# COMMENTS ON RISTROPH'S "SOVEREIGNTY AND SUBVERSION"

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ALICE Ristroph's article offers both a first-order characterization of Hobbes's accounts of law and punishment, and a second-order characterization of what Hobbes was providing us in those accounts and what, correspondingly, counts as appropriate or inappropriate criticism of those accounts. I am almost entirely in agreement with her first-order characterization of Hobbes's political and legal theory: She is correct in rejecting the assimilation of Hobbes's legal theory to Austin's,[1] and in noting the strands of Hobbes's view that disqualify him from counting as any sort of legal positivist.[2] And I agree, on the whole, with her characterization of Hobbes's account of justified punishment, and that this account has its attractions yet produces some puzzles which Hobbes does not fully resolve.

My disagreements are with her second-order characterization of Hobbes's legal theory. I want to discuss two related areas of disagreement. The first disagreement concerns whether we should assess Hobbes's account of law in terms of the standards of general descriptive jurisprudence: Ristroph denies that it should be; I disagree. The second concerns whether we should take Hobbes's treatment of the political as explanatorily prior to the legal to show that Hobbes was in some way apart from the natural law tradition in jurisprudence: Ristroph affirms this; I disagree.

## I. ON HOBBES'S RELATION TO "DESCRIPTIVE JURISPRUDENCE"

Ristroph concedes that, in *Leviathan*, it looks very much like Hobbes is attempting to provide a general descriptive account of law.[3] It is not only that Hobbes explicitly says, at the beginning of the *Leviathan* chapter on civil law, that he is about to tell us what law is, wherever it is to

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[1] I argue for the rejection of this assimilation in Mark C. Murphy, Hobbes (and Austin, and Aquinas) on Law as the Command of the Sovereign, *in* The Oxford Handbook of Hobbes (Al P. Martinich & Kinch Hoekstra eds., forthcoming 2015) (on file with author).

[2] See Mark C. Murphy, Was Hobbes a Legal Positivist?, 105 Ethics 846, 849 (1995).

[3] Alice Ristroph, Sovereignty and Subversion, 101 Va. L. Rev. 1029**,** 1047 (2015).

be found.[4] It is also that all of Hobbes's definitional markers (for example, placing the term defined, here "civil law," in all capitals) are present.[5] There is no suggestion that anything different is going on when Hobbes offers a definition of law than when he provides definitions for any of the enormous number of terms that get defined in *Leviathan*.

This is particularly important because, early in *Leviathan*, Hobbes offers both some account of the standards of definitional adequacy and an advertisement for what adequate definitions can do. According to Hobbes, when one forms adequate definitions,[6] what becomes possible is a science—that is, a knowledge of the necessary consequences to which one is committed by virtue of assigning defined terms to things.[7] So it looks to me that we have, initially, very strong reason to think that Hobbes is practicing general descriptive jurisprudence: providing what he takes to be a proper analysis of the concept of law, and employing that concept to draw further necessary truths about legality, especially legality within a civil order.[8] We would therefore need strong reasons to reject this appearance and to deny that Hobbes is doing what Austin, Hart, Raz, and other practitioners of general descriptive jurisprudence are doing.

There are a few suggestions in Ristroph's text about how to overcome this burden, but I do not think that they successfully overcome it. One suggestion Ristroph makes is that we have good reason to think that, in Hobbes, it is just not the case that there is a nature that law has, and so Hobbes could not be sensibly trying to provide an account of that nature when giving a definition of law.[9] That is true enough. But the point would prove too much: Hobbes is a nominalist; he does not think that there are natures, strictly speaking.[10] But that does not preclude Hobbes from making all sorts of claims about what counts as adequate defini-

[4] Thomas Hobbes, Leviathan ch. xxvi, para. 1, at 172–73 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

[5] Id. ch. xxvi, para. 1, at 172.

[6] Id. ch. iv, paras. 3–24, at 16–22.

[7] Id. ch. v, para. 17, at 25.

[8] Compare these ambitions with Scott Shapiro's aim to clarify what individuals seek to learn when they inquire into the nature of something. See Scott J. Shapiro, Legality 8–10 (2011).

[9] See Ristroph, supra note 3, at 1051 ("'[L]aw' is not something that just exists in the universe, like an acid or a base . . . .").

[10] Hobbes, supra note 4, ch. i, paras. 4–5, at 6–7.

tions, applying those definitions to existing things, and drawing what he takes to be necessarily true conclusions from them.

Ristroph also suggests that Hobbes's view that law exists not as a natural matter, but as a matter of artifice, precludes characterizing Hobbes's efforts as an exercise in general descriptive jurisprudence.[11] But that seems also to be a mistake. There are lots of things that exist by way of artifice that Hobbes thinks that he can define and, on the basis of those definitions, proceed to draw necessarily true conclusions about. Covenants,[12] for one example; speech,[13] for another. That there exist covenants and speech generally is a matter of human invention and artifice; but that does not preclude Hobbes in any way from offering a general descriptive account of covenants, and even of speech. In Hobbes's table of the sciences,[14] he includes both knowledge of the consequences of natural bodies and knowledge of the consequences of artificial bodies (bodies politic) as sciences; he pretty clearly thought that "science" applies univocally to both of these endeavors, so that the fact that one sort deals with what is a matter of artifice and the other with what is a matter of nature makes no difference to their being objects of a general, necessary science.

It might be thought that the very fact that Hobbes's definition of law so unabashedly traffics in normative concepts, rather than keeping a safe Hartian or Razian distance,[15] entails that, if Hobbes is thinking clearly, he must not be engaged in general descriptive jurisprudence. There are some strands of discussion in contemporary jurisprudence which suggest that to practice general descriptive jurisprudence presupposes that any successful theoretical outcome will be a positivist outcome. I disagree with this suggestion. Hobbes's definition of law is antipositivist, but

[11] Ristroph, supra note 3, at 1051 ("Law, like sovereignty, is a human artifice; it has no *nature* in the Hobbesian sense.").

[12] Hobbes, supra note 4, ch. xiv, para. 11, at 82.

[13] Id. ch. iv, para. 1, at 16.

[14] Id. ch. ix, at 48 tbl.

[15] That is: Hart's and Raz's views incorporate into their account descriptions of agents' evaluations. This is part of the point of Hart's appeal to the "internal point of view," the point of view of those who view the law "in terms of rules . . . [and] in the terms of the rule-dependent notions of obligation or duty." H.L.A. Hart, The Concept of Law 89 (2d ed. 1994). The appeal to the evaluative is also present in Raz's thesis, the basis for his central argument for positivism, that agents of the law necessarily claim authority for it. Joseph Raz, The Authority of Law: Essays on Law and Morality 29–33 (1979). This is obviously a descriptive enterprise, and in no way contributes to a case against Hart and Raz as practitioners of descriptive jurisprudence.

while positivism requires that general descriptive jurisprudence is a possibility, engaging in general descriptive jurisprudence does not entail a commitment to positivism. It is just as much a *description* of the necessary existence conditions of law to say that law is (inter alia) a command to one who is obligated to obey the commander as it is to say that law is an order backed by a threat.

If some concept in use has normative criteria of application, then it is part of the job of *describing* that concept to say that it has normative criteria of application. *Doing so requires no normative commitments of the inquirer*. A comparison: When J. L. Mackie says that the concept of the morally required is (in part) the concept of what is objectively reason-giving,[16] he is *describing* the concept of the morally required, not committing himself to its being properly applied to anything; and indeed, he denies that it is properly applied to anything.[17] Similarly, when Hobbes says that law is to be defined as something those to whom it is addressed are obligated to obey, he is describing the concept of law, not committing himself to its being properly applied to anything. This is descriptive jurisprudence. He does think, though, that it does apply, in the civil case in particular, and his theory of the commonwealth explains why it does apply in that context.[18]

Hobbes indeed occupied a very particular, practical perspective, one informed by his experiences with the English Civil War and his hopes for the prospect of a more stable peace. But this fact is not relevant to what he takes to be the success conditions for theorizing about law's nature. Hobbes suggests that those success conditions are the success conditions of ordinary descriptive jurisprudence, and there is no basis in Hobbes's work to think anything to the contrary.

## II. HOBBES ON THE EXPLANATORY RELATIONSHIP BETWEEN THE LEGAL AND THE POLITICAL

Ristroph also suggests that there is an important difference between Hobbes and later positivists and natural law theorists, which makes him fit uncomfortably in either camp. Here is the argument:

> There is something odd about trying to categorize Hobbes as either a legal positivist or a theorist of natural law, because both those terms

[16] J.L. Mackie, Ethics: Inventing Right and Wrong 40 (1977).
[17] Id. at 48–49.
[18] See generally Hobbes, supra note 4, pts. I–II, at 6–244.

> have become associated with a set of claims about law as an independent concept or practice, one distinct from political affairs. . . . But in full measure, Hobbes's account of law does not attempt to explain law without a background account of its human participants and their relationships to one another. Law, as it interested Hobbes, was a feature of the commonwealth, and so the definition of law required an account of the commonwealth.[19]

So one way in which Hobbes's theory of law departs from the natural law tradition must be that defenders of natural law jurisprudence *do* try to explain law, in full measure, without a background account of its human participants and their relationship to one another.

There is, as I shall explain, a sense in which Hobbes's account of law does attempt to explain law without a background account of human participants and their relationship to one another. So no one could appeal to that sense to explain why there is anything odd about categorizing Hobbes as a natural law theorist. But even where Hobbes's account does rely on a background account of human participants and their relation to one another, I shall show that such reliance is actually indistinguishable from that of others in the natural law tradition. Therefore, no possible reading of Hobbes's account seems to me to call into question Hobbes's status as a natural law theorist.

Hobbes must have thought it was possible to give some account of law entirely independently of his substantive account of human beings and their relations to one another inside and outside a commonwealth, because, for Hobbes, civil law is just one species of the genus *law*, and it is not essential to law on Hobbes's account that the parties involved be human beings. Divine law, of both the natural and positive sort, is a clear example of this point: While Hobbes does think that there can be a kingdom of God by covenant that is commonwealth-like in its origin and structure, there is also a kingdom of God by nature, the character of which does not depend on features of the commonwealth.[20] Its being by nature precludes it from being by covenant, and being by covenant is an essential commonwealth feature, on Hobbes's view.[21] Nor should we think that there is anything about Hobbes's account of law that requires humans to be involved in the story at all when law is on the scene. For

[19] Ristroph, supra note 3, at 1045.
[20] Hobbes, supra note 4, ch. xxxi, paras. 2–7, at 234–37.
[21] Id. ch. xvii, paras. 12–13, at 109.

there are, Hobbes allows, nonhuman rational creatures[22]—angels—and Hobbes's semi-orthodox views on the angels (that some of them fell on account of their sin against God[23]) entail that the angels were under some sort of divine law that they violated.[24]

So it strikes me as false that Hobbes's definition of law "require[s] an account of the commonwealth."[25] What Hobbes sees as crucial in law is just its obligating features, be they present by nature (as in the case of divine natural law, for example) or by covenant.

Now, it may be objected that I am ignoring Ristroph's qualifying phrase: She says that "[l]aw, *as it interested Hobbes*, was a feature of the commonwealth . . . ."[26] I do not think that this is correct, for reasons I just noted: Hobbes cares an awful lot about law that is not civil law. Indeed, he has to—for one of his central concerns in *Leviathan* is that divine law might conflict with civil law, and so subjects might be motivated and even justified in violating civil law when one is "contrary" to the other.[27]

If we confine our discussion only to Hobbes's interest in civil law, it is no doubt true that in providing an elaborate theory of civil law—not just of what law is, but of various other legal concepts and their application—Hobbes appeals to the features of his theory of the commonwealth. That is because civil law is merely the law of a civil society. Every civil society is some variation on the commonwealth: The only tool that Hobbes recognizes for naturally equal human beings to be bound to each other in a political society is the covenant, and through the presence of covenants, express or tacit, it becomes possible for someone who personates a multitude of individuals to issue commands that those individuals are obligated to obey.[28]

I agree with Ristroph when she claims that this sort of methodology is distant from that of contemporary legal positivism. But the distance is

[22] Hobbes denies that there could be angels if angels are taken to be *nonmaterial* beings. But he just thinks that this shows that what Scripture affirms is the existence of material angels. Id. ch. xxxiv, para. 15, at 265–66.

[23] Id. ch. xxxiv, para. 23, at 269.

[24] Id. ch. xxvii, para. 1, at 190. For Hobbes, one cannot sin unless one is violating some law. For the angels to fall on account of their sin, then, they must have been violating a divine law that they were under.

[25] Ristroph, supra note 3, at 1045.

[26] Id. (emphasis added).

[27] Hobbes emphasizes that his account of civil duty is not complete until he has provided an account of divine law. Hobbes, supra note 4, ch. xxxi, para. 1, at 234.

[28] Id. ch. xvi, paras. 13–14, at 104.

*not* generated by the fact that positivists think that one can provide a rich, elaborate account of the law without looking to general features of human political society. The distance is generated, rather, by Hobbes's invocation of the political to explain how, why, and to what extent individuals can be *genuinely obligated* to do what a political superior tells them to do. Otherwise, like Hobbes, positivists are happy to appeal to general features of human political society to try to provide evidence for and further elaboration of their own positivist theses. (Consider in this connection Hart's speculation, well-grounded or not, on the "minimum content of natural law,"[29] which, whatever its merits, is not in tension with Hart's positivism.)

I do not understand, though, why this sort of methodology seems to Ristroph to be in any way at odds with the natural law tradition of theorizing about law. Like Hobbes, Aquinas is concerned with a variety of types of law, including divine law of both the natural and positive variety as well as civil law.[30] And like Hobbes, Aquinas thinks that it is essential to law to genuinely bind—that is, to give decisive reasons for compliance.[31] Like Hobbes, Aquinas also thought it plain that civil law had to proceed from an appropriately authoritative source.[32] But he also thought that in proceeding to more particular conclusions about human law, one would have to proceed to investigate the general features of human social life, of what makes humans better and worse off, and of the different ways that humans might establish and exercise authority within their political communities.[33]

So I am not sure whether Ristroph has offered any reason to distance Hobbes's view from the natural law jurisprudential tradition. Given our agreement that the first-order theses of legal theory that Hobbes affirms seem to be distinctively natural law positions, one would think that she should take Hobbes to be squarely in the Aquinas line.

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[29] Hart, supra note 15, at 193–200.

[30] 28 Thomas Aquinas, Summa Theologiae Ia2ae Q. 91, at 19–39 (Thomas Gilby ed., Blackfriars 1966).

[31] Id. Ia2ae Q. 90, A. 1, at 7–9.

[32] Id. Ia2ae Q. 90, A. 3, at 13–15; id. Ia2ae Q. 91, A. 3, at 25–27.

[33] From this, one may understand the relative thinness of Aquinas's positive account. Admittedly, he thought that there were some ways of going wrong with respect to lawmaking that could be specified in advance and concretely—for example, any would-be law that requires one to violate a moral absolute is not law but a perversion of law, id. Ia2ae Q. 96, A. 4, at 129–33. But to Aquinas, most law consists in determinations of the natural law, id. Ia2ae Q. 95, A. 2, at 103–07, the selection of which is a matter of virtue and free discretionary choice, id. Ia2ae Q. 95, A. 2, at 107, rather than something codifiable in a science.

It may well be that I have misunderstood Ristroph's account of the relationship between Hobbes's legal theory and his theory of the political order, that I have made it tamer than what she has in mind, and that as a result I too cavalierly assimilate Hobbes's account to the predecessor natural law view. But in my mind, it seems possible to treat Hobbes's more detailed conclusions about law as implications from theses about what is true about law in general, conjoined with subordinate theses about the ways in which humans can or cannot find themselves under obligations. These theses are supported by Hobbes's overall political theory. If that is the extent of the involvement of Hobbes's political theory in Hobbes's theory of law, then no difference of substance between Hobbes and paradigmatic natural law theory has been brought into relief here.