

Prologue: Hobbes and Legal Order

I. THE DEMANDS OF LEGALITY

In 1610 Sir Edward Coke upheld the cause of a doctor who was both judged and fined by the same Royal College of Physicians that stood to benefit from the fine, giving effect to the doctrine that no person may be judge and party of the same cause.¹ Coke declared that ‘when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void’.² For Sir Edward, the common law was the repository of legality, and legality constrained how public authority (even legislative authority) may be exercised. That is, for exercises of authority to be more than exercises of mere power, they must comply with the demands of legality. The justification and nature of the demands of legality comprise the subject matter of this book.

These demands may arise from positive law, such as constitutional documents and legislation. But sometimes the positive law is silent: there was no law on the books prohibiting the Royal College of Physicians from imposing a self-serving fine. In cases such as these, judges who follow Sir Edward give effect to legal principles despite the absence of statutory provisions on which to ground them. These statute-independent or freestanding principles are interesting from the point of view of an inquiry into the nature of law because their existence suggests that legitimate exercises of public power are constrained by moral and structural features intrinsic to legal order. Within the common law legal tradition, these moral and structural features are constitutive of the rule of law.

In the coming chapters I explore some of the ways in which the rule of law is embodied in principles of public law, and how these principles are best justified and explained. In particular, I discuss the contemporary demands of legality which crystallize in public law duties of fairness and reasonableness. The duty of fairness requires public decision-makers to act impartially and independently. Also, individuals must have the opportunity to know and reply to the case

¹ *Dr Bonham’s Case* (1610), 8 Co Rep 107a, 118a, 77 ER 638 (CP).

² *Ibid*, 652 (ER).

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against them. The duty of reasonableness requires decision-makers to base their decisions on reasonable interpretations of their enabling statutes. As we shall see, reasonable interpretations take seriously statutory purposes and values, but they also take seriously fundamental values said to reside in the common law and exist independently of statutes, such as equality and liberty. Judges will sometimes set aside administrative decisions that infringe equality or liberty if the infringement is not expressly authorized by statute. This is the principle of legality that lies at the heart of common law constitutionalism, a constitutional theory that looks to the common law for values and principles capable of guiding statutory interpretation.

Many judges, however, are suspicious of statute-independent duties of fairness and reasonableness. They believe that courts should not foist on public bodies legal obligations that the legislature has declined to impose, for the legislature alone has authority to create legal rights and obligations. Now, commonwealth courts have long held that public officials must exercise their authority reasonably in the sense that they may not use their powers arbitrarily or capriciously. In Canada, the courts have extended this injunction against arbitrariness with the result that where important interests are at stake, the duty of fairness will generally apply regardless of whether there is an explicit basis for it in the relevant statute. Yet it is the legislature rather than the judiciary that is presumed to have authority to create legal rights and obligations through its lawmaking power. The challenge presented by freestanding duties of fairness and reasonableness, then, is to explain and justify them in the absence of legislative endorsement.

Some judges rely on a background assumption of legislative intent. In the case of fairness, the background assumption would be that the legislature always intends delegated power to be exercised fairly, and that fair exercises of power require procedural safeguards such as hearings and disclosure. But some statutory grants of authority provide no procedural safeguards and are discretionary in nature. Often the conferral of discretion is put in broad and subjective terms of simply whether ‘the Minister is of the opinion . . .’.³ In these cases it is problematic to rely on legislative intent, for the legislature seems to have supplied the Minister with as unfettered a discretionary power as ordinary language will allow.

Not surprisingly, appeals to legislative intent fail to convince judges who think that the separation of powers licenses them to enforce only those

³ See eg *Williams v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 646 (FCA), Strayer JA: ‘[T]he test is not whether the permanent resident is a *danger to the public* but whether the “Minister is of the opinion” that he is such a danger’ (emphasis in original). Strayer JA concluded, *ibid*, 672–3, that the principles of fundamental justice ‘have never imposed a duty on [administrative] tribunals to give reasons where a statute has not specifically so provided’.

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duties which are clearly grounded in positive law. These judges have a telling reply against the view that statute-independent duties can rest on an intent the legislature has failed to express: if the legislature really did intend to include certain procedures, it could have easily made those requirements explicit. So, to answer the separation-of-powers argument and vindicate the demands of legality found in freestanding duties such as fairness and reasonableness, another story needs to be told. We shall see that this story is an account of the theoretical underpinnings of common law constitutionalism.

We begin with the premise implicit in Sir Edward's decision in *Dr Bonham's Case*: a failure to comply with the demands of legality reduces exercises of public authority to exercises of mere power. The distinction is critical because the demands of legality jointly constitute the rule of law, and the rule of law, I contend, permits certain exercises of power to count as exercises of authority. For present purposes, exercises of mere power can be understood as the threat or use of force for which there is no moral justification, such as the mugger's threat 'your money or your life'. Exercises of authority, on the other hand, may be backed by threats of force or coercion, but their prescriptions are justified on moral grounds, such as the role they play in securing a regime of secure and equal freedom. People subject to authority are thought to have moral reasons for acting in accordance with it, reasons which are independent of the punishment they may face if they fail to do so.

For the remainder of this prologue I use Thomas Hobbes' venerable discussion of sovereignty to illustrate how legal order can ground authority in a way that makes sense of the power/authority distinction implicit in *Dr Bonham's Case*. Hobbes has been called 'the greatest English political philosopher',⁴ and as we shall see, his conception of the state mirrors in many ways the republican conception of the state defended throughout this book: the state is a fiduciary of the people over whom it exercises power. As a fiduciary, the state owes its people a single but complex legal obligation, one which arises solely from the fiduciary character of its relationship to the people. The state must govern its people in accordance with the demands of legality, which is to say, in accordance with the rule of law.

The fiduciary conception of the state both predates and succeeds Hobbes. Citing Plato for the principle that public officials must concern themselves with the entire community rather than just a part of it, Cicero concluded that '[t]he guardianship of the state is a kind of trusteeship'.⁵ Similarly, Locke asserted less than 40 years after the publication of *Leviathan* that legislative

⁴ From the editors' introduction to Thomas Hobbes, *On the citizen*, trans Richard Tuck and Michael Silverthorne (Cambridge; New York: Cambridge University Press, 1998) (first published in 1641), p xxxiii.

⁵ Cicero, *On Moral Obligation*, trans John Higginbotham (Berkeley: University of California Press, 1967) (first published in 44 BC), ch 25, p 69.

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power is ‘only a fiduciary power to act for certain ends’.⁶ And Bentham too, much like Burke, would later say that ‘[a]ll political power is fiduciary’.⁷ Nonetheless, Hobbes is of special interest because, unlike Locke, Bentham, and Burke, he uses determinate legal principles to construct a fiduciary theory of political and legal authority. Despite Hobbes’ iconic standing in the liberal tradition, we shall see that his account of sovereignty has important republican features. Within this account, the constitution of legal order within a relationship of mutual trust does the heavy lifting.

I argue in Chapter IV that fiduciary relationships arise if one party (the fiduciary) has broad discretionary power of an administrative nature over the important interests of another (the beneficiary), and the beneficiary is unable, either as a matter of fact or law, to exercise the entrusted power. The common law recognizes many types of fiduciary relations, including those which exist between principal and agent, solicitor and client, directors and their corporations, and partners and their partnerships. Similarly, parents and doctors are fiduciaries of their children and patients respectively. These latter kinds of relationships may give the impression that a fiduciary conception of the state is necessarily paternalistic and unable to account for the idea that the people are (or should be) authors of the law as well as its subjects. I consider the paternalism objection in Chapter III, in the context of the Crown-Native fiduciary relationship the courts have recognized in Canada. Beginning with Hobbes, however, will help us see from the start that the fiduciary account of state authority is neither paternalistic nor authoritarian because the people (in a sense to be explained) are the authors of state authority. It is for this reason that on this book’s cover the people wear the crowns.

Starting with Hobbes will also illuminate important differences between the fiduciary theory of the state and the social contract tradition. Hobbes’ theory contains elements of both. I will argue that for Hobbes the origin of sovereign authority arises from the people’s presumed consent amongst themselves to a social contract that institutes sovereignty. The ongoing relationship between the people and the sovereign, however, is based on authorization and trust (or, more precisely, the implications of the position of trust held by the sovereign).

Hobbes also provides us with a valuable opportunity to see that the position one takes in the contemporary debate on freestanding public duties

⁶ John Locke, *Second Treatise on Civil Government*, as reproduced in *Social Contract* (Oxford: Oxford University Press, 1948) (first published in 1690), pp 125–6, ch 13, para 149.

⁷ Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham* (Edinburgh: Tait, 1843), ch 14 ‘View of a Complete Code of Laws’, p 182; Edmund Burke, *On Empire, Liberty, and Reform: Speeches and Letters*, ed David Bromwich (New Haven: Yale University Press, 2000).


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will be influenced by one's underlying view of law and legal order. If one holds the positivist theses that there is no necessary connection between law and morality (the separation thesis), and that all legal rights and obligations may be identified independently of their content and solely in virtue of their institutional source (the sources thesis), then statute-independent public duties will appear suspect. These duties have no clear institutional source (in principle, agencies could adopt them without judicial prompting), they can only be identified by reference to their moral content (eg fairness), and if they are intrinsic to legal order (as their freestanding status suggests), then they reveal a necessary connection between law and morality. If one denies the positivist theses, then statute-independent duties are possible, but still call for an explanation. Notwithstanding Hobbes' reputation as the father of legal positivism, he anticipates the puzzle that freestanding duties present, and supplies a rich and non-positivist explanation of them.

2. THE PEOPLE AS THE AUTHORS OF SOVEREIGNTY

An inchoate and compressed indication of Hobbes' solution to the puzzle of freestanding duties is found in his claim that 'no man is obliged by a covenant, whereof he is not author, nor consequently by a covenant made against, or beside the authority he gave' (L xvi.6, 102).⁸ In the context of Hobbes' social contract, this means that no individual may be subject to an obligation that demands more of her than is consistent with the scope of authority she can be deemed to have granted to the state. An important aspect of the state's authorization, I claim, is that its institutions must exercise their powers on behalf of the legal subject and in accordance with the demands of legality, or, as Hobbes might put it, consistent with the demands of equity and the other laws of nature. This interpretation of Hobbes is controversial. I can lay out only a *prima facie* case in its defence. A more orthodox understanding of Hobbes conceives of the sovereign as a supreme authority vested with unlimited power to make and repeal laws possessing whatever form and content the sovereign wishes to give them. In this section, I first set out the role that authorization plays in Hobbes'

⁸ References to *Leviathan* throughout the book are indicated by in-text parenthetical citations and are to chapter (or 'R&C' for the Review & Conclusion), paragraph and page number from the Curley edition: Thomas Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668*, ed Edwin Curley (Indianapolis: Hackett Publishing, 1994). References to the 1668 Latin edition are indicated by 'OL' (*Opera Latina*) and are from the selected variants translated by Curley. References to *De Cive* are indicated by 'DC' and are to chapter, paragraph, and page number from the Tuck and Silverthorne edition, *supra* note 4. References to *The Elements of Law* are indicated by 'EL' and are to chapter, paragraph, and page number from the Gaskin edition: Thomas Hobbes, *Human Nature and De Corpore Politico*, ed JCA Gaskin (Oxford: Oxford University Press, 1994). Unless otherwise indicated, italics are from the original.

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discussion of the state, and then respond to the orthodox interpretation of Hobbes' text.

Hobbes is well known for his claim that individuals may be taken to consent to state authority because each would always prefer the state to the state of nature, a condition in which life for the individual is 'solitary, poor, nasty, brutish and short' (L xiii.9, 76). Were the subject to experience this lawless condition of each against all, she would contract with others to establish sovereignty because each person can expect to do better with a sovereign than without. In this sense, each person is presumed to consent to sovereignty, and so the legal obligations that flow from sovereignty are consistent with Hobbes' view that there can be 'no obligation on any man which ariseth not from some act of his own' (L xxi.10, 141).⁹

The presumed contract formed in contemplation of the state of nature, however, is not between the sovereign and the subject, but between the subjects themselves. Although the original covenant gives rise to sovereignty, the relationship between sovereign and subject is one of authorization rather than contract. As a consequence, 'there can happen no breach of the covenant on the part of the sovereign' (L xviii.4, 111). Nonetheless, while it is trivially true that the sovereign cannot breach the original covenant, his officers and the institutions of sovereignty may violate the terms of the authorization contained within it. Such violations, I later suggest, would undermine the legitimacy of legal order.

As for the sovereign's subjects, they owe obedience 'as long, and no longer, than the power lasteth by which he is able to protect them' (L xxi.21, 144).¹⁰ Hobbes envisions a reciprocal relationship between protection and obedience, affirming in the conclusion of *Leviathan* that his overarching purpose has been 'to set before men's eyes the mutual relation between protection and obedience' (L R&C.17, 497). Hobbes' 'mutual relation' is articulated through an account of authorization which supplies the framework for both the sovereign's powers and the subject's obligations.

The conceptual problem that Hobbes sought to answer was how the state, as an abstract and artificial construct, may be conceived of as a person that represents and acts on behalf of just those persons subject to its powers. Put another way, Hobbes wished to explain how the state could stand in a relation to its subjects that would let them distinguish valid claims to sovereign authority from those without merit.

⁹ For present purposes we need not detain ourselves on whether the presumption of consent means hypothetical or tacit consent. I discuss both in Chapter V.

¹⁰ For ease of exposition, I will refer to the sovereign throughout as Hobbes does, ie in the masculine as 'he' or 'his'.

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Hobbes conceives of the state as an artificial rather than a natural person, and as such it can represent only the multitude who ‘confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will’ (L xvii.13, 109). The person who represents the state is the sovereign, who is either a single natural person or an assembly of natural persons, but in his public capacity he is an artificial person in that he represents and acts in the name of each person subject to his authority. But while the sovereign is the actor who exercises public power, he is not the author of his actions.

The authorship of sovereignty rests with the subject, an authorship Hobbes summarizes in his formal definition of the state (L xvii.13, 109):

one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence.

Elsewhere, Hobbes claims that a multitude establish a sovereign when each can be deemed to affirm that ‘I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner’ (L xvii. 13, 109). He reiterates that ‘the consent of a subject to sovereign power is contained in these words *I authorize, or take upon me, all his actions*’ (L xxi.14, 142).

Hobbes compares authority to ownership. Whereas ownership gives one a right to exclusive use and possession of a thing, authority denotes a right to act on one’s own behalf or on behalf of another (L xvi.4, 101–2):

And as the right of possession is called dominion, so the right of doing any action is called AUTHORITY. So that by authority is always understood a right of doing any act: and *done by authority*, done by commission or licence from him whose right it is.

Connecting the subject’s consent and authorship to the sovereign’s actions permits Hobbes to say that those actions are in fact the actions of the subject because the subject is their author. And, says Hobbes, since it is impossible to injure oneself, the sovereign cannot by his actions injure the subject (L xxi.19, 143–4). Similarly, the subject cannot accuse the sovereign of wrongdoing because ‘seeing every subject is author of the actions of his sovereign, he punisheth another for the actions committed by himself’ (L xviii.7, 113). Hobbes does concede that ‘they that have sovereign power may commit iniquity’, but they may not commit ‘injustice, or injury in the proper signification’ (L xviii.6, 112–13). By identifying the subject with the sovereign’s actions, Hobbes eliminates the possibility of complaints of injustice against the sovereign, since all such complaints would be against the very person who made them (eg L xxiv.7, 162).

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Authorization gives Hobbes the necessary criterion to resolve the conceptual problem mentioned earlier of distinguishing legitimate claims of representation and sovereign authority from counterfeits, since the actions of the sovereign are attributable to the subject if, and only if, the subject has authorized the sovereign to act on her behalf. Conversely, if a pretend representative has not been authorized, and if the pretender attempts to assert authority through some exercise of power, that action cannot be attributed to the subject because the subject is not the author of the action. It follows that the pretend sovereign can make no claim to the subject's obedience because he acts without her authorization. Such would be the predicament of a foreign power that proclaimed sovereignty over an unconquered people who had their own sovereign. Without the 'mutual relation of protection and obedience' that authorization makes possible, there is no basis for legal obligation.

Hobbes' discussion of slaves held in prison or bonds underscores the point. Unlike conquered persons who become subjects following defeat on the battlefield, captive slaves are not trusted with their corporal liberty, and as a result 'have no obligation at all' (L xx.10, 131). The subject, on the other hand, 'hath corporal liberty allowed him, and upon promise not to run away, nor do violence to his master, is trusted by him' (ibid). By making liberty a condition of obligation, Hobbes is able to connect sovereignty by acquisition (or conquest) to the social contract story of sovereignty by institution: because conquered subjects are trusted with life and liberty, they can be presumed to have covenanted with others to authorize and obey their new sovereign.¹¹ They now enjoy the conquering sovereign's protection, and 'every man is supposed [presumed] to promise obedience to him in whose power it is to save or destroy him' (L xx.5, 130). While the sovereign has a like power over captive slaves who may beg for their lives and even profess their submission, they cannot be understood to authorize the sovereign because they do not enjoy the benefits of protection, ie security of life *and* liberty. In other words, security of life and liberty are necessary conditions of authorization, while authorization is the necessary and sufficient condition of obligation. But how, exactly, is authorization supposed to take place?

Quentin Skinner has developed a sophisticated account of authorization in defence of an orthodox interpretation of Hobbes' theory of the state. Skinner rightly affirms that 'public acts of a sovereign will count as valid acts

¹¹ Admittedly, the more natural reading of the text in chapter 20 is that the vanquished covenant directly with the sovereign. The proposed interpretation, however, coheres better with his more general account of authorization, as well as with the reality of Hobbes' day, acknowledged in the Review and Conclusion, in which many subjects enjoyed protection without expressly submitting to a conquering sovereign (L R&C.7, 491).

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of the state if and only if the sovereign has been authorised to perform them by each and every member of the multitude'.¹² Critical to Skinner's view of Hobbes—and where we part ways—are the mechanics of authorization he attributes to Hobbes, ie the structure and content of the interaction between subject and sovereign which results in the sovereign's authority and the subject's obligation to obey the law.

Recall that Hobbes says that an act 'done by authority' is done 'by commission or licence from him whose right it is'. Skinner infers from this that the subject's grant of authority to the sovereign must take the form of a voluntary transfer of right. And when the transfer occurs, Skinner says, the authorizing subject gives up the right to perform the action himself.¹³ The transfer of a right to act thus implies a renunciation of the right, Skinner claims, as well as a duty not to interfere in the transferee's exercise of the right once it has been transferred.

The right that is allegedly transferred to the sovereign is the 'right of nature'. For Hobbes, this is a liberty-right possessed by individuals in the state of nature. It entitles them to do whatever they think is appropriate to ensure their self-preservation (L xiv.1, 79). It is a 'right to all things' (L xiv.5, 80). In the state of nature, Hobbes says, '[t]o lay down a mans right to anything is to *divest* himself of the *liberty* of hindering another of the benefit of his own right to the same' (L xiv.6, 81). To give up one's right in the state of nature, then, means giving up the right of preventing others from exercising their 'right to all things'. This renunciation confers no additional right on others, as Hobbes is quick to point out: 'For he that renounceth or passeth away his right giveth not to any other man a right which he had not before (because there is nothing to which every man had not right by nature), but only standeth out of his way' (L xiv.6, 81).

In short, because people in the state of nature already have a right to do anything they wish in pursuit of self-preservation, the renunciation of that right by one person cannot have the effect of providing a further right (or an enlargement of a right) to someone else. Therefore, Hobbes' view of renunciation of right in the state of nature, including the idea of '*divesting* himself of the *liberty* of hindering another', does not show that a transfer of right to another takes place. Because a simple laying down of right in the state of nature does not effect a transfer of right, it cannot support Skinner's claim that an authorized party gains its authorization from a transfer of right alleged to occur pursuant to a renunciation.

¹² Quentin Skinner, *Visions of Politics* (New York: Cambridge University Press, 2002), p 202.

¹³ *Ibid.*, pp 185–6.

Hobbes does at one point affirm a duty not to interfere once a right has been renounced or transferred to another person (xiv.7, 81):

And when a man hath in either manner [renunciation or transfer] abandoned or granted away his right, then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such right is granted or abandoned from the benefit of it; and [it is said] that he *ought*, and it is his DUTY, not to make void that voluntary act of his own, and that such hindrance is INJUSTICE, and INJURY, as being *sine jure* [without right], the right being before renounced, or transferred.

Skinner concludes from this passage that '[o]nce you have covenanted, you must leave it to your representative, who is now in possession of your right of action, to exercise it at his discretion'.¹⁴ This is again too quick, and mischaracterizes the point of Hobbes' remarks.

In the text from Hobbes quoted immediately above, Hobbes is not speaking to authorization, but rather is laying the groundwork for his analysis of contract. In this context, one aimed at specifying the features of contract, Hobbes says that a transfer of right occurs when the transferor 'intendeth the benefit thereof [of the right] to some certain person or persons' (xiv.7, 81). That is, the transferred right is to benefit the person to whom it is transferred.¹⁵ Cases of authorization are fundamentally different, even if they arise from a contract.

An agent under contract does not acquire the principal's right in the thing she is contracted to administer. On the contrary, she acquires the principal's consent for the sole purpose of representing him and managing the affairs she is entrusted to manage. If she has been contracted to administer an estate, for example, she may be entrusted with the authority to possess and administer the estate's assets, but she does not acquire legal and beneficial title to them. Her office requires that she faithfully respect her principal's rights in the things administered such that the principal, and not the agent, receives the full benefit of them. Transferring the principal's underlying rights to the agent such that she became their legal and beneficial owner would defeat from the outset the very point of the agency. Hobbes, I argue momentarily, was fully aware of this elementary analysis of authorization.

Skinner, however, interprets Hobbes as saying that 'we are led by reason to recognise that the best means of attaining peace and the other contentments of life will be to transfer our rights [of nature] to a sovereign who will exercise them on our behalf'.¹⁶ It follows from the transfer of this right,

¹⁴ Ibid, p 186.

¹⁵ This is so notwithstanding that because a transfer of right is a voluntary act, 'it is either in consideration of some right reciprocally transferred to himself or for some other good he hopeth for thereby' (L xiv.8, 82).

¹⁶ Skinner, *supra* note 12, p 203.

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Skinner says, that the sovereign enjoys a limitless right of action. And this shows that the original covenant ‘is not a means of limiting the powers of the crown; properly understood, it shows that the powers of the crown have no limits at all’.¹⁷ Skinner’s argument coheres well with the orthodox view which insists that Hobbes makes the sovereign all powerful to prevent a slide towards the state of nature. But Skinner’s construal of authorization is deficient for several reasons, and its deficiency reveals that the sovereign’s authority does not amount to an unscripted *carte blanche*.

As suggested above in the discussion of contract and authorization, Skinner conflates the right of action which an authorized agent must possess to act from authority with the primary rights or interests of the principal that the agent is authorized to administer. There is no reason to presume that a commission or licence to act in respect of certain rights means that those rights are transferred to the agent. The presumption in cases of authorization is just the opposite. Hobbes says that acts done by authority are done by commission or licence from ‘him whose right it is’. If the right had transferred to the agent, one would expect Hobbes to acknowledge the transfer with a change of tense. So even if we concede for the moment that some transfer of right is necessary for a relationship of authorization to take hold, and if we follow Skinner further to assume that the subject transfers his right of governing himself to the sovereign, those premises do not imply that what is transferred for the purpose of establishing sovereignty is an unfettered right of action as broad as the subject has in the state of nature. All that needs to be transferred is a limited right of action sufficient to grant to the sovereign the power and authority necessary to establish legal order in accordance with the terms of the authorizing original covenant.

There are other problems with Skinner’s account of authorization worth noting, and these difficulties reveal tensions in the orthodox understanding of Hobbes. The right of nature that is supposed to be transferred to the sovereign and do the authorizing work is not a claim-right that, by itself, can generate or underlie legal obligations owed by others to the right-holder. The right of nature is a free-standing liberty-right rather than a claim-right with legal implications. Whereas a claim-right denotes that someone else owes the right-holder a correlative duty, a liberty-right does not entail correlative duties. The liberty-right-holder is simply free to act as she pleases within the scope of the right.¹⁸ People may exercise a liberty-right to acquire obligations, such as when they enter into covenants, but the mere fact of liberty in one person does not—in the absence of a legal relationship—give

¹⁷ *Ibid*, p 208.

¹⁸ See generally W Hohfeld, *Fundamental Legal Conceptions*, ed W Cook (New Haven: Yale University Press, 1919).

rise to a legal obligation on the part of another. So it is unclear how giving up this liberty by transferring it to the sovereign—but not through a covenant with him—is supposed to make the subject the author of the sovereign's action and thereby generate the subject's obligation to obey.

Just as troubling for Skinner's account are the things that the subject cannot be obligated to do as a matter of law. Because covenants are voluntary acts they are presumed to further the good of the person making the covenant. For example, an individual cannot surrender the right to preserve her life, since she could not be deemed to pursue her good through such a surrender (xiv.8, 82; xxi.12, 142). As a consequence, the subject has no obligation to surrender her life if called on by the sovereign to do so.

Skinner refers to this absence of obligation in a quizzical footnote in an article on liberty,¹⁹ but there is no mention of the limits of obligation in his discussion of authorization. This is a stark omission, for Skinner is keenly aware of the importance to Hobbes of the 'mutual relation between protection and obedience'. A possible explanation for the omission is that if one limits the basis of both sovereign authority and legal obligation to a transfer from subject to sovereign of the unlimited right of nature, then the significance of the original covenant to legal obligation disappears. That is, the covenant no longer limits the scope of obligation to that which the subject can be taken to have consented because the covenant no longer plays a role in setting the terms of public authority and legal obligation.

Moreover, Hobbes' theory of punishment explicitly rejects the idea that the sovereign's authority to punish arises from a transfer of right from subject to sovereign. In setting out this theory, Hobbes first reminds the reader that the subject cannot give 'any right to another to lay violent hands upon his person' (L xxviii.2, 203). In making a commonwealth, the subject 'giveth away the right of defending another, but not of defending himself' and he also 'obligeth himself to assist him that hath the sovereignty in the punishing of another, but of himself not' (L xxviii.2, 204). This presents a puzzle. Individuals are expected to lay down their right of nature only to the extent that others are so willing. On entering civil society, 'no man' is 'to reserve to himself any right which he is not content should be reserved to every one of the rest' (L xv.22, 97). But no one can covenant away their right to defend themselves, so no one can require others to do so (even if it were possible). It follows that individuals in the state of nature could transfer to the sovereign only a right of punishment that would come with an

¹⁹ Quentin Skinner, 'The Proper Signification of Liberty', *Visions of Politics: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), p 209, n 87, citing *Leviathan*, *supra* note 8 for 'the remarkably extensive range of things that a subject, "though commanded by the Sovereign", may "without Injustice refuse to do"'.

eviscerating proviso: the right (such as it is) cannot be exercised against any subject. Because everyone must make an exception for themselves, on the transfer theory everyone would benefit from the same exception and so all would be immune from punishment.

Hobbes has another reason, too, for resisting the transfer theory. He points out that ‘to covenant to assist the sovereign in doing hurt to another, unless he that so covenanteth have a right to do it himself, is not to give him a right to punish’ (L xxviii.2, 204). Since punishment proceeds from public authority only, and there is no public authority in the state of nature, it ‘is manifest, therefore, that the right which the commonwealth (that is, he or they that represent it) hath to punish is not grounded on any concession or gift of the subjects’ (L xxviii.2, 204).

Hobbes’ solution is to ground the right of punishment on the sovereign’s own pre-commonwealth right of nature (ibid):

[T]his is the foundation of that right of punishing which is exercised in every commonwealth. For the subjects did not give the sovereign that right, but only (in laying down theirs) strengthened him to use his own as he should think fit, for the preservation of them all; so that it was not given, but left to him, and to him only, and (excepting the limits set him by natural law) as entire as in the condition of mere nature, and of war of every one against his neighbour.

Hobbes at last, in chapter 28, cashes in the distinction drawn earlier in chapter 14 between renunciation and transfer. To summarize: the sovereign’s authority to punish is not transferred to him by his subjects because they have no such right to transfer. Nor does it arise from a transfer of his subjects’ right of nature. Instead, the sovereign’s right to punish is grounded on the subject’s ‘laying down’ their right of nature and strengthening his. Just as noteworthy, the right to punish is to be used ‘for the preservation of them all’ and subject to ‘the limits set him by natural law’. These qualifications allow Hobbes in the remainder of 28 to distinguish acts of punishment from acts of hostility. More generally, as we shall see presently, they play a constitutive role in his conception of public authority. Skinner’s discussion of authorization neglects altogether Hobbes’ theory of punishment.

3. THE CONSTITUTION OF LEGAL ORDER

Hobbes thinks that legal order has a fairly determinate constitution, and that it is part and parcel of sovereignty. Political order may take a variety of forms—democracy, aristocracy, and monarchy—but certain constitutive parts of legal order are constant throughout. These constants are embodied in Hobbes’ laws of nature, and include a number of principles of legality:

impartiality in adjudication (equity), equal or proportionate distribution of things (or by lot if common use or division is not possible), submission of disputes to an impartial arbiter, the idea that no person may be judge of her own cause, and recognition of witness testimony in disputes over facts.²⁰ I argue now that the laws of nature are partially constitutive of the authority the sovereign enjoys to announce and enforce law, and so a breach of them undermines his authority and the claim he has to his subjects' obedience. I will refer to this account as the constitutional interpretation of the laws of nature.²¹

For Hobbes, a law of nature is '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' (L xiv.3, 79; also DC ii.1, 33). Hobbes defines the 'fundamental law of nature' as a 'precept, or general rule of reason, that every man ought to endeavour peace, as far as he has hope of attaining it. . . .' (L xiv.4, 80; also DC ii.2, 34; EL xv.1, 82). And all the laws of nature are 'immutable and eternal' (L xv.38, 99). In sum, the laws of nature are immutable and prescriptive rules we can know through reason.

Their importance to Hobbes is suggested by their location in *Leviathan*. Immediately after discussing the state of nature in chapter 13, he sets out these laws in chapters 14 and 15 as the constitutional programme required both to supplant the state of nature and to minimize the tendencies to slip back into it once civil society is established. That is, he articulates the laws of nature prior to his discussion of authorization in chapter 16, prior to his analysis of the state in chapter 17, and prior to his description of the types of sovereignty in chapters 18 and 19. If the laws of nature were optional in the sense that the sovereign could adopt them into the civil law or not at his sole discretion, one would expect them to be tagged on only after he had worked out the central concepts of authorization, the state, and sovereignty. Hobbes' does not turn his attention to the civil law—the kind of law the sovereign can enact and repeal at his discretion—until chapter 26. Arguably, Hobbes identification of the laws of nature with reason explains their absence from the argument that the sovereign can make and repeal civil law as he pleases: the sovereign can neither make nor repeal the laws of nature because their authority depends on reason as well as the sovereign's will.

However, the view that the laws of nature represent constraints on the sovereign is in tension with other important passages in *Leviathan*. Hobbes seems to deny flatly that the laws of nature are laws that create legal

²⁰ See L xv.23–33, 97–8; also EL xvi.12–13, 92; xvii.3–7, 94–6; DC iii.15–24, 50–2.

²¹ David Dyzenhaus offers a similar account: David Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 *Law & Phil* 461.

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obligations, for only the sovereign has the authority to create those obligations (L xv.4r, 100):

These dictates of reason men use to call by the name of lawes, but improperly; for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves, whereas law, properly, is the word of him that by right hath command over others.

His discussion of the laws of nature and the civil law in chapter 26 of *Leviathan* (the ‘mutual containment thesis’) elaborates the point: (L xxvi.8, 174):

The law of nature, and the civil law contain each other, and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature . . . are not properly laws, but qualities that dispose men to peace and to obedience. When a commonwealth is once settled, then are they actually laws, and not before, as being then the commands of the commonwealth, and therefore also civil laws; for it is the sovereign power that obliges men to obey them.

More specifically, Hobbes claims that law—civil and natural—must have certain institutional properties to create legal obligations that bind on action (L xxvi.8–23, 174–81). First, the law must have a known author who is recognized to have law-making authority and effective power. Second, a law must have an authentic interpretation, ie an interpretation that is authentic because it is rendered by a judge appointed by the sovereign. Finally, the civil law must be published, since for it to succeed as a command it must be made known to those subject to it. These properties—a known author with sovereign power, publicity, and an authentic interpretation—require the legal institutions of civil society.

It may seem that Hobbes is committed to positivism given his incorporation of the laws of nature within civil law and the emphasis he places on institutionalization. In the remainder of this section I will attempt to reconcile Hobbes’ apparent commitment to positivism with the constitutional interpretation of the laws of nature. We can begin this reconciliation using a distinction Hobbes draws with respect to different types of obligation. Hobbes requires institutions to be in place in order for full-blooded legal obligations to arise and bind on action *in foro externo* (in the external forum). At the same time, Hobbes thinks that the laws of nature bind *in foro interno*—on conscience, ‘to a desire they should take place’—in the state of nature as well as in civil society (L xv.36, 99). He says that ‘[t]he Laws of Nature oblige in Conscience always, but in effect then *only where there is Security*’ (L xv.36, 99, emphasis added). If the security condition also applied to the *in foro interno* application of the laws of nature, then the laws of nature would apply *in foro interno* only in civil society, where the sovereign is present to provide security. But then Hobbes would have no reason to

base the *interno/externo* distinction on the presence of security. For security to play a role in making the distinction, it must be the case that the laws of nature bind on conscience (*in foro interno*) even when there is no security, as is the case in the state of nature.²²

This suggests that, for Hobbes, at least some part of the *normative* authority of the laws of nature—their normative capacity to sustain legal obligations—can be specified independently of the institutional formalities and sovereign power that make those laws obligatory *in foro externo*. Even though the laws of nature are ‘not written, nor otherwise published’, they create legal obligations once civil society is in place (*ibid*). Hobbes is explicit in this regard: because the laws of nature can be known ‘not upon other men’s words, but every one from his own reason’, those laws ‘therefore, need not any publishing, nor proclamation’ (*ibid*). This feature of the laws of nature is difficult to reconcile with the positivist view that all legal obligations arise *solely* from the sovereign’s will, since the normative dimension of the laws of nature is apparent through reason alone and explicable independently of his will.

An objector might point out that it is still the sovereign who has ultimate interpretive authority over the laws of nature. Hence they place no real limitations on the sovereign, who can declare them to be more or less whatever he wants. Hobbes’ argument for sovereignty, however, seems to presuppose that the subject can judge if the sovereign complies with at least some of the laws of nature, ie the laws that govern the institutions of legal order (eg equity, equal use of things in common, impartiality in adjudication, etc). His justification of these laws is always cast in terms of how their breach leads to conflict, yet the sovereign alone is entitled to set up the institutions that make their breach possible. It follows that the sovereign, and only the sovereign, can breach them. As with the other laws of nature, Hobbes calls them ‘articles of peace, upon which men may be drawn to agreement’, and so they participate in the justification of sovereignty (L xiii.14, 78). They are ‘the precepts by which men are guided’ to avoid ‘the condition of war’ (L xxxi.1, 233–4). Plausibly, the laws of nature are ‘articles’ of the original covenant that people are presumed to agree upon. But for them to play a meaningful role in the justification of sovereignty, they must be reasonably determinate and intelligible *independently* of sovereignty, which is why Hobbes says they are knowable both through reason and in the state of nature.

While the sovereign retains final interpretive authority, the contribution of the laws of nature to the argument for sovereignty would be undermined if, on entering civil society, the sovereign could interpret them in any way he

²² For the contrary view, see Michael Oakshott, *Rationalism in Politics and Other Essays*, new and expanded edn (Indianapolis: Liberty Press, 1991).

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pleased. After all, why would people be ‘drawn to agreement’ on them if, in practice, they are meaningless? And if the argument for sovereignty is weakened, then so too is the sovereign’s authority. Hobbes insists that because sovereignty, in the long run, ‘cannot be maintained by any civil law or terror of legal punishment’, the argument for it must be ‘diligently and truly taught’ to the people (L xxx.4, 220). Assuming, then, that the basic content of the institutional laws of nature is not lost once people enter civil society, an interpretation that flagrantly violated them would subvert the sovereign’s authority in two ways. First, as I will argue below, it would weaken the subject’s obligation to obey. Second, the infringing interpretation would undermine legal institutions and move civil society towards the state of nature by promoting conflict.

One might think that these consequences could perhaps serve as useful advice to the sovereign but that they are not really constraints. The point of my argument, however, is not to show that the sovereign’s powers to interpret are limited in the sense that they are subject to review by another authority (on Hobbes’ account, this reviewing authority would be the sovereign). Nor do I mean to imply that an abuse of interpretive powers would justify rebellion, as Locke might claim.²³ Rather, the point is much weaker and conditional: if the sovereign wishes to issue interpretations of the laws of nature that are not destructive of his authority and the subject’s obligation to obey, then he must do so in a way that does not flagrantly violate them, especially when their meaning is relatively plain and determinate.

Under this constitutional account of the laws of nature, they constitute the fundamental (if embryonic) normative framework within which sovereign authority must operate so as to achieve the ends of sovereignty (peace and security) while making a claim to the subject’s obedience. Several passages from *Leviathan* support this reading. Hobbes asserts that violation of the laws of nature ‘can never be made lawful. For it can never be that war shall preserve life, and peace destroy it’ (L xv.38, 100). Elsewhere he flatly states that ‘sovereigns are all subject to the laws of nature, because such laws be divine, and cannot by any man or commonwealth be abrogated’ (L xxix.9, 213). At yet another place, Hobbes says that ‘whatsoever is not against the law of nature may be made law in the name of them that have the sovereign power’ (L xxvi.41, 188). This suggests that if a sovereign were to issue a decree that violated the laws of nature, then in some sense the decree would fail to constitute law. Hobbes alerts us to the sense he has in mind in the same paragraph: ‘in all things not contrary to the moral law (that is to say, to the law of nature) all subjects are bound to obey that for divine law

²³ For Locke, because sovereignty belongs to the people and is held in trust by government, the people are entitled to rebel and overthrow abusive rulers. See Locke, *supra* note 6.


which is declared to be so by the laws of the commonwealth' (ibid). The suggestion here is that the subject is not bound to obey commands 'contrary to the moral law'. And in his chapter that segues from the secular argument for the commonwealth to an extended scriptural argument, Hobbes says plainly that 'subjects owe to sovereigns simple obedience in all things wherein their obedience is not repugnant to the laws of God' (L xxxi.i, 234).

In *The Elements of Law* he is explicit: 'the civil law cannot make that to be done *jure*, which is against the law divine, or of nature' (EL xxix.5, 179). So too in *De Cive*: 'Reason itself however changes neither its end, which is *peace and self-defence*, nor its means, namely those virtues of character which we have laid out above, and which can never be repealed by either custom or civil law' (DC iii.29, 54–5). In the Latin version of *Leviathan* Hobbes confirms that 'the laws of nature are not changed or restricted by the civil law, but only natural right is' (OL xxvi.8, 175). A plausible explanation of Hobbes' commitment to the laws of nature is that he thinks they provide immutable building blocks of legal order, and thus they are partially constitutive of the sovereign's authority and the subject's obedience.

The laws of nature also provide the legal framework within which judges are to interpret and apply civil law. In setting out the 'things that make a good judge (or a good interpreter of the laws)', Hobbes first points to 'a right understanding of that principal law of nature called *equity*' (L xxvi.28, 184).²⁴ In interpreting the law, a proper understanding of equity is important because 'the intention of the legislator is always supposed to be equity; for it were a great contumely for a judge to think otherwise of the sovereign' (L xxvi.26, 183). Thus, 'if the word of the law' does not 'authorize a reasonable sentence', the judge ought to 'supply it with the law of nature' (ibid). By way of illustration, Hobbes gives the case of a man who leaves his house empty and upon return is kept out by force. The written law says only that if someone is put out of their house by force they shall be restored by force. Hobbes claims that although in his hypothetical case 'there is no special law ordained' that expressly governs the dispute, its resolution nonetheless 'is contained in the same [written] law; for else there is no remedy for him at all, which is to be supposed against the intention of the legislator' (ibid).

Hobbes offers the case to make a Dworkinian point, to show how the laws of nature can 'supply' a 'reasonable sentence' when the written law alone cannot do so. The judge must rely on the idea that the 'intention of the legislator is always supposed to be equity', and this reliance on equity

²⁴ For discussion of Hobbes' complex view of equity, see Dennis Klimchuk, 'Hobbes on Equity' in D Dyzenhaus and T Poole (eds), *Hobbes and the Law* (Cambridge: Cambridge University Press, forthcoming 2012).

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implies that the judge must adopt one of just two permissible approaches to the case. The first is that equity on its own requires the ‘reasonable sentence’ in light of the indeterminacy of the written law. The second is that equity points to the general purpose underlying the written law—provision of a remedy to wrongfully dispossessed home owners—which in turn justifies a wide interpretation of the law conducive to a ‘reasonable sentence’. The judge is not entitled, as Hart might suggest, to observe that the written law is indeterminate and then use her discretion to decide the case one way or the other. While perhaps not Dworkin’s idealized judge Hercules, there is in Hobbes’ judge the glimmer of a proto-Dworkinian.

Similarly, if a judge has no positive law to go on, the laws of nature will fill in the gaps and provide the required legal principles, for in those circumstances the judge’s sentence ‘ought to be according to the reason of his sovereign (which being always understood to be equity, he is bound to it by the law of nature)’ (L xxvi.14, 177–8). The laws of nature also play this gap-filling role whenever the sovereign’s administrative officials lack statutory instructions. They as much as judges are ‘obliged to take for instructions the dictates of reason . . . which being always understood to be equity, [they are] bound to it by the law of nature’ (ibid). Hobbes concludes that these ‘instructions of natural reason may be comprehended under one name of *fidelity*, which is a branch of natural justice’ (ibid). In other words, when public officers carry out their public obligations, they owe a specific duty of loyalty (*fidelity*) to the sovereign, and the content of the duty is supplied by the interchangeable principles of ‘natural justice’, the ‘dictates of reason’, and the laws of nature. While the duty of loyalty is owed to the sovereign, the sovereign’s offices are designed to secure peace and security for his subjects. There is a good sense, then, in which the duty of loyalty to the sovereign is ultimately a duty owed to the people.

To sum up: in each branch of the state—the administration, the judiciary, and the legislature—public actors are to be guided by equity and the other laws of nature. These laws structure and fill the recesses of legal order. Notwithstanding the sovereign’s wide interpretive power, Hobbes believed that a failure to abide by the laws of nature would subvert the sovereign’s authority and the subject’s duty to obey.

4. TRUST AS THE BASIS OF THE STATE-SUBJECT RELATIONSHIP

Bearing in mind these implications and the constitutional role Hobbes assigns to the laws of nature, consider now how they may be incorporated into his conception of authorization. Against the background threat of the state of nature, the subject is deemed to have covenanted with others to


authorize a sovereign to establish legal order because it is in everybody's interest to do so. When individuals renounce their right of nature, they do not transfer it to the sovereign so as to become his slaves.²⁵ Rather, they are deemed to have consented amongst themselves to establish a sovereign licensed to exercise public power solely for the sake of establishing legal order consistent with the laws of nature.

Now, on the orthodox understanding of Hobbes, the subject's relationship to the sovereign rests on consent in the sense that sovereignty flows from the original covenant. And once civil society is established, the subject's actual relationship to the sovereign is not mediated by consent or anything else. The sovereign is taken to possess the right of liberty that the subject has transferred to him, and so, as Skinner put it, 'the powers of the crown have no limits at all'. But the orthodox view overlooks the moral precept that Hobbes thought actually connected the sovereign to the people: trust.

Once we are in civil society, the subject's ongoing relationship to the sovereign is mediated and based on trust. Trust is what we are left with once we have consented to an original covenant that authorizes irrevocable power that the sovereign has unilateral authority to exercise. And trust is the moral medium that connects public authority to the people. The presence of trust implies that sovereign power has been authorized subject to the condition that it will be used exclusively for the purpose for which it has been conferred, ie the procurement of legal order consistent with the laws of nature. A breach of trust on the part of the sovereign would not justify a Lockean rebellion, but it would undercut the subject's obligation to obey.

In support of this position, I briefly canvas some of ways in which Hobbes assigns a role to trust in his discussion of authority and the sovereign's offices. When Hobbes posits equity as a law of nature, he describes the judge as one who is 'trusted to judge between man and man' (L xv.23, 97). Similarly, Hobbes says that the arbitrator who distributes 'to every man his own' is someone who can be said to 'perform his trust' (L xv.15, 95). Trust also plays a pivotal role in Hobbes' justification of the principle of impartial dispute resolution. If the judge would gain from one side's victory in the dispute, 'no man can be obliged to trust him' (L xv.32, 98). Hobbes seems to suggest here, consistent with the argument made earlier, that a person subject to judicial authority cannot be obligated to take the judge's decision as binding if the judge has taken a bribe. The consequence of corruption, Hobbes warns, is that 'the condition of war remaineth, contrary to the law of nature' (ibid).

²⁵ Compare Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1988), pp 114–28 (arguing that Hobbes' argument for absolute sovereignty implies a master/slave relationship between sovereign and subject).

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Hobbes is just as explicit in his discussions of the relationship between the sovereign and the people, and the sovereign's duties which are said to flow from the trust reposed in him. He describes the office of the sovereign as one arising from the people's trust: 'The office of the sovereign . . . consisteth in the end for which he was trusted with the sovereign power, namely, the procuration of *the safety of the people*' (L xxx.I, 219). In the same vein, he says that a monarch with authority to appoint a successor 'is obliged by the law of nature to provide, by establishing his successor, to keep those that had trusted him with the government from relapsing into the miserable condition of civil war' (L xix.II, 123). Hobbes elsewhere acknowledges that 'a sovereign monarch, or the greater part of a sovereign assembly, may ordain the doing of many things in pursuit of their passions, contrary to their own consciences', and qualifies such action as 'a breach of trust, and of the law of nature' (L xxiv.7, 162). One cannot commit a 'breach of trust' unless one is under a duty to abide by the requirements of an office held in trust.

Given Hobbes' explicit reliance on consent and his celebrated account of authorization, it is suggestive that he uses 'trusted' or 'entrusted' in places where, if consent were the sole desiderata, he could have simply said 'authorized'. Hobbes may have preferred the language of trust because it indicates a moral relationship capable of sustaining the commonwealth on an ongoing basis. That is, Hobbes uses consent to explain the *origins* of sovereignty, but its justification over time—and so its *nature*—is explicated in the language of a 'mutual relation' based on trust.²⁶ The sovereign is entrusted with the commonwealth's peace and security, while the subject is entrusted with life and liberty. So long as the sovereign fulfils the obligations that arise from this trust by ruling in accordance with the principles of legal order, the subject has an obligation to obey the law. Together, the laws of nature and the moral relationship of reciprocal trust supply the constitutional framework of legal order.

I have tried to show that the orthodox reading of Hobbes fails to account for his understanding of the laws of nature, and that the subject's surrender of her right of nature does not involve a transfer to the sovereign of an unfettered discretionary power. Instead, the concept that animates Hobbes' discussion of authorization is entrusted or *fiduciary* power. As noted above fiduciary power arises when one party, the fiduciary, is entrusted with a unilateral right of

²⁶ The interpretation I am urging here helps explain the infamous 'rebel's catechism' in *Leviathan*, where Hobbes says that if 'our refusal to obey frustrates the end for which the sovereignty was ordained, then there is no liberty to refuse; otherwise there is' (L xxi.15, 142). Skinner's account of authorization makes no attempt to explain this and similar passages.

action over the interests of another, the beneficiary, where the beneficiary is in principle or in practice unable to exercise this power. In these circumstances, the duty of the fiduciary is to act with due regard for the best interests of the beneficiary. In the case of the fiduciary state and its officials, public authorities have a right of action over the people's interest in living within a legal order rather than a state of nature. But the right of action is expressly limited to the terms of its authorization. A failure to abide by those terms would subvert the state's authority and the moral claim it could otherwise make to its subjects' obedience.

In the remaining chapters I argue that seeing the state as a fiduciary explains its authority to legislate, administer, adjudicate, and otherwise provide for legal order. The state-subject fiduciary relationship also explains the default limits of public authority, limits that constitute the rule of law and emerge as freestanding public duties that constrain exercises of authority. Those duties help to guarantee what Hobbes sought from the original covenant, that exercises of public power necessarily take place within an institutional and stable legal framework. As we shall see, the legitimacy of the framework is supplied by a fiduciary principle of legality. This principle transmits authorization to the state on behalf of the subject, and thereby permits the state to act authoritatively on the subject's behalf, but always subject to fiduciary constraints.

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