Ecclesiastica* he repeats an argument to be found in *Behemoth* in a more developed form:

The crowd has no known measure of good and evil, and regard justice and injustice as mere words.

Everyone calls "just" whatever he can get away with; and whatever he suffers unwillingly, he considers a crime against God.⁴⁵

What appears at first sight as a cynical acknowledgement of the conventional nature of justice turns out, upon analysis, to be a protest against the general failure to understand "the measure of good and evil," of justice and injustice. To what cause is this general failure due? It comes about through the conjunction of democracy and sectarianism. Only at the behest of demagogues and false prophets do men fail to calculate their interest by *ratio*, the measure of harm and benefit. So, in *Behemoth*, where as so often he describes civil war as a "world turned upside down" in remarkably Thucydidean terms, he claims: "it is easier to gull the multitude, than any one man amongst them."⁴⁶ It is precisely due to preachers and demagogues that men can be seduced so easily from their interests, and even their pecuniary interests.

"Good is to everything, that which hath active power to attract it locally, *Malum*, therefore, to everthing is that which hath active power to repel it," Hobbes declared as early as the *Short Tract* (c. 1630).⁴⁷ He had refined the

⁴⁵ Hobbes, *Historia Ecclesiastica*, lines 2155–58. Translations of Hobbes's *Historia Ecclesiastica* (1688) are from the forthcoming edition by Patricia Springborg and Patricia Stablein.

⁴⁶ *Behemoth*, p. 38.

⁴⁷ See, Ferdinand Tönnies, "A Short Tract on First Principles," in Tönnies, ed., *The Elements of Law*, including "A Short Tract on First Principles," (New York, 1969), pp. 208–9. For the debate about Hobbes's authorship of the "Short Tract," see the late Karl Schuhmann's seminal piece, "Le *Short Tract*, première oeuvre philosophique de Hobbes," *Hobbes Studies* 8 (1995): pp. 3–36.

thesis in *De Cive* (1642) and the *Philosophical Rudiments* (1651), claiming in the latter, "For every man is desirous of what is good for him and shuns what is evil, but chiefly the chiefest of natural evils, which is death; and this he does by a certain natural impulsion of nature, no less than that whereby a stone moves downward."⁴⁸ The thesis that good and evil are names for the attraction of pleasure and the avoidance of pain, natural impulses activated by human judgment, had been formulated by Lorenzo Valla and Juan Luis Vives, probable sources for Hobbes.⁴⁹

Therefore we say that such-and-such things exist or do not exist, or are these and those, of such or a different kind, we reckon on the basis of our belief, not of the things themselves. It is not they that constitute their measure for us, but our mind. For when we call things good, bad, useful, useless, we are not speaking according to things, but according to ourselves.⁵⁰

Views about the conventional nature of judgments of good and bad, useful and useless, are to be found across the range of philosophical traditions, and are not peculiar to the Epicureans. The Sophist Protagoras had epitomized the view that the measure of truth was political, what men collectively decide (*Theaet.* 167c), although, like Democritus, he thought "a basis for the judgments of 'better' and 'worse' is to be found in the efficacy of 'art.'"⁵¹ But for Democritus, as Gregory Vlastos points out, "man is the measure" in a very different sense: "His physical concept of the soul defines a unitary human nature which affords a basis for universally valid judgments".⁵² "Man is the

⁴⁸ Hobbes, EW 2, p. 8.

⁴⁹ For Hobbes and Valla, see Gianni Paganini, "Hobbes, Valla e i problemi filosofici della teologia umanistica: la riforma 'dilettrica' della Trinità," in L. Simonutti, ed., *Dal necessario al possibile: Determinismo e libertà nel pensiero anglo-olandese del XVII secolo* (Milan: Franco Angeli, 2001), pp. 11–45; and Paganini, "Thomas Hobbes e Lorenzo Valla: Critica umanistica e filosofia moderna," *Rinascimento, Rivista dell' Istituto Nazionale di Studi sul Rinascimento*, 2nd series, 39 (1999): pp. 515–68.

⁵⁰ See Juan Luis Vives, *De prima philosophia*, in his *Opera*, 2 vols, (Basle, 1555), vol. 1, pp. 532–33, trans. Richard Waswo, *Language and Meaning in the Renaissance* (Princeton, Princeton University Press, 1987), pp. 128–29. For a more extensive discussion of Hobbes and Vives, see Patricia Springborg, "Hobbes and Epicurean Religion," in *Der Garten und die Moderne: Epikureische Moral und Politik vom Humanismus bis zur Aufklärung*, ed. Gianni Paganini and Edoardo Tortarolo (Stuttgart: Rommann-Holzboog Verlag, 2003 [forthcoming]).

⁵¹ Gregory Vlastos, "Ethics and Physics in Democritus, I," *The Philosophical Review* 54 (1945), p. 591.

⁵² Gregory Vlastos, "Ethics and Physics in Democritus, II," *The Philosophical Review* 55 (1946), p. 53.

measure," because the good for man is not given but must be created, through "art."⁵³ In this way man can truly be said to make himself.

The content of Hobbes's "science of justice": jus to lex

The Latin term for "the measure," so central to Hobbes's science of justice, was *ratio*,⁵⁴ whose more concrete meaning, a system of calculation, has been overtaken by the figurative meaning, reason. This system of calculation, reason, was in Hobbes's view, so straightforward that the simplest men could grasp it, and there are various remarks to this effect in *Behemoth*, as we have noted. His science of just and unjust, like Epicurus' *Principal Doctrines* (*Kuri-ai Doxai*), take the form of *Ratae Sententiae*, renamed by Hobbes Laws of Nature. It has been customary to compare these principles with Grotius's concept of natural right (*jus naturale*), and for good reason. Hugo Grotius (1583–1645), jurist and politician, was among the first early modern thinkers to derive particular moral axioms from general principles of reason in this way. So, for instance, Hobbes's definition of *jus naturale* as "the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature," appears to rephrase Grotius, who declared: "Natural right (*jus naturale*) is a dictate of right reason indicating that some act is either morally necessary or morally shameful, because of its agreement or disagreement with man's nature as a rational and social being."⁵⁵ In this respect Hobbes belongs to the long history of the reception of the Roman law concept of *jus*, mediated by Canon law and the efforts of Glossators and Postglossators, to produce elaborate legal theory, differentiated in terms of *jus naturale* and *jus gentium*, as the basis for justice in "right" (*jus*), on the one hand, and its expression in the positive law of nations (*lex*), on the other.⁵⁶

While this is indeed the legacy to which Hobbes's science of just and un-

⁵³ Ibid., p. 64.

⁵⁴ For definitions of *ratio* see Lewis & Short's standard *Latin Dictionary* and Cooper's *The-saurus Linguae Romanae & Britannicae* (London 1565):

ratio -ionis (f.), from *reor* and *ratus* (1) reckonning; account, calculation; list, register; af-fair, business; (2) relation; respect, consideration; procedure, method, system, way, kind; (3) reason; reasoning, thought; cause, motive, science, knowledge, philosophy. (Cooper) "reason: counsayle: purpose: care: respecte: consideration: regarde: cause: the mattier: the way: the facion: the fourme: proportion: the trade: the feate: the meane. An accompte or rekenyng."

⁵⁵ Hobbes, *Leviathan*, ch. 14, §1, Curley ed., p. 79. Curley notes the parallel to Grotius, *De jure belli ac pacis* 1.1.10.12.

⁵⁶ For Roman Law concepts of *jus* and *lex*, see H.F. Jolowitz, *A Historical Introduction to*

just belongs, the peculiar character of his own particular doctrines and the important role of social contract, as the vehicle by means of which *jus* can be converted into *lex*, are best explained with reference to Epicurus' *Ratae Sententiae* XXXI to XXXIII that we have already mentioned. Indeed, it is Pierre Gassendi, Hobbes's important contemporary, with whom he was closely associated in Paris, and who was at the time putting together his great Latin compilation of Epicurean sources, whom Hobbes most likely followed in defining justice as conventional. A letter dated 10 October 1644 from Charles Cavendish, Hobbes's patron, to John Pell, the mathematician, reports: "Mr Hobbes writes Gassendes his philosophie is not yet printed but he hath reade it, and that it is big as Aristotele's philosophie, but much truer and excellent Latin."⁵⁷ Cavendish refers to Gassendi's *Life of Epicurus* and *Animadversions on the Ten Books of Diogenes Laertius* published in 1649.⁵⁸ The Hobbes-Gassendi dialogue was not all one way, however. Gassendi made an important concession to Hobbes by including his famous aphorism, "homo homini lupus" in his comment to Epicurus *Ratae sententiae* XXXIII late in the *Animadversions*, to illustrate human aggressivity in the state of nature.⁵⁹ It is perhaps not surprising then, that when in *Leviathan* Hobbes first introduces the concept of Justice, his argument should follow the same structure as Epicurus' *Principal Doc-*

the Study of Roman Law, 2nd edition (Cambridge: Cambridge University Press, 1967). For the development of modern natural rights theory out of Roman Law *jus naturale* and *jus gentium*, see M.P. Gilmore, *Argument for Roman Law in Political Thought, 1200–1600* (Cambridge, Mass., Harvard University Press, 1961), and Richard Tuck, *Natural Rights Theories, their Origin and Development* (Cambridge, Cambridge University Press, 1981).

⁵⁷ Published in J. O. Halliwell, *A Collection of Letters Illustrative of the Progress of Science in England from the Reign of Queen Elisabeth to that of Charles the Second* (London, Historical Society of Science, 1941), p. 85, and cited in Gianni Paganini, "Hobbes, Gassendi e la psicologia del meccanicismo," in *Hobbes Oggi*, Actes du Colloque de Milan (18–21 May, 1988), ed. Arrigo Pacchi (Milan, Franco Angeli, 1990), pp. 351–445, n. 12.

⁵⁸ Gassendi's "dialogue at a distance" with Hobbes has now been documented by Gianni Paganini. See Gianni Paganini, "Hobbes, Gassendi et le *De Cive*," in *Materia Actiosa: Antiquité, Âge Classique, Lumières; Mélanges en l'honneur d'Olivier Bloch*, ed. Miguel Benítez, Antony McKenna, Gianni Paganini, Jean Salem (Paris 2000), pp 183–206. In the ethical part of the *Syntagma*, dating to the years 1645–46, after the publication of the first edition of Hobbes's *De Cive* in 1642, and before the second, which Gassendi helped his friend Samuel Sorbière promote, Gassendi made transparent reference to Hobbes on freedom in the state of nature, as Paganini argues. For further elaboration on Hobbes's debt to the Epicureans see Arrigo Pacchi's seminal piece, "Hobbes e l'epicureismo," in *Rivista Critica di Storia della Filosofia* 33 (1975): pp. 54–71.

⁵⁹ This was noted by Paganini, "Hobbes, Gassendi e la psicologia del meccanicismo," p. 438; a discovery made simultaneously by Olivier Bloch in his "Gassendi et la théorie politique de Hobbes," in *Thomas Hobbes, Philosophie première, théorie de la science et politique*, Actes du Colloque de Paris, ed. Yves Charles Zarka and Jean Bernhardt (Paris: Presses Universitaires de France, 1990,), p. 345.

trines, read through Gassendi's eyes,⁶⁰ which we may restate in the form of a syllogism: (1) that justice, although arising from nature, is a pact of mutual restraint against harm and being harmed (*RS XXXI*); (2) that "for all tribes of men which have been unable or unwilling to make compacts not to harm or be harmed,... nothing ever is either just or unjust" (*RS XXXII*); and (3) that, therefore, "Justice never is anything in itself, but in the dealings of men with one another in any place whatever and at any time it is a kind of compact not to harm or be harmed" (*RS XXXIII*).

We can reconstruct the logic of Hobbes's theory of Justice in terms of a parallel syllogism:⁶¹ (1) "To obey the laws, is justice and equity, which is the law of nature, and, consequently, is civil law in all nations of the world; and nothing is injustice or iniquity otherwise than it is against the law." (2) In the state of nature, "this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place."⁶² (3) Therefore: "Where there is no common power, there is no law; where no law, no injustice."

The conclusion to Hobbes's syllogism may suggest a legal positivist position: no *jus* without *lex*. But this is not the burden of his argument taken as a whole, which was rather to assert the classic position assumed by Aristotle as well as by Epicurus, that justice is relational, and not the virtue of the solitary man. Against Plato's theory of innate ideas, Hobbes concurs with Aristotle: "Justice and injustice are none of the faculties neither of the body, nor mind. If they were, they might be in a man that were alone in the world as well as his senses and passions. They are qualities that relate to men in society, not in solitude."⁶³ But if justice is in practice always a question of what is lawful, it cannot be reduced to a legal positivist principle, nevertheless. In fact Hobbes is harsh in his criticism of those who would reduce *jus* to *lex*, insisting: "For though they that speak of this subject used to confound *jus* and *lex* (*right* and *law*), yet they ought to be distinguished, because RIGHT consisteth in liberty to do or to forbear, whereas LAW determineth and bindeth to one of

⁶⁰ Gassendi's Latin translation of Epicurus *RS XXXIII*, indicated in italics, with his own interpolations in roman, reads: "*Iustitia per se* (et quatenus quidem id quod heic est iustum, illeic est iniustum) *nihil est*; ac in homine solitariè spectato reperitur nulla, *sed dumtaxat in mutuis hominum societatibus, pro ea cuiusque regionis amplitudines in qua possunt pacta de non inferendo, accipiendove nocumento iniri.*" See Gassendi: *Animadversiones in decimum librum Diogenis Laertii, qui est de vita, moribus, placitisque Epicuri* (first published 1649, 1675 edition), vol. 2, p. 302a, cited by Paganini, "Hobbes, Gassendi et le *De Cive*," p. 188–89.

⁶¹ *Behemoth*, p. 44.

⁶² *Leviathan*, ch. 13, §13, Curley ed., p. 78.

⁶³ *Ibid.*

them."⁶⁴ So, in *A Dialogue between a Philosopher and a Student of the Common Laws of England* he explicitly accused Coke for confusing *jus* and *lex*,⁶⁵ a charge he might well have levelled against Grotius, for whom *jus* retained the idea of right as a liberty,⁶⁶ but who nevertheless defined *jus naturale* as a command or prohibition.⁶⁶

For Hobbes, as for Epicurus, justice is not simply defined with reference to our interests. But Hobbes does not move as quickly as Epicurus to a conventional definition of justice. If for Epicurus, it is in the nature of man as a social being to arrive at justice through covenants, for Hobbes the route to justice is through the laws of natural reason. Like Grotius Hobbes arrives, by a slightly longer route, at the conclusion that it is in man's nature to seek justice through covenants, due to rational theorems forced upon him by the war of all against all: "reason suggesteth convenient articles of peace, upon which men may be drawn to agreement. These articles are they which otherwise are called the Laws of Nature,"⁶⁷ which he then goes on to itemize: the first being to seek peace, the second contract as a means to peace, the third and subsequent being Laws of Nature concerning the laying down of a right, the renouncing of a right, and the transferring of a right.⁶⁸ It follows from these laws, and their implications in terms of obligation and duty, that *Injustice* is injury, or a form of malfeasance:

And when a man hath in either manner abandoned or granted away his right, then is he said to be OBLIGED or BOUND not to hinder those to whom the right is granted or abandoned from the benefit of it; and [it is said] that he *ought*, and it is his DUTY not to make void that voluntary act of his own, and that such hindrance is INJUSTICE and INJURY, as being *sine jure* [without right], the right being before renounced or transferred. So that the *injury* or *injustice*, in the controversies of the world is somewhat like to that which the disputations of scholars is called absurdity. For as it is therefore called an *absurdity* to contradict what one maintained in the beginning, so in the world it is called injustice and injury voluntarily to undo that which from the beginning he had voluntarily done.⁶⁹

⁶⁴ *Leviathan*, ch. 14, §3, Curley ed., p. 79, where Curley notes that John Finnis, in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980, pp. 205–10), emphasizes the parallel between Hobbes's position and that of Suarez (*On Laws and God the Lawgiver*, 1.2.5).

⁶⁵ EW 6, p. 73, see Curley, p. 79, n. 4.

⁶⁶ Grotius *De jure belli ac pacis* 1.1.5, noted by Curley, p. 79.

⁶⁷ *Leviathan*, ch. 13, §14, Curley ed., p. 78.

⁶⁸ *Ibid.*, ch. 14, §§4–7, Curley ed., pp. 80–81.

⁶⁹ *Ibid.*, ch. 14, §7, Curley ed., p. 81.

If justice is honouring contracts and obedience to the law, injustice the failure to live up to the terms of the contract or, worse, efforts to retract rights that have already been contracted away, injustice is therefore an absurdity. But this fact alone is not sufficient to deter individuals from unlawful or unjust behaviour. It is in the nature of rational theorems that they bind *in foro interno*, in the internal court of reason, without necessarily binding *in foro externo*, in the external court of human affairs.⁷⁰ To prevent precisely this form of malfeasance the act of contract must be paralleled by an act of authorization, which empowers a sovereign to convert *jus* into *lex*. Hobbes, like Machiavelli, argues the priority of the *princeps* as lawgiver, claiming in the *Dialogue between a Philosopher and a Student of the Common Laws* that lawmakers and laws are logically prior to justice and injustice:

Laws are in their nature antecedent to justice and injustice. And you cannot deny that there must be law-makers before there were any laws, and consequently before there was any justice (I speak of human justice); and that the law-makers were before that which you call own and property of goods or lands, distinguished by *meum, tuum, alienum*.⁷¹

Discovering that the student takes as a definition of Justice the definition of Aristotle and the Common Lawyers, of "giving to every man his own," the Philosopher in the *Dialogue* embraces this principle as his point of departure for "the science of *just* and *unjust*," pointing out that the very substance of Justice depends on the particular laws of "propriety" (property) that a sovereign has set up. This is simply a restatement of Hobbes's position in *Leviathan*, where he develops his case more fully, once again with reference to the Aristotelians:

And this is also to be gathered out of the ordinary definition of justice in the Schools. For they say that *justice is the constant will of giving to every man his own*. And therefore where there is no *own*, that is, no propriety, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth there is no propriety; all men having right to all things; therefore where there is no commonwealth there is nothing unjust. So that the nature of justice consisteth in keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that propriety begins.⁷²

⁷⁰ See *De Cive* (EW 2, pp. 45–46).

⁷¹ EW 6, p. 29.

⁷² *Leviathan*, ch. 15, §3, Curley ed., p. 89.

It is in this way that *jus* and *lex* are mutually entailed and we can show that Hobbes, far from being a legal positivist in the ordinary sense, is closer in fact to Scholastic thought:

The law of nature and the civil law contain each other, and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature (as I have said before in the end of the 15th chapter) are not properly laws but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the commonwealth; and therefore also civil laws; for it is the sovereign power that obliges men to obey them. For in the differences of private men, to declare what is equity, what is justice, and what is moral virtue, and to make them binding, there is need of the ordinances of sovereign power, and punishments to be ordained for such as shall break them; which ordinances are therefore part of the civil law. The law of nature therefore is a part of the civil law in all commonwealths of the world.⁷³

In *Leviathan* Hobbes goes out of his way in fact to rebut the legal positivist position that "justice is whatever the law says it is" and an "unjust law" is simply an oxymoron. He makes witty play on Psalm 14:1-3 "The fool says in his heart, 'There is no God,'" to argue precisely the foolishness of arguing "there is no such thing as justice," or that justice is whatever men decide conduces to their benefit. He makes the argument, significantly, in the context of broken covenants in general, and with reference to "*Coke's Commentaries on Littleton*," which make the case for setting aside a king, in particular:

The fool hath said in his heart: "there is no such thing as justice"; and sometimes also with his tongue, seriously alleging that: "every man's conservation and contentment being committed to his own care, there could be no reason why every man might not do what he thought conduced thereunto, and therefore also to make or not make, keep or not keep, covenants was not against reason when it conduced to one's benefit."⁷⁴

Edwin Curley in his commentary notes that "the position Hobbes ascribes to the fool is very like the one Grotius ascribes to Carneades, whom he takes as representative of those who deny natural law"; and he points to an incon-

⁷³ Ibid., ch. 26, §8, Curley ed., p. 173.

⁷⁴ Ibid., ch. 15, §4, Curley ed., p. 90.

sistency between *Leviathan* and *De Cive*, where Hobbes's position appeared to be close to Carneades' in claiming that "in the state of nature profit [*utilitas*] is the measure of right [*jus*]." ⁷⁵ It is true that in *De Cive* Hobbes gives a curious redescription of his claim that "The laws of nature oblige *in foro interno*: that is to say, they bind to a desire they should take place, but *in foro externo*: that is to putting them in act, not always," when he makes the following addendum: "Briefly in the state of nature, what is just and unjust, is not to be esteemed by the actions, but by the counsel and conscience of the actor." ⁷⁶ But this is to emphasize that only in the state of nature, before the conversion of *jus* into *lex*, can justice be attributed to *jus* – and then we might rather say that it is an impulse to justice, rather than justice as such. It is a position that Hobbes explicitly abandons in *Leviathan*, where he says of the state of nature: "The notions of right and wrong, justice and injustice, have there no place." ⁷⁷ Rather than being an inconsistency then, as Curley claims, Hobbes's position has in fact changed between the work of 1640 and that of 1652. It is likely that the course of the civil war, in many respects an analogue for the state of nature, may have impressed upon him the necessity to close any window that would open the opportunity to challenge the prevailing rule of law (*lex*) in the name of right (*jus*) or justice in the abstract. More importantly, Hobbes's doctrine of simultaneous authorization and consent, developed between *De Cive* and *Leviathan*, forbids it. *Jus* and *lex* now lie in different zones and the rights due to individuals in principle in the state of nature, once exchanged for *lex* under the terms of the social contract, can never be retracted. ⁷⁸

Hobbes's "science of justice" and civil law

Hobbes presents himself, in fact, as a theorist in the civil law tradition, opposed to "the ancient constitution" and, where he treats it *in extenso*, he tends to subsume feudal law under civil, as we shall later see. ⁷⁹ When, as we have noted, the student, B, poses to the teacher, A, the Aristotelian question whether a differentiation can be made "between the ethics of subjects and

⁷⁵ Curley note to *Leviathan*, ch. 15, §4, Curley ed., p. 90; cf. *De Cive* (EW 2, p. 46).

⁷⁶ *De Cive* (EW 2, pp. 45–46).

⁷⁷ *Leviathan*, ch. 13, §13, Curley ed., p. 78.

⁷⁸ I have developed this argument elsewhere, see Patricia Springborg, "Leviathan, the Christian Commonwealth Incorporated," *Political Studies* 24, no. 2 (1976): pp. 171–83 (reprinted in *Great Political Thinkers*, ed. John Dunn and Ian Harris [Cheltenham: Elgar, 1997], vol. 2, pp. 199–211).

⁷⁹ See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957).

the ethics of sovereigns," A gives a civil lawyer's response: "To obey the laws, is justice and equity, which is the law of nature, and, consequently, is civil law in all nations of the world; and nothing is injustice or iniquity otherwise than it is against the law."⁸⁰ In other words, he appears to put the legal positivist position. But in fact, as we have seen, Hobbes's position is more complicated, and he argues justice as *lex* only as the conclusion of a syllogism that includes as its first premise the distinction between *jus* and *lex*. To accept the distinction between *jus* and *lex*, he argues, is to accept that *jus* is justiciable only in terms of *lex*, and that what justice *in practice* means, therefore, is that which is lawful, and injustice, that which is unlawful. It follows from the conversion of natural right (*jus naturale*) into the law of nations (*jus gentium*), as the necessary condition for a legally enforceable peace, that "to obey the laws, is the prudence of a subject; for without such obedience the commonwealth (which is every subject's safety and protection) cannot subsist."⁸¹

For all Hobbes's complaints about infatuation with the Greek and Latin tongues as signaling "democratical principles," or the commitment of the gentry to Ciceronian Republicanism, on the one hand, Aristotelianism and the philosophy of the Schools, on the other, it is precisely the Greek natural law and Roman civil law traditions, mediated through early modern thinkers like Bodin and Grotius, to which he in fact turns for his theory of justice. Much of the content of *Behemoth* is concerned with showing how the power of preachers and parliamentarians has succeeded in replacing "the science of *just* and *unjust*," argued from Reason, with amorphous concepts of "righteousness" extrapolated from the Bible. He complains that "though in the Latin and Greek Bible the word *justice* occur exceeding often, in the English, though it be a word that every man understands, the word righteousness (which few understand to signify the same, but take it rather for rightness of opinion than of action or intention), is put in the place of it," concluding, ironically, that "the writings of the heathens, Greek and Latin... were not at all behind us in point of virtue and moral duties, notwithstanding that we have had much preaching, and they none at all."⁸²

One is impressed at the degree to which "the science of *just* and *unjust*," set out programmatically in *Leviathan*, is contextualized in the later works, *Behemoth* and the *Dialogue between a Philosopher and a Student of the Common Laws*, in terms of prevailing legal debates over the relative merits of feudal practice, Common Law and Civil Law. This is not to say that Hobbes resolves all these

⁸⁰ *Behemoth*, p. 44.

⁸¹ *Ibid.*, p. 44.

⁸² *Ibid.*, p. 63.

issues – sometimes his position is ambiguous, as in the case of his attitude to feudal law. For instance, in *Behemoth* he characterizes the stance of “the people” in the civil war, as “in general... so ignorant of their duty, as that not one perhaps of ten thousand knew what right any man had to command him, or what necessity there was of King or Commonwealth.” Their ignorance of the logic of sovereignty bespoke a feudal mentality: “King, they thought, was but a title of the highest honour, which gentlemen, knight, baron, earl, duke, were but steps to ascend to, with the help of riches; they had no rule of equity, but precedents and custom.”⁸³

Hobbes’s polemic against “precedents and custom” extends to the ancient constitution itself. While refraining from disparaging *Magna Carta* itself, which he deems a form of “statute law,” and to which, therefore, obedience is compulsory, the teacher, A, mocks its claims to ancient liberty. He points specifically to “the article wherein a King heretofore hath granted that no man shall be distrained, that is, have his goods taken from him, otherwise than by the law of the land.”⁸⁴ “For, where was the law of the land, then?”, he asks. “Did they mean another *Magna Charta*, that was made by some King more ancient yet?” It was precisely the vulnerability of the law of precedent to infinite regress upon which the Parliamentarians had played in their effort constantly to expand their own scope for action. The people were unwitting victims, whom parliamentarians and preachers have intentionally misled, and who remain in ignorance of “the rules of *just* and *unjust*,” even though they have been “sufficiently demonstrated” by Hobbes himself.⁸⁵

It is not too much to claim that “the science of *just* and *unjust*” in *Leviathan* precisely amounts to a theory of how the conversion of *jus* into *lex* takes place, explicated in terms of theories of natural right and Roman law, as we have seen. The state of nature is intolerable, precisely because there no generally accepted legal conventions obtain. And one of the most forceful reasons for erecting a sovereign, is that the concept of Justice in Natural Law has no content, and is practically inoperable, until the sovereign, with authority to define legal terms, is established. Hobbes adopts the Roman Law attribute of the sovereign as the source of all laws of property,⁸⁶ in a very strict sense, then.⁸⁷

⁸³ Ibid., p. 4.

⁸⁴ Ibid., p. 35.

⁸⁵ Ibid., p. 39.

⁸⁶ See M.P. Gilmore, *Argument for Roman Law*, p. 97, who discusses the sovereign as the source of legal proprietary rights in Roman Law.

⁸⁷ “Laws are in their nature antecedent to justice and injustice. And you cannot deny that there must be law-makers before there were any laws, and consequently before there was any justice (I speak of human justice).” EW 6, p. 29.

Justice according to Plato and Aristotle, "giving to every man his own," is a vacuous imperative until the relevant terms have been defined by statute. In *Leviathan* Hobbes specifies Roman Law as the source of this legal theory:

For before constitution of sovereign power (as hath already been shown) all men had right to all things, which necessarily causeth war; and therefore, this propriety, being necessary to peace, and depending on sovereign power, is the act of that power, in order to the public peace. These rules of propriety (or *meum* and *tuum*) and of *good*, *evil*, *lawful* and *unlawful* in the actions of subjects are the civil laws; that is to say, the laws of each commonwealth in particular (though the name of civil law be now restrained to the ancient civil laws of the city of *Rome*, which being the head of a great part of the world, her laws of that time were in these parts the civil law).⁸⁸

Hobbes had made a considerable advance on the social contract theory of Epicurus. The intervening millennium had seen, first the development of legal codifications, and later the recovery of the Roman Law tradition and its civil law practice. The thirteenth century rediscovery of the Institutes of Justinian, which heralded the era of the humanist Glossators and Postglossators had seen the gradual co-optation of theories of Natural Right by Canon Law. One cannot underestimate the ingenuity with which Hobbes melded these traditions in a theory of sovereignty which, although anticipated by Machiavelli and Bodin, constituted a systematic and demonstrable science of justice, richly contextualized in terms of feudal and civil law. To the man best known for the concept of the "war of all against all," we owe in fact a "science of *just* and *unjust*" fundamental to the modern theory of rule of law, and one which has now been extended from the sovereign nation state to the international system, where Hobbes believed the writ of law could not run. It is to defend this achievement, by means of which rule of law can be upheld across borders, across nations and even across cultures, that we wish to hold to account those who would let Behemoth loose. Leviathan, "mortal god and king of the proud," with incomparable power on earth, is the nation state whose sovereignty we still defend in the name of peace.

⁸⁸ *Leviathan*, ch. 18, §10, Curley ed., p. 114.