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## A LEGAL COMMENTARY ON HOBBESIAN PHILOSOPHY

H. Newcomb Morse\*

The objective of this legal commentary is threefold: firstly, to subject selected salient statements of Hobbesian philosophy to scrutiny and analysis; secondly, to delineate the profundity of Hobbes' observations upon the law; and, thirdly, to reveal the remarkable relevancy, especially for Americans, of such philosophical utterances today, although made in the England of over three centuries ago.

Hobbes mentioned "a common Power set over them both [two men], with right and force sufficient to compell performance."<sup>1</sup> This statement anticipated the Constitution of the United States as a common power set over all three branches of government (the legislative, executive and judicial departments, the "irreprehensible," the "irresistible" and the "irreversible,"<sup>2</sup> respectively), with right (established by the legislative or executive department or, in the event of questioned legality, the one or the other with the concurrence of the judicial department) and force (the executive department) sufficient to compel performance. Establishment by Mr. Chief Justice John Marshall of the doctrine of judicial review in the United States made for, not judicial superiority, but instead judicial hegemony precisely because the Constitution constituted a common power set over all three of the great departments of national government. Hobbes referred to "a civill estate, where there is a Power set up to constrain those that would otherwise violate their

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1. T. HOBBS, *LEVIATHAN* 113 (Everyman's Ed. 1950) [hereinafter cited as HOBBS]. The spelling capitalization and punctuation, including even the variations therein, of the original manuscript as reprinted in the Everyman's Edition are reproduced herein.

2. I. KANT, *THE PHILOSOPHY OF LAW—AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 170 (1974) [hereinafter cited as KANT].

faith.”<sup>3</sup> That power, in the context of the Constitution of the United States, is the executive department.

Hobbes stated:

And they that give to a man the Right of government in Sovereignty, are understood to give him the right of levying mony to maintain Souldiers . . . .<sup>4</sup>

In the American milieu the right of government in sovereignty was not given but rather was delegated; they that delegated it were the peoples of the several states, and it (most of it) was delegated not to a man (a king or prince) but instead to the state governments, and thence a small portion of that part of it which had been delegated to the state governments was delegated by the latter, with the concurrence of their constituent peoples, to the national government under and pursuant to the Constitution. The most important attribute of this delegated sovereignty (one faction of that portion delegated to the national government) is “the power to tax,”<sup>5</sup> which Marshall aptly characterized as involving “the power to destroy,”<sup>6</sup> for without this power and the exercise thereof, the raising and supporting of armies<sup>7</sup> and the providing for and maintaining of a navy<sup>8</sup> would be impossible of performance.

Hobbes maintained that “there must be some coërcive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant.”<sup>9</sup> He was alluding to the two-faceted deterrence theory of punishment for crime: if the punishment is sufficiently severe, knowledge thereof in all likelihood will deter *A* from committing the crime, but if *A* nevertheless does commit the crime, knowledge of the example made of *A* in all probability will deter *B*, *C*, *D*, and others from doing likewise. With respect to punishment per se as *the* response to crime, it might be noted that this assumption preceded Hobbes’ *Leviathan* by millennia and was reflected 215 years later in the title of the Dostoyevsky novel *Crime and Punishment*, which antedated by over a century the beginning of an attitudinal change manifested in the title of the Menninger book *The Crime of Punishment*, in which Dr.

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3. HOBBS, *supra* note 1, at 37.

4. *Id.* at 114.

5. U.S. CONST. art. I, § 8, cl. 1.

6. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 415, 436 (1819).

7. U.S. CONST. art. I, § 8, cl. 12.

8. U.S. CONST. art. I, § 8, cl. 13.

9. HOBBS, *supra* note 1, at 119.

Menninger makes the statement: “[T]he prevalent punitive attitude of the public toward criminals in self-destructive, and hence itself a crime.”<sup>10</sup>

Hobbes stated:

Again, the Injustice of Manners, is the disposition, or aptitude to do Injurie; and is Injustice before it proceed to Act; and without supposing any individual person injured.<sup>11</sup>

The mere preparation to commit a crime, without an overt act, does not constitute even an attempt to commit a crime, let alone a completed crime. Assume, for example, a gang exists consisting of *A*, a potential accessory before the fact; *B*, a potential principal in the second degree; *C*, a potential principal in the first degree; and *D*, a potential accessory after the fact. *A* plans a bank robbery whereby *B* will drive *C* to the bank, wait in the automobile while *C* robs the bank and then *B* and *C* will repair to *D*'s remote cabin where *D* will harbor them. If, in arriving at the bank, *B* and *C* abandon the scheme, none of them, including *A*, has committed any crime. But while no crime has been committed, an injustice of manners has occurred; the injustice of manners is, quite simply, Hobbesian for sin. Also, no overt act was necessary to complete the offense of criminal conspiracy at common law.<sup>12</sup>

Hobbes stated:

And so also in Common-wealths, private men may remit to one another their debts; but not robberies or other violences, whereby they are endammaged; because the detaining of Debt, is an Injury to themselves; but Robbery and Violence, are Injuries to the Persons of the Common-wealth.<sup>13</sup>

A common generic classification of crimes is that of crimes of violence (or human crimes) and property crimes. Robbery, like arson, partakes of both characteristics, presenting a classification problem. This problem was resolved by American courts holding that violence, or the threat or otherwise putting in fear thereof, is the gravamen of robbery and that, consequently, robbery is a crime primarily against the person rather than against property.<sup>14</sup> The phrase “robberies or other violences” reveals

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10. K. MENNINGER, *THE CRIME OF PUNISHMENT* 156 (1969).

11. HOBBS, *supra* note 1, at 123.

12. *United States v. Hirsch*, 100 U.S. 33, 34 (1879).

13. HOBBS, *supra* note 1, at 124.

14. “Larceny is an offense against the possession; robbery, against the person.” *Neufield v. United States*, 118 F.2d 375, 388 (D.C. Cir. 1941). “Although robbery at

that Hobbes preceded the American courts in reaching this conclusion by over two and a half centuries.

Hobbes stated:

*Men look not at the greatness of the evill past, but the greatness of the good to follow.* Whereby we are forbidden to inflict punishment with any other designe, than for correction of the offender, or direction of others.<sup>15</sup>

“Direction of others” refers to the second facet of the two-faceted deterrence theory of punishment heretofore mentioned. Correction of the offender refers to the reformation or rehabilitation theory of punishment. While reformation and rehabilitation mean approximately the same in this context, the former term was used earlier and has more of a moral ring. Hobbes’ thought here has the approbation of latter-day legal philosophers, as, for example: Roscoe Pound and George Whitecross Paton both use the word “individualization” in advocating that the punishment fit the criminal rather than the crime. Pound declared: “Again in criminal law, one of the problems is the individualization of punishment, the adjusting of our penal system to the criminal rather than to the abstract crime.”<sup>16</sup> And Paton said:

Modern criminology considers that the *personality* of the offender is as important as his *act* and emphasizes that the wrongdoer is not only a criminal to be punished but a patient to be treated. The cry is for individualization of the penalty, not to let the punishment fit the crime, but the personality of the criminal.<sup>17</sup>

Hobbes stated:

[N]o man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other: for hee hath taken (though an unavoydable bribe, yet) a bribe; and no man can be obliged to trust him.<sup>18</sup>

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common law is a species of aggravated larceny, the gist of the offense is a crime against the person, as larceny is an offense against the possession.” *United States v. Mann*, 119 F. Supp. 406, 407 (D.D.C. 1954). “Robbery is an offense against the person.” *Whitley v. Cunningham*, 205 Va. 251, 256, 135 S.E.2d 823, 827 (1964).

15. HOBBS, *supra* note 1, at 126-27.

16. R. POUND, *THE SPIRIT OF THE COMMON LAW* 49 (1921).

17. G. PATON, *A TEXT-BOOK OF JURISPRUDENCE* 349 (1946) [hereinafter cited as PATON].

18. HOBBS, *supra* note 1, at 130.

Hobbes foreshadowed the modern American prevalence of conflict of interest and the concern over this nefarious phenomenon. The legitimacy of his emphasis of bribery is reflected in that offense being one of only three national constitutional crimes in the United States.<sup>19</sup>

Hobbes stated:

*Whatsoever you require that others should do to you, that do ye to them.*<sup>20</sup>

This is, of course, a restatement of the positive wording of the Platonic Golden Rule, announced three and a half centuries before Christ, and the Christian Golden Rule.

Hobbes further stated:

*Do not that to another, which thou wouldest not have done to thy selfe . . . .*<sup>21</sup>

This statement is consonant with the negative wording of the Confucianist Golden Rule, announced five centuries before Christ. The distinction is manifested in the moral law today, as interpreted by clergymen in their sermons, with the accent not on punishment for committing sins, as formerly, but on reward for not committing sins. It is the difference between "Be good" and "Do not be bad," the difference between a mandatory and a prohibitory injunction. Both the clergymen of a bygone era and the clergymen of the present, in emphasizing punishment and reward, respectively, are consistent in meaning that punishment and reward are dispensed by God. But, according to Hobbes, the Golden Rule, whether expressed in a positive-mandatory fashion or in a negative-prohibitory manner, is predicated upon punishment, but punishment meted out by the state, as enunciated in the following passage:

For the Lawes of Nature (as *Justice, Equity, Modesty, Mercy,* and (in summe) *doing to others, as wee would be done to,*) of themselves, without the terrour of some Power, to cause them to be observed, are contrary to our naturall Passions, that carry us to Partiality, Pride, Revenge, and the like. And Covenants, without the Sword, are but Words, and of no strength to secure a man at all.<sup>22</sup>

This calls to mind Mr. Justice Felix Frankfurter's dissenting opinion in *Baker v. Carr*<sup>23</sup> in which he wrote: "The [Supreme] Court's authority—

19. See U.S. CONST. art. II, § 4 (bribery and treason); art. I, § 6 cl. 1 (breach of the peace and treason); art. III, § 3, cls. 1, 2 (treason).

20. HOBBS, *supra* note 1, at 108.

21. *Id.* at 131.

22. *Id.* at 139.

23. 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”<sup>24</sup> The purse is possessed by the Congress and the sword by the President, but the Constitution, as the covenant, in Hobbesian verbiage, of “that great [American] LEVIATHAN,”<sup>25</sup> “that *Mortal God*,”<sup>26</sup> that “Artificial Man,”<sup>27</sup> this Golem, and the Supreme Court as the interpreter of “the dernier Resort”<sup>28</sup> of that covenant, ultimately rest their case on sustained public confidence in their moral sanction.

Hobbes stated:

And as small Familyes did then; so now do Cities and Kingdomes which are but greater Families (for their own security) . . . .<sup>29</sup>

This is similar to the Hegelian statement: “A nation does not begin by being a state. The transition from a family, a horde, a clan, a multitude, & C., to political conditions is the realization of the Idea in the form of that nation.”<sup>30</sup> The truth of these statements is manifested by the historical development of the doctrine of self-defense. The word “self” in the word “self-defense” has evolved in latitude of meaning and has a meaning quite different in extent from the word “self” in the real property phrase “self-help.” From the standpoint of life, limb, and liberty, originally, under the common law, man had the legal right to strike and to kill, if need be, in the protection of only his own person. Later, however, this right was extended so as to include the protection by man of the persons of his immediate family. This enlarged meaning of the word “self” in the phrase “self-defense” is analogous to the meaning accorded the word “personal” in the law of infancy pertaining to the infant’s liability on quantum valebant for necessities purchased which he needed and which were for his personal benefit. The extended meaning of the word “self” in the phrase “self-defense” was further enlarged so as to encompass the protection by man of the persons of fellow human beings threatened with great and immediate bodily harm unless so threatened in execution of public justice. Or perhaps, regard-

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24. *Id.* at 267.

25. HOBBS, *supra* note 1, at 143.

26. *Id.*

27. *Id.* at 179.

28. *Williams v. Watson’s Executors*, (C.P.S.C. 1759) reprinted in J. SMITH, *CASES & MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 453 (1965).

29. HOBBS, *supra* note 1, at 140.

30. G. HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* 218-19 (1969) [hereinafter cited at HEGEL].

ing this second extension, the word "family" instead was rendered an enlarged meaning in this connection so as to refer to all members of the human family rather than to only one individual family. The present meaning of the word "self" in the phrase "self-defense" thus bears a meaning considerably different in degree from the word "self" in the distraint designation "self-help," which remedy may be exercised, for example, only by a lessor or someone in privity to him.

Hobbes stated:

The Multitude sufficient to confide in for our Security, is not determined by any certain number, but by comparison with the Enemy we feare; and is then sufficient, when the odds of the Enemy is not of so visible and conspicuous moment, to determine the event of warre, as to move him to attempt.<sup>31</sup>

This statement espouses the deterrence theory in international relations which probably realized its most eloquent American expression in President George Washington's celebrated statement: "To be prepared for war is one of the most effectual means of preserving peace."<sup>32</sup>

Hobbes stated:

And be there never so great a Multitude; yet if their actions be directed according to their particular judgements, and particular appetites, they can expect thereby no defence, nor protection, neither against a Common enemy, nor against the injuries of one another. For being distracted in opinions concerning the best use and application of their strength, they do not help, but hinder one another; and reduce their strength by mutuall opposition to nothing: whereby they are easily . . . subdued by a very few that agree together . . .<sup>33</sup>

This is a cautionary statement, especially salutary for constitutional parliamentary governments warring with totalitarian states. The message is all too clear: do not debate while Washington, Paris or London is about to burn.

Hobbes stated:

From this Institution of a Common-wealth are derived all the *Rights*, and *Facultyes* of him, or them, on whom the Sovereign Power is conferred by the consent of the People assembled.<sup>34</sup>

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31. HOBBS, *supra* note 1, at 140.

32. First Annual Address to both Houses of Congress (January 8, 1790).

33. HOBBS, *supra* note 1, at 140-41.

34. *Id.* at 145.



The objections to this statement in its application to the American political system are the same objections which were levied against Hobbes' third aforementioned statement. However, the efficacy of the latter part of the statement "by the consent of the People assembled" is borne out by the statement in the Declaration of Independence: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."<sup>35</sup> Under the Constitution of the United States, the peoples of the several states, being sovereign, are both the *governed* and the *governing* (through their elected representatives); there is a *hypostatical union* of two hypostases; that is, of two substances or natures (governed and governing) in the person of the people of each state, transposing from the theological to the political the following Hobbesian statement: "But the word *hypostatical union* is . . . the union of two hypostases, that is, of two substances or natures (human and divine) in the person of Christ."<sup>36</sup>

Hobbes stated:

[T]hey that have already Instituted a Common-wealth, being thereby bound by Covenant, to own the Actions, and Judgements of one, cannot lawfully make a new Covenant, amongst themselves, to be obedient to any other, in any thing whatsoever, without his permission. And therefore, they that are subjects to a Monarch, cannot without his leave cast off Monarchy . . . .<sup>37</sup>

This statement certainly is in utter irreconcilable conflict with the Declaration of Independence.

Hobbes stated:

And whereas some men have pretended for their disobedience to their Sovereign, a new Covenant, made, not with men, but with God; this also is unjust . . . .<sup>38</sup>

This statement surely is at loggerheads with the action taken by Sir Thomas More, the great recusant, whose "new Covenant" was indeed truly a "new and everlasting covenant" with the "*Immortal God*,"<sup>39</sup> which Hobbes conceded was higher than the Leviathan or the "Artificial Man"<sup>40</sup> when he referred to "that *Mortal God* . . . under the

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35. Declaration of Independence at clause 2 (1776).

36. IV THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY 311 (W. Molesworth ed. 1962) (1st ed. London 1840).

37. HOBBS, *supra* note 1, at 145.

38. *Id.*

39. *Id.* at 143..

40. *Id.* at 179.

*Immortal God* . . . .<sup>41</sup> Dramatist Robert Bolt, in his play *A Man for All Seasons*, has Sir Thomas More speak thusly: "The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy."<sup>42</sup> The duty to God and the duty to the Commonwealth or State are not only different but unequal and, in the event of the repugnancy of the latter to the former, the former may be analogized to organic law and the latter to statutory law, with the following rule governing: "[T]he existence and authoritative capacity of governmental instrumentalities for making law, their powers, and the methods by which their powers may legally be exercised, are subject to the higher law of the constitution."<sup>43</sup>

Hobbes stated:

Because the Right of bearing the Person of them all, is given to him they make Sovereigne, by Covenant onely of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Sovereigne; and consequently none of his Subjects, by any pretence of forfeiture, can be freed from his Subjection.<sup>44</sup>

This statement could not be used as an argument against the legality of the secession of 1860 and 1861 because secession was effected by states, not citizens acting individually, and because the states seceded with the authorization of their sovereigns, namely, their respective peoples. In secession, there was no breach of covenant (the Constitution) on the part of the Southern states as (by and through their peoples) sovereigns; there were breaches of the covenant on the part of the national government, but the national government was not a sovereign. It was not citizens who wished to be freed from the sovereign's subjection, but sovereigns who wished to be freed from the non-sovereign national government's extra-constitutional subjection.

Hobbes stated:

But by this Institution of a Common-wealth, every particular man is Author of all the Sovereigne doth; and consequently he that complaineth of injury from his Sovereigne, complaineth of that whereof he himselfe is Author . . . .<sup>45</sup>

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41. *Id.* at 143.

42. R. BOLT, *A MAN FOR ALL SEASONS* 126 (1962).

43. 1 D. SANDS, *STATUTES & STATUTORY CONSTRUCTION* 13 (4th ed. 1972).

44. HOBBS, *supra* note 1, at 146.

45. *Id.* at 148.

A man cannot sue himself, nor generally can he sue another when he, himself, is at fault (the delict doctrine of contributory negligence and the family relations law doctrine of recrimination); thus, the constitutional law doctrine of sovereign immunity.

Hobbes stated:

[A]nnexed to the Soveraigntie, [is] the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects  
 . . . .<sup>46</sup>

This statement bears remarkable similarity to the following statement by Mr. Justice Bushrod Washington of the United States Supreme Court, while presiding over the Circuit Court in *Corfield v. Coryell*:<sup>47</sup>

The inquiry is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; . . . with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.<sup>48</sup>

The word “Goods” in Hobbes’ context has its equivalent in Mr. Justice Washington’s term “property.” Hobbes’ phrase “what Goods he may enjoy” has its Washingtonian counterpart in “with the right to acquire and possess property of every kind.” The Hobbesian phrase “what Actions he may doe” left its imprint on Mr. Justice Washington’s phrase “(with the right ) to pursue and obtain happiness and safety.” And Hobbes’ phrase “without being molested by any of his fellow Subjects” is reflected in Mr. Justice Washington’s phrase “protection by the government.”

46. *Id.* at 149.

47. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3,230).

48. *Id.* at 551-52 (emphasis added). This rationale was quoted with approval and relied upon heavily by Mr. Justice Samuel F. Miller in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75-76 (1873).

Hobbes stated:

For seeing the Sovereign is charged with the End, which is the Common Peace and Defence; he is understood to have Power to use such Means, as he shall think most fit for his discharge.<sup>49</sup>

This statement is a progenitor pronouncement of Mr. Chief Justice Marshall's doctrine of incidental or implied powers, laid down as follows in *M'Culloch v. Maryland*<sup>50</sup> in 1819: "But there is no phrase in the instrument [the Constitution] which, like the articles of confederation, excludes incidental or implied powers."<sup>51</sup> [T]hat instrument does not profess to enumerate the means by which the powers it confers may be executed."<sup>52</sup>

Hobbes stated:

For whatsoever, is so tyed, or environed, as it cannot move, but within a certain space, which space is determined by the opposition of some externall body, we say it hath not Liberty to go further.<sup>53</sup>

Mr. Justice Miller in the *Slaughter-House Cases*<sup>54</sup> held that a privilege and immunity<sup>55</sup> which owes its "existence to the Federal government, its national character, its Constitution, or its laws"<sup>56</sup> is "that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state."<sup>57</sup> How could one establish such residence were he not allowed to travel to the state of his choice and enter same? The Supreme Court of the United States, in the 1941 case of *Edwards v. California*,<sup>58</sup> repulsed a statutory assault by California<sup>59</sup> against the liberty referred to in the Hobbesian statement by "restraining the transportation of persons and property across its border."<sup>60</sup>

49. HOBBS, *supra* note 1, at 151.

50. 17 U.S. (4 Wheat.) 415 (1819).

51. *Id.* at 421.

52. *Id.* at 423.

53. HOBBS, *supra* note 1, at 177.

54. 83 U.S. (16 Wall.) 36, 75-76 (1873).

55. U.S. CONST. amend. XIV, § 1.

56. 83 U.S. at 79.

57. *Id.* at 80.

58. 314 U.S. 160 (1941).

59. "Every person, firm or corporation or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." CAL. WELF. & INSR. CODE § 2615 (West) (repealed 1941) *quoted in* 314 U.S. 160, 171 (1941).

60. 314 U.S. 173.

Hobbes made several statements with which Professor W. Newcomb Hohfeld would disagree.<sup>61</sup> Hobbes declared: “*Right*, consisteth in liberty to do, or to forbear”<sup>62</sup> Hohfeld would say this was a definition of privilege rather than of right, the closest approximation in meaning to “privilege,” according to Hohfeld, being “liberty.”<sup>63</sup> Hobbes wrote: “*Right is Liberty*”;<sup>64</sup> in the Hohfeldian schema, “liberty” is the nearest equivalent to “privilege,” and “privilege” is the jural opposite of “duty,”<sup>65</sup> which is the jural correlative of “right.”<sup>66</sup>

Hohfeld borrowed his theory of right and duty as jural correlatives from Hegelian philosophy; it was written in Hegel’s *Philosophy of Right*: “In the sphere of abstract right, I have the right and another has the corresponding duty.”<sup>67</sup> Hegel also wrote:

The crucial point in both the Kantian and the generally accepted definition of right . . . is the “*restriction* which makes it possible for my freedom or self-will to co-exist with the self-will of each and all according to a universal law.” [T]his definition contains only a negative category, restriction.<sup>68</sup>

Hohfeld defined right in a restrictive, negative fashion, in this Kantian tradition, as, for example, in his famous land hypothesis: “[I]f X has a right *against* Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”<sup>69</sup>

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61. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter cited as Hohfeld].

62. HOBBS, *supra* note 1, at 107.

63. Hohfeld, *supra* note 61, at 41.

64. HOBBS, *supra* note 1, at 248.

65. Hohfeld, *supra* note 61, at 30.

66. *Id.*

67. HEGEL, *supra* note 29, at 109-10.

68. *Id.* at 33. See also THE GREAT LEGAL PHILOSOPHERS—SELECTED READINGS IN JURISPRUDENCE 306 (C. Morris ed. 1959).

69. Hohfeld, *supra* note 61, at 32 (emphasis added). The same land hypothesis, except more developed and worded differently, is contained in P. VINOGRADOFF, COMMON SENSE IN LAW 67 (1913). (Strangely enough, the publication of the Hohfeld work preceded that of the Vinogradoff work by only one month). This land hypothesis, in varying verbiage is also found in the following works: T. HOLLAND, THE ELEMENTS OF JURISPRUDENCE 83 (13th ed. 1924); J. SALMOND, JURISPRUDENCE 184 (6th ed. 1920); H. TAYLOR, THE SCIENCE OF JURISPRUDENCE 531 (1908); A. KOCOUREK, JURAL RELATIONS 5 (1927); R. POUND, CONTEMPORARY JURISTIC THEORY 74 (1940); PATON, *supra* note 17, at 222; J. STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 150-51 (1964) (referring to Austinian legal philosophy); J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED at lxxx (2d ed. 1970) (1st ed. n.p. 1831) (Austin’s words, first published in 1831, are particularly appropriate).

Julius Stone in his *Legal System and Lawyers' Reasonings* makes the statement: "The charge that the duties of criminal law and of public law generally do not obey Hohfeld's specification as to correlatives is, however, more serious. This was a chronic problem for Austin, too; and clearly Hohfeld's mind was mainly focused on the relations of private law."<sup>70</sup> Although Hohfeld did not concern himself with criminal law or public law, this author has demonstrated, in his works *The Hohfeldian Approach to Constitutional Cases* and *The Hohfeldian Place of Right in Constitutional Cases*<sup>71</sup> that the duties of public law (constitutional law) do obey Hohfeld's specification as to their correlatives (rights) and will demonstrate forthwith that the duties of criminal law also obey Hohfeld's specification as to their correlatives (rights). Dennis Lloyd in his *The Idea of Law*<sup>72</sup> makes the statement:

Others, however, such as Kelsen, have pointed out that the conjunction of right and duty, though common enough, is not a necessary one, for there may be duties which are imposed without conferring any rights, as for example in the case of many public and social-welfare duties. This applies to much (if not to all) of criminal and administrative law.<sup>73</sup>

This legal commentary will demonstrate that the conjunction of right and duty is a necessary, in fact, an *indispensable* one in criminal law. Superimposing Hobbes on Hohfeld by restating the central Hobbesian theme in a restrictive, negative manner in terms of the jural correlatives of rights and duties within the criminal law milieu, the state has a right *against* the subject or citizen that the latter will not be remiss in abiding by the penal code and the citizen, in accordance therewith, is under a duty to the state not to commit a breach of the peace. In return therefor, the citizen has a right *against* the state that the latter will not default in affording him security against all persons, both outside and inside the state's jurisdiction. In conformity therewith, a duty is incumbent upon the state to the citizen not to fail in extending security to the citizen against all persons both external and internal. Stated in terms of the two basic Hohfeldian words and the two fundamental Hobbesian words, the state has a *right* against the citizen that the latter will not be remiss in *obedience*<sup>74</sup> to the criminal code. The

70. J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 160 (1964).

71. See Morse, *The Hohfeldian Approach to Constitutional Cases*, 9 *AKRON L. REV.* 1 (1975) and *The Hohfeldian Place of Right in Constitutional Cases*, 6 *CAP. L. REV.* 1 (1976).

72. D. LLOYD, *THE IDEA OF LAW* 311 (1970).

73. *Id.* at —.

74. See HOBBS, *supra* note 1, at 630.

citizen, in consequence thereof, is under a *duty* to the state not to default in *obedience* of the criminal code, and in return therefor the citizen has a *right* against the state that the latter will not fail in rendering to him *protection*<sup>75</sup> from harm at the hands of any and all persons both without and within the state's jurisdiction. In consequence thereof, a *duty* is incumbent upon the state to the citizen not to be remiss in affording *protection* to the citizen from hurt at the hands of any and all persons both external and internal.

Hobbes stated:

[T]he Consent of a Subject to Sovereign Power, is contained in these words, *I Authorise, or take upon me, all his actions*; in which there is no restriction at all, of his own former naturall Liberty: For by allowing him to *kill me*, I am not bound to kill my selfe when he commands me. 'Tis one thing to say, *Kill me, or my fellow, if you please*; another thing to say, *I will kill my selfe, or my fellow*. It followeth therefore, that

No man is bound by the words themselves, either to kill himselfe, or any other man; And consequently, that the Obligation a man may sometimes have, upon the Command of the Sovereign to execute any dangerous, or dishonourable Office, dependeth not on the Words of our Submission; but on the Intention; which is to be understood by the End thereof. When therefore our refusal to obey, frustrates the End for which the Sovereignty was ordained; then there is no Liberty to refuse: otherwise there is.<sup>76</sup>

The efficacy of the foregoing passage was recognized in the following statement from the opinion and judgment of Michael A. Musmanno when, in 1948, he was acting as Presiding Judge of United States Military Tribunal II at Nuremberg in Case No. 9, "The Einsatzgruppen Case": "The subordinate is bound only to obey the *lawful* orders of his superior . . . ."<sup>77</sup> Justice Musmanno declared: "The obedience of a soldier is not the obedience of an automaton."<sup>78</sup> (The precise word in the military context would be "martinet.") Consider Field Marshal Colonel General Wilhelm Keitel, the example par excellence of the martinet mentality, who was aptly characterized as "the rigid,

75. *Id.*

76. HOBBS, *supra* note 1, at 184.

77. IV U.S. GOV'T. PRINTING OFFICE, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 470, 471 (emphasis added) [hereinafter cited as TRIALS].

78. *Id.* at 470.

unthinking 'cadet'.<sup>79</sup> Justice Musmanno continued: "A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery."<sup>80</sup> Fifteen years later, in a law review article, Justice Musmanno wrote: "[W]hile a soldier's first duty is to obey, it is also rudimentary common sense that his obedience is not that of an automaton. A soldier is a reasoning agent. He does not respond, and is not supposed to respond to an order which directs him to commit murder."<sup>81</sup> The Justice continued: "General J. Lawton Collins, Chief of Staff of the United States Army, excellently put the matter when he said: 'Discipline in our army cannot be founded upon a mechanical and uninquiring subservience, but instead must have as its keynote a respect for the rights and responsibilities of the individual.'<sup>82</sup> General Collins' reference to the word "mechanical" connotes the same meaning conveyed by Justice Musmanno's use of the word "machinery."

Hobbes continued:

Upon this ground a man that is commanded as a Soldier to fight against the enemy, though his Sovereign have Right enough to punish his refusall with death, may nevertheless, in many cases refuse, without Injustice; as when he substituteth a sufficient Souldier in his place; for in this case he deserteth not the service of the Commonwealth.<sup>83</sup>

The right to furnish a substitute in lieu of personally performing military service existed and remained in American law as late as 1917. During the War Between the States, in 1863, the United States Congress passed a statute providing: "[A]ny person drafted and notified to appear . . . may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft . . . and thereupon such person so furnishing the substitute . . . shall be discharged from further liability under that draft."<sup>84</sup> This statute was amended in 1864<sup>85</sup> and after the Civil War, in 1867<sup>86</sup> and 1869,<sup>87</sup> but was not repealed until 1917, when the Congress provided: "[N]o person liable to military

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79. Nelles, Book Review, 14 DE PAUL L. REV. 237 (1964).

80. TRIALS, *supra* note 77, at 470.

81. Musmanno, *Are Subordinate Officials Penally Responsible for Obeying Superior Orders Which Direct Commission of Crime?*, 67 DICK. L. REV. 221, 225 (1963).

82. *Id.*

83. HOBBS, *supra* note 1, at 184-85.

84. Ch. LXXV, § 13, 12 Stat. 731, 733 (1863).

85. Ch. XIII, § 5, 13 Stat. 6, 7 (1864).

86. Ch. CII, 14 Stat. 417 (1867).

87. Ch. LVI, 15 Stat. 282 (1869).



service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States . . . ."<sup>88</sup>

Hobbes stated:

As for other Liberties, they depend on the Silence of the Law. In cases where the Sovereign has prescribed rule, there the Subject hath the Liberty to do, or forbear, according to his own discretion.<sup>89</sup>

This statement is the basis for the legal rule of construction that what is not prohibited is permitted. The foremost examples of American organic application of the rule are domestic slavery, secession and judicial review.

Hobbes stated:

When long Use obtaineth the authority of a Law, it is not the Length of Time that maketh the Authority, but the Will of the Sovereign signified by his silence, (for Silence is sometimes an argument of Consent;) . . . ."<sup>90</sup>

Leading illustrations of silence signifying consent in the law are as follows: Under the doctrine of imposed intention, if an accused stands mute before the bar of justice at arraignment, refusing to enter a plea of guilty or not guilty, the law will create a fiction and enter a plea of not guilty for him. The law is not construing the accused's intention, as his silence might be interpreted as readily to mean guilt as innocence. Rather, the law is imposing its own intention to fill the existing lacuna in order to be consistent with its own preexisting fiction of the rebuttable presumption of innocence.

The doctrine of imposed intention applies to the law of contracts whereby, in many instances, silence presumes consent. Silence on the part of a debtor converts an open account into an account stated. In regard to a contract for luxuries made during infancy, continued silence on the part of the infant, even after reaching his majority, effects a ratification. In regard to a contract of sale on trial or approval, silence on the part of the bailee past the time specified in the contract, or, if no time is stipulated, past a reasonable time, will transfer the bailee's status into that of a buyer. As regards a contract of sale and/or return, silence on the part of the conditional buyer past the time designated in the con-

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88. Ch. 15, § 3, 40 Stat., Pt. I, 76, 78 (1917) (current version at 10 U.S.C. 514 (1975)).

89. HOBBS, *supra* note 1, at 186.

90. *Id.* at 227.

tract, or, if no time be provided, past a reasonable time, will operate to preclude the conditional buyer from reinvesting title in his seller. In regard to goods patently defective, when there is delivery without an opportunity of inspection on the part of the buyer, continued silent retention will result in a waiver of possible objection. Silence on the part of a defendant in a civil action, who has received proper service of process, presumes his admission of the truth of the allegations contained in the plaintiff's petition and will result in the entering of a default judgment against him. A man's failure to execute a will leaves his estate chargeable to the law of descent and distribution, presuming that had he made a will he would have divided his estate in approximately equal portions among his wife and children.

Hobbes stated:

And Law was brought into the world for nothing else, but to limit the naturall liberty of particular men, in such manner, as they might not hurt, but assist one another . . . .<sup>91</sup>

This statement, liberally construed, proscribes competition as well as personal injury or property damage through infraction of the penal law and counsels cooperation.

Hobbes stated:

*That the Common Law, hath no Controuler but the Parliament . . . .*<sup>92</sup>

This statement is the absolute reverse of the famous declaration made by Sir Edward Coke forty-one years earlier in *Doctor Bonham's Case* (or the *College of Physicians Case*),<sup>93</sup> in which he progenerated the doctrine of judicial review: "[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ."<sup>94</sup> In England, unlike in the United States where sovereignty resides in the peoples of the several states, sovereignty resides in the Parliament. The Hobbesian, Austinian and American view is that sovereignty is unlimited. But because judicial review is a fetter on parliamentary sovereignty, Lord Coke's view seems

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91. *Id.* at 228.

92. *Id.* at 229.

93. 77 Eng. Rep. 646 (1610).

94. *Id.* at 652.

to coincide with that of John Locke to the effect that there is a limitation to sovereignty.

Hobbes stated:

Over . . . mad-men there is no Law, no more than over brute beasts; nor are they capable of the title of just, or unjust; because they had never power to make any covenant, or to understand the consequences thereof . . . .<sup>95</sup>

This statement is prophetic indeed because it preceded *Rex v. McNaghten*<sup>96</sup> by almost two centuries and *Rex v. Arnold*<sup>97</sup> by almost three-quarters of a century. The “wild-beast” form of the knowledge test for insanity was progenerated in *Arnold*.

Hobbes stated:

For the will of another, cannot be understood, but by his own word, or act, or by conjecture taken from his scope and purpose; which in the person of the Common-wealth, is to be supposed alwaies consonant to Equity and Reason.<sup>98</sup>

Here he lays down the basis for the American rule that there is a rebuttable presumption of constitutionality cast in favor of all legislative enactments.

Hobbes stated:

[B]y the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator.<sup>99</sup>

Here he inveighs against what would be termed in the United States

95. HOBBS, *supra* note 1, at 231.

96. 8 Eng. Rep. 718 (1843).

97. 16 Howell's St. Tr. 695 (1724). Justice Robert Tracy of the English Court of Common Pleas stated, at pp. 764, 765:

When a man is guilty of a great offense, it must be very plain and clear, before a man is allowed such an exemption; therefore it is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a *wild beast*, such a one is never the object of punishment. . . .

(Emphasis added). The foregoing passage from *Arnold* was cited as authority and paraphrased by Mr. Justice Charles Roe, as the author of the opinion of the Supreme Court of New Hampshire in 1870 in *State v. Pike*, 49 N.H. 399, 434 (1870) as follows: “It has been held within one hundred and fifty years (146 years, to be exact) that the test in criminal cases is whether the defendant was totally deprived of his understanding and memory and did not know what he was doing any more than a wild beast.”

98. HOBBS, *supra* note 1, at 232.

99. *Id.* at 235.

today as “judicial legislation,” as when the Supreme Court of the United States violates the tripartite division of the national government and usurps the congressional prerogative.

Hobbes stated:

The Interpretation of the Law of Nature, is the Sentence of the Judge constituted by the Sovereign Authority, to heare and determine such controversies, as depend thereon; and consisteth in the application of the Law to the present case For in the act of Judicature, the Judge doth no more but consider, whither the demand of the party, be consonant to naturall reason, and Equity; and the Sentence he giveth, is therefore the Interpretation of the Law of Nature; which Interpretation is Authentique; not because it is his private Sentence; but because he giveth it by Authority of the Sovereign, whereby it becomes the Sovereigns Sentence; which is Law for that time, to the parties pleading.<sup>100</sup>

The final phrase “Law for that time, to the parties pleading” refers to the law of the case, as distinguished from the rule of law.

Hobbes stated:

It is also against Law, to say that no Proofs shall be admitted against a Presumption of Law.<sup>101</sup>

Of course, in terms of modern law, proof (or evidence) may be admitted against a rebuttable presumption of law but not against a conclusive presumption of law.

Hobbes stated:

There be other things of this nature, wherein mens Judgements have been perverted, by trusting to Precedents  
 . . . .<sup>102</sup>

This statement is the basis for “the pure stream doctrine” of this author. Because there has to be some *practical* basis for judicial decisions, courts have predicted their opinions upon prior holdings, or precedents. This has made for relative uniformity and not inconsiderable facility. However, this method is of limited effectiveness because a court tends to base its ruling upon the most recent precedent, rather than upon the original precedent. As Blaise Pascal pointed out, “Information is so much more likely to be authentic if you get it at the fountain-

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100. *Id.* at 236-37.

101. *Id.* at 238.

102. *Id.* at 239.

head . . . .”<sup>103</sup> For example, if there were a series of ten cases on a given point of law over a period of fifty years, the last precedent would have become diluted, distended and distorted through a process which might best be described as precedential pollution. The finely etched line of the original precedent would have been supplanted by the meander line of the last precedent.

Over a period of time, a number of precedents of a legal proposition tend to become like silt being carried downstream and forming, unaided by artificial causes, alluvion. Then to cite the latest precedent would be akin to citing batture rather than the head of navigation; in other words, like citing as authority something that has undergone a *primary* change of identity, as from part of a riverbed to accessory to a riparian estate. The courts have been following what could be characterized as the corrosion concept but should follow, instead, what could be termed the pure stream doctrine by reverting, for the authority upon which to predicate a decision, *directly* to the original precedent. This, then, would afford an *effective* basis for judicial decisions.

As a legal proposition is enunciated in case after case, each time the court citing as its authority the most recent case, silt settles upon the proposition. Enough silt may settle so that the proposition may attach to the riverbank, with the result that the proposition, even if relevant as found at its source, has lost its relevancy as found in the more recent precedents, but only because it has been adorned, embellished and encrusted.

The foregoing thought was expressed well in the following statement by Mr. Justice Campbell Thornal, as the organ of the Supreme Court of Florida, in the 1957 case of *Hargrove v. Town of Cocoa Beach*:<sup>104</sup>

“[I]nstead of disregarding the rule of stare decisis we now merely restore the original concepts of our jurisprudence to a position of priority in order to eradicate the deviations that have . . . detracted from the justice of the initial rule.”<sup>105</sup>

Hobbes stated:

For a Fundamental Law in every Common-wealth, is that, which is being taken away, the Common-wealth

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103. THE ESSENTIAL PASCAL 224 (R. Gleason ed. 1966) (Provincial Letter No. 4).

104. 96 So. 2d 130 (Fla. 1957).

105. *Id.* at 134.

faileth, and is utterly dissolved; as a building whose Foundation is destroyed.<sup>106</sup>

In the American legal and political fabric, if the doctrines of the federal (or dual) system of government, the separation of powers between the national government and the state governments, the absolute coequality of the several states, the tripartite system of the national government, and the separation of powers among the three great departments of the national government were taken away, either wholly or singly, the Constitution of the United States as the organic instrument of our country, the covenant of our "*Mortal God*,"<sup>107</sup> would fail, and would be utterly dissolved; as a building whose foundation is destroyed.

If the provision of the Constitution of the United States prescribing the amendatory process<sup>108</sup> were not complied with, the purported amendment would not be unconstitutional for the reason that it had not been integrated into the Constitution and, therefore, had not become an amendment. However, a proposed amendment which had been effectuated pursuant to the specified amendatory process might be unconstitutional if it contravened, in the words of Mr. Justice Joseph Story in *Terrett v. Taylor*<sup>109</sup> in 1815, "the spirit . . . of the Constitution of the United States."<sup>110</sup> The same jurist, in *Martin v. Hunter's Lessee*<sup>111</sup> the following year, referred to the "spirit of the Constitution."<sup>112</sup> In his concurring opinion in *Martin*, Mr. Justice William Johnson mentioned "the spirit, intent, or meaning of the constitution"<sup>113</sup> and of "the true spirit of the constitution."<sup>114</sup> Three years later Mr. Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*<sup>115</sup> alluded to "the general spirit of the instrument,"<sup>116</sup> meaning the constitution. The references by Justices Story, Johnson and Marshall to the *spirit* of the Constitution recall to mind the following passage by Immanuel Kant:

The Forms of the State are only the *letter (littera)* of the original Constitution in the Civil Union; and they may therefore remain so long as they are considered, from ancient and

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106. HOBBS, *supra* note 1, at 247.

107. *Id.* at 143.

108. U.S. CONST. art. V.

109. 13 U.S. (9 Cranch) 249 (1815).

110. *Id.* at 256.

111. 14 U.S. (1 Wheat.) 562 (1816).

112. *Id.* at 579.

113. *Id.* at 589.

114. *Id.* at 594.

115. 17 U.S. (4 Wheat.) 463 (1819).

116. *Id.* at 494.

long habit (and therefore only subjectively), to be necessary to the machinery of the political Constitution. But the *spirit* of that original Contract (*anima pacti originarii*) contains and imposes the obligation on the constituting Power to make the mode of the *Government* conformable to its Idea . . . .<sup>117</sup>

Let us assume that a hypothetical twenty-seventh amendment abolished the doctrines of the limited powers of the United States and the residual powers of the several states. Such an amendment would be repugnant to the two articles of amendment which expressly announce such doctrine<sup>118</sup> and to all of the original seven articles and to the other twenty-four articles of amendment which impliedly do so. Or let us assume that a future amendment abrogated the doctrine of the tripartite division of national jurisdiction by abolishing the judiciary as a separate department and, in the Hegelian manner,<sup>119</sup> incorporating the judiciary within the executive department. Such an amendment would be contrary to the three articles which expressly provide for such doctrine<sup>120</sup> and to the other four original articles and to all the preceding twenty-six articles of amendment which impliedly do so. Either amendment is incompatible with the manifest spirit of the Constitution. Either amendment must be considered either as unconstitutional or as embodying a new constitution supplanting the present Constitution of the United States, circumventing the honest and legitimate method of promulgating and adopting a new constitution by convention.

Three concepts of real property law which are employed in constitutional law to ascertain whether a body politic possesses sovereignty are escheat, eminent domain and adverse possession. If property escheats to a body politic, if that body politic possesses the power of condemnation and if adverse possession cannot be asserted against that body politic, the body politic probably possesses sovereignty. In reconciling a conflict between provisions in a deed, resort is had first to the cardinal rule of contract law: to the intention of the parties. If that test proves insufficient, then look to the rule of real property law that the former provision should govern. In reconciling a conflict between stipulations in a will, if application of the paramount rule of contract law proves inconclusive, then resort is had to the rule of the law of wills that the latter stipulation should govern. Since concepts of real property law,

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117. KANT, *supra* note 2, at 210.

118. U.S. CONST. amends. IX, X.

119. "[T]he executive power . . . also included the powers of the judiciary . . . ." HEGEL, *supra* note 30, at 189.

120. U.S. CONST. arts. I, II, III.

and not those of the law of wills, are applied in constitutional law in determining sovereignty, the rule of construction of real property law applied in the event of conflicting provisions in a conveyance might be carried over for application to the Constitution of the United States, in the event of a conflict between a hypothetical future amendment and the spirit which permeates the present Constitution.

Hobbes stated:

There is a . . . doctrine, plainly, and directly against the essence of a common-wealth; and 'tis this, *That the Sovereign Power may be divided* . . . .

. . . .  
. . . [A] Kingdome divided in its selfe, . . . cannot stand.<sup>121</sup>

In the American schema of government, the sovereign power, consistent with Hobbes, is not divided but *delegated* sovereign power is divided between the state and national governments and among the three great departments of each. It is this distinction and the continuous cognizance of it that are of profound signification. When Abraham Lincoln paraphrased St. Mark<sup>122</sup> in saying, "A house divided against itself cannot stand,"<sup>123</sup> he intended the term "house" to refer to the United States. Of Hobbes' "Kingdome" (England) an integral and indivisible part thereof, the Parliament, as the seat of all sovereignty possesses *unlimited* sovereignty but Lincoln's "house" possesses only *highly limited delegated* sovereignty, delegated by the several *states* with the concurrence of the *peoples* thereof, as the source of all sovereignty.

Hobbes continued:

For notwithstanding the insignificant distinction of *Temporall*, and *Ghostly*, they are still two Kingdomes, and every Subject is subject to two Masters. For seeing the *Ghostly* Power challengeth the Right to declare what is Sinne it challengeth by consequence to declare what is Law, (Sinne being nothing but the transgression of the Law;) and again, the Civill Power challenging to declare what is Law, every Subject must obey two Masters, who both will have their Commands be observed as Law; which is impossible.<sup>124</sup>

This statement does violence to the great mandatory injunction, as

121. HOBBS, *supra* note 1, at 280-82.

122. "If a house be divided against itself, that house cannot stand." *Mark* 3:25.

123. Speech to Republican State Convention, Springfield, Ill. (June 16, 1858).

124. HOBBS, *supra* note 1, at 282-83.



expressed in the Holy Gospel According to St. Matthew, of “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”<sup>125</sup> The Hobbesian distinction is, of course, the time-honored one between the profane and the sacred, the secular and the sectarian, the worldly and the canonical. The distinction, however, is not “insignificant;” it is one of the utmost moment and gravity. That “every Subject must obey two Masters, who both will have their Commands be observed as Law” is not “impossible” because obedience is to two different bodies of law—the mundane law and the ecclesiastical law—operating in two different orbits, much like the moon and the earth. When obedience to the temporal law and obedience to the spiritual law collide, as in the case of King Henry VIII and Sir Thomas More, the higher heavenly law would supersede the material law.<sup>126</sup> The individual person, granting priority to the eternal law, as the result of governance by conscience, would have to suffer the consequence imposed by the transitory law. Actually, the distinction, happily, should not, and usually does not, constitute a division for, in the words of Sir Frederick Pollock, “[w]ere the legal formulation of right permanently estranged from the moral judgment of good citizens, the State would be divided against itself.”<sup>127</sup> Thus, only when the distinction is not recognized and observed is there a division.

Hobbes stated:

[T]he nature of Justice, consisteth in keeping of valid Covenants: but the Validity of Covenants begins not but with the Constitution of a Civill Power, sufficient to compell men to keep them . . . .<sup>128</sup>

This same thought was expressed in much the same manner, even to the use of the noun form of Hobbes’ gravamen word in verb form “compel,” as recently as 1974 by Macklin Fleming in his *The Price of Perfect Justice*<sup>129</sup> as follows: “In ultimate analysis, the law requires compulsion—intelligent, reasoned, measured, and tempered, but compulsion nonetheless . . . . If we remove the element of compulsion from law, what remains may be a perfectly devised system of ethics and morals, but it will not be a working system of law.”<sup>130</sup> The Fleming

125. *Mathew* 22:21.

126. For an analytical treatment of the concept of supersedence in an exclusively secular setting, see Morse, *The Doctrine of Supersedence*, 1963 LA REVUE LEGALE 385.

127. F. POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS 18 (1961).

128. HOBBS, *supra* note 1, at 119.

129. M. FLEMING, THE PRICE OF PERFECT JUSTICE—THE ADVERSE CONSEQUENCES OF CURRENT LEGAL DOCTRINE ON THE AMERICAN COURTROOM (1974).

130. *Id.* at V.

statement is qualified so as to be somewhat ameliorative of Hobbes. Modifying the Hobbes-Fleming stance is the following posture assumed by Yves R. Simon in his *The Tradition of Natural Law—A Philosopher's Reflections*,<sup>131</sup> published in 1965: "When a society is in such a condition that its laws are obeyed only insofar as there is real danger of being caught and punished, it has already disintegrated and even the fear of punishment cannot do much to hold it together."<sup>132</sup> Hobbes presaged Simon's "fear of punishment" in the following thematic passage:

The final Cause, End, or Designe of men, (who naturally love Liberty, and Dominion over others,) in the introduction of that restraint upon themselves, (in which wee see them live in Common-wealths,) is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of Warre, which is necessarily consequent (as hath been shewn) to the naturall Passions of men, when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of their Covenants . . . .<sup>133</sup>

In analyzing Jean-Jacques Rousseau's *The Social Contract*, Simon wrote:

The political booklet of Rousseau, with all its subtleties, expresses powerfully the theory that the state is constituted by a total surrender of one's freedom to a general will with which one's own will is identified in a quasi-mystical way, so that, by obeying the will of the people alone one remains as free as in the state of native independence.<sup>134</sup>

The foregoing statement encompasses two Rousseauian points of contradiction of Hobbesian philosophy. Point 1: According to Hobbes, the state is constituted by not a total, but by a partial, surrender of one's freedom. However, whereas all freedom is not, most freedom is, surrendered. An example of Point 1, as stated by Hobbes, is: "In cases where the Sovereign has prescribed no rule, there the Subject hath the Liberty to do, or forbear, according to his own discretion."<sup>135</sup> The term "liberty" is equated by Professor Hohfeld to the word "freedom."<sup>136</sup> Partially analogous to the last-quoted Hobbesian statement is

131. Y. SIMON, *THE TRADITION OF NATURAL LAW—A PHILOSOPHER'S REFLECTIONS* (1965).

132. *Id.* at 118.

133. HOBBS, *supra* note 1, at 139.

134. SIMON, *supra* note 131, at 73-74.

135. HOBBS, *supra* note 1, at 186.

136. Hohfeld, *supra* note 61, at 42-43.

the American constitutional law doctrine of concurrent powers if national government is transposed for sovereign and state for subject. The doctrine is partially, rather than totally, analogous, however, because sovereignty resides in the peoples of the several states. Point 2: According to Hobbes, one does *not* remain as free in the state as in the state of native independence or, in Hobbesian nomenclature, “the condition of meer Nature.”<sup>137</sup> An example of Point 2, as stated by Hobbes, is: “And Law was brought into the world for nothing else, but to limit the naturall liberty of particular men, in such manner, as they might not hurt, but assist one another, and joyn together against a common Enemy.”<sup>138</sup>

Hobbes stated:

The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them . . . .<sup>139</sup>

. . . .  
 . . . But if a man, besides the obligation of a Subject, hath taken upon him a new obligation of a Souldier, then he hath not the liberty to submit to a new Power, as long as the old one keeps the field, and giveth him means of subsistence, either in his Armies, or Garrisons: for in this case, he cannot complain of want of protection, and means to live as a Souldier: But when that also failes, a Souldier also may seek his Protection where-soever he has most hope to have it; and may lawfully submit himself to his new Master.<sup>140</sup>

Perhaps the foremost example in history of a soldier such as is envisioned upon a reading of the foregoing passage is General Field Marshal Friedrich Paulus. Four times he was denied permission by Hitler to effect a break-out of the German Sixth Army from the trap at Stalingrad. The Hoth Corps Group was unable to traverse the remaining nineteen miles necessary for Paulus' relief.<sup>141</sup> When Paulus, as a prisoner of war whom Russia had no intention of ever repatriating, testified as a surprise witness for the Soviet Union at the trial before the Interna-

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137. HOBBS, *supra* note 1, at 113.

138. *Id.* at 228.

139. *Id.* at 187.

140. *Id.* at 621-22.

141. For an analytical summation of the Battle of Stalingrad, see Morse, *A Recapitulation of the Great Capitulation*, 26 CAN. MIL. J. 9 (1960); for an analysis of the nexus between law and military science, see Morse, *Juristisches und Militarisches Denken und Handeln*, 4 NEUE SEITSCHRIFT FÜR WEHRRECHT 145, Jahrg. 4, Heft 4, October 1962 (J. Schweitzer Verlag, Berlin).

tional Military Tribunal at Nuremberg on the afternoon of February 11, 1946, his devastating testimony <sup>142</sup> proved to be the principal cause for the death sentences meted out to Keitel, Jodl and Goring. When he accepted the Russian commission to organize and train the East German army, can the propriety of his actions be questioned without questioning the verity of the Hobbesian statement?

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142. VII SECRETARIAT OF THE MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 261 (1947).