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### Hobbes, Formalism, and Corrective Justice

Anita L. Allen

*University of Pennsylvania Carey Law School*

Maria H. Morales

*Florida State University*

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# Hobbes, Formalism, and Corrective Justice

Anita L. Allen\* and Maria H. Morales\*\*

## INTRODUCTION

### A. Recent Theories of Corrective Justice

In the United States, courts offer what appear to be both corrective justice and distributive justice rationales for their decisions in personal injury cases. In *Becker v. Interstate*, for instance, a federal court's appeal to distributive justice was explicit.<sup>1</sup> As a practical matter, corrective justice and distributive justice rationales coexist in the body of cases lawyers commonly refer to as "tort law." Professor Ernest Weinrib suggests, however, that tort law is fundamentally a matter of corrective rather than distributive justice.<sup>2</sup> His starting point is Aristotle's *Nicomachean Ethics*.<sup>3</sup>

According to Weinrib, "[t]he strength of Aristotle's treatment of justice lies in the very differentiation between corrective and distributive justice."<sup>4</sup> Moreover, "in distinguishing these two forms of justice, Aristotle sets out the justificatory structures to which any coherent legal arrangement must conform."<sup>5</sup> Weinrib seeks to illuminate the moral foundations of tort law by appeal to a formal, Aristotelian conception of corrective justice, supple-

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\*Professor of Law, Georgetown University Law Center. B.A., New College, 1974; M.A., Ph.D., University of Michigan, 1979; J.D., Harvard Law School, 1984.

\*\*Assistant Professor of Philosophy, Florida State University. B.A., University of Maryland, 1987; Ph.D., University of Pennsylvania, 1992.

1. *Becker v. Interstate Properties*, 569 F.2d 1203 (3d Cir. 1977) (holding real estate developer liable for negligence of undercapitalized sub-contractor (citing *Majestic Reality Assocs., Inc. v. Toti Contracting Co.*, 153 A.2d 321, 325 (N.J. 1959)) ("The contractee, true, has no control over the doing of the work and in that sense is also innocent of the wrongdoing; but he does have the power of selection and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee."). Thus, the *Becker* court did not limit itself to a fault-oriented corrective justice analysis. It also undertook a no-fault or strict liability distributive justice analysis, inquiring whether developer liability would efficiently spread costs, promote safety, and place burdens on those who benefit from the injury-causing activity. *Becker*, 569 F.2d at 1209-12.

2. See generally Ernest Weinrib, *Aristotle's Forms of Justice*, 2 *Rat. Jur.* 211 (1989); Ernest Weinrib, *Causation and Wrongdoing*, 63 *Chi.-Kent L. Rev.* 407 (1987); Ernest Weinrib, *Law as a Kantian Idea of Reason*, 87 *Colum. L. Rev.* 472 (1987); Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L.J.* 949 (1988) [hereinafter *Legal Formalism*]; Ernest Weinrib, *The Special Morality of Tort Law*, 34 *McGill L.J.* 403 (1989); Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *Law & Phil.* 37 (1983); Ernest Weinrib, *Understanding Tort law*, 23 *Val. U. L. Rev.* 485 (1989).

3. Aristotle, *The Nichomachean Ethics* (Sir David Ross trans., Oxford 1975).

4. Ernest Weinrib, *Corrective Justice*, 77 *Iowa L. Rev.* 405, 412 (1991).

5. *Id.* at 413.

mented by substantive Kantian and Hegelian understandings of moral equality. On Weinrib's account, corrective justice restores the *ex ante* moral equality owed free, rational agents as a matter of natural right. "At the time of the defendant's actions," Weinrib maintains, "his enrichment consists in the excessive freedom of acting unconstrained by the obligation to respect the plaintiff's right."<sup>6</sup> Consequently, when the defendant's act materializes into injury, the injury itself becomes a measure of the defendant's surplus freedom.<sup>7</sup> More than serving as an "amoral heuristic device," for Weinrib, corrective justice partakes of the stringent Kantian and Hegelian normativeness that consists in making the actor conform to the abstract structure of willing.<sup>8</sup> Kant and Hegel "show that corrective justice is a necessary implication of free will."<sup>9</sup>

Weinrib's perspectives are in some respects idiosyncratic. Yet other leading scholars maintain that corrective justice is the moral foundation of tort law and their theories bear generically Aristotelian and Kantian stamps. While not expressly taking the texts of Aristotle or Kant as his starting places, Professor Jules Coleman holds views similar to Weinrib's in key respects.<sup>10</sup>

Like Weinrib, Coleman relies on an "Aristotelian" distinction between corrective and distributive justice, and on a "Kantian" substantive, moral rights-based understanding of wrongdoers' gains as correlative to their victims' losses. Like Weinrib, Coleman believes that principles of corrective justice are, and should be, applied in appropriate personal injury cases. Like Weinrib, Coleman believes that corrective justice "may, as a consequence of meeting its demands, reestablish or defend distributive injustices."<sup>11</sup>

Against a background of distinguishing between "pure relational" and "pure annulment" conceptions of corrective justice, Coleman describes his own conception as "mixed."<sup>12</sup> Relational conceptions provide that, in view of personal wrongdoing, one incurs certain obligations of reparation or compensation toward one's victims that give one a reason for acting. Annulment conceptions of corrective justice maintain that wrongful gains

6. Ernest Weinrib, *Corrective Justice* 92 (unpublished manuscript, conference draft 1991).

7. *Id.* at 66.

8. *Id.* at 67.

9. Weinrib, *Corrective Justice*, *supra* note 4, at 424.

10. *See generally* Jules Coleman, *Markets, Morals and the Law* 166-201 (1988); Jeffrey Murphy & Jules Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* 167-89 (1984); Jules Coleman, *Justice and the Argument for No-Fault*, 3 *Soc. Theory & Prac.* 161 (1974); Jules Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 *Law & Phil.* 371 (1982) [hereinafter *Moral Theories of Torts: Part I*]; Jules Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 *Law & Phil.* 5 (1983) [hereinafter *Moral Theories of Torts: Part II*]; Jules Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 *Chi.-Kent L. Rev.* 451 (1987); Jules Coleman, *The Structure of Tort Law*, 97 *Yale L.J.* 1233 (1988).

11. Jules L. Coleman, *A Mixed Conception of Corrective Justice*, 77 *Iowa L. Rev.* at 427, 429 (1991).

12. *Id.* at 437-41.

and losses ought to be eliminated through reparation or compensation. Coleman formerly advanced a pure annulment conception of corrective justice which provided only that *some* person or institution ought to annul wrongful gains and losses.<sup>13</sup> Coleman now concedes to Weinrib, Richard Epstein, and others that an inherent moral relationship exists between injurers and the victims they wrong.<sup>14</sup>

Coleman's revised theory, his self-described "mixed conception" of corrective justice, combines elements of the pure annulment and the pure relational conception.<sup>15</sup> Wrongdoers, defined as those who violate others' rights, have a duty to repair the wrongful losses their conduct occasions. Thus, under Coleman's mixed conception, wrongdoers have relational reasons for acting to annul the losses for which they are responsible. Coleman claims that retributive justice pertains to the duty of wrongdoers to rectify their wrongs by submitting to punishment.<sup>16</sup> By contrast, he claims that corrective justice pertains to wrongdoers' duties to rectify losses occasioned by their wrongs. A similar distinction between paying the victims of one's offense and submitting to punishment for one's offenses may be found in Thomas Hobbes' *Leviathan*: "[I]f the law imposes a sum of money to be paid, to him that has been injured; this is but a satisfaction for the hurt done him; and extinguisheth the accusation of the party injured, not the crime of the offender."<sup>17</sup>

In espousing a partially relational, or mixed, conception of corrective justice, Coleman has not abandoned his signature distinction between the grounds of rectification and the mode of rectification.<sup>18</sup> He continues to deny that "A wrongfully injured B" entails that "A ought to rectify B's loss." Coleman argues that while A's injuring B provides the ground for B's rectification, it does not follow that A's repairing or compensating B is therefore the mode of rectification required by justice. According to Coleman, "Even if the injurer has the duty to repair injustice, it does not follow that justice requires that the duty be discharged by the injurer."<sup>19</sup> Coleman maintains that victims acquire rights to repayment, normatively entailed by their injurers' correlative obligations, and injurers acquire normative reasons for acting to rectify. The ideal of corrective justice, however, dictates no unique institutional mechanisms for discharging wrongdoers' obligations. A wrongdoer's obligations could be justly discharged by a distributionally just social insurance scheme, Coleman suggests.

13. Id. at 429-33.

14. E.g., Richard Epstein, Nuisance: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979).

15. Coleman, supra note 11, at 437-41.

16. Id. at 442.

17. Thomas Hobbes, *Leviathan: or the Matter, Forme, and Power of Commonwealth Ecclesiastical and Civil* 232 (Michael Dakshott ed., Collier Macmillan Publishers 1962) (1651).

18. See generally Coleman's explication of the distinction between grounds and mode of rectification in Coleman, *Moral Theories of Torts: Part I*, supra note 10; Coleman, *Moral Theories of Torts: Part II*, supra note 10; Coleman, *The Structure of Tort Law*, supra note 10. See also Coleman, *Markets, Morals and the Law*, supra note 10.

19. Coleman, supra note 11, at 443.

### B. *The Hobbesian Alternative*

The philosophic perspectives of Weinrib and Coleman on corrective justice are far from identical. They differ both in broad aspect and in detail. However, both perspectives assume that a just legal order would recognize distributive *and* corrective justice. In addition, notwithstanding Coleman's distinction between the grounds and mode of rectification, both perspectives assume that a just legal order would treat corrective justice as a matter of rights and duties between specific injurers, presumably tortfeasors, and their victims. Scholars interested in the development of western legal thought may be interested to note that the legal philosophy of Thomas Hobbes, one of the seminal figures of modern legal philosophy, appears to embrace neither of these salient assumptions.

The vision of political order that Hobbes presented in his monumental *Leviathan* importantly included a vision of the law.<sup>20</sup> This essay will recount Hobbes' legal vision, highlighting the conceptions of justice it embodies. In part, our aim is historical exegesis. Hobbes' theory of law included a conception of distributive laws and distributive justice. But it did not include, at least not obviously, a separate theory of corrective justice.<sup>21</sup> We set forth Hobbes' legal vision in some detail to lay bare the structure that enabled him to reject notions about corrective justice that many theorists today readily assume.

In place of the classic Aristotelian distinction between corrective and distributive justice,<sup>22</sup> Hobbes explicitly substituted a distinction between commutative and distributive justice. The former pertains to keeping one's covenants, the latter to the allocation of goods and liberties. Hobbes' theory suggests that what is often called "corrective" justice is only a contingent, heuristic aspect of a system of just distribution. We believe that an examination of Hobbes' philosophy of law can potentially illuminate current discussion of the moral foundations of tort law. His was the philosophy of a legal formalist and rule positivist who expressly rejected central aspects of the Aristotelian analysis of justice that some present-day scholars readily embrace. We do not hold up Hobbes' legal philosophy as a model. However, his ideas underscore the need to take seriously theories of justice that reject responses to personal injury premised on the supposed demands of corrective justice.

Identifying Thomas Aquinas and Immanuel Kant as two philosophers influenced by what he regards as Aristotle's problematic analysis of justice, Richard Posner has observed with regret that "there has been little discussion of corrective justice by philosophers, and the concept remains essentially where Aristotle left it."<sup>23</sup> Posner has not mention Hobbes' effort to modify the Aristotelian analysis of justice. Indeed, legal scholars have

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20. Hobbes, *supra* note 17, at 129-261.

21. This Essay uses "corrective," "compensatory," and "rectificatory" as synonyms. Sometimes "repair" will be used to indicate rectification in kind and "compensate" to indicate monetary rectification.

22. See Aristotle, *supra* note 3, Book 5, at 112-21; see generally Weinrib, *Aristotle's Forms of Justice*, *supra* note 2.

23. Richard Posner, *The Problems of Jurisprudence* 323 n.11 (1990).

paid little attention to the details of Hobbes' discussion of justice, though they frequently mention his social contract theory and his definition of law as the sovereign's commands.<sup>24</sup> Consequently, Hobbes' rejection of corrective justice (other than in the context of contract law) has gone virtually unexamined.

This Essay will demonstrate that Hobbes' legal theory is, surprisingly, a distant cousin both of Posner's anti-Aristotelianism and of Weinrib's neo-Aristotelianism. Influenced by Weinrib's theories, contemporary discussions of the moral foundations of tort law seem to presuppose that formalist and corrective justice approaches to personal injury are inseparable. Hobbes' legal theory deserves attention, in part, to help underscore the point that formalism and corrective justice are separable. Part I of this Essay will lay out Hobbes' theory of legal justice to show its distinct positivism, formalism, and avoidance of Aristotle's corrective justice. Part II will consider Hobbes' theory in relation to recent debates.

## I. HOBBS ON JUSTICE

Hobbes' theory of justice is inseparable from his theory of law. "[L]aws are the rules of just, and unjust," Hobbes asserted, "nothing being reputed unjust that is not contrary to some law."<sup>25</sup> Hobbes' theory of law is a structural beam in the edifice of a contractarian political theory of the "forme [sic] and power of a commonwealth ecclesiastical and civil."<sup>26</sup>

### A. *Natural Law*

The political theory of the *Leviathan* is familiar terrain to political theorists. According to Hobbes, the natural condition of humankind is a condition of war.<sup>27</sup> Virtually equal in body, mind, and hope, human beings in a state of nature will employ violence to gain and defend power, possessions, and reputation. So conceived, the natural predicament of humanity is the "war of every man, against every man."<sup>28</sup> Two dispositions incline rational, self-interested human individuals to seek peace. First, they fear death. Second, they desire necessities, comforts, and the fruits of personal industry.<sup>29</sup> To escape the perils of violent competition among equals over resources and social standing, individuals seek the protection of a common power or sovereign who can "over-awe them all."<sup>30</sup> To escape a life that is "solitary, poor, nasty, brutish and short,"<sup>31</sup> rational persons will compact to form a commonwealth in which they all are subject to a single sovereign with absolute political authority and the ability to maintain peace.

24. E.g. *id.* at 11, 13, 151, 172, 340.

25. Hobbes, *supra* note 17, at 198.

26. *Id.* at unnumbered title page.

27. *Id.* at 98-99.

28. *Id.* at 100-01.

29. *Id.* at 102.

30. *Id.* at 99.

31. *Id.* at 100.

Hobbes maintained that reason dictates ceding all natural liberty—short of the liberty of self-preservation against direct threats—to a mighty commonwealth. He identified nineteen “natural laws,” also termed “commands of God” and “moral virtues,” conformity to which is called for by rational self-preservation.<sup>32</sup> He defined a natural law as “a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and omit that, by which he thinketh it may be best preserved.”<sup>33</sup> Hobbes’ first law of nature is that “naturally every man has a right to everything.”<sup>34</sup> The second is that “a man be willing, when others are so too, as far-forth, as for peace, and defence [sic] of himself and be contented with so much liberty against other men, as he would allow other men against himself.”<sup>35</sup> His third is the “fountain and original of JUSTICE,”<sup>36</sup> that “men perform their covenants made.”<sup>37</sup> Other laws of nature include gratitude, mutual accommodation, equity, the facility to pardon, equal use of indivisible common goods, arbitrary division by lot of common goods that cannot be shared, safekeeping of mediators, submission to the judgment of arbitrators, and judicial impartiality. Still other laws of nature proscribe pride, contumely, arrogance, and retribution or revenge that looks at the “greatness of the evil past” rather than at the “greatness of the good to follow.”<sup>38</sup> Hobbes summed up the prescriptive thrust of the nineteen natural laws in one simple formula described as “intelligent even to the meanest capacity” and thus properly binding all: “Do not that to another, which thou wouldest not have done to thyself.”<sup>39</sup>

### B. *Positive Law*

The details of the theory of law set forth in the *Leviathan* are less well known than their contractarian political underpinnings. Hobbes maintained that the rational demands of natural law impel human beings toward the formation of mutually advantageous positive civil law. The Hobbesian laws of nature are “articles of peace” that reason suggests, whereby individuals may come to an agreement to order society in a peaceful state. Products of reason rather than sovereignty, they are “laws” only in a derivative sense. Civil law, or law properly so-called, is the will of the sovereign ruler:

CIVIL LAW is to every subject, those rules, which the commonwealth hath commanded him, by word, by writing, or other sufficient sign of will, to make use of, for the distinction of right, and wrong; that is to say, of what is contrary, and what is not

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32. Id. at 103-22.

33. Id. at 103.

34. Id. (emphasis omitted).

35. Id. at 104 (emphasis omitted).

36. Id. at 113.

37. Id. (emphasis omitted).

38. Id. at 119.

39. Id. at 122.

contrary to the rule.<sup>40</sup>

The sovereign's civil laws define "[g]ood, evil, lawful and unlawful," as well as "the rules of propriety, or meum and tuum."<sup>41</sup> Moreover, the sovereign's laws define justice and injustice in the commonwealth.<sup>42</sup> Hobbes' first and primary definition of justice makes justice a feature of all laws that issue from the sovereign will.

In Hobbes' view, justice depends upon a sovereign's positive rule. Yet the third law of nature appears to introduce a different account of justice that anticipates, rather than depends upon, the existence of rules of positive law: "[W]hen a covenant is made, then to break it is unjust. The definition of INJUSTICE, is no other than the not performance of covenant. And whatsoever is not unjust, is just."<sup>43</sup> The ideal of justice reflected in Hobbes' third law of nature seems to be logically prior to the practical justice which the positive law generates. Hobbes' second definition of justice, the performance of covenants, makes no reference to a sovereign's commands. So, it appears that even in the state of nature individuals could create rights and obligations through private covenants, the performance or nonperformance of which would define a *kind* of justice and injustice. In the absence of the civil commonwealth, individuals possess the natural liberty to, in effect, make their own "law." Individuals can create rights and obligations through private covenants which define a kind of natural justice and injustice.

Hobbes' third law of nature raises several pressing questions concerning his theory of justice. First, is there room in Hobbes' account for talking about justice independently of a commonwealth? Second, what is the connection between Hobbes' first and second definitions of justice? Finally, can we sort through the two definitional strands in Hobbes' argument to yield a coherent account of justice? It is not our aim here to offer a definitive solution to these interpretive queries. However, we suggest that these difficulties in Hobbes' account arise at least in part from his own use of the terms "natural" and "nature." The role of natural law in Hobbes' theory is closely linked to his argument for the creation and legitimacy of the state. Hobbes linked the *effectiveness* of the laws of nature with the existence of certain social background conditions, notably, with the existence of laws properly so-called. Subjects may not appeal to natural law to justify their noncompliance with the positive justice entailed by civil law, no matter what the content of civil law might be. All that justice viewed as a law of nature requires is conformity to reason. "Natural" *means* conformable to reason.<sup>44</sup> Reason dictates that persons seek to escape the condition of war by participating in the creation of a mode of political organization conducive to peace.<sup>45</sup> Justice thus requires making and keeping compacts

40. *Id.* at 138 (emphasis omitted).

41. *Id.*

42. *Id.* at 198.

43. *Id.* at 113 (emphasis omitted).

44. *Id.* at 116-17.

45. As Gregory Kavka points out, the laws of nature must have binding force in what he calls the "attenuated" state of nature. *See* Gregory Kavka, *Hobbesian Moral and Political*



conducive to peace, and a fortiori making and keeping a social compact that will invest a sovereign with unfettered powers. Finally, keeping the social compact entails obeying the sovereign's rules of law defining justice and injustice.

The conventional character of Hobbes' theory of justice has contributed to its infamy. Hobbes required that we label even intolerant laws "just" if they in fact function to keep peace. Hobbes distinguished between the justice of laws and the goodness of laws. The goodness of laws depends on their promoting individuals' fundamental interests consistently with the laws of nature. Although Hobbes allowed for the existence of bad laws, the badness of laws does not affect their status as laws and hence their status as just. But Hobbes' distinction between just and good laws raises a problem. Imagine a commonwealth in which a privileged minority enjoys the benefits of community life, while the majority is subordinated to it by coercion. The repressive sovereign regime persistently issues civil laws favoring the privileged group at the expense of other subjects. Hobbes gave no indication of how much tyranny would spark war and return a people to the state of nature. He implied, however, that if the subordinated subjects of the commonwealth we are imagining could not dispose of the sovereign without instigating discord of uncertain proportions and duration, rational self-preservation would dictate continued tolerance of the intolerant, "just" order. Given that the sovereign defines moral terms through its legislative activity, subjects cannot judge that the commonwealth's laws are bad. Rational people would prefer a "bad" interpretation of the laws of nature to many conflicting ones that might lead them back to the state of nature. It might not be wholly in the subjects' interest to obey the sovereign, but it may be more rational than to disobey the sovereign, thereby risking the dissolution of the commonwealth.

Moreover, the interpretation of the laws of nature always rests with the sovereign and its agents. The "interpretation of all laws dependeth on the authority sovereign; and the interpreters can be none but those, which the sovereign, to whom only the subject oweth obedience, shall appoint."<sup>46</sup> The subjects have scant power to challenge an "incorrect" interpretation of the laws of nature. They cannot even *judge* whether the sovereign's interpretation is correct. It is likely that in a Hobbesian world people's capacity to reflect and to challenge established institutions would be seriously weakened, or at least that competing conceptions of justice would wither away from disuse and inefficiency.

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Theory (1986). Otherwise, the transition to civil society would be impossible. But the sense in which the laws of nature are binding in what Kavka calls the "unadulterated" state of nature, the real *bellum omnes contra omnium*, is obscure. At most, the laws of nature in that state could serve as precepts for personal morality within Hobbes' "natural" institutions (such as the family). Nonetheless, the claim that the laws of nature bind individuals in the attenuated state of nature points to the transitional character of Hobbes' legal positivism.

46. Hobbes, *supra* note 17, at 205.

### C. Formalism and Adjudication

For Hobbes, the positive legal norms of sovereign commonwealths are the formal framework for adjudication. Thus, Hobbes asserted that the good judge will take notice of fact only from witnesses and of law only from the statutes, constitutions and declarations of the sovereign. Legal adjudication is a process of rule application in Hobbes, but rule application of a special sort. It is “verification.”<sup>47</sup> Judges say what is *truly* law and what law *truly* demands.<sup>48</sup>

Yet, for Hobbes, law—however simply expressed and whether written or unwritten—requires interpretation. Hobbesian interpretation consists of “the application of the law to the present case.”<sup>49</sup> It is guided by the intent of the sovereign, to whose lips every court must chain its ears. However, where the intent of the sovereign legislator is inexplicit, unclear, contradictory, or seemingly iniquitous, a judge properly relies upon natural law, and in particular, the natural law of equity.<sup>50</sup> Under the terms of Hobbes’ theory, neither the requirement of judicial interpretation nor the permissibility of judicial appeal to natural law breaches legal formality. Hobbes implied that, to the extent that sovereigns possess effective powers and judges possess virtues of right reason and impartiality,<sup>51</sup> the formal integrity of law as a system of peace-keeping rules is not threatened by politics, realism, pragmatism, judicial activism or other (anachronistically phrased) instrumentalist vices.

#### I. Reciprocal Containment

Modern legal theories from Hobbes’ to H.L.A. Hart’s face what might be called “the realist challenge.” The realist challenge is to give an account of the law that adequately distinguishes law from politics: finding the law (adjudication), from making the law (legislation). Hobbes’ formalist solution to the problem of realism featured his “reciprocal containment” thesis. For Hobbes, a law of nature is a general rule discoverable by reason and directed at procuring the means for self-preservation. In contrast, he defined civil law as “those rules, which the commonwealth hath commanded [every subject] by word, or writing, or other sufficient sign of the will, to make use of, for the distinction of rights, and wrong; that is to say,

47. *Id.* at 204.

48. *Id.* at 209.

49. *Id.* at 206.

50. *Id.* at 209.

51. *See id.* at 210. Hobbes stated:

The things that make a good judge, or a good interpreter of laws, are, first, a *right understanding* of that principal law of nature called equity . . . . Second, contempt of unnecessary riches, and preferments. Thirdly, to be able in judgment to divest himself of all fear, anger, hatred, love, and compassion. Fourthly, and lastly, patience to hear; diligent attention in hearing; and memory to retain, digest, and apply what he hath heard.

*Id.*

of what is contrary, and what is not contrary to the rule.”<sup>52</sup> The “reciprocal containment” thesis is a concise statement of Hobbes’ views on the relation between natural and civil law. As developed, the laws of nature are general rules discoverable by reason and directed at procuring the best means for self-preservation. Civil laws are the sovereign’s commands, which define right and wrong. Hobbes nonetheless argued that “[t]he law of nature, and the civil law, contain each other, and are of equal extent.”<sup>53</sup> He drew the puzzling conclusion that “the law of nature therefore is . . . a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature.”<sup>54</sup> What could Hobbes have meant?

According to Weinrib, “[L]egal formalism claims that juridical relationships can be understood as embodying, in [Roberto] Unger’s phrase, an ‘immanent moral rationality.’”<sup>55</sup> Moreover, “[t]he positive law is immanently rational to the extent that it captures and reflects the contours of rationality that are internal to the relationships that law governs.”<sup>56</sup> Problematically, Hobbes appears to have maintained that positive law is immanently rational to the fullest extent. By virtue of his reciprocal containment thesis, Hobbes’ formalism is a distant cousin of Weinrib’s.

*a. Positive law in the natural law*

The first premise of Hobbes’ reciprocal containment thesis is that the law of nature is contained in the positive civil law. The second premise, which we will seek to elucidate first, is that the positive civil law is contained in the law of nature. The second part of the reciprocal containment thesis could mean at least two things. First, it could mean that the laws of nature rationally and morally mandate the institution of a commonwealth and, a fortiori, civil laws for the protection of individuals’ fundamental interests in a peaceful, cooperative social life. Second, it could mean that the laws of nature contain certain basic rational and moral precepts that are to function as guidelines for the sovereign’s legislation. We will refer to the first as the “contractarian” interpretation and to the second as the “minimum content” interpretation.

According to the contractarian interpretation of the assertion that the civil law is contained in the law of nature, the laws of nature presuppose the conditions that make civil law possible. The contractarian meaning has two shortcomings. First, it shares the weaknesses of Hobbes’ social contract theory generally.<sup>57</sup> Yet, for Hobbes, the social contract is only one means of justifying the origin and legitimacy of the state. He distinguished between commonwealths by institution, contractually created, and commonwealths by acquisition, created by force. In both cases individuals are bound to obey the sovereign, whose powers are absolute. Furthermore, the motivation for

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52. *Id.* at 198.

53. *Id.* at 199.

54. *Id.*

55. Weinrib, *Legal Formalism*, *supra* note 2, at 957.

56. *Id.* at 957 n.26.

57. *See generally* Jean Hampton, *Hobbes and the Social Contract Tradition* (1986) (employing game theory and decision theory to critique Hobbes’ psychology and politics).

obedience is always the same, fear of death, either in the hands of one another (in the state of nature) or in the hands of the sovereign conqueror. The notion of the social contract defines the terms for mutually advantageous cooperation, but so does obedience to a conqueror. As a result, the contractarian interpretation cannot explain the conditions that make civil law possible in commonwealths by acquisition.

The second shortcoming of the contractarian interpretation is that it cannot adequately explain the sense in which the whole of civil law—down to the most technical statutory provisions—can be contained in the laws of nature.

The “minimum content” rendering of the first part of the reciprocal containment thesis is more promising. On this interpretation, the laws of nature provide that civil legislation must incorporate basic natural law if it is to serve its purpose of keeping individuals out of the state of nature. So, for example, all commonwealths should have laws for encouraging cooperation, for according others equal rights, for dividing resources equally or fairly, and for settling disputes by fair arbitration (As we shall see, although one might suppose that rules of corrective justice would be requisite “minimum content,” Hobbes did not specify rules for rectifying losses stemming from personal injury in the *Leviathan*. He did, however, enumerate and rank order common criminal offenses and identify conditions that excuse criminal acts.)

The minimum content interpretation makes Hobbes’ reciprocal thesis and H.L.A. Hart’s argument for the “minimum content of natural law” practically parallel in both aim and content. In *The Concept of Law*, Hart argues that the main difference between moral criticism in terms of justice and other types of moral criticism is that the former is more specific.<sup>58</sup> Criticism in terms of justice is connected to the notion of fairness.

The leading precept in the idea of justice is to “treat like cases alike and treat different cases differently.”<sup>59</sup> This precept has two noteworthy features: a uniform and a shifting criterion. The uniform criterion is the precept’s formal aspect, which remains “an empty form” until filled in. The shifting criterion is the filling in of the precept by determining what makes cases alike and what differences are relevant. These determinations are necessary for the criticism of law as unjust. Impartiality in the application of law to particular cases is not sufficient: an unjust law may be justly administered.<sup>60</sup> The law itself cannot provide the criteria for establishing what similarities and differences among individuals are relevant to the criticism of law as unjust.<sup>61</sup> For these criteria, an appeal to valuative considerations outside the legal system is necessary.

According to Hart, the distributive application of the notion of justice, “the most public and the most legal of the virtues,”<sup>62</sup> gives it special relevance

58. H.L.A. Hart, *The Concept of Law* 154 (1961).

59. *Id.* at 155.

60. *Id.* at 156.

61. *Id.* at 157.

62. *Id.* at 103.

in the criticism of law. Justice is the segment of morality primarily concerned with the ways in which classes of individuals are treated. Principles of justice do not exhaust the idea of morality, however, and thus Hart attempts to provide a general characterization of moral rules or principles.

Two difficulties arise. First, moral terms are open-textured.<sup>63</sup> Second, there is wide disagreement about the status of moral principles.<sup>64</sup> Nonetheless, Hart argues that there are “four cardinal features” common to rules or principles termed “moral”: importance, immunity from deliberate change, voluntary character of moral offenses, and forms of moral pressure.<sup>65</sup> These features are the necessary formal criteria of any moral rule or principle. They shape the wide sense of morality to which Hart adheres. In addition, they are purportedly “neutral” between rival philosophical theories as to the status of moral rules and principles. Like Hobbes and Hume, Hart recognizes that there is a considerable overlap between morality and law, of which he also adopts a “wide” definition.

Hart’s general claim is that there is no necessary connection between morality and law. He acknowledges, however, that there is an important connection between them, albeit weaker. To that extent, his commitment to legal positivism is not to a blindly formalist account. In what Hart calls the “pre-legal world,” the distinction between morality and law is often blurred. The transition to the “legal world,” primarily effected through the introduction of secondary rules, makes the distinction “something definite.”<sup>66</sup>

According to Hart, not all nonlegal rules are moral rules. Rules of etiquette, for example, are not moral. Some nonlegal rules, however, have “supreme importance—these are” moral rules.<sup>67</sup> Very often there will be at least a “partial overlap” between moral and legal rules. The particular obligations recognized in any given legal world vary as its moral code varies. Yet, given certain features of human beings and the world in which they live, the social moralities coexisting alongside legal worlds “always include certain obligations and duties, requiring the sacrifice of private inclination or interest”<sup>68</sup> essential to its survival. Among rules necessary for social life “are those forbidding, or at least restricting, the free use of violence, rules requiring certain forms of honesty and truthfulness in dealings with others, [and] rules forbidding the destruction of tangible things or their seizure from others.”<sup>69</sup>

In short, morality and law share a common commitment both to survival and to securing at least a minimum of protection for human life. This, in turn, explains their largely common vocabulary.<sup>70</sup> Both morality

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63. *Id.* at 164.

64. *Id.*

65. *Id.* at 169-76.

66. *Id.* at 165.

67. *Id.* at 166.

68. *Id.*

69. *Id.* at 167.

70. *Id.* at 168.

and law accept and incorporate “the minimum content of Natural Law.”<sup>71</sup> Hart argues that, given certain “truisms” about human beings and their world, “there are certain rules of conduct which any social organization must contain if it is to be viable.”<sup>72</sup> Four of the “simple truisms” or universally recognized principles of conduct reveal Hart’s conception of human nature: human vulnerability, approximate equality, limited altruism, and limited understanding and strength of will. The fifth one is a fact about the world: that there are limited resources.<sup>73</sup>

Hart’s truisms combine a Hobbesian characterization of human nature with a Humean account of why social conventions are necessary. According to this view, morality and law should have a certain content because these truisms apply to human beings in their world. Any legal system that does not incorporate the minimum content of natural law cannot “forward the minimum purpose of survival which men have in associating with one another.”<sup>74</sup> In its absence, Hart states:

[M]en as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.<sup>75</sup>

Hart emphasizes the social character of justice, which presupposes a framework of rules publicly recognized as regulative of cooperation and a host of public expectations that cannot be met outside such a framework. Like Hobbes, he explains the genesis of justice and justifies its continuity by referring to certain basic features of human nature and to certain presumed primary social needs. Most importantly, however, only public recognition and widespread acceptance of the value of institutions of justice for organized social life can make these institutions stable and reliable. If people were not convinced that the continued existence of these institutions is for their good, and the common good, then they would not be effective. Hart’s reply to the Austinian thesis that the law may have *any* content is an argument from the morality of “natural necessity.”<sup>76</sup> To describe adequately the law and other social institutions, Hart contends, one must make room for statements whose truth is “contingent upon human beings and the world they live in retaining the salient characteristics which they have.”<sup>77</sup> The content requirements of Hart’s argument leave open the possibility that laws may be unjust or immoral in the broad sense of justice or morality. In Hart’s view, narrow definitions of either morality or law “lead us to exclude certain rules even though they exhibit all the complex

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71. *Id.* at 189.

72. *Id.* at 188.

73. *Id.* at 190-93.

74. *Id.* at 189.

75. *Id.*

76. *Id.* at 195.

77. *Id.*

characteristics”<sup>78</sup> of morality or law, thus complicating and obscuring the study of these social phenomena.<sup>79</sup> The use of narrow concepts “would force us to divide in a very unrealistic manner elements in a social structure which function in an identical manner in the lives of those who live by it.”<sup>80</sup> It is at best candid to suppose that the adoption of narrow concepts “is likely to lead to a stiffening of resistance to evil, in the face of threats of organized power, or a clearer realization of what is morally at stake when obedience is demanded.”<sup>81</sup> The law can be, and often has been, an instrument for those who manage to secure enough cooperation from some to dominate others.<sup>82</sup>

Unlike Hobbes, Hart maintains that “to make men clear sighted in confronting the official abuse of power,”<sup>83</sup> as well as in confronting the social abuse of appeals to morality, it is important to “preserve the sense that the certification of something as legally valid [or morally good] is not conclusive of the question of obedience.”<sup>84</sup> The sense that one can appeal to “something outside the official system” ultimately to settle the issue of obedience “is surely more likely to be kept alive among those who think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.”<sup>85</sup> Thus, Hart believes that laws are made, not discovered. Among other things, laws are made to protect interests, to distribute social benefits and burdens, and to secure peaceful, cooperative social life. That they have often fallen short of these goals is a reason for criticism, rather than for claiming that they are not really law.

In principle, the minimum content of natural law is compatible both with gross violations of human beings’ prima facie entitlement to equal treatment and with the maxim that differential treatment requires special forms of justification. For Hart, that neither law nor accepted social morality need extend minimal protection and benefits to all persons within their scope are “painful facts of human history.”<sup>86</sup>

*b. Natural law in the positive law*

We can now apply the two-interpretation analysis to the second part of the reciprocal containment thesis: that the natural law is contained in the civil law. The contractarian interpretation does not help to make the thesis intelligible. It seems empirically false that all commonwealths incorporate laws for peace, the surrender of the right of nature, and the performance

78. *Id.* at 205.

79. *Id.*

80. *Id.* at 177.

81. *Id.* at 205.

82. *Id.* at 295-06.

83. *Id.* at 206.

84. *Id.*

85. *Id.*

86. *Id.* at 196.

of contract. The contractarian meaning certainly cannot explain what the second part of the thesis would mean in commonwealths by acquisition.

Gregory Kavka tries to unpack the second part of the reciprocal containment thesis by suggesting that it might involve either a weak or a strong claim. The strong claim runs counter to Hobbes' legal positivism and to his unyielding belief in the ultimate, absolute authority of the commonwealth's sovereign. The sovereign could very well repudiate the laws of nature without the subjects being able to protest. The weak claim is that the sovereign or its agents must *interpret* the laws of nature. These laws are "not fully developed until embodied in civil law."<sup>87</sup> In other words, the weak claim asserts that the laws of nature "are to be presumptively regarded as part of the civil law of any State even without explicit enunciation or enactment."<sup>88</sup> But the first disjunct runs into the same problem as the strong claim: the sovereign has the power to interpret the laws of nature in any way it sees fit. Moreover, the second disjunct at most could mean that, before enactment, the laws of nature have the status of rational guides for their sovereign's legislative activity. Ascribing such a status to laws of nature would not explain—without falling prey to circularity—why the laws of nature should be normative constraints on legislation.

Kavka believes that Hobbesian philosophy is in a better position than Hobbes to support the strong claim that natural law "is contained in the civil law of all satisfactory States."<sup>89</sup> If "satisfactory states" are defined as those commonwealths with rational sovereigns, Hobbes would agree that the natural law is contained in the civil law of all satisfactory states. In these commonwealths the interpretation problem does not arise because the rational sovereign's legislative authority is consistent with the laws of nature. The laws of nature are "contained in" the civil law of such commonwealths in the sense that they are incorporated in it. The theorems of moral philosophy are part of law properly so-called.

The definition of civil law Hobbes offered is not wholly content-neutral. If content considerations constrain what is to count as law, then not every interpretation of the laws of nature is correct. At least two conditions must be met for the interpretation of the laws of nature to be "correct." First, the rational sovereign must see itself as constrained by the laws of nature. Second, the rational sovereign's interpretation of the laws of nature must secure the peace and prosperity of the subjects of the commonwealth. Morality promotes persons' rational self-interest, notably their fundamental interests in social peace, security of their persons, and comfortable living. To the extent that in commonwealths with rational sovereigns the laws of nature impose content requirements on law, there is a congruence between morality and law.

This implication of Hobbes' view is limited, however, by his assertion that the laws of nature are contained in the civil law in *all* commonwealths of the world. A fortiori, they would be contained in the civil law of

87. Kavka, *supra* note 45, at 249.

88. *Id.*

89. *Id.* at 250.



commonwealths with irrational sovereigns. By "irrational sovereign," we mean a sovereign who acts against peace and the prosperity of its subjects. Hobbes simply assumed that sovereigns are rational (or should be presumed rational by adjudicators), and thereby mystified law as a product of rationality.

## 2. *De-mystification and Re-mystification*

As we have shown, Hobbes' positivism has formalist elements. Strictly defined, all law issues from a sovereign with authority to enforce compliance.<sup>90</sup> Legal justice is nothing but the formal, logical application of positive law. The Hobbesian laws of nature are articles of peace that reason suggests, whereby individuals may come to an agreement to order society in a state of peace. These "articles of peace" are only improperly termed "laws." This thick positivism is the progenitor of Bentham's imperative theory of law and of Austin's influential statement of legal positivism.<sup>91</sup> Hobbes' positivism de-mystified the law to the extent that it broadened the traditional natural law definition of law to include even iniquitous rules set in place by human powers.

But his rationalistic formalism mystifies sovereignty and, through sovereignty, civil law. Hobbes' understanding of positive civil law as a product of sovereignty (and yet) reciprocally contained in natural law infuses his legal theory with a quality of normative mystery contemporary legal realists and pragmatists are quick to discredit. This quality seems to spring from the idiosyncratic character of Hobbes' legal theory. Unlike orthodox natural law theorists on the one hand and strict positivists on the other, Hobbes gave an important role to the laws of nature while arguing that, ultimately, the meaning of law and justice can be elucidated only by reference to a constituted state.

## D. *Distributive Law and Justice*

### 1. *Distributive Laws vs. Penal Laws*

Hobbes divided law into two broad categories, natural and positive.<sup>92</sup> The natural laws are those which have been laws for all eternity. These are not only "natural," but also "moral" laws, consisting in moral virtues such as justice, equity, and all habits of mind conducive to peace. Positive law, on the other hand, is law made "by the will of those that have had the sovereign power over others; and are either written, or made known to men, by some other argument of the will of the legislator."<sup>93</sup>

90. Hart, *supra* note 58, at 126 ("The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for . . . choice [in the application of general rules to particular cases], once the general rule has been laid down.")

91. John Austin, 2 *Lectures on Jurisprudence or the Philosophy of Positive Law* (Robert Campbell ed., 5th ed. 1911) (1873); Jeremy Bentham, *The Limits of Jurisprudence Defined* 139 (Charles Warren Everett ed., 1945).

92. Hobbes, *supra* note 17, at 211.

93. *Id.* at 212.

Positive laws, Hobbes wrote, are either distributive or penal. Distributive laws are those that determine the rights of subjects, “declaring to every man what it is by which he acquireth and holdeth a propriety in lands, or goods, and a right or liberty of action; these speak to all subjects.”<sup>94</sup> By contrast, “penal” laws are those “which declare, what penalty shall be inflicted on those that violate the law; and speak to the ministers and officers ordained for execution.”<sup>95</sup> If the positive law includes tort law, then tort law would appear to be, in Hobbes’ view, distributive, and the rules of justice it establishes are rules of distributive justice. Insofar as they are directed at citizens rather than officials, the laws of property, contract, and substantive criminal laws are also distributive laws in Hobbes’ sense.

Hobbes’ distinction between distributive and penal laws does not correspond to Aristotle’s realms of distributive and corrective justice. For Hobbes, distributive positive laws would seem to include the laws of corrective justice insofar as they are addressed to subjects rather than officials. Again, according to Hobbes, “[D]istributive are those that determine the rights of the subjects, declaring to every man what it is, by which he acquireth and holdeth propriety in lands, or goods, and a right or liberty of action.”<sup>96</sup> A right or liberty of action could include a right to bring a claim for damages, since one of the means by which one “acquireth and holdeth a propriety in lands, or goods”<sup>97</sup> is as a consequence of a successful damage action. Tort law is also, in this sense, distributive. Penal laws are addressed to “ministers and officers” and declare “what penalty shall be inflicted on those that violate the laws.”<sup>98</sup> Hobbes seemed to mean by distributive positive law all of the “primary rules of obligation” (in Hart’s sense) addressed to citizens.

By definition, distributive positive laws establish norms allocating goods and liberties among members of society. Call them “allocation rules.” Do allocation rules entail rules that maintain distributive arrangements? Are “allocation maintenance” rules logically or practically required to dictate procedures to follow when there is, as there inevitably is, willful or accidental deviation from the initial pattern of distribution selected for its ability to secure peace? The Aristotelian analysis of justice suggests that allocation maintenance rules are logically required by a system of human allocation.

Hobbes’ legal theory suggests that allocation maintenance rules are a practical, but ethically contingent, feature of a just system of legal rules. In theory, occasions of privately complained of or officially noticed deviations from an optimal distribution—*A* batters *B*; *C* converts *D*’s property; *E* mismanufactures *F*’s automobile—could be viewed as occasions for forward-looking measures that would deter future injurious conduct, improve safety, morally educate, or encourage insurance. They could also

94. *Id.*

95. *Id.*

96. *Id.* at 212.

97. *Id.*

98. *Id.* at 212.

be viewed, following Aristotle or Kant, as occasions for backward-looking measures such as reparation or punishment.

Hobbes was openly hostile to backward-looking responses to "past evil." He posited as his seventh law of nature that purely vengeful or retributive responses to evil are never justified.<sup>99</sup> Proper punitive responses aim at a good to be gained, such as rehabilitation ("correction of the offender") or deterrence ("direction of others") rather than a loss to be restored or a gain to be disgorged.<sup>100</sup> If, as a descriptive matter, American personal injury law has focused on backward-looking, corrective justice, it is not because of logic alone.

Hobbes did not distinguish distributive laws that allocate from complementary distributive laws that function to maintain allocations by mandating rectification. Indeed, Hobbes had little to say about the details of the "corrective" dimensions of distributive law. His theory can be interpreted as leaving maximum discretion to the sovereign in choosing a corrective justice system. A sovereign could enact regulations aimed at increasing safety and deterring willful injury but providing no legal remedy for individual instances of injury. A sovereign could decide to treat some or all human-caused interference with an initial allocation as crimes, awarding no monetary damages to the victim but punishing the injurer. Victims, if paid, could be paid from public funds or private funds; the private funds could belong to the injurer or not. Something other than money, such as an apology, could be awarded the victim. The sovereign could decide to treat some or all human-caused interference with initial allocations as tort, but award damages from public funds or private insurance funds.

## 2. *Commutative Justice vs. Distributive Justice*

For Aristotle, justice is a virtue, and like other virtues, a mean between two extremes.<sup>101</sup> Justice, the chief and most comprehensive of all virtues, implies obedience to law and fairness to others.<sup>102</sup> Justice as fairness signifies taking no more than one's share of the good things and at least one's share of the bad.<sup>103</sup> Justice as conformity to law signifies obedience to norms whose aim is the happiness of the social and political community.<sup>104</sup> The realms of the unjust and the unfair are not perfectly congruent: everything unfair is unlawful, but not everything unlawful is unfair.<sup>105</sup> Yet "justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice. For legal justice is the discrimination of the just and unjust. . . . We do not allow a *man* to rule, but rational principle . . . ."<sup>106</sup>

99. *Id.* at 119.

100. *Id.*

101. Aristotle, *supra* note 3, at 118.

102. *Id.* at 107.

103. *Id.* at 121.

104. *Id.* at 108.

105. *Id.* at 116.

106. *Id.* at 122-23.

Aristotle distinguished between distributive justice—fairness in distribution—and rectificatory or corrective justice.<sup>107</sup> Distributive justice concerns the proper apportionment or allocation of goods such as wealth or honors.<sup>108</sup> Aristotle allowed that a just apportionment may be equal or unequal, in accordance with principles such as merit, need, desert, or entitlement. Rectificatory justice concerns both voluntary transactions, such as sales, consensually initiated by the parties, and involuntary transactions, such as theft, which is clandestine and nonconsensual.<sup>109</sup> After a voluntary or involuntary transaction that offends the rectificatory ideal of justice the judge tries to take away the offenders' gain and restore equilibrium.<sup>110</sup>

According to Aristotle, in such a situation,

[I]t makes no difference whether a good man has defrauded a bad man or a bad man a good one, or whether it is a good or a bad man that has committed adultery, the law looks only to the distinctive character of the injury, and treats the parties as equals if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other been slain, one suffering and one action have been equally distributed; but no judge tries to equalize things by means of one penalty taking away the gain (or pain) of the assailant.<sup>111</sup>

Aristotle understood that his use of the terms "gain" and "loss" in connection with involuntary noncommercial transactions is metaphorical.<sup>112</sup>

By contrast, for Hobbes, *law* may be penal or distributive in its function while *justice* may be commutative or distributive. For Hobbes, commutative justice is the branch of corrective justice identified by Aristotle as involving voluntary transactions.<sup>113</sup> Commutative justice, described by Hobbes as arithmetical, requires the performance of a contract. It consists of equality in the thing for which the contract has been made. Distributive justice is geometrical. It entails equal benefit for equal merit. When Hobbes described laws as distributive, he was referring to their function. When he described justice as distributive, he was referring to a quality a law must have in order to accord with a natural standard.

Hobbes plainly intended distributive justice to include Aristotle's conception of both involuntary corrective justice and distributive justice. Less clear is Hobbes' intent in departing from the distinction between arithmetical justice and geometrical justice he found in other writers. He clearly saw error in

this distinction, in the sense wherein it useth to be expounded. .

107. *Id.* at 112-17.

108. *Id.* at 117-20.

109. *Id.* at 117, 120.

110. *Id.* at 115.

111. Aristotle, *supra* note 3, at 114-15.

112. *Id.* at 121, 123.

113. Aristotle, *supra* note 3, at 111.

. . . To speak properly, commutative justice, is the justice, of a contractor; that is, a performance of covenant, in buying, and selling; hiring, and letting to hire; lending, and borrowing; exchanging, bartering, and other acts of contract.

And distributive justice, the justice of an arbitrator; that is to say, the act of defining what is just. Wherein, being trusted by them that make him arbitrator, if he perform his trust, he is said to distribute to every man his own: and this is indeed just distribution, and may be called, though improperly, distributive justice; but more properly equity; which also is a law of nature . . . .<sup>114</sup>

Hobbes rejected Aristotle's notion that distributive justice can be based on any standard of "merit."<sup>115</sup> Distributive justice, Hobbes said, is really equitable distribution. It must be based on an arbitrator's judgment of equity. In contrast, Aristotle believed that principles of distributive justice match individuals with their deserts. To Hobbes, however, such reward for merit is a matter of "grace," not justice.<sup>116</sup>

## II. CONTEMPORARY QUESTIONS, HOBBSIAN ANSWERS

Our elaboration of the legal philosophy of the Leviathan reveals a philosophy that is consistent with the abandonment of corrective justice as the foundation for tort law. Indeed, it is consistent with the abandonment of tort law itself. Such an appreciation of the Hobbesian perspective can help contemporary Aristotelians and their critics frame the nature of the normative "tort theory" enterprise.

Lately, this enterprise has most often begun with efforts to show the morality or moral consistency of existing personal injury law. Current tort theory often takes moral assessment of the permissibility or necessity of strict, no-fault liability as its central challenge. To contemporary tort theorists, Aristotle's appeal lies in his provision of a formal, analytic distinction which, when combined with substantive Enlightenment values of equality or equal rights, appears to generate an obligation of individuals and/or society to annul losses. Aristotle provides an analysis that purports to distinguish sharply annulling losses from punishing wrongs and distributing resources fairly.

A Hobbesian perspective, which assumes human equality but collapses distributive and relevant dimensions of corrective justice, asks contemporary theorists to rethink common normative assumptions about annulling losses in response to the inequality resulting from, or violation of rights implied by, victim-injurer relationships. It asks us to rethink whether individuals have a moral duty to annul losses, or a reason to annul losses in addition to submitting to punishment; whether a workable government must have institutions of corrective justice distinct from institutions of distributive or retributive justice; whether, even if protecting equality or equal rights is their aim, corrective institutions must have the private,

114. Hobbes, *supra* note 17, at 118.

115. *Id.*; Aristotle, *supra* note 3, at 112 ("[A]wards should be 'according to merit'").

116. Hobbes, *supra* note 17, at 118.

bilateral, transactional character of current American tort law; and whether a regime of correction can be a regime of *justice* if it must—or may—ignore distributional concerns.

The Hobbesian perspective asks us to rethink the connection between corrective justice and formalism. Hobbes' theory presents an "immanent rationality" formalism that rejects key aspects of Aristotle's analysis. In doing so, it challenges Weinrib's assertion that Aristotle "sets out the justificatory structures to which any coherent legal arrangement must conform."<sup>117</sup> It is by no means self-evident that, or in what sense, Hobbes' distinction between distributive and commutative justice is less "coherent" than Aristotle's distinction between distributive and corrective justice.

In addition, reading Hobbes in light of current corrective justice debates suggests the importance of two specific tasks. First, reading Hobbes suggests the importance of asking certain questions that are not being asked today, chiefly, "who is formalism?" It is beyond the scope of this paper to discuss the social context of the *Leviathan*. Understanding the context of formalism, however, may provide surprising instructions about where to look for insights into the direction of current theory.

Second, reading Hobbes suggests the need for expanding the range of philosophical questions that are asked about personal injury cases. The question, "are fault-based liability and strict liability morally consistent and justifiable?" is an important one. Obsession with that question, however, has come artificially to constrict discussion about morally appropriate responses to personal injury. Certainly, Hobbes' list of nineteen moral laws or virtues is quaint. But it, like similar lists in Aristotle's ethics, stands as a reminder of the richness of moral thinking and discourse.

Hobbes was not above moral reductionism. Indeed, he believed that the collective demand of his nineteen moral virtues could be summed up in one—the negative Golden Rule. Even if, as Hobbes thought, all of the moral virtues could be incorporated "in a single imperative, there would arguably be a great deal to say about the the morality of particular features of American personal injury law. Yet there has been a striking tendency among philosophers to prefer more reductive to less reductive modes of analysis.

#### A. *Who Is Formalism?*

On March 8 and 9, 1991, the University of Iowa College of Law sponsored a conference entitled "Corrective Justice and Formalism." The brochure for the conference stated its goals in broad terms. It would examine the moral dimensions of an important area of law. Conferees were to elaborate theoretical perspectives on "the care one owes to one's neighbors."<sup>118</sup> The academics who presented papers at the conference were asked to focus their comments on the contributions of two scholars, Professor Ernst Weinrib of the University of Toronto and Professor Jules

117. Weinrib, *supra* note 4, at 413.

118. Brochure, *Corrective Justice and Formalism*, Symposium of the Iowa College of Law (on file with the Iowa Law Review).

Coleman of Yale University, to the growing literature on tort theory. Weinrib and Coleman were paired because, to a significant extent, they view tort law as a reflection of corrective ideals of justice and as having moral foundations not wholly reducible to economic instrumentalism.

Professors Weinrib and Coleman both attended the conference. They labored hard for two solid days to present their latest reflections on legal theory and to respond with care to the serious papers and questions introduced for discussion. With characteristic intelligence, warmth, and humility, Weinrib sought to defend his formalist conception of corrective justice.

Weinrib's remarks brought the following odd-sounding question to mind: who is formalism? That is, what kind of person is likely to advance legal formalism? Who finds formalism plausible or credible? Who finds solace in formalism's mandate for richer and richer articulation of strictures contained in the law? We understand these to be questions about the psychology and sociology of legal theory.

The "who is formalism" question emerged as an unexpected response to a certain style of philosophical argument Weinrib employed in defending his formalism. Weinrib asserted that "*we lawyers know* that causation is not the same thing as market deterrence," and that "*we lawyers know* that adjudication is not legislation." These assertions seemed to resonate with many in his audience. The conference audience consisted, in part, of significantly like-minded philosophers without strong affinities either to "law and economics" or "critical legal studies." Yet both like-minded and hostile listeners could potentially appreciate the psychological and sociological limitations of arguments that appeal, even in the respected names of "reflective equilibrium" and "paradigm case intuitionism," to the privileged "*we*" of "*we lawyers know*".

Some who sat in Weinrib's audience may have been waiting to be persuaded of precisely the assertions he elected to assume as true. As the "law is politics" slogan of the critical legal studies movement attests,<sup>119</sup> many lawyers would disagree that adjudication is relevantly different from legislation. One does not have to be a left-winger, however, to be skeptical of the distinction between adjudication and legislation. The experience of teaching jurisprudence to American law students and undergraduates suggests that some students, by virtue of their race, class, gender, sexual orientation or disability, arrive at law school already believing that judges engage, sometimes for better, typically for worse, in making law (legislation) rather than finding law (adjudication). For these individuals, formalism can look like an elaborate form of self-deception, the arguments used to defend it appearing obscure, circular, and self-serving.

At the Iowa conference, Professor Weinrib described formalists as arguing about the requirements of law in a non-vicious circle with a "wide arc." Formalists reason from what they explicitly believe about the law to what they implicitly believe about the law, he explained. A formalist begins with explicit law, probes its presuppositions to reveal implicit law, and then

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119. See generally *The Politics of Law* (David Kairys ed., 1990).

probes further still to reveal the deepest presuppositions of law. Weinrib argues that the deepest probe reaches to the conceptions of Hegelian abstract right, Kantian right, or natural rights immanently contained within the law.

Suppose two interpreters of the Fourteenth Amendment, for instance Chief Justice Rehnquist and Justice Blackmun, begin with its express terms. They both find the ideal of ordered liberty; but then, at a still deeper level they find the opposing "law," one discovering that abortion choice is women's fundamental right, the other discovering that it is not.<sup>120</sup> Who is correct? Which position is most defensible? True? Formalism claims to be consistent with the fact of earnest expert disagreement. A good deal of attention has gone to debating whether that particular claim of formalism can be sustained.<sup>121</sup> We are not here, however, interested in assessing formalism as a theory in the usual way. Rather, we are interested in who can be a formalist and whether only certain kinds of individuals will find the project and methods of formalism appealing.

Formalism is sometimes viewed as inherently conservative. Indeed, it instructs those who reason about law and decide legal cases to look to established positive or natural norms. Members of politically powerless, disadvantaged groups who cannot accept that there could be legitimate legal barriers to empowerment and welfare may be inclined to balk at positivistic formalism. Accustomed to the criticism that formalism impedes reform, Weinrib argued at the Iowa conference that precisely because his theory is purely formal, it should not worry or impede reformers. If tort reformers want the law to do good things, they can work toward the enactment of law that will do good things. Weinrib's only reservation about such a project derives from his belief that the good things legal reformers have typically done in the last one hundred years, in responding to the admitted limitations of the common law, have not been consistent with the principles of corrective justice that make tort law itself coherent.

Weinrib's putatively reassuring response, that reformers may work toward the enactment of better law, is not actually or equally reassuring to everyone. It may be reassuring to those who believe that they or their representatives have the power to bring about substantive legislative reform. It may be reassuring to those who believe that the requirements of natural law or political morality are contained in the positive law, awaiting discovery by a sympathetic judiciary.

Why was formalism appealing to Hobbes? A good deal is known about his life and his beliefs.<sup>122</sup> Born in 1588, Hobbes

found himself in a country where peace and security were constantly in jeopardy because of the demands for liberty and a greater share of government by the growing class of traders,

120. *Cf.* *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785 (1986) (White, J., dissenting).

121. *Cf.* Ronald Dworkin, *Law's Empire* (1986).

122. Miriam Reik, *The Golden Lands of Thomas Hobbes* (1977); George Robertson, *Hobbes* (Scholarly Press 1970) (1910); Arnold Rogow, *Thomas Hobbes: A Radical in the Service of Reaction* (1986).



professional men, and yeomen farmers who rated the authority of the Bible and of their own consciences above that of the magistrates, bishops, and counsellors of the king.<sup>123</sup>

Hobbes particularly despised the authority of organized religion. He almost lost his life for his beliefs. Hobbes' brand of formalism facilitated a theoretical defense of supreme secular authority. Secular authority is as unassailable as church authority if the natural law is contained in the positive law and the positive law is contained in the natural law. Hobbes hoped his formalism would catch on, ending the political chaos of his time, uniting the citizens of England by showing that rationality, prudence, religion, and morality required that all submit equally to the will of an absolute, indivisible, sovereign commonwealth.

In the United States and similar western nations, many people seem to believe that the positive law has a special relationship to religious, moral, or humanistic values; that they are largely congruent. We suggest, however, that legal formalism will not be appealing to those who have come to doubt that special, congruent relationship. Nor will it have appeal to those who doubt that they can win critically important legislative and judicial battles for reform. None of this is intended to prove that formalism is theoretically untenable. We only offer for consideration the thought that formalists in a pluralistic society that includes marginalized groups have a harder rhetorical job than their arguments would seem to indicate that they know.

*B. Is the Choice Between Fault and Strict Liability the Only Question?*

Corrective and distributive rationales coexist in American law. Fault-based and strict-liability co-exist as well, and are often defended by appeal to corrective and distributive rationales, respectively. Recognizing this, Jules Coleman assigned to legal philosophers the task of deciding "whether any moral principle or consistent set of such principles can adequately explain and . . . justify both fault and strict liability."<sup>124</sup>

For Hobbes, the importance of Coleman's question would have been twofold. The question would have been an important one for moral scientists engaged in pure research and for jurists charged with interpreting the law. The civil law contains the natural law—the moral virtues. Jurists charged with interpreting the positive law should have right reason with respect to moral law.

For Hobbes, the natural law is a morality of peace. Conduct is good or bad in relation to whether it promotes or impairs peace. Hobbes, who rejected Aristotle's theory of corrective justice for involuntary transactions, did not directly address the choice between fault and strict liability or whether the two are morally consistent. Hobbesian morality nevertheless suggests several very different responses to Coleman's question. It is

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123. Hobbes, *supra* note 17, at 7.

124. In *Moral Theories of Torts: Parts I and II*, *supra* note 10, Coleman assumes that tort law is a morally significant phenomenon. He also seems to assume that existing tort law, in fact, imposes liability sometimes on the basis of *moral* fault. Given the application of objective standards of intent in intentional torts and reasonableness in negligence, it is not obvious that tort law is governed at all by principles of moral fault.

consistent with the broad outlines of Hobbes' theory to suppose that no private law civil tort remedies are morally required by natural justice. Equity, pardon, and forward-looking retribution are moral virtues under Hobbes' natural ethic. Arguably, rational persons in a state of nature would agree to submit to the authority of a sovereign who collected taxes for a social insurance system that compensated all victims of accidental injury.

A utilitarian's antipathy to purely backward-looking private law responses to intentional and accidental injury is also consistent with the broad outlines of Hobbes' moral thought. An aggressively forward-looking Hobbesian moralist might conclude that the fault principle is an indefensible limitation on liability for injury where goods presumably conducive to peace, such as safety and efficient risk-spreading, can be achieved through a mix of fault-based and strict liability.

Another response would find an argument for fault-based liability in the natural law against pride. Hobbes described pride as the failure to acknowledge others as naturally equal to oneself. It is Kant's version of this idea that grounds Weinrib's defenses of the fault principle in traditional tort law.

A further response would find in the equity and anti-pride laws of nature an argument for a no-fault tort scheme. The most secure peace may depend upon victim-oriented responses to injury that do not discriminate against victims on the basis of moral assessment of an individual injurer's state of mind. According to Coleman, "moral philosophers largely have ignored the question of who should bear a loss when no candidate for it is at fault."<sup>125</sup> Coleman asserts that moral philosophers "have stopped contributing to the dialogue at the very point where their contribution is needed most."<sup>126</sup>

The important question of the consistency and justifiability of the fault-based and strict liability tendencies of contemporary tort law can overpower other important questions. Consider the following intentional tort case.<sup>127</sup> A four-year-old boy, Salvatore D'Angelo, intentionally battered his teenage babysitter, breaking both her arms. She sued in tort. According to Coleman's theory, corrective justice will impose a prima facie duty on the agent, little Salvatore, that gives him a reason for acting to annul the loss occasioned by his wrongdoing. He may be excused from such a duty because of his age. For now, we will ignore the problematic nature of speaking about the moral reasons small children—or other mental incompetents liable for intentional torts at common law—have for acting. The implicit attribution of moral responsibility here is provisional.

Society's tort system, in the name of corrective justice, may impose private liability on Salvatore as the mode of rectification. Does it have to? A public response to private injury is a contingent requirement in Hobbes' view, existing only to the extent peace requires. Coleman, however,

125. *Markets, Morals and the Law*, supra note 10, at 183.

126. *Id.*

127. The fact pattern which follows is based on *Ellis v. D'Angelo*, 116 Cal. App. 2d 310 (1955) (holding that a child of four may be held liable for intentional torts).

apparently believes that justice requires a public response to intentionally caused personal injury, non-contingently. Yet the existence of moral rights and duties of corrective justice does not entail that the state ought to do anything in response to the "fact" that a particular victim experiences a loss and an injurer has a duty to that victim. Arguably, the state must enforce the moral "rights" of victims. States, however, do not enforce all of our moral rights. It is not obvious that a just state would be less just if it employed noncorrective, nonrelational modes of responding to injury. Tort theorists are obliged to provide an understanding of the moral argument from individual moral rights to morally obligatory public institutions protecting those rights.

While some would say that corrective justice requires that the sitter be paid out of Salvatore's (or his insurance company's) pocket, Coleman would entertain, in our view properly, the possibility that some nontort distributive mechanism could justly compensate the sitter. Coleman would probably agree that a just society may conclude that Salvatore is not a morally culpable agent and thus impose no legal liability. Can a just society recognize that Salvatore is morally innocent and still hold him liable in intentional tort by appeal to the "two innocents" maxim?<sup>128</sup> The two innocents maxim provides that as between two innocent parties, loss should ultimately fall on the party who instigated or caused the injury. Legal liability premised on the two innocents maxim is not barred by Coleman's mixed conception of corrective justice. However, Coleman would stress that application of the maxim is not the application of corrective justice if Salvatore is innocent rather than a wrongdoer. In so far as tort law relies upon the two innocents maxim, the justice of tort law is distributional. In two innocents cases involving children and the insane, the argument is often made that imposing liability on an incompetent will encourage responsible adult caretakers with an economic interest in the defendant's estate to take precautions against injury.

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128. See, e.g., *Polmatier v. Russ*, 537 A.2d 468 (Conn. 1988) (holding insane person liable for intentional tort, and stating "where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss rather than on the other who had no agency in producing it and could not have avoided it"); *Losee v. Buchanan*, 51 N.Y. 476 (1873) (holding there was no liability without fault for injuries caused by paper mill explosion, and there was no application in case like this of rule that "where one of two innocent parties must suffer, he who puts in motion the cause of injury must bear the loss"); *Breunig v. American Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970) (declaring no liability without fault for injuries caused by suddenly insane person and finding that policy basis for holding permanently insane persons liable for their torts includes "[w]here one of two innocent persons must suffer a loss it should be borne by the one who occasioned it"); *Jolley v. Powell*, 299 So. 2d 647 (Fla. Dist. Ct. App. 1974), *cert. denied*, 309 So. 2d 7 (Fla. 1975) (finding that insanity of man who shot another under bizarre circumstances does not justify exception to reasonable man standard and stating "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it"); cf. *Becker v. Interstate Properties*, 569 F.2d 1203 (3d Cir. 1977) (holding real estate developer liable for negligence of undercapitalized sub-contractor); *Ellis v. D'Angelo*, 116 Cal. App. 2d 310 (1955) (finding that child of four may be held liable for intentional torts explaining that "it is just that the loss should fall on the estate of the wrongdoer rather than on that of a guiltless person, and that without reference to the question of moral guilt").

The cases above are a diverse sampling of cases citing the influential maxim. Each case appears in W. Page Keeton et al., *Tort and Accident Law* (1989).

It is generally assumed that corrective justice or corrective and distributive justice together exhaust the moral foundations of personal injury law. This assumption is not clearly warranted. Morally speaking, from a perspective that emphasizes responsibility, one could argue that Salvatore's parents ought to be liable for his intentional injuries because they are his parents. We do not propose to defend this view, but a moral perspective that regards certain family members as co-responsible is not on its face implausible. The existing common law rule officially limits parental responsibility to instances in which the parents had reason to know of their child's dangerous proclivities. But why should parental liability be so limited? The move away from the patriarchal legal rules that formerly treated husbands and wives as a single entity, did not foreclose a new morality and law of familial responsibility.

Even without a morality of familial responsibility, one could argue that non-negligent parents should help to pay for the sitter's injury. A morally decent thing to do might be for the parents to offer to pay at least half of the sitter's medical costs. It would be a way of expressing gratitude. It would acknowledge that it was out of a mutually beneficial arrangement ("contract") for services that the injury to the sitter occurred. The implausibility of the argument that the sitter's wages reflected her risks, makes the loss-sharing argument very attractive from a moral point of view.

Should tort law sometimes require sharing losses in the name of decency, or gratitude? Are there *sui generis* moral relationships or ad hoc moral obligations that justify legal liability on some occasions? Should tort law require moral virtue of parties in situations in which corrective and distributive justice would not call for liability? Do such situations exist? Do existing tort rules, such as the rule that limits parental liability or the rule against "bad Samaritan" liability, reflect rejection by positive law of Hobbes' moral virtues—his natural laws—as legal requirements? Can traditional rules conceived by philosophers in corrective justice or distributive justice terms be reconceived in terms of moral virtues? Can they be reconciled with moral virtues?

Such questions warrant exploration, alongside the question of the morality of strict liability that has become a staple of mainstream tort theory. To date, the small number of philosophers who have turned their attention to tort law and to questions of liability in the absence of fault have been remarkably like-minded about the kind of moral reflection they deem relevant to the tort law. It is no small accomplishment, in connection with personal injury law, to illuminate, as several theorists have, the moral requirements of equality, of moral rights, and of reciprocity. But, we conclude, it will be important to go broader as we go deeper.