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## Law and Public Reason

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In this article, the author argues that H.L.A. Hart's legal positivism is ultimately self-subverting. He contends that Hart fails in his attempt to show that positivism can explain the normativity and authority of law in a way which does not entail any commitment to the legitimacy of law; Hart's positivism cannot escape its origin in Thomas Hobbes's command theory of law which holds that positive law is always legitimate. Thus, Hart's positivism does not provide subjects with a genuine resource to test the legitimacy of law. However, the author concludes that such a resource might be found in Ronald Dworkin's legal theory, if he is understood as arguing that the legitimacy of law is a matter of principles immanent within the law.

Dans cet article, l'auteur affirme que la théorie positiviste du professeur H.L.A. Hart finit par se miner elle-même. D'après lui, Hart ne parvient pas à démontrer que le positivisme peut expliquer la normativité et l'autorité de la loi indépendamment de la légitimité de cette dernière ; le positivisme de Hart est ancré dans la théorie de Hobbes, selon laquelle le droit positif est toujours légitime. La théorie de Hart n'offre donc aucun moyen d'évaluer la légitimité de la loi. Mais, conclut l'auteur, la théorie de Dworkin fournit peut-être un tel moyen, si on considère qu'elle présente la légitimité du droit comme relevant de principes immanents au droit.

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\* I thank Arthur Ripstein and Cheryl Misak for their comments on drafts of this essay and the students in my "Normativity, Positivism, and the Law" seminar at the University of Toronto, Fall Term of 1991 for many insights. I should also mention that the ideas in this essay were conceived in and inspired by numerous discussions with Ronald Dworkin in the course of his supervision of my doctoral thesis at Oxford, with Madison Powers during that same period, and with Michael Taggart during the course of revision of the thesis for publication.

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Revue de droit de McGill

To be cited as: (1993) 38 McGill L.J. 366

Mode de référence: (1993) 38 R.D. McGill 366

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**Introduction**

The current debate between legal positivists and Ronald Dworkin can be understood as centring around the question of whether, and to what extent, the authority of law is dependent upon its legitimacy. At least this is so from the perspective of this century's most influential positivist, H.L.A. Hart, who argues that it is a mistake to confuse legitimacy with legal authority. For him a virtue of the positivist conception of law is that it can explain the normativity or authority of law without presupposing or entailing any commitment to its legitimacy. Positivism, he argues, encourages legal subjects to question the legitimacy of law because it necessitates the conclusion that law in and of itself has no claim to legitimacy despite its claim to authority.

In this article, I will show that Hart's conception of legal positivism is ultimately self-subverting. It cannot escape its origin in Thomas Hobbes's command theory of law which holds that positive law is always legitimate. Hart of course explicitly rejects the command theory of law, and attempts to replace its idea of law as the product of the command of the sovereign with his concept of a "rule of recognition." With Robert Ladenson I will argue against Hart, not only that Hobbes's idea of the command of the sovereign should remain fundamental for legal positivism, but that the idea can accommodate, perhaps even already includes, the conception of a rule of recognition. However, I will also argue against Ladenson that Hobbes's idea of command, despite some of the concerns he expressed in this regard, entails the conclusion that law is always legitimate. Hence legal positivism, including Hart's particular conception, cannot provide subjects with a resource to test the legitimacy of law.

Moreover, I will suggest that a circularity that Ladenson finds problematic in Hart's conception of the rule of recognition is only problematic for a positivist theory of law. Within a theory of law like Dworkin's, such circularity not only makes sense but permits us to see just how a theory of law might offer a genuine resource for testing the legitimacy of law.

## I. Legality and Legitimacy

The central puzzle about the nature of law is how to reconcile its two faces. On the one hand, the law claims authority over all its subjects; it claims the right to rule and thus it claims their allegiance. So the first face of law is normativity. On the other hand, the law threatens law-breakers with coercion. It is taken to be a mark of an effective legal system that it can by and large implement that threat. So the second face of the law is effective coercion. This reminds us of the existence of wicked legal systems like the South African one which continue to exist despite the fact that the majority of their subjects are oppressed by unjust laws. Such systems exist not because of the general allegiance of subjects, reflected in a widespread recognition of the right to rule of the rulers, but because the subjects are effectively coerced into obedience.

Hence the puzzle: it seems that in order to understand what law is we have to understand its claim to authority, as well as its coerciveness. But how are we to understand a claim to authority when the legal system on whose behalf it is made is thought by many of its subjects, as well as outside observers, to be morally illegitimate? Is the law's claim to authority, that is, its claim on the allegiance of its subjects, altogether different from a claim about its legitimacy, understood as its claim to allegiance on the basis of principles of sound morality?

In a classic attempt to provide a solution to this puzzle, H.L.A. Hart argues for a positivist conception of law.<sup>1</sup> Such a conception holds that what law is is determined by an inquiry into certain publicly accessible social facts, and not by moral argument. In elaborating upon this, Hart rejects the command model of law advocated by positivists from Hobbes to John Austin.<sup>2</sup> The command model is based upon the belief that law is a set of commands, backed by generally effective threats, of a legally unlimited sovereign. We know who the sovereign is by finding out what person or institution in a society is both habitually obeyed and is not subservient to any other person or institution. The model thus takes the mere fact of effective government power exercised through law as definitive of what law is.

Hart argues against the command model but not because he disputes its claim that law exists when there is an effective government which governs through the medium of positive law. His complaint is only that it reduces law to its second face of coercion. It thus fails to account for the normativity of law.

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<sup>1</sup>H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) [hereinafter *Concept of Law*].

<sup>2</sup>For the purposes of this essay, I take the positivist tradition not to include the neo-Kantian positivism of Max Weber, Hans Kelsen and Gustav Radbruch.

It cannot explain why, as Saint Augustine urged, we should distinguish the legal state from robber bands.<sup>3</sup>

It might seem that the obvious approach to this problem is to understand the law's claim to authority as one which is always, however weak in wicked legal systems, a justified claim about the legitimacy of law. But it is just that approach that Hart wants to avoid. He thinks that it is a mistake to confuse legitimacy with legal authority. For him a virtue of the positivist conception of law is that it can explain the normativity or authority of law without presupposing or entailing any commitment whatsoever to the legitimacy of law. For the position encourages legal subjects to question the legitimacy of law. They will take a critical attitude to law because they will know that law in and of itself has no claim to legitimacy, despite the fact that it does and must claim authority.<sup>4</sup> In the current debate between legal positivists and Ronald Dworkin the focus has not been directly upon the issue of the legitimacy of law. Rather it has been upon whether Dworkin's understanding of adjudication fundamentally challenges the positivist understanding of law as determined by inquiry into certain publicly accessible social facts and thus not by moral argument. The central issue here is the role of moral principles in the determination of hard cases. Hard cases are cases where it is controversial what the law is on a matter. For positivists, it seems that if hard cases can be settled only by arguments of principle, that is, by judges resorting to moral arguments and considerations about what the law should be, then such cases are settled not by law but by an act of judicial discretion. In other words, the judge has to reach beyond the law and, as a result, her decision is not determined by what the law is, but by her judgment as to what the law should be.

Since Dworkin's challenge to positivism has hinged on showing the pervasiveness of principles in judicial reasoning in hard cases, this positivist claim about discretion has deadlocked the current debate. The more Dworkin shows that adjudication is a matter of principles, the more positivists think that he has proved their thesis about discretion.<sup>5</sup>

I believe that this debate can be unlocked by attending to a tension in Hobbes's argument for a positivist conception of law. The tension exists between the principle that law is not subject to the evaluation of morality and Hobbes's temptation at times to provide a very limited right of resistance to legal subjects in cases of severe state oppression. Hobbes argues that law is much more than the embodiment of public reason; it is the embodiment of right reason. That argument is made in the service of an enlightened political project — one which seeks to achieve a political order that will ensure respect for what Hobbes takes to be the natural equality of all individuals. However, in requiring that law be

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<sup>3</sup>*Concept of Law*, *supra* note 1 at 152.

<sup>4</sup>*Ibid.* at 205-07.

<sup>5</sup>See generally R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); R. Dworkin, *Law's Empire* (Cambridge: Belknap Press of Harvard University Press, 1986); *Concept of Law*, *ibid.*; H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) at 6-7 [hereinafter *Essays*]; J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) [hereinafter *Authority of Law*].

necessarily the embodiment of right public reason, that law be taken by subjects as legitimate whatever its content happens to be, Hobbes in fact subverts his enlightened project.

This tension in Hobbes's work is reproduced in Hart's work and it explains the difficulty Dworkin has had in challenging positivism. More importantly, however, this tension illustrates that once the debate between contemporary positivism and Dworkin is conceived as a debate about right or appropriate public reason, we can see why it is not an arcane dispute about the proper way to understand adjudication. Rather it is a debate about some of the most important questions of legal and political philosophy.

## II. The Rule of Recognition

A useful starting point is Robert Ladenson's defence of a Hobbesian conception of law.<sup>6</sup> Ladenson argues that Hobbes's command model does respect the important distinction between law and the orders of a gangster. He also argues for the superiority of a Hobbesian conception of law over Hart's because Hobbes's conception escapes a circularity fatal to Hart's conception.

Ladenson's defence brings to light two questions. The first question I want to explore is whether circularity is a defect only in positivist conceptions of law but not a defect in others, for example, Dworkin's. The second question to be explored is whether Hart's mistake in providing a circular argument for a positivist conception of law is illuminating. I believe that this mistake is illuminating in that the need Hart wants to address in providing a circular argument, that is, providing subjects with a resource to test the legitimacy of law, cannot be fulfilled by a positivist conception of law. The urgency of this need is shown, also, by the fact that even Ladenson's argument becomes circular as soon as he tries to deal with it. Indeed, Ladenson's retrieval of Hobbes on behalf of positivist legal theory tells us why we should ultimately reject positivism.

In Part I of his essay, Ladenson rests his argument on a distinction between justification rights and claim rights.<sup>7</sup> Claim rights are rights which correlate with duties. They presuppose an institutional background which will uphold one's claim that one is owed certain performances or forbearances by others. It should be noted that such rights cannot do the job of providing non-circular support for a positivist conception of law. Non-circular rights would be those established by an argument which would show what the justification for the institution that creates those rights and duties is.

Although Ladenson does not specifically characterize Hart's concept of law as one which rests on the idea of claim rights, his charge of circularity against Hart exposes the claim right structure of Hart's account of the rule of recognition, which Hart argues should replace the command model. Hart holds

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<sup>6</sup>R. Ladenson, "In Defense of a Hobbesian Conception of Law" (1980) 9 *Phil. & Pub. Aff.* 134. Hart directs his argument at the command model of law put forward by John Austin. But since Hart's specific criticisms of that model apply with equal force to Hobbes, I will, following Ladenson, take Hobbes as the real target of Hart's critique.

<sup>7</sup>*Ibid.* at 137-39.

that the fundamental rule of a legal system is its rule of recognition which stipulates how other legal rules are to be identified. The rule of recognition is thus a secondary rule which tells us how the primary rules, the rules which grant rights or impose obligations on the members of a community, are to be identified.<sup>8</sup>

According to Hart, we find out what the rule of recognition is by observing the practice of legal officials. In other words, we see what arguments they ultimately accept as showing the legal validity of a particular rule and what arguments they (rightly) use to criticize those officials who depart from accepted practice.

Hart has basically two arguments to support his contention that the rule of recognition can explain the normativity of law.<sup>9</sup> Both rely on his contention that normativity is a matter of rules not commands. Hart's first argument, which I will deal with in Sections IV and V below, is that the idea of a rule, and not the model of an uncommanded commander, is required to explain certain features of legal systems. The second argument, which is my focus here, claims to show that the rule of recognition is the key to understanding a legal system as a matter of rules.

In the case of primary rules, the second argument is not problematic. Primary rules are recognized not because they are commands but because they conform to the criteria of validity of the rule of recognition. It is appropriate for officials to identify and apply these as the rules of the legal system because this is what the criteria of validity show to be appropriate. But how is the rule of recognition itself explained? What makes it appropriate for officials to accept the rule?

Hart resists giving answers to these questions. For him it is sufficient to claim that such a rule is in fact the key to any legal system and that officials manifest their acceptance of the rule by continuing to act in terms of the criteria it stipulates. As Ladenson points out, Hart's resistance makes his account of the rule of recognition circular. The concept of law is analyzed in terms of the rule of recognition. But the rule of recognition is elucidated in terms of the concept of law.<sup>10</sup>

Ladenson does not want to reject the idea of the rule of recognition as a potentially useful account of important features of a legal system, any more than he wants to reject the idea of a claim right. His point is only that Hart's account does not provide a "philosophically illuminating reductive elucidation of the concept of law."<sup>11</sup>

Put differently, in order to escape circularity, Hart would have to tell us what the argument is for officials to adopt, as the fundamental rule of the legal system, the concept of law presupposed in the idea of the rule of recognition.

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<sup>8</sup>*Concept of Law*, *supra* note 1 at 89-120.

<sup>9</sup>*Ibid.*, c. 4, 5.

<sup>10</sup>Ladenson, *supra* note 6 at 157-59.

<sup>11</sup>*Ibid.* at 159.

That argument, it seems, must be one which explains the duty that officials have to adopt the rule of recognition as the fundamental legal rule without referring to the right which legal subjects have to expect that officials will determine what law is in accordance with the rule.

The vice of circularity here, then, is that it leaves unanswered the question which Hart himself takes to be crucial. What makes it appropriate for officials to accept the rule of recognition as binding? Without an answer to that question, we are left without an account of the normativity of law.

Ladenson grounds an account for normativity in the notion of a justification right. In contrast with claim rights, justification rights do not provide the basis for a claim against others but, rather, allow a response to demands for justification of one's behaviour. The right to rule, he suggests, is such a right when understood in terms of Rational Contractor Theory, of which the device of Rawls's veil of ignorance is the best known contemporary expression.<sup>12</sup>

For Ladenson, the right to rule is a justification right if one can set out a "plausible account of a line of reasoning that would lead all rational people under the veil of ignorance not to object to coercion when *genuinely* carried out by governmental authority." [emphasis added]<sup>13</sup> And Ladenson takes the argument of chapter 13 of *Leviathan* as supplying just such a plausible line of reasoning. It advances "strong reasons ... for holding that possession of the governmental power and acceptance by those one presumes to govern of its exercise jointly constitute a justification for coercive acts which would otherwise be immoral."<sup>14</sup>

Hobbes's argument starts in his "state of nature," where each individual has an absolute right to the satisfaction of his desires. But since Hobbes holds that in the state of nature there can be no more to a claim of individual right than an expression of subjective desire, this absolute right makes the state of nature one of perpetual war between individuals so that life is "solitary, poore, nasty, brutish, and short."<sup>15</sup>

This argument, notoriously, leads Hobbes to the conclusion that peace and order can only be secured if all individual subjects give up their natural right to act as they see fit in accordance with natural reason, that is, their subjective evaluations of good and bad, desirable and undesirable. They should give up that right, as Hobbes tells us in the second Law of Nature, to the extent that they deem this necessary for peace and to the extent that others are prepared to give up the same. And the first Law of Nature tells us that we should seek to preserve ourselves and that peace is the guarantee of self-preservation.<sup>16</sup>

The problem for Hobbes is that his subjectivism, that is, his premise that there is no more to natural reason (individual reason in the state of nature) than

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<sup>12</sup>*Ibid.* at 139-40. See also J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971).

<sup>13</sup>Ladenson, *ibid.* at 140.

<sup>14</sup>*Ibid.* at 139. See T. Hobbes, *Leviathan*, C.B. MacPherson, ed. (London: Penguin, 1981).

<sup>15</sup>*Leviathan, ibid.*, c. 13 at 186.

<sup>16</sup>*Ibid.*, c. 14 at 189-90.

an expression of desire, leads, as we have just seen, to the state of nature being the reign of subjective desires; a war of one against all.<sup>17</sup> His statements of the first few laws of nature each contain what in administrative law would be called a “subjective discretion clause” which puts the decision as to the kind of action required to follow the law, and the means required to carry it out, in the absolute discretion of the subject. So these statements carry within themselves the seeds of their own destruction.

Hobbes’s solution to this problem is a wholesale substitution of the “artificial reason” of a sovereign whose commands establish the order that makes peaceful coexistence possible for the natural reason of individuals. The sovereign’s reason is of course merely his understanding of what the laws of nature require. But if his reason is taken as a standard of right reason by subjects, as in fact representing the outcomes of correct natural reason, it serves as the artifact which makes order possible. For to allow to individuals the decision as to what is in fact necessary to achieve peace, or the extent to which liberty should be given up, or as to the question whether everyone has given up a like amount of liberty, is to reintroduce the danger of the slide into war.<sup>18</sup>

As Hobbes makes clear in his chapters on what we might think of as the institutional design best suited to secure peaceful order,<sup>19</sup> individual reason as to what is necessary to secure order has to be pre-empted by the artificial reason of the sovereign. The fact that the sovereign has commanded “that x” is sufficient reason for obedience to x. In Hobbes’s words: “COMMAND is, where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that says it.”<sup>20</sup> Thus law for Hobbes is the kind of law which best realizes the idea of command. Law is law when it is of the kind that effectively pre-empts reason on all those matters which, if left to the dictates of natural reason, would start the slide towards civil war.

I will come back to the important issue of institutional pre-emption of natural reason in Section V below. For the moment, I want to focus on Ladenson’s claim that Hobbes’s argument in chapter 13 of *Leviathan* is a Rational Contractor argument, capable of grounding law’s claim to authority. As we shall see, Ladenson wants to sustain that claim in order to join with Hart in resisting the contention that law is always legitimate.

### III. The Legitimacy of Wicked Law?

Because Hobbes regards the pre-emption of natural reason by the artificial reason of the sovereign as vital for securing order, it is not open to the subjects of a particular sovereign to question the origins of their sovereign’s power. That question is, for Hobbes, tantamount to questioning the legitimacy of sovereign power and thus to taking the first step on the path to the war of each against all. Subjects must assume the legitimacy of both the sovereign that they happen to

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<sup>17</sup>*Ibid.*, c. 13 at 183-86.

<sup>18</sup>*Ibid.*, c. 13 at 186-88.

<sup>19</sup>Chapters 18 to 31 of *Leviathan*, *ibid.*, deal with institutional design.

<sup>20</sup>*Ibid.*, c. 25 at 303.



have and his particular commands. The only time they might appropriately ask questions about legitimacy is when they are already in a state of civil war, and then the question has no meaning since the war will be resolved by superior force and not by arguments about legitimacy.<sup>21</sup>

Paradoxically, the upshot of Hobbes's Rational Contractor argument is that subjects must always assume they have entered into the contract, no matter their actual place in society. Although Hobbes makes a distinction between sovereignty by institution and sovereignty by acquisition, he denies that a sovereign could ever as a matter of fact be instituted. *De facto* sovereigns are by definition sovereigns by institution, since on his argument subjects have always consented to the bonds of civil society, even when from the outside those bonds would be judged oppressive.<sup>22</sup>

Seen in this light, Hobbes's position seems quite different from Rawls's veil of ignorance, in which subjects are able to design society in accordance with their assessment of where they might end up. For Rawls, it seems, one can question the legitimacy of one's place in civil society. It is only through actually observing the defects in justice of existing social arrangements that one can inform one's choice behind the veil of ignorance. The ambition of Rawls's liberalism is not to justify what actually exists, but to bring what actually exists closer to an ideal informed by knowledge of the defects in what exists.

Hart and other contemporary legal positivists are also liberals in this sense. They, for reasons already suggested, think that a positivist conception of law encourages legal subjects to be critical of the law in order to bring about changes in it that accord more with *their* perception of their interests. Ladenson too wants to enlist himself and Hobbes, or at least a Hobbesian conception of law, in the liberal ranks.

How can the justification right produced by Hobbes's Rational Contractor argument in chapter 13 of *Leviathan* be so enlisted? Ladenson's answer relies on the difference between the structure of justification rights and claim rights. While claim rights correlate with duties, justification rights do not. Since they do not so correlate, they are not threatened by circularity. The sovereign must always have, on Hobbes's argument, the right to exercise governmental power. But that right does not without further argument correlate with any duties on the part of the sovereign's subjects.

By way of example, Ladenson says that during the Nazi era, German traffic police had a right to detain speeding motorists which private citizens did not have. This right "stemmed simply from the Nazi government's power and general acceptance, not from the moral worth of its ideological foundations."<sup>23</sup> And he also says that German citizens had a right to resist the Nazis, and in particular to resist their policy of placing people in death camps.<sup>24</sup>

<sup>21</sup>*Ibid.*, c. 19 at 238-39.

<sup>22</sup>*Ibid.*, c. 18 especially at 228-32, c. 19 especially at 239-42, c. 20 especially at 251-53.

<sup>23</sup>Ladenson, *supra* note 6 at 144.

<sup>24</sup>*Ibid.* at 142-45.

Here, Ladenson draws an analogy between the right to exercise governmental power and the right of self-defence. He says that the right of self-defence has limits: self-defence can become retaliation. Nevertheless, one continues to have the right of self-defence in the abstract even though in the concrete one may have transgressed its limits.<sup>25</sup>

Thus, Ladenson wants to claim that the Nazis did not lose their abstract right to rule, held merely in virtue of their monopoly on governmental power, even though in the concrete they had transgressed its limits. His point seems to be that, insofar as Nazi law transgressed the limits of "genuine" governmental power, subjects were under no duty to obey those laws. Indeed, they had a right to resist them.

But the analogy is not apt. The defence of self-defence exists not in the abstract, but rather against an institutional background, established by government or the common law, which grants that defence. In fact, the defence is hardly a justification right, even though in law its function is to operate as a justification for action that would otherwise be illegal. One has that right because of the duty of subjects not to attack one another. And it is the fact that one is subject to that same duty that places limits on the right of self-defence.

Indeed, for Hobbes it is not open to subjects to make the distinction between the abstract and the concrete when the issue is the legitimacy of sovereignty and of the actual commands of the sovereign. The existence of the abstract right to rule *depends* on subjects not making that judgment. It is for this reason that Hobbes emphatically argues that the sovereign is an uncommanded commander. There can be, within his conception of sovereignty, no limits on legislative power.<sup>26</sup>

I will examine below Ladenson's attempt to justify legal limits on the sovereign within a Hobbesian conception of law. For the moment it should be noticed how his analogy between the right of self-defence and the right to exercise governmental power exposes his own slippage towards circularity. His account of the right of resistance of German subjects to the Nazi government is only a hair's breadth away from the claim that the subjects had that right because the inappropriate exercise of governmental authority meant that subjects no longer had a duty to obey the sovereign's commands insofar as these were inappropriate. Conversely, it must be that subjects have the duty to obey the commands of *de facto* governments when, and only when, those commands are legitimate.<sup>27</sup>

Ladenson would justly respond that his account of limits to governmental power does have a basis in Hobbes. As he points out, Hobbes would have said

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<sup>25</sup>*Ibid.* at 142-43.

<sup>26</sup>See especially *Leviathan*, *supra* note 14, c. 26.

<sup>27</sup>Ladenson is right to say that one legitimate reason for obedience to political authority is that governments can sometimes achieve through coercion goals which it would be immoral for private citizens to attempt to achieve by the same means. See Ladenson, *supra* note 6 at 143. But while this reason might have required Nazi subjects to obey the commands of the traffic police, the requirement would stem from that particular legitimating reason and not from the general justificatory argument for governmental authority which Ladenson takes from Hobbes.

of European Jews that they were not subjects or citizens, but rather captives of the Nazi government. It follows that they were under no duty at all not to resist Nazi power.<sup>28</sup>

And Hobbes, as is well known, explicitly allows subjects a right of self-defence when their sovereign endangers their survival, even when the danger is in the form of a punishment visited on subjects according to law.<sup>29</sup> He concludes *Leviathan* by saying that his only design was "to set before mens eyes the mutuall Relation between Protection and Obedience."<sup>30</sup>

But the fact that Ladenson's response has a basis in Hobbes's justificatory argument does not show that the response succeeds. We have to ask whether there is not a deep tension in the structure of *Leviathan*, and in any Hobbesian conception of law, which attempts to establish a right of civil disobedience on the basis that the sovereign has overstepped the limits of legitimate power.

That is, Hobbes's argument is non-circular in that he provides a justificatory argument *for* law of a particular kind. We should adopt a conception of law that is capable of effectively pre-empting individual reason because such pre-emption is the only way to avoid the war of each against all. In order to preserve its integrity, the proponent of that argument has relentlessly to resist giving subjects the option of public moral criticism of the law, let alone action in defiance of the law.<sup>31</sup> If subjects are encouraged to criticize the law for not being in accordance with right reason, that is, their natural reason, the spectre of civil war looms. Thus subjects must assume the legitimacy of law which means that Hobbes or a Hobbesian must actively disapprove of advocating tests for the legitimacy of law.

In other words, Hobbes's argument is non-circular in that it provides what we can think of as an external justificatory argument. That argument requires that law must not be subject to the evaluation of public political morality. And this requirement is in deep tension with Hobbes's claim that subjects have a right to resist the sovereign when their very survival is at stake.

What then are we to make of these seemingly conflicting claims and of Ladenson's attempt to make a benign liberal of Hobbes?<sup>32</sup> By contrast with this

<sup>28</sup>*Ibid.* at 145 note 15.

<sup>29</sup>*Leviathan*, *supra* note 14, c. 21 at 268-69.

<sup>30</sup>*Ibid.* at 728. Carl Schmitt, perhaps Hobbes's most important twentieth-century disciple, responded to the Nazi situation in just this way, at least from the time that he had fallen from grace with the Nazis. However, unlike Ladenson, Schmitt was very much aware of the tension in this Hobbesian response and in *Leviathan* itself. See C. Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Cologne: Edition Maschke im Hohenheim, 1982) [hereinafter *Der Leviathan*].

<sup>31</sup>In *Leviathan*, *ibid.*, c. 30 at 381, Hobbes admits that it might be impossible for the sovereign to reach into people's minds. All that he can hope to command, and all that he needs to command, are the outward manifestations of the mind, that is, actions. In *Der Leviathan*, *ibid.* at 113, Schmitt argues that this chapter exposes the tension in Hobbes which must eventually lead to the subversion of the Hobbesian project.

<sup>32</sup>David Gauthier has recently suggested an interpretation which would follow naturally from Ladenson's claim that Hobbes is offering us a Rational Contractor Theory of morality. We are to suppose that Hobbes should be committed to a much more generous account of what individual

benign interpretation which seeks to make Hobbes into a proto-liberal, there is a nasty, authoritarian interpretation. The authoritarian interpretation is that when Hobbes recognizes a right to resistance, he recognizes it as a kind of brute fact. Even when subjects accept that law is legitimate whatever its content, there will come a point in the implementation of oppressive law when that acceptance must begin to crumble just because oppression has reached a certain pitch. At this point, it makes no sense to say that subjects have a duty to obey the law. If anything, subjects will react like cornered rats in such a situation since they are beyond the reaches of rational argument.<sup>33</sup>

But it is also important to see that consistency requires Hobbes to refrain from saying that subjects in these dire straits have a duty to obey the law. For the premise of his argument is that this duty arises from the need to establish the order that permits individual self-preservation and security. When there is no question but that an individual's self-preservation is at stake, Hobbes has to concede that in some sense that individual is in something like the state of nature, where all the constraints of civil society are absent.

However, the individual is still in civil society subject to the effective power of the sovereign. So the lack of normative constraints from that individual's point of view does not affect what officials should do. They must execute the commands of the sovereign, however oppressive they are. Nor would Hobbes think that subjects who are not oppressed in this way are entitled to come to the aid of the oppressed. Finally, he would not want subjects to be told that they have such a right since that would put in their subjective discretion the decision as to when oppression had reached the requisite pitch.<sup>34</sup>

Thus, unless Hobbes could have accepted that all German subjects were in an analogous position to European Jews, Hobbes could not have thought that there was a general right of resistance. And he could not have been influenced in making this judgment by what happened to all Germans as a result of Nazism. Such retrospective judgments are irrelevant and dangerous. When order in fact breaks down, law loses its legitimacy because the sovereign is no longer effective. And to allow for evaluation by subjects of the legitimacy of law on the basis of what might happen is, on his view, to ask for the breakdown of order.

Indeed, there is a real question, seldom asked, about who the audience of *Leviathan* is. The tension just identified arises because Hobbes both requires that officials faithfully execute highly oppressive commands and acknowledges something like a right of resistance for those who are severely oppressed. His way of working out the tension is to avoid the circularity that arises when effective power is considered legitimate only on condition that it is appropriately exercised. As a matter of practice, officials must always follow the commands of the sovereign. For Hobbes, the point of having a non-circular argument is to

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reason can establish (D. Gauthier, "Thomas Hobbes and the Contractarian Theory of Law" (1990) 16 *Can. J. Phil.* 5).

<sup>33</sup>I owe this suggestion to Michael Dila. See also T. Hobbes, *Man and Citizen*, B. Gert, ed. (Indianapolis: Hackett, 1991) c. 2 at 130-31.

<sup>34</sup>*Leviathan*, *supra* note 14, c. 15 at 203-05.

remove from subjects the opportunity to argue that they have rights apart from those that they have under the law.

This suggests that for Hobbes the audience cannot be the individual reasoners in general, that is, the potential objects of oppression, because that would require Hobbes to have a faith in reason which *Leviathan* denies. Most plausibly, the reasoning of *Leviathan* is directed at those who already have power in an effort to persuade them as to the best methods of consolidating their power and to enable them to maximize the chances of establishing general peace and security.<sup>35</sup> I will now argue for that view in examining Ladenson's attempt to show that a Hobbesian conception of law can account for those features of a legal system which Hart thinks require the rule of recognition account.

#### IV. The Persistence of Law and the Continuity of Law-Making Power

In *Concept of Law*, Hart identifies three main problems for the command model of law. First, he does not think that the model accounts for the normativity of law: the fact that the law claims authority. Secondly, he does not think that the model can explain the persistence of law and the continuity of law-making power. Thirdly, he claims that the model cannot deal with a fact of the matter about all legal systems: that there are legal limits on sovereign power.<sup>36</sup>

I agree with Ladenson that the command model, at least when understood as Hobbes's creation, does account for the normativity of law by offering a justificatory argument for the authority of law. We might not like the authoritarian conclusion of the argument, but that is precisely because of the way it accounts for the normativity of law. In this section, I focus on the problem for the model of accounting for what Hart identifies as the continuity of law-making power and the persistence of law.

Hart claims that the command model of law cannot plausibly deal with the persistence of law: the fact that laws are often considered valid even though they were made by an earlier legislator. Furthermore, Hart claims that the model cannot deal with the continuity of law-making power: the fact that particular sovereigns are considered to inherit the right to make law from their predecessors.<sup>37</sup>

Hobbes's attempt to solve the problem of the persistence of law is to say that the "Legislator is he, not by whose authority the Lawes were first made, but by whose authority they now continue to be Lawes."<sup>38</sup> Hart says that such a doctrine is unacceptable because it makes the validity of past statutes depend on their recognition by the courts. It is not that Hart objects to recognition by the courts being the key: this is what the rule of recognition amounts to. His objection is that for Hobbes such law is valid only if the sovereign tacitly acquiesces

<sup>35</sup>See D. Herzog, *Happy Slaves: A Critique of Consent Theory* (Chicago: University of Chicago Press, 1989).

<sup>36</sup>For the first problem, see *Concept of Law*, *supra* note 1, c. 2 at 19-20, c. 5 at 77-88. For the second and third problems, see *Concept of Law*, *ibid.*, c. 4.

<sup>37</sup>*Ibid.*, c. 4.

<sup>38</sup>*Leviathan*, *supra* note 14, c. 26 at 315.

to it, so that ultimately Hobbes's explanation rests on a highly implausible claim that the sovereign has put his mind to each legal datum.<sup>39</sup>

But, as Ladenson points out, it is perfectly open to Hobbes to suggest as a matter of general policy that past statutes persist until explicitly overturned.<sup>40</sup> Hart, it seems, does not see this as an option because he supposes that the rule of recognition, understood here as the practice of the courts, has to figure as the ultimate ground in the explanation of why such statutes are valid. For him, sovereignty cannot be the ultimate ground of the explanation because the rule of recognition is ultimate. But that is to beg the question against Hobbes.

One can make this point even more forcefully by noting that the Hobbesian justification for sovereignty might require of sovereigns that they enact such a policy, or, failing this, require of judges that they adopt such a policy, even if the sovereign has not so commanded them. That is, since order and certainty are obviously served by the assumption that past statutes continue to be valid unless repealed, sovereigns should command this or judges should presume that this is the case.

Of course, if a past statute were contrary to the present will of the sovereign, he could repeal it either directly or indirectly. This consideration justifies judges adopting the fiction that the sovereign tacitly acquiesces in the statute's validity. In fact, a judicial decision as to continued validity might be thought of as posing directly to the sovereign the question of whether he in fact approves, or at least does not disapprove, of the continued operation of the statute. It would follow that his inaction after such a decision would be strong evidence of real tacit approval, or, at least, of no active disapproval. And against a background of this kind of activity, judges would in fact have good reason to assume that by implication a sovereign intended a policy of continued validity of past statutes.

This line of argument in a sense requires the concept of a rule of recognition, since it says that judges should adopt as a matter of practice a criterion of validity that requires the recognition of past statutes. But Hart must reject this argument since it does not rest upon facts about criteria in particular rules of recognition, but rather upon the Hobbesian justification for a positivist conception of sovereignty and law.

As for the continuity of law-making power, Ladenson says that ingrained traditions might make it possible that the acceptance which one sovereign — Rex I — enjoyed will lead to almost immediate acceptance of the rule of the next sovereign — Rex II. There is no certainty that Rex II's commands will be obeyed and Hobbes does not tell us why such traditions might be effective. Ladenson says that this is a question for the sociology and not the philosophy of law.<sup>41</sup> But it is worth noting that Hobbes does not make this distinction and

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<sup>39</sup>*Concept of Law*, *supra* note 1 at 63-64. Hobbes uses the same device to explain the validity of judicial decisions. See *Leviathan*, *ibid.*, c. 26 at 315-16.

<sup>40</sup>Ladenson, *supra* note 6 at 146.

<sup>41</sup>*Ibid.* at 147.

in fact suggests that a wise sovereign will see to it that practices are in place to ensure a line of succession which is not problematic.<sup>42</sup>

Hart also wants to say that Hobbes cannot account for the fact that Rex II is presumed to have a right to succeed in virtue of some rule of succession. For Ladenson the idea of a justification right provides the appropriate response to Hart. For a Hobbesian, if someone has both governmental power and the general acquiescence of subjects, he has *ipso facto* the right to rule.<sup>43</sup>

Moreover, Ladenson argues that any deeper claim is mistaken. If the claim is that the right is inherited in virtue of the legitimacy of the past sovereign, one can ask: in virtue of what did he have a claim? One will be driven, Ladenson says, either to a theory of the divine right of kings or to a theory about voluntary agreement which has to deal with the question of how such an agreement can bind future generations.<sup>44</sup>

Ladenson's point against Hart is forceful because Hart, as we have seen, wants to avoid any argument for the legitimacy of law. It becomes even more forceful when we note that Hart's account of the rule of recognition rests on very much the same basis as a Hobbesian account of the continuity of sovereignty. For Hart, the rule of recognition explains both the persistence of law and the continuity of sovereignty. It tells us that there is an ultimate rule which authoritatively settles issues about what is to count as law. But surely that fails to address the fact of the continuity of the rule of recognition. According to Hart, the rule of recognition exists in virtue of two facts. On the one hand, there must be a practice of officials which manifests their ongoing acceptance of the rule as containing the appropriate standards for identifying law. On the other hand, there must be general acquiescence of subjects to the rule of that law. He says also that questions about the validity of the rule of recognition, that is, about why the officials continue to accept it, cannot arise within a particular practice of law. To ask such questions is to step outside the practice.<sup>45</sup>

Thus Hart must think that there is no need for any deeper explanation of the continuity of the rule of recognition other than pointing to the fact that the legal system in which the rule of recognition exists is effective and that legal officials accept the rule as appropriate. Of course, eliminating a search for a deeper explanation has radically different implications for Hobbes, on the one hand, and for Ladenson and Hart on the other.

For Hobbes, the search is eliminated because it will undermine the legitimacy of law. The fact that there can be no deeper ground for legitimacy is for him the reason that law is legitimate. For Hart, and apparently for Ladenson as well, the search is eliminated because it ends up presupposing the legitimacy of law. But that is because they suppose that there is justice beyond law. In other words, while Hobbes's positivism is meant to pre-empt subjects and officials from taking an external point of view, that is, one which assesses the law from

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<sup>42</sup>*Leviathan*, *supra* note 14, c. 20 at 248-51.

<sup>43</sup>*Concept of Law*, *supra* note 1 at 53-54; Ladenson, *supra* note 6 at 147-48.

<sup>44</sup>Ladenson, *ibid.* at 147-48.

<sup>45</sup>*Concept of Law*, *supra* note 1 at 104-05.

the standpoint of standards outside of the law, Hart's (and Ladenson's) is meant to encourage them to do so. I will now argue that only Hobbes's position can make sense of both a positivist conception of law and of the place of a rule of recognition within such a conception.

## V. Legal Limits on Sovereignty

It should be recalled that Ladenson does not want to reject a rule of recognition account of law. Clearly, he thinks that such an account makes sense of legal systems in which there is an effective separation of powers and thus legal limitations on sovereignty. While he acknowledges that Hobbes rejected the doctrine of separation of powers, he argues that a Hobbesian conception of law can account for such a separation. Since he regards such legal limits as consistent with a Hobbesian account of law, he must also think that the very same justification right which supports that conception supports the rule of recognition.<sup>46</sup>

The Hobbesian account of the separation of powers is simply that there has come into being more than one branch of government, and that each branch has effective, that is, generally accepted, power. Thus, according to Ladenson, a Hobbesian can conceive of a judiciary with the power given by an entrenched bill of rights to test the validity of legislation. A Hobbesian can even conceive of the electorate as possessing governmental power within a certain scope, that is, power over the selection of political leaders.

But that one can conceive of the separation of powers in the abstract does not tell us why, in practical terms, Hobbes rejected the doctrine of separation of powers. For Hobbes, it was not that the idea of limits on sovereign power was in the abstract impossible, but that it was in the concrete dangerous, given his argument for his conception of law.

That conception of law is positivist in that it holds that the content of law is that which is determined by publicly accessible factual tests, that is, without resort to moral argument. Law has to have this form because if the content of law is made dependent on the conclusions of moral argument, the spectre of civil war looms. At every point, Hobbes argues for political and legal institutions capable of pre-empting natural reason.

Thus he is against democracy and in favour of monarchy because he thinks that democratic assemblies re-enact the state of nature in their deliberations and thus are less effective sources of artificial, pre-emptive reason.<sup>47</sup> He disapproves of allowing towns or political groupings too much room to acquire power, in case they should challenge the sovereign.<sup>48</sup> He wants the universities to be used to indoctrinate future leaders in the doctrine that might is right.<sup>49</sup> He argues that one should strip the façade of objectivity away from the common law so as to deprive judges of their basis for reinterpreting statutes to suit particular inter-

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<sup>46</sup>Ladenson, *supra* note 6 at 151-57.

<sup>47</sup>*Leviathan*, *supra* note 14, c. 19.

<sup>48</sup>*Ibid.*, c. 22.

<sup>49</sup>*Ibid.*, c. 30 at 383-85.



ests, instead of in accordance with the actual reason of the sovereign.<sup>50</sup> He also wants to disestablish established religions because of their propensity to compete with secular sovereignty.<sup>51</sup>

All of these arguments are couched in the form of advice to holders or potential holders of sovereign office. We might think of this advice as prudential rather than moral, since Hobbes is telling sovereigns what makes order possible, and not what the content of good order is.

Hobbes also gives lots of what we can think of as moral advice. His premise in chapter 13 of *Leviathan* is the natural equality of all men. And in many places, especially in his criticism of common law judges,<sup>52</sup> he shows his hostility to claims of privilege made on the basis of a false perception of the natural superiority of the powerful and the wealthy. His moral advice to sovereigns can be summed up as advocating the orderly and equal distribution of the greatest possible amount of negative liberty to all subjects.<sup>53</sup>

But since he assumes both that any order is better than the threat of disorder and that good order is possible only if one assumes the legitimacy of any order, his moral advice is not for the ears of subjects in general. It is sovereigns who must decide on the content of the order they establish. As a result, success as a sovereign is first and foremost dependent on heeding the bits of prudential advice. Of course, at a certain point the moral and the prudential advice might be thought to coincide. For example, Hobbes's concession of a right to resistance on the part of the subject who is threatened with punishment or whose security is no longer guaranteed is required by his discussion of the laws of nature. But at the same time in the concession of that right one hears a counsel of prudence to sovereigns to respect the natural equality of all subjects.<sup>54</sup>

Indeed, I suspect that the categorization of Hobbes's advice as moral or prudential may distort Hobbes's arguments when these arguments are squeezed into these categories for very much the same reasons that I do not think that Hobbes would make a sharp distinction between the philosophy and sociology of law. For Hobbes, there is an intimate connection between one's philosophical justification for political order and the actual design of political order. But my point here is only one about the priority of a certain kind of argument in *Leviathan* and of the practical consequence of that point: that, on Hobbes's view, both officials and subjects are supposed to obey the law and not trouble themselves with questions about the legitimacy of law.

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<sup>50</sup>See J. Cropsey, ed., *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Chicago: University of Chicago Press, 1971) [hereinafter *Dialogue*].

<sup>51</sup>See D. Johnston, *The Rhetoric of Leviathan: Thomas Hobbes and the Politics of Cultural Transformation* (Princeton: Princeton University Press, 1986) at 213 [hereinafter *Rhetoric of Leviathan*]. Hobbes could not say this explicitly but, with Johnston, I take it to be the point of c. 32-47 of *Leviathan*.

<sup>52</sup>*Dialogue*, *supra* note 50.

<sup>53</sup>According to my argument, this is how one should understand the laws of nature set out in *Leviathan*, *supra* note 14, c. 14-15.

<sup>54</sup>See *Dialogue*, *supra* note 50, and especially *Leviathan*, *ibid.*, c. 15 at 212.

Therefore, to use Lon Fuller's term, it would for Hobbes be an "inconsiderate sovereign"<sup>55</sup> who established a democratic form of government, or who allowed free thinking in the universities, or who set up a charter of rights and freedoms which permitted judges to test the validity of legislation against their natural reason in the guise of applying the dictates of sound morality. It is not that these steps are conceptually impossible, but just that each is a time bomb, waiting to explode order. It is not that Hobbes's conception of law is unable formally to accommodate the idea, for example, of a charter of rights and freedoms, but that he regards such a charter as inherently destabilizing.

It should be noted that for Hobbes the official obligation to apply the law has to be rather different in kind than the obligation of subjects to obey the law. In regard to subjects, Hobbes has no qualms about riding roughshod over the distinction between the idea of being under an obligation and the idea of being obliged by force which launches Hart's own argument for a positivist conception of law. Hobbes is committed to the view that there is no distinction since he thinks that it is only against the backdrop of superior force that the obligations of civil society can come into existence.<sup>56</sup>

It is of course better if subjects understand the true position that the law is legitimate, whatever its content. But if they don't, and if, like Hobbes's "Foole," they are prone to calculate whether, on their own understanding of their interests, it is in their interests to obey the law, then coercion must play its role.<sup>57</sup>

But it is surely a different matter for executive officials, since it is their job to apply the law and to see to it that the law is actually obeyed. They must accept that the law is legitimate. The example of judges, that is, of the officials charged with authoritatively determining the content of the law, illuminates this issue, especially because Hobbes recognizes that interpretation is an important element in the authoritative determination of the law.<sup>58</sup>

On the surface, Hobbes's remarks about interpretation are puzzling. First on his list of "[t]he things that make a good Judge, or good Interpreter of the Lawes"<sup>59</sup> is "[a] right understanding of that principall Law of Nature called Equity" which he says depends on the "goodnesse of a mans own naturall Reason ..."<sup>60</sup> The other things he mentions are all virtues which speak to the idea of judicial independence in the service of determining what the (positive) law actually is on a matter.<sup>61</sup>

Hobbes also says that:

the Intention of the Legislator is always supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Sovereigne. He ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply

<sup>55</sup>See L.L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940) at 34-41.

<sup>56</sup>*Leviathan*, *supra* note 14, c. 13.

<sup>57</sup>For Hobbes's attempt at a reply to the "Foole," see *Leviathan*, *ibid.*, c. 15 at 203-05.

<sup>58</sup>*Ibid.*, c. 26 at 322.

<sup>59</sup>*Ibid.*, c. 26 at 328.

<sup>60</sup>*Ibid.*

<sup>61</sup>*Ibid.*, c. 26 at 328-29.

it with the Law of Nature; or if the case be difficult, to respite Judgement till he have received more ample authority.<sup>62</sup>

Finally, in an earlier chapter, he says that “[i]t is true that they that have Sovereigne power, may commit Iniquity; but not Injustice, or Injury in the proper signification.”<sup>63</sup>

If one takes these remarks at face value, it might seem that Hobbes is saying that where it is unclear what the law on a matter is, or even when the law clearly seems to lead to an inequitable result, judges should resort to their own natural reason, or their understanding of equity, to determine what the law is.

However, one must also take into account Hobbes’s view that all the laws of nature, including the law of equity, are contained in the civil law, since our only access to the laws of nature is via the content of the civil law in fact declared by the sovereign. In addition, there is his claim that “Law can never be against Reason.”<sup>64</sup>

For the same reasons that Hobbes cannot allow subjects to second-guess the sovereign as to what the laws of nature require, he cannot allow this privilege to judges. Judges have to have a grasp of the laws of nature that might be lacking in subjects, precisely because they have to deal with hard cases, that is cases where the law seems indeterminate. What the laws of nature require of them in such cases is that they should strive to give effect to the sovereign’s understanding of right and wrong. Or, if no such understanding is available, they should interpret the law so as to maximize stability and order. The example discussed earlier of a Hobbesian account of the persistence of law illustrates just this point.<sup>65</sup>

Indeed, if one attends to Hobbes’s understanding of how judicial access to the laws of nature is to be gained, it is clear that all he lacks in his understanding of the institution of positive law is the concept of a rule of recognition.<sup>66</sup> For he clearly sees that not only will judges require positivistic tests to determine the content of laws (Hart’s primary rules), but also positivistic tests to determine the sources of law (Hart’s secondary rules). Judges need to know via positivistic tests what counts as valid law before they can set about the task of determining the content of the law. The principle of judicial independence which Hobbes articulates is one which fits with his conception of judges as executive officials whose job it is to obey and not to reason why. A rule of recognition makes this possible.<sup>67</sup>

Now Hart would say that even if the concept of the rule of recognition is all that is lacking in Hobbes’s model, this leaves a significant gap because that

<sup>62</sup>*Ibid.*, c. 26 at 326.

<sup>63</sup>*Ibid.*, c. 18 at 232. See also his ironic approval of Coke’s dictum that “Equity is a certain perfect Reason that Interpreteth, and Amendeth the Law Written” in *Dialogue*, *supra* note 50 at 101.

<sup>64</sup>*Leviathan*, *ibid.*, c. 26 at 314, 316.

<sup>65</sup>See Section IV, above.

<sup>66</sup>I owe this point largely to discussions with Terry Burrell.

<sup>67</sup>For a similar account of the role of judges and the value of judicial independence in the work of a contemporary positivist, see J. Raz, “The Rule of Law and its Virtue” in *Authority of Law*, *supra* note 5, 210 at 216-17.

concept requires that Hobbes admit something which he seems committed to denying. That is, since the concept of the rule of recognition presupposes that sovereignty is subject to legal limits, Hobbes, in recognizing the concept, would have to drop the idea of the uncommanded commander.

Ladenson, as we have seen, thinks that a Hobbesian conception of law can accommodate a rule of recognition. My suggestion here is that Hobbes is committed to the concept. I will now also argue that Hobbes's idea of an uncommanded commander gives him a better solution to the problems which Hart raises in relation to that idea than the solution offered by Hart.

A helpful example is one which haunts Hart's account of the rule of recognition. In South Africa in the 1950s, the Nationalist government was beginning to establish its conception of racist order known as *apartheid*. The *South Africa Act, 1909*<sup>68</sup> had established a Parliament, composed of two Houses, which could pass laws on any matter by a simple majority of each House. The *Act* also made a special provision in relation to two issues for which changes in the law required a two-thirds majority of a joint sitting of the Houses. The government was determined to do away with one of these protected provisions, which gave people of mixed race ("Coloureds") a vote on the common electoral roll.

At that time, the government could not muster the two-thirds majority of both Houses of Parliament required by the *Act*. It attempted to circumvent the provision by simply ignoring the requirement. As such, the statute was passed by a simple majority in each House. The Appellate Division, the supreme South African court, declared the resulting statute invalid.<sup>69</sup> The Court did the same when a statute was enacted purporting to make Parliament the ultimate court of appeal in constitutional matters.<sup>70</sup> Finally, the majority of the court, with one dissent, upheld the validity of a statute which inflated the Senate to provide the required majority.<sup>71</sup> It is worth noting that by this stage the government had also enlarged the court from six to eleven judges, and there was no doubt about the way the additional judges would vote on this matter.<sup>72</sup>

Hart's final comment on such matters is, "all that succeeds is success";<sup>73</sup> that is, since there can be no answer at law, whoever wins has the power to dictate an answer.<sup>74</sup> But this comment seems to negate the usefulness of the idea of the rule of recognition, which Hart says is introduced as a cure for uncertainty.<sup>75</sup>

<sup>68</sup>*South Africa Act, 1909* (U.K.), 9 Edw. 7, c. 9 [hereinafter *Act*].

<sup>69</sup>The *Separate Representation of Voters Act, 1951*, S.U.S.A. 1951, No. 46, was invalidated in *Harris v. Minister of the Interior*, 1952 (2) SA 428.

<sup>70</sup>The *High Court of Parliament Act, 1952*, S.U.S.A. 1952, No. 35, was invalidated in *Minister of the Interior v. Harris*, 1952 (4) SA 769.

<sup>71</sup>The validity of the *Senate Act, 1955*, S.U.S.A. 1955, No. 53, was upheld in *Collins v. Minister of the Interior*, 1957 (1) SA 552.

<sup>72</sup>D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Oxford University Press, 1991) at 50-51 [hereinafter *Hard Cases*].

<sup>73</sup>*Concept of Law*, *supra* note 1 at 149.

<sup>74</sup>*Ibid.* at 144-50, especially at 149-50.

<sup>75</sup>*Ibid.* at 92.

At times, Hart implies that indeterminacy in the rule of recognition, and the less dramatic but more common instances of apparent indeterminacy in primary rules, is not a significant problem for the positivist account of law since indeterminacy occurs only at the margins of law. But he admits that the issue of where the margins lie is itself marginal, that is, open to interpretation.<sup>76</sup> So the claim that indeterminacy can be kept to the margins is, as proponents of Critical Legal Studies have pointed out, hardly convincing in conflicts of interpretation over primary rules. It becomes even more unconvincing in the case of the most fundamental rule of the legal system.

Further, if the concept of the rule of recognition is required by Hobbes's idea of sovereignty, and by what lies behind that idea, that is, the claim that effective government power is legitimate, then Hobbes has a solution which Hart lacks. In such conflicts, Hobbes is clear that he who has effective power is also sovereign. As such, the judges should have decided the matter by recognizing that the government was entitled to have its way in the first place.<sup>77</sup> By the time of the second round, when the issue had, as it were, been remitted to the sovereign for further decision, the judges were surely way out of line in disobeying the government's will.

In particular, Hobbes would reject the justification for the judicial resistance to the government in this case, which was that the idea of a High Court of Parliament violated the principle of judicial independence. For Hobbes the principle of judicial independence, which follows from a correct understanding of the laws of nature, speaks to judges faithfully executing the commands of the sovereign.<sup>78</sup> Here, as in the case of the Hobbesian solution to the problem of the persistence of law, it is Hobbes's justificatory argument for positive law that determines the outcome.

Hart's response must surely be that there is a gap: the rule of recognition is itself indeterminate and so there is no answer to the question. But this response begs the question of why indeterminacy, which in these cases is the result of a conflict of interpretation, is equivalent to a gap. Why do we have to suppose that the sovereign is himself always subject to some fundamental positivistically determined rule, so that when there is no such rule available we have to conclude that there is no answer as to who is sovereign?

One answer suggested by much of what Hart has to say is that the rule of recognition account follows from a correct analysis of the concept of law. That is, the rule of recognition account is true as a matter of correct analysis of concepts and not because it is supported by a compelling justificatory argument.<sup>79</sup>

However, Hart himself is not entirely satisfied with this answer. Most significant here are two of Hart's recent admissions. First, Hart admits that his analytical argument fails to supply an account of what reason judges have for

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<sup>76</sup>See especially *Essays*, *supra* note 5 at 71-72.

<sup>77</sup>Compare the discussion in Ladenson, *supra* note 6 at 144 note 14, 154-55.

<sup>78</sup>*Leviathan*, *supra* note 14, c. 26 at 327-29.

<sup>79</sup>See *Concept of Law*, *supra* note 1 at vii-viii; *Essays*, *supra* note 5 at 50-56, 65.

adopting the rule of recognition. Secondly, he concedes that an account which says that, at least from the perspective of judges, the reason must be a moral one, is the obvious candidate but the one which he most wants to resist.<sup>80</sup>

In contrast, Hobbes's justificatory argument for positivism explains not only why judges should adopt positivism, but also deals with problems which plague a rule of recognition account claiming to be the product of pure analytical argument. Hobbes not only tells us why judges should adopt a rule of recognition, he points judges towards an answer in cases of apparent indeterminacy in the rule of recognition. As Carl Schmitt perspicuously put it, for a Hobbesian, the sovereign is he who decides *on* the exception.<sup>81</sup>

Hart is particularly badly placed to deny this point. Whenever he tries to articulate either the workings of the rule of recognition, or an account of its origins, he puts forward a Hobbesian justification for the legitimacy of effective power as the bulwark against uncertainty and chaos.<sup>82</sup> Of course, he wants to claim that he is saying nothing about the legitimacy of law in putting forward these arguments. But if it is Hobbes's justificatory argument alone which can explain why we might think that mere facts about effective government power transmit normative force to law, the question is whether that claim is open to Hart.<sup>83</sup>

The only way in which it would be open to him is if there were no plausible alternative account of the concept of law. We would then have to adopt a rule of recognition account, not because of Hobbes's argument for the legitimacy of law, but because this is simply how law works. If we also believe that we can have access to sound morality through methods other than the artificial reason of a sovereign, we might then suppose that we should always be prepared to ask whether the law that in fact exists is legitimate. And Hart at times suggests that

<sup>80</sup>H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 262-68.

<sup>81</sup>C. Schmitt, "Souverän ist, wer über den Ausnahmezustand entscheidet" in *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker und Humblot, 1990) at 11.

<sup>82</sup>*Concept of Law*, *supra* note 1 at 92. Stephen Perry has pointed out that my argumentative strategy might miss altogether Joseph Raz's positivist account of authority which is non-Hobbesian but nevertheless supplies an external justification for law. In his article, "Authority and Justification" (1985) 14 *Phil. & Pub. Aff.* 3, Raz argues rightly against Ladenson that he is mistaken in thinking that because there can be a political authority which is not owed a duty of obedience, there can also be a public authority which does not claim that it is owed such a duty (*ibid.* at 4-5). Raz's own explicitly non-Hobbesian argument is complex and he concludes that no political authority is ever completely legitimate; it is always up to the individual to decide whether to obey the law or not. But Raz's argument depends crucially on what he calls the "pre-emption thesis" — that the fact that an authority requires performance is a reason for performance which is not to be added to other reasons, but should exclude and take the place of some of them (*ibid.* at 13). This pre-emption thesis does no more than restate Hobbes's definition of command (see text accompanying note 20) with the proviso that the legal subject should him or herself decide whether to accept that the authority of the political sovereign is legitimate. But since, as we have just seen, Raz himself thinks that all *de facto* political authorities will claim that they are owed a duty of obedience, and since he adopts a Hobbesian understanding of what an authoritative directive amounts to, I find it difficult to see how his own theory of authority helps Hart, if I am right about Hart's predicament.

<sup>83</sup>See *e.g.* *Concept of Law*, *ibid.* at 89-96, 198-99.

positivism, while it has the virtue of encouraging moral criticism of the law, should be adopted first and foremost because it explains how law happens to work.<sup>84</sup>

But there are alternative conceptions of the nature of law, most notably Dworkin's.<sup>85</sup> And one way of understanding Dworkin's position on the legitimacy of law is that law is legitimate because it is based on principles of sound morality which are exposed and tested in legal argument. On this understanding of Dworkin's position, the argument for the legitimacy of law is circular.<sup>86</sup>

But, as I will now argue, the circularity is not vicious in the way that Hart's account of the rule of recognition is for two related reasons. First, Dworkin's account responds fully to the need which I have suggested tempts both Hart and Ladenson into circularity. That is the need to provide legal subjects with a resource to test the legitimacy of law. Secondly, Dworkin clearly sees that this need cannot be responded to by a positivist conception of law.

According to Dworkin, we find out what law is by demanding the best principled justification of existing law, on the assumption that the principles that will figure in that justification will be to some significant extent sound moral principles.<sup>87</sup> It is the understanding of law as a matter of principles, rather than as a matter of positivistic rules, that imports circularity. For the principled understanding requires an argument about what law is which is at the same time an argument about what law should be, and which takes place within the practice of law.

Thus the Dworkinian conception contrasts starkly with the Hobbesian justificatory argument, which has to take place outside the practice of law. As I have shown, liberal positivists like Hart and Ladenson also think that arguments for the legitimacy of law have to take place outside the practice of law. But for Hart, and perhaps for Ladenson as well, because the range of available external arguments is deeply suspect, law is not in and of itself legitimate.

It should be noticed how, in a sense, Hart does put forward an argument about, though not for, the legitimacy of law which is external and non-circular. It is that law is legitimate when and only when its content contingently corresponds with the dictates of sound morality.<sup>88</sup> My challenge to him is that this argument is not one that can be deployed by judges who have to determine what law is in accordance with what a positivistically understood rule of recognition identifies as law.<sup>89</sup> So we can see how non-circular justificatory arguments

<sup>84</sup>*Ibid.* at vii-viii.

<sup>85</sup>See generally *Taking Rights Seriously*, *supra* note 5; *Law's Empire*, *supra* note 5.

<sup>86</sup>Dworkin in fact resists adopting this understanding. See his response to critics in M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, N.J.: Rowman & Allanheld, 1983) at 254-60. For my own argument as to why he should not eschew this understanding, see *Hard Cases*, *supra* note 72, c. 10.

<sup>87</sup>See *Taking Rights Seriously*, *supra* note 5 at 66; see generally *Law's Empire*, *supra* note 5.

<sup>88</sup>*Concept of Law*, *supra* note 1 at 206.

<sup>89</sup>In fact, that argument is not open to judges on any conception of law, except on some versions of Critical Legal Studies which suppose that Hobbesian arguments about the hopeless indeterminacy of the common law apply to all modes of law including statutes.

might be required for positivistic conceptions of law, but cannot be employed to justify law conceived as a matter of (sound moral) principles.

It is precisely the internal nature of the justificatory argument for law conceived as a matter of principles that troubles contemporary positivists. Because the principled conception of law seems committed to there being some legitimacy to all law, it seems to ascribe legitimacy to even the law of wicked legal systems. Worse yet, it assumes that the principled basis for such law is by definition a sound one. It would therefore seem that Dworkin must think that the *apartheid* principles that are the official policy behind the wicked laws of South Africa are principles of a sound morality. Thus to succeed as a plausible rival to legal positivism, a Dworkinian conception of law has to do more than provide an adequate account of functioning legal systems. It has to rebut the charge that it legitimates wicked law.

But, as I have already suggested, Hobbesian positivism must also rebut that charge, given the way it seems that Hobbesian judges would have to decide at least one set of decisions in the wicked legal system of South Africa. Dworkinian judges would ask the same question in such cases as Hobbesian judges: what is the best principled justification for effective government power? But they would be open to the argument that the principled justification is one that relies on legal principles that require government to abide by certain constraints if it is going to govern through the medium of law. That option is, as I have suggested, closed to Hobbesian judges because the principled justification on which they rely is an argument for the legitimacy of brute government power.

My claim is not that Dworkinian judges would have triumphed over the *apartheid* regime. It is undeniable, as the court-packing measure shows, that a determined and powerful government will ride roughshod over judges who stand in its way. But Dworkinian judges would have used right to expose the true nature of the might exercised in these circumstances, rather than using the language of right to legitimate and cloak that might.

Furthermore, the history of the adjudication of the *apartheid* laws since those decisions reinforces this conclusion. On the one hand, positivistically-minded judges employed tests which sanctioned *apartheid* policy. On the other hand, a minority of judges who were always alert to find a principled basis for statutory interpretation managed to resist that policy by requiring executive officials to comply with common law principles of reasonableness, fairness and equality which were at odds with that policy.<sup>90</sup>

It is significant that the government, in order to counteract this kind of interpretation, often had to resort to statutory forms which showed a clear intention to take the task of interpretation away from the courts altogether, thus giving a free hand to executive officials. To a large extent, the government was saved from altogether blatant exercises of this kind. For the majority of judges were prepared to find that executive officials had such a free hand because they

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<sup>90</sup>For a detailed account, see *Hard Cases*, *supra* note 72, c. 3-7.



adopted positivistic tests that led to this result. In this way, they helped to cloak might with right.<sup>91</sup>

The lesson to be learned here is that if one's conception of law includes the idea of independent judges deciding what law is by resort to something that transcends the mere fact of government power, then when government finds it necessary to bypass adjudication in order to be effective, law itself is at stake. Law is not however at stake if one's conception of law, and thus of the judicial role, is positivistic. According to a positivistic model, judges are seen as mere executors of the content of legislation that government has seen fit to inject.

I suggest that the move Hart seeks to make on behalf of legal positivism away from the idea of the uncommanded commander is prompted by the desire to move away from the Hobbesian justificatory argument for the legitimacy of existing government power. Hart's sense that there is more to obligation than effective coercion and his attempt to find a basis for legal limits on government power, guaranteed by a judiciary, support this suggestion.

If I am right that in order to make that move one has to adopt a principled conception of law, which is based on a circular argument for the legitimacy of law, this would explain why Hart ends up with a circular account of the rule of recognition. And as Ladenson's own slip into circularity shows, a positivist conception of law is required by Hobbes's non-circular justificatory argument precisely because Hobbes wants to pre-empt public debate about the legitimacy of law. Thus it should come as no surprise if positivism in practice has the authoritarian implications which Hobbes meant the positivist conception of law to have.

Earlier, I identified what we can think of as a pragmatic tension in Hobbes's position. This tension exists between his moral theory, that is, his commitment to equality, and his pessimism about reason which leads him to argue for the priority of order over good order. This same tension is reproduced in Hart's legal positivism. Ironically, it is made deeper by Hart's greater confidence in reason.

The tension has remained buried because of several factors. One is Hart's powerfully expressed aim of providing a conception of law that would facilitate the testing of the legitimacy of law. Another is that rival conceptions, because they argue for an internal legitimacy of law, have apparently had trouble dealing with wicked legal systems. Finally, there is the claim which I have not yet sufficiently discussed, that in hard cases judges have a discretion ultimately undetermined by law as to how to decide the case.

For contemporary positivists, discretion allows for the entry of social and political values into law through judicial interpretation. That is, since in hard cases there is no result determined by law, the judge has to make a value-based decision as to what the law should be. As I suggested at the beginning of this article, it is this claim that deadlocked the debate between Dworkin and the positivists. The more Dworkin shows that adjudication is a matter of choosing

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<sup>91</sup>See *ibid.*, especially c. 7.

between principles, the more positivists think that he has proved their thesis about discretion.

Indeed, Dworkin, in criticizing positivism, has often found himself faced with the seemingly impossible task of having simultaneously to attack two very different targets. On the one hand, there is the positivism which requires judges to settle hard cases by resort to a Hobbesian justification for positive law. On the other hand, there is the positivism which tells judges that there is no law in such cases. And contemporary positivists like Hart and Joseph Raz pronounce themselves to be positivists of the second sort when positivism is alleged to be authoritarian.<sup>92</sup>

It follows that these positivists would reject my characterization of the majority of South African judges as positivist. They would say that in hard cases on the interpretation of *apartheid* laws, judges should have exercised their discretion in the most productive way.<sup>93</sup> But is this response open to them, given both Hobbes's justification for a positivist conception of law and the existence of Dworkin's rival conception?

For Hobbes it is true by definition that if principles have to be resorted to in interpretation, there is no answer at law. Since the relevance of principles involves deciding on the basis of moral argument, and since he is a subjectivist about morals, for him the relevance of morality means the indeterminacy of law. But it is strange for contemporary positivists, who are cognitivists about morals, to assume the equivalence of morality and indeterminacy.

For this reason, the "incorporationist" offshoot of positivism is developing. Incorporationists hold that when, as a matter of fact, the law makes sound moral principles relevant to the decision of a hard case, and when those principles do determine a decision, there is in fact a decision determined by law. What binds incorporationists to the positivist tradition is, first, that they hold that whether sound principles of morality are embedded in law is always contingent on whether the principles have, as a matter of fact, been so embedded. And, secondly, they suppose that recognition that the presence of such principles is contingent allows them to preserve what they take to be the main virtue of positivism: that it regards the legitimacy of law as contingent on the content that law happens to have.<sup>94</sup>

But the incorporationist offshoot in fact shows why the positivist thesis about discretion has to be rejected. If the reason for regarding law as a matter of facts rather than principles is Hobbes's, then in cases like those on the interpretation of *apartheid* laws, positivist judges will rarely find that sound moral principles should determine their decisions. There will be an ample resource of facts of the kind that Hobbes's justificatory argument for positive law would identify which will determine their decision.

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<sup>92</sup>See *Authority of Law*, *supra* note 5 at 180-209.

<sup>93</sup>See J. Raz, "Dworkin: A New Link in the Chain" (1986) 74 Cal. L. Rev. 1103 at 1111.

<sup>94</sup>See e.g. E.P. Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" in Cohen, ed., *supra* note 86, 3; J.L. Coleman, "Negative and Positive Positivism" in Cohen, ed., *ibid.*, 28; D. Lyons, "Moral Aspects of Legal Theory" in Cohen, ed., *ibid.*, 49.

Indeed, as Dworkin has suggested, such hard cases do not arise because of indeterminacy but, rather, because of over-determinacy.<sup>95</sup> It is not because there is no answer as to what the law is, but because there are rival answers that there is a problem of interpretation. And that rivalry goes all the way down to the different justifications in political morality for preferring a conception of law as a matter of fact or a conception of law as a matter of principle.

## Conclusion

I have argued that all conceptions of law are also conceptions of legitimate law.<sup>96</sup> The main difference between rival conceptions is whether their argument for legitimacy comes from outside the practice of law or builds on principles internal to law, that is, what Fuller described as an "inner morality of law."<sup>97</sup> And, in view of the authoritarian implications of a conception which relies, consciously or not, on an argument for legitimacy that comes from outside the law, my conclusion is that one should prefer a conception which attempts to make sense of law first and foremost as a matter of principles internal to legal practice.

Debate about such issues in legal philosophy has direct implications for political philosophy. Hobbes clearly announced the critique of modern society of which Alisdair MacIntyre's *After Virtue* is the most striking contemporary evocation.<sup>98</sup> Hobbes saw that once religion has been disestablished, one is left with the fractured survivals of formerly total world views. His war of each against all is, I think, best understood not as the war of unconstrained maximizers, but as the clash between these fractured visions in their attempt to regain control over the whole.

Unlike MacIntyre, Hobbes welcomed this disestablishment. The last part of *Leviathan* is best read as arguing subtly for the hastening of this process.<sup>99</sup> It is only, Hobbes thought, when religion is disestablished that a social and political world can be created in which the natural equality of all individuals is respected.<sup>100</sup> He is a liberal, but no democrat, since he thinks that democracies are the prey of special interest groups, each trying to gain control over the whole in part by a spurious claim that their interest is the interest of all.<sup>101</sup>

But given his pessimism about individual reason, and given that he rejects the traditional religious source of governmental legitimacy, Hobbes finds himself forced to argue for the legitimacy of *de facto* governmental power. Law, or at least positive law, is to be taken not only as embodying public reason, but also appropriate or right public reason. As Carl Schmitt showed, the imagery of the

<sup>95</sup>*Law's Empire*, *supra* note 5, especially c. 1-3.

<sup>96</sup>Of course, there are conceptions of law which seek to subvert law by showing its illegitimacy; for example, some versions of Marxism. But these still present arguments about legitimacy.

<sup>97</sup>L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

<sup>98</sup>A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981).

<sup>99</sup>*Leviathan*, *supra* note 14, c. 32-42. See *Rhetoric of Leviathan*, *supra* note 51.

<sup>100</sup>See *Rhetoric of Leviathan*, *ibid.*

<sup>101</sup>See *Leviathan*, *supra* note 14, c. 22 at 286-87.

*Leviathan* tries to do the impossible: to draw on religious mythic sources at the same time as demystifying power.<sup>102</sup>

Hobbes's problem remains the problem of contemporary political philosophy. Contemporary liberals accept Hobbes's premise about natural equality and his understanding of liberty as the absence of obstacles. And, like Hobbes, they seem to regard their task as to preserve morality by ensuring that it is inviolable from the raids of those individuals who are organized to take advantage of the mechanisms of representative democracy.

Thus while liberals like Rawls want to use political philosophy to criticize the *status quo* so as to bring the social and political order more into line with people's actual desires, they also seek to preserve social and political order from the wrong sorts of desires. As does Hobbes, they fear the reign of subjectivity that democracy seems to invite. Their Rational Contractor argument, like Hobbes's, does not leave anything they consider of crucial importance to collective deliberation.

Political theorists whose first allegiance is to democracy criticize liberals for this reason.<sup>103</sup> But they are left in the uncomfortable position of adopting the practical conclusion of Hobbes's Rational Contractor argument. They conclude that a decision is right merely in virtue of the fact that it was made by the assembly with sovereign power.

The task for legal philosophy is thus one and the same as the task for political philosophy. Can one construct a theory of public reason on a principled basis which will place a great deal more faith in public reason than do liberals, yet do justice to the substantive premise of individual equality which they and democrats share?

My final suggestion is that Dworkinian legal philosophy offers us an important clue. A conception of public reason which can manage this daunting task will be one which contains arguments for principles that are already internal to the practice of public reason. And these principles will have to be capable of ensuring that the results of reason are reasonable without severely restricting the scope of issues on which the public is allowed to reason.<sup>104</sup>

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<sup>102</sup>Schmitt, *supra* note 81.

<sup>103</sup>See e.g. M. Walzer, "Philosophy and Democracy" (1981) 9 *Pol. Theory* 379.

<sup>104</sup>For an intriguing attempt to follow that clue, see A. Gutmann & D. Thompson, "Moral Conflict and Political Consensus" (1990) 101 *Ethics* 64.