

HOBBS AND THE RISE OF MODERNITY

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Abstract

This article examines the specific role of Hobbes' *Dialogue of the Common Laws* in the development of the liberal tradition in the common law. Hobbes usually has been regarded as the founder of a theory of absolute sovereignty and as an advocate of state centralization. In some cases he is even considered a forerunner of such neoconservative political philosophers as Carl Schmitt and Leo Strauss. However, this reading of Hobbes will contend that his philosophical and political enterprise has been misunderstood. Opposed to the authoritarian reading I wish to emphasize a strain of pragmatic and free thinking modernity in Hobbes' writings. Hobbes supports freedom of expression and enquiry against all types of sectarian claims made by the most powerful legal and religious circles and guilds of that time which he saw as intent on pursuing their own narrow self-interests against the needs of the common people. In other words, he was an early advocate of intellectual freedom and was an agent of change within the conceptual history of common law. The historical influence of these liberal features of Hobbes set in motion a shift towards a kind of consequentialist and informal utilitarianism in the understanding of common law. This is the important historical outcome of *A Dialogue*. I argue that the contrast between Hobbes' rational jurisprudence in *A Dialogue* and common law itself is particularly significant to the rise of English and American Constitutionalism, modern individualism and utilitarianism.

INTRODUCTION

The subject of this article is the historical legacy of Hobbes' *Dialogue of the Common Laws*, which he wrote in the late 1660s as an attack on the legal ideas of the common lawyers, and in particular on the ideas of the greatest lawyer of the early seventeenth century, Sir Edward Coke.¹ In recent years, it has gradually gained wide but not undisputed acceptance among political theorists the view that Hobbes provided a rationalist defence for absolutism, but his individualistic methodology and the use he made of social contract theory, prefigured early liberalism.² The importance of Hobbes is firmly rooted in his role as an agent of change in the history of Western philosophy. To make a long story short, a basic idea of 'classical' political philosophy was developed in Greek antiquity and adopted – but transformed – in the Christian intellectual traditions of late antiquity and the Middle Ages. This is the idea that the philosophical consideration of political concepts naturally presupposes normative ideas connected with some notion of an objective human good, end, purpose, or function.³ This idea of a human good, as it figures in political theory, was much more radically transformed in European political philosophy of the seventeenth and eighteenth centuries starting more or less with Hobbes as a sort of demon of modernity.⁴ By the twentieth century, many major political philosophers appeared to believe that it is possible 'to do political philosophy' without reference to such a normative metaphysical, ethical, or religious ideal. Political organization is regarded as a matter of convention or agreement and, in that sense, as something that is the result of human artifice rather than a straightforward consequence of human biology (or of human nature, more broadly). Legitimate political authority is the rational endorsement of all citizens (irrespective of whether such endorsement ever explicitly occurs).⁵

However, the role of Hobbes' Restoration writings in this process deserves a closer attention than they have usually received. Hobbes in these writings, that is, in his *History of the Civil war*, known as *Behemoth*, and in his extensively revised Latin translation of *Leviathan*, as well as in the *Dialogue of the Common Laws* and a number of other, minor pieces, grappled with the problem that the restored monarchy had allowed itself to be captured by a powerful group of ideologues – the

clergymen of the Church of England and their supporters among the common lawyers, whom he accused of being a threat against both civil order and intellectual freedom. *A Dialogue's* criticism against these ideologues had a remarkable historical significance, and the role and the case for religious toleration in Hobbes should be made more forcefully than it has been, with some exceptions, by most modern scholars because it is crucially important for the rise of important features of liberalism.⁶

The meaning of a political concept such as liberalism is often contested, meaning that no neutral or settled definition of it can ever be developed, but I take the important features of liberalism to which I refer to be that liberal thought is characterized by a commitment to individualism, a belief in the supreme importance of the human individual, implying strong support for individual freedom.⁷ From the liberal point of view, individuals are rational creatures who are entitled to the greatest possible freedom consistent with the like freedom for fellow citizens.⁸ The history of conceptions of the common law reflects the gradual and uneasy rise and acceptance of these ideas and in this article I am arguing that Hobbes contributed to this process by setting in motion a shift towards a kind of consequentialist and informal utilitarianism in the history of the conceptions of common law.⁹ In this way, the ideas set in motion by Hobbes, i.e., his individualistic methodology and rationalism, the use he made of social contract theory and in particular the role and the case he sets for religious toleration also largely stand at the cross-road of the distinction between classical liberal thought, which believed in natural law, in the inalienability of private property and in a minimal state and modern or contemporary liberal thought, which believes that private property is a social right and that government should be used to improve life through social engineering.¹⁰

HOBBS' PLEA FOR RELIGIOUS TOLERATION AS AN AVATAR OF LIBERALISM

In his great pre-Restoration works, notably of course *Leviathan* itself, Hobbes consistently argued that both civil order and intellectual freedom were fundamental political values, and indeed that it was the

destruction of intellectual freedom which had commonly led to civil disorder, through the creation of armies of bigots determined to rule their fellow men for ideological ends, so that: “men are either punished for answering the truth of their thoughts, or constrained to answer an untruth for fear of punishment”.¹¹ Against this practice, Hobbes asserted that it was wrong “to extend the power of the Law, which is the Rule of Actions only, to the very Thoughts, and Conscience of men”.¹² *Leviathan*, read in its entirety, was a plea for the ruler of England to secure his power over his citizens by allying with the supporters of religious toleration, and thereby to free the citizens from the most formidable threats to their personal and intellectual liberty. To press this point Hobbes boldly stated: “Faith is a Gift of God, which Man can neither give, nor take away by promise of rewards, or menaces of torture”.¹³ The ruler Hobbes probably had in mind at the time was precisely a restored Charles II, to whom the book seems initially to have been dedicated;¹⁴ when Charles finally succeeded in restoring the monarchy, however, he immediately allowed the Church of England to re-establish a grip upon the religious affairs of the nation, and Hobbes found himself treated as a prime target by the re-founded Church, which threatened him with exile, imprisonment or even death for the theological views he had expressed in *Leviathan*.¹⁵ So the reign of Charles II constituted for Hobbes a theoretical as well as a personal challenge: a regime which in general he supported turned out still to be involved in a struggle against enemies within, and indeed at certain critical moments to have given way to those enemies. What did Hobbes’ theory imply about the correct response to this situation? Clearly, the works in which he sought to answer this question by arguing in favour of religious toleration and for the elimination of sectarian strife are going to be among the most interesting of his writings, as in them he was forced to deal with the practical implications of his ideas, and to come to a judgement about the whole of modern English history. The ideas expressed in this judgement constitute an avatar of liberalism and contributed to the development of important features of liberal tradition in the common law.

Indeed, Hobbes always sought freedom of thought and religious toleration as a remedy against the disorder and oppression caused by sectarian strife. That there is more into this than the contention in *Leviathan* in favour of freedom of thought and religious toleration is confirmed

by the fact that there is always an implicit or explicit historical theory in Hobbes: mostly, it is a theory of the corruption of the Christian religion by Aristotelian philosophy, especially in the Middle Ages. This historical theory is clearly expressed in *Leviathan*, but it is possible to read the seeds of it, at least implicit, into the early works, even though Hobbes is not giving an historical account of this corruption in *The Elements of Law* and *De Cive* because, as pointed out by Quentin Skinner, in these works Hobbes eschews historical arguments in favour of rational reasoning.¹⁶ So in *De Cive*, even though no explicit historical account of it is given, it is already implied a theory of the corruption of human life as a whole by philosophical speculation beginning with Socrates and which led to the ideological grip on power by the bigots. This theory is implicitly set out in the preface to *De Cive*, as well as in the third section;¹⁷ it is referred to in *The Elements of Law Natural and Political*,¹⁸ and of course explicitly becomes a full historical account of the corruption of Christian religion in *Leviathan* where this account is the central theme of Parts Three and Four,¹⁹ and in the *Historia Ecclesiastica*.²⁰ This historical account is also one of the central themes of *Behemoth*, as well as the exclusive subject of some of Hobbes' other post-Restoration writings, such as the *Historical Narration Concerning Heresy*.²¹ A Dialogue also contains this history of corruption, partly in the history of heresy which is such a striking feature of this work, and partly in the history of the misunderstanding of politics which gave rise to the common lawyers' sense of their own power over the common people and which together with the ideological power of the bigots undermines civil order and intellectual freedom.²²

But in order to understand the importance of the arguments in favour of religious toleration in A Dialogue it is also useful to bear in mind that a natural set of questions to ask about Hobbesian politics, and one which surely occurred to Hobbes himself, is, what would life under a well-founded Hobbesian commonwealth actually be like, and has there ever been a genuine example of such a state; and if not, why not? In *Leviathan* he says that we have always lived if not in darkness, then yet in a mist compared with the lucidity of a well-founded Hobbesian commonwealth, and that the reason for this is precisely the proliferation of sects, both of Christian and of secular philosophers. So, in one sense, by the presence of an historical narrative, Hobbes in A Dialogue was not provid-

ing his readers with an analysis of any form of government whatsoever: he was providing them with an account of a specific kind of government, with a number of special conditions, notably the elimination of sectarian strife, which was not to be found in a pure form anywhere in modern Europe. The absence of this specific kind of government required explanation, however, and Hobbes argues that it is due to the corruption of the Christian religion by Aristotelian philosophy. To press this point is one function of the historical discussions in his works. But the historical passages of *A Dialogue* are also intended to make Hobbes' political conclusions palatable to common lawyers and to those with property, the principal users of common law.²⁴

In all his works, Hobbes consistently expresses deep hostility to orators who use the power of rhetoric to promote faction and schism, and who lead people to commit themselves to partial or unexamined moral, religious and even scientific opinions.²⁵ Freeing genuine personal inquiry from the internal coercion of the persuasive was always one of Hobbes' fundamental aims.²⁶ But all his works, to a degree, employ the techniques of the orator themselves to convince their audience – rhetoric destroys itself, much as reason was to destroy itself in Hume.²⁷ Nowhere this is more evident than in *A Dialogue*.²⁸ So a plausible explanation for the rhetorical form in which Hobbes couched the arguments of the book is that it was a means of slipping into the minds of contemporary readers especially those imbued with the attitudes of the common lawyers, a theory of absolutist government which ran counter to their fundamental assumptions about sovereignty and the law.²⁹ Hobbes was all the more compelled to coach his arguments in this rhetorical form because he was doing two things at the same time which, at least on the face of it, it was difficult to render compatible: he was trying to make his conclusions palatable to common lawyers on the one hand and challenging the views put forward by some common lawyers to undermine their authority with the propertied on the other.

However, his rhetorical task must be understood in view of the fact that the situation and the attitudes of the common lawyers were not univocal. The idea that Hobbes' theory of absolutist government ran contrary to their fundamental assumptions should not be overestimated: recent work by people like Glenn Burgess, Alan Cromartie and Johann

Sommerville has given us a complex sense of what the attitudes of the common lawyers were;³⁰ while in the particular case of *A Dialogue* it should not be forgotten that Aubrey says that both Hale and Vaughan read it, and Vaughan, as much of a common lawyer as Hale, greatly approved of it – while Hale, as we know, did not.³¹ So two lawyers as close as Hale and Vaughan, both friends and executors of the great Selden, could read *A Dialogue* in very different ways, which should warn us against attributing too high degree of uniformity to the common lawyers. There were always many different interpretative schools among the lawyers, and the idea expressed by John Davies and to an extent by Coke, that common law was custom in the sense that it was made informally by the people themselves was only one view.³² Equally powerful by Hobbes' time was the view espoused by Selden, and by both Hale and Vaughan, that common law is lost statute – statutes the records of whose promulgation had been lost, as having been made before the modern sets of Parliamentary rolls.³³ Moreover, on either view it was accepted that any provision of common law could legally be changed by a simple Parliamentary act, though Coke for one believed that this might be very unwise: this is and has always been the law of England.³⁴

In a sense, it was the non-historical side of common law to which Hobbes was chiefly antagonistic: the idea that common law is “reason” and that therefore any case, in the absence of statute, can be decided by the “reason” of the judges. There are two features of this. The first is Hobbes' interesting argument that the best interpreters of the sovereign's will are not judges with their professional or “artificial” reason, but the common people: and that therefore English juries should be seen as judges of law as well as of fact.³⁵ This was an extremely radical view, and it still is – it is the principle of “jury nullification”, much debated in the United States, and among Hobbes' contemporaries only the Levellers espoused it.³⁶ It might be worth remarking in this context that Hobbes' admirer John Vaughan, as Justice of the Common Pleas, later pronounced the definitive ruling on the incorrigibility of a jury's decision, which still governs Anglo-American law.³⁷ A Hobbesian view of the jury thus led to what has usually been seen as the antithesis of “absolutist” politics, and to a practical way of limiting state power without handing comparable power to another institution or sect. The second feature is Hobbes' realization

that it was the idea that, in the absence of statute, a judicial case can be decided by the “reason” of the judges which was permitting the reintroduction of laws against heresy into England through the back door.³⁸ Parliament, having not renewed the laws in 1640, was unable to reintroduce them after the Restoration because there was always a majority against any particular proposal.³⁹ But Coke, and his Restoration followers, believed that common law incorporated the truths of orthodox Christianity and could therefore be used to condemn heretics in the absence of statutory sanction.⁴⁰ In this respect, *A Dialogue* continues the case for toleration made by Hobbes in Part Four of *Leviathan*. I will analyze next this feature of *A Dialogue* and in particular the fact that Hobbes by challenging the belief that common law was the embodiment of universal reason as understood by the common lawyers contributed to the evolution of this belief and to a shift towards a kind of consequentialist and informal utilitarianism.

REASON IN HOBBS AND IN THE COMMON LAW

The fact that for Hobbes law is the rational will of the sovereign ran against the main claim invariably made about common law, i.e., that it was the embodiment of reason. Hobbes in *A Dialogue* points out that to rest law on reason, and to identify this with individual reason is a recipe for anarchy. Accordingly, the Philosopher states:

I find my own reason at a stand; for it frustates all the Laws in the World: for upon this ground any Man, of any Law whatsoever may say it is against Reason, and thereupon make a pretence for his disobedience.⁴¹

Here indeed Hobbes was right. In fact, the appeal to reason was continually made by radicals in the Civil War on the authority of Coke (and later by the French revolutionaries, hence Burke’s famous critique of them), and Hobbes may have paid attention to the Levellers.⁴² Hobbes’ point is that individual rationality is indeterminate, even though not all interpretations are equally valid and true. So he admits the existence of “true” interpretations, but only given the fact that “*True* and *False* are

attributes of Speech, not of Things”.⁴³ That is to say, “speech” makes some interpretations less indeterminate than others according to how precise is the meaning of the words which are used, and to the degree to which these words are used consistently and unambiguously in accordance with their meaning. Yet to say, as common lawyers claim, that rationality resides in custom is clearly untrue since we debate the rationality of customs. So the Philosopher tells the Lawyer:

Now as to the Authority you ascribe to Custome, I deny that any Custome of its own Nature, can amount to the Authority of a Law: For if the Custom be unreasonable, you must with all other Lawyers confess that it is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity that makes it Law.⁴⁴

Furthermore, to claim, as the common lawyers themselves do, to have a unique insight into the rationality of custom is, he suspects venal special pleading. Their reason is no different from anyone else’s, their knowledge could be gained in a couple of months.⁴⁵ Despite the rationalism of his method, Hobbes’ view, expressed in his *Questions Concerning Liberty Necessity and Chance* printed in 1656, is that the claim that reason is a criterion of the *content* of true law “is an error that hath cost many thousands of men their lives”.⁴⁶ In *A Dialogue* his answer to the problem of rational indeterminacy is the insistence that “It is not Wisdom, but Authority that makes a Law”.⁴⁷ In fact, Hobbes believes that only the authority of the sovereign, and not the “reason” embodied in any law, can save lives. Indeed, what reason reveals is the need to have an authoritative determination, not what the nature of that determination was. This idea was already in the *Questions Concerning Liberty Necessity and Chance*, where Hobbes stated:

I think rather that the reason of him that hath the sovereign authority, and by whose sword we look to be protected both against war from abroad and injuries at home, whether it be right or erroneous in itself, ought to stand for right to us that have submitted ourselves thereunto by receiving the protection.⁴⁸

On Hobbes' view all reason is the reason of human individuals, and individual reason is inherently indeterminate whilst law must be determinate. So only the authority of the sovereign, but not "reason" by itself, can prevent the fighting caused by conflicting views and save many lives. Reason cannot, therefore, be the basis for law. This point is raised here to establish the position which the next generation of common law thinkers attacked, and in doing so developed a peculiar notion of reason as custom.

However, there is a sense in which what common law does with custom, and what Hobbes does with his criticism of "the common law mind", share a role in the way the perception of the relationship between the individual and the state started changing from the seventeenth century, i.e., in the growing recognition of the subjective individuality of the citizens as autonomous social agents within the state, which is one feature "of the rise of individualism and the modern state" and of liberalism itself, and grew out of the struggles between king and Parliament. *A Dialogue* by challenging the belief that common law was the embodiment of universal reason as understood by the common lawyers contributed to the evolution of this belief. Indeed, Hobbes provoked a more self-conscious defence of common law from Hale which, however, inexorably left the common law mind open to the critical scrutiny underpinning the difference between being traditional and being consciously traditional. In fact, as pointed out by Burke and Hegel to whom the distinction between the two is commonly attributed, once it becomes necessary to convince the people that tradition must be regarded in the traditional way, it becomes clear that they no longer view tradition in that way and that men "live and trade each on his own private stock of reason".⁴⁹ In regard to this, Hegel in *The Phenomenology of Spirit* gives an enlightening exemplification of this process by describing what happens when we start enquiring about the origin of customary laws:

[I]f I enquire after their origin and confine them to the point whence they arose, then I have transcended them; for now it is I who am the universal and they are the conditioned and limited. If they are supposed to be validated by my insight, then I have already denied their unshakeable, intrinsic being, and regard them as something which, for

me, is perhaps true, but also is perhaps not true.⁵⁰

As exemplified in this passage, the “traditionary” conception of common law requires a certain naïve innocence which, once lost, cannot be regained. Hale, at least to a certain extent, seems to be aware of this in his critique of *A Dialogue*. For this reason, he advances a pragmatic defence of common law by constructing, against the attack of Hobbes’ political absolutism and rationalism, a more sophisticated defence of common law, i.e. the defensive development of custom as adaptation. In a famous image in *The History of the Common Law of England*, Hale compared the common law to a river which, although it has a source, collects and intermingles with the waters of numerous tributaries so that “it is almost an impossible Piece of Chymistry to reduce every *Caput Legis* to its true original ... Danish ... Norman ... Saxon or British Law”.⁵¹ Then, importantly, he goes on:

Neither was it, or indeed is it much material, which of these is their Original; for ’tis very plain, the Strength and Obligation, and the formal Nature of a Law, is not upon Account that the Danes, or the Saxons, or the Normans, brought it with them, but they became Laws, and binding in this Kingdom, by Virtue only of their being received and approved here.⁵²

This is a significant shift in emphasis on the basis of legitimacy. No longer are the crucial criteria the objective ones of longevity or provenance, which the “traditionary common law mind” did not put under critical scrutiny, but other criteria whose objectivity requires a more self-conscious effort to be recognized, and, most importantly, a downright subjective criterion: acceptability. Indeed, the actual “acceptance” referred to – these laws were in effect, “they were received here” invokes a more complex “objective” criterion which is open to critical scrutiny, namely empirical evidence that the rule actually existed and was treated as binding. But acceptability – “they were approved here”, even though does invoke some standard of what may be law, for example, the “natural law” standard that no unjust rule can truly be a law is *subjective* because it entails that ultimately it was up to an autonomous decision of the English

and not depending on the nature and content of the laws themselves whether or not they were treated as binding. So, from having an objective status as an historical product, common law has become a matter of (pure) subjectivity. In regard to this, the lesson of Hobbes' *Dialogue* to the common lawyers constitutes a turning point in the history of legal and political thought. In sum, because of this, Hobbes – at least posthumously – has won his long battle against Coke: even though his political fight, i.e., the defence of absolute monarchy, was “lost” by Hume, common law is not taken as the “objective” embodiment of reason, but as a most valuable historical convention which, nevertheless, like all human practices, can be subject to critical scrutiny.⁵³ In my view, this together with its arguments in favour of religious toleration is the most enduring legacy of Hobbes' *Dialogue*.

However, this shift towards a kind of consequentialist and informal utilitarianism in the history of common law must not be seen as leading to a complete rejection of objectivist and natural law influenced conceptions of common law. Rather it is the emergence of a new discourse qualifying and complementing the older one. Indeed, the evolution of the various conceptions of common law was practically mirrored by their legal and political application in the British and American constitutional systems (and by the many others which were influenced by them), and this application always required the blending of different conceptions of common law and law itself within the evolving constitutional systems: law itself is not static, but a living, growing institution that reflects society's changing conceptions.⁵⁴

CONCLUSION

This work contends that *A Dialogue* is responsible for the transition from the view that common law is an “objective” embodiment of reason to the historical conventionalist view that it is a generally useful set of arrangements arrived at through adaptive custom that can be subject to critical scrutiny, and suggests that this also influences the rise of important features of Western individualism and liberalism. Even though it can be argued that the changes that Hale, and later Locke and Hume

brought to the justification of common law might have happened without Hobbes, what matters most is the fact that they were reacting to and were themselves agents in the vast changes in intellectual perspective which Hobbes and his *Dialogue* had brought into being.⁵⁵ In the same vein, it is true that one may argue that the loss of objectivity of common law and of the concern to formalise natural right, and eventually also the drift away from contract, much less a renewable contract, are only loosely connected and that by no means it is obvious that the outcome of this loss should lead to a kind of consequentialist and informal utilitarianism because logic does not preclude other possibilities.⁵⁶ Nevertheless, this has been *the* historically dominant outcome. That is to say, what matters most is that *A Dialogue* embodies the rise of important features of liberal individualism which set in motion the historical process leading to a kind of consequentialist and informal utilitarianism.

A Dialogue is “liberal” because it recommends toleration. Indeed, even though toleration has been a policy of absolutist regimes – in fact James II had a policy of toleration, it is specifically liberal because it entails freedom of thought, i.e., the principle from which liberalism stems from and which some absolutist regimes may have in fact wittingly or unwittingly encouraged. What is historically and philosophically most significant is that *A Dialogue*’s liberal individualism, conventionalism and modern subjectivism as well as its plea for religious toleration was recalled not only few years later by Locke, but also in the following century, and even later, by Hume, Burke, Blackstone and Bentham. Hobbes directly or indirectly provoked these responses by his own use of history as rhetoric, which undermines traditionary authority based on an “objective” notion of reason, and required the common lawyers to rethink, deepen and ultimately reconstruct on more “conventionalist” basis their arguments in favour of the ancient constitution, even though their approach remains different from Hobbes’.⁵⁷

As my purpose in writing this paper was philosophical, rather than historical as such, I conclude by assessing the historical outcome of the process set in motion by Hobbes within common law and beyond. There is a potential problem here: once liberalism has surrendered any belief in objective truths, all personal subjective beliefs become true. The result is that, on the positive side, the only way you can make a decision is by

appeal to your own conscience. But on the negative side, once all things are equally valid, the only way to attain supremacy is through war and power. And in regard to this it is relevant to mention that the usurpation of the great faiths by secular ideology is not usually recognized. But this process has a historical and a contemporary dimension. For all the major monotheistic faiths, their primary historical distortion lies with their utilization for the purposes of state formation and nationalism and this process has been at work also within common law systems.

Thus liberalism can make out of us all free and responsible citizens, or bigots and religious fundamentalists justifying extreme political ideologies. When the arrow is primed on the bow sooner or later it must be unleashed, as the Chinese proverb says. Alas, there is only a fine line between the two outcomes but only the former holds true to the original principles of liberalism itself highlighted by Hobbes' case for religious toleration and freedom of thought in *A Dialogue*. The latter outcome would be tantamount to snatching defeat from the jaws of victory.

Endnotes

¹See, *A Dialogue between A Philosopher and A Student of the Common Law of England*, Edited with an Introduction by Joseph Cropsey (Chicago, The University of Chicago Press, 1971).

²See, for instance, Andrew Heywood, *Political Theory: An Introduction, Second Edition* (London, Mcmillan Press, 1999), p.124.

³In terms of the nomos-physis antithesis, the foundation of political organization and of the political virtues or aretai in nature (physis) is the obvious alternative to their foundation in nomos. The appeal to physis often had a normative, rhetorical character: that is, physis should be in control; but nomos - conventional mores, customs, human laws - frequently constitute an unwarranted and morally deleterious constraint on the operation of nature. We find the appeal to nature conjoined with a particular notion of an unwritten or 'common' (koinos) law. In some cases, this concept of law is no more than what eventually came to be called the *ius gentium* (Latin for law of peoples), those parts of written law or of customary and unwritten moral principles that held to be shared by all peoples. The *ius gentium* was construed by some as the commandments of the god(s) and, as such, would seem to be a matter of nomos. However, by the fourth century B.C.E. Aristotle identifies common or universal law, 'all those unwritten principles which are supposed to be acknowledged everywhere', [Aristotle, *Rhetoric*, trans. W. Rhys Roberts, 1.10.1368b8-9] as 'law according to nature': 'For there really is, he says, 'a natural justice and injustice

that is common to all, even to those that have no association or covenant with one another'. [*Rhet.* 1.1373b6-9] The explicit opposition to *nomos* (in the form of 'association or covenant') is here obvious. But how, more explicitly, are political organizations, law, justice, and the political *aretai* grounded in *physis*? At least part of the answer to this question involves a functionalist conception of *aretai*, the virtues or excellences of something. An *arete* of something X is a quality or capacity that enables X to fulfil well X's proper *ergon*, its work, business or function. So if X's function is to G, an *arete* of X, a virtue or excellence of X, makes X a good G-er. The functionalistic model supplies a framework for grounding the human *aretai*, including the political *aretai*, in nature (*physis*) - as opposed to tradition, convention, or agreement, all gathered together under the concept of *nomos*. See: Michael J. White, *Political Philosophy: An Historical Introduction*, (Oxford: Oneworld Publications, 2003), pp.17-18.

⁴In the classical tradition of political philosophy represented, for example, by Aristotle and Aquinas, law is first and foremost a dictate of practical reason. The job, so to speak, of positive law – and of those political structures that determine and implement it - is to direct human beings toward the common good, the content of which is determined by the objective human function or end. So, from this perspective, it is essential to positive law that it be a rationally determined means for furthering the (objective) good or end of human persons. Although seventeenth-century contractarians such as Hobbes and Locke do not entirely dispense with the connection between law and practical rationality, they focus on the idea that command and consent (which are functions of the will or volitional faculty) are essential to the legitimacy of law and the political order. In other words, it is either command or consent (or both) that distinguish what has the moral authority of law from what is merely 'good advice' or prudential counsel.

The shift in emphasis from practical reason to the will seems to be related to a distinctive feature of much modern and contemporary political theory that originates in the contractarian tradition: the privileging in political philosophy of the idea of agreement (in a broad sense that can include promises, contracts, and even tacit consent). In at least some varieties of contractarianism, a corollary is the political employment of a paradigm of commutative justice, rather than the paradigm of distributive justice. Commutative justice is a matter of the fairness of private transactions among citizens; distributive justice is a matter of the fairness of the distribution of the benefits and burdens of social cooperation. The classical assumption was that the fairness of distributive justice is not necessarily a matter of equal distribution, but rather a matter of distribution in proportion to criteria of desert (or merit or worth) of some sort. So achieving distributive justice will certainly involve the exercise of practical rationality. However, in many (although not necessarily all) cases, it seems quite plausible to identify the instantiation of commutative justice with that to which the parties involved freely consent. It may thus seem that issues of commutative justice (determined by that to which persons are willing to assent) are relatively more straightforward and less controversial than issues of distributive justice (determined

by criteria that may well be both difficult to ascertain and controversial). This is essentially the line of Thomas Hobbes. He is more explicit than later theorists; but the tendency to interpret fairness, in the political sense, essentially in terms of commutative justice remains an important element of much later political thought. See: Michael J. White, *Political Philosophy: An Historical Introduction*, pp.120-121.

⁵Eventually, contractualism becomes at best an analytic conceptual device, or disappears all together as elections offer a much more direct and powerful form of legitimization of political authority. See: *Ibidem*, p.120.

⁶However, a number of distinguished scholars have recently pointed out that Hobbes favoured religious toleration. See, for instance: Richard F. Tuck, "Hobbes and Locke on Toleration", *Thomas Hobbes and Political Theory*. Edited by Mary G. Dietz. (Lawrence KS., University Press of Kansas, 1990), pp.153-171; Mark A. Goldie, "The reception of Hobbes", *The Cambridge history of political thought, 1450-1700*. Edited by J.H. Burns, with the assistance of Mark A. Goldie (Cambridge, Cambridge University Press, 1991), pp.589-615; Alan Ryan, "Hobbes, toleration and the inner life", in David Miller and Lary Siedentrop (eds.), *The Nature of Political Theory* (Oxford, Oxford University Press, 1983), pp.197-218; Johann Sommerville, *Thomas Hobbes: Political Ideas in Historical Context* (New York, 1992), pp.149-156.

⁷Liberal democracy emerged in Western Europe in tandem with the expansion of capitalism and the rise of a middle class constituency. It developed in opposition to medieval, hierarchical institutions - the despotic monarchies whose claim to all-powerful rule rested on the assertion that they enjoyed divine support. Liberal democrats attacked the old system on two fronts. First, they fought for the creation of a sphere of civil society where social relations including private business and personal life could evolve without state interference. An important element in this respect was the support of a market economy based on the respect for private property. The second element was the claim that state power was based not on natural or supernatural rights but on the will of the sovereign people. Ultimately, this claim would lead to demand for democracy - that is for the creation of mechanisms of representation that assured that those who held state power enjoyed popular support. The tradition that became liberal democracy was liberal first (aimed at restricting state power over civil society) and democratic later (aimed at creating structures that would secure a popular mandate for holders of state power). Even when the focus was on democracy, liberals had various reservations. They feared that democracy would impede the establishment of a liberal society. The classical explanation of the meaning of liberalism can be found in: Isaiah Berlin, "Two Concepts of Liberty", in *Political Philosophy, Edited by Anthony Quinton*, (Oxford: Oxford University Press, 1985), pp.141-152, p.146.

⁸See, *Ibidem*, p.145.

⁹See, *Ibidem*, p.147.

¹⁰See, Leon P. Baradat, *Political Ideologies: Their Origins and Impact*, Ninth Edition (Upper Saddle River, NJ: Pearson Prentice Hall, 2006), p.39.

¹¹*Leviathan* (Harmondsworth, Penguin Books, 1968), Part IV, chap.46, p.700.

¹²*Ibidem*.

¹³*Ibidem*, Part III, chap.42, p.527.

¹⁴See, Richard Tuck, "A note on the text", *Leviathan*, Edited with an Introduction by Richard Tuck (Cambridge, Cambridge University Press, 1991), pp.xxvii-xxxvii, p.xxxiii.

¹⁵See, Richard Tuck, *Hobbes* (Oxford, Oxford University Press, 1989), pp.33-34.

¹⁶See, Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, (Cambridge, Cambridge University Press, 1996), p.3. But, of course, my reading of Hobbes even though is consistent with Skinner's findings it is from a different perspective. I am more concerned with a philosophical understanding of the history of ideas than with establishing a serious method for determining how historical influence or parallel operates between authors.

¹⁷See: Thomas Hobbes, *On the Citizen*, Edited and Translated by Richard Tuck (Cambridge, Cambridge University Press, 1998), Preface to the readers, p.9; chap.xviii, pp.238-241,247.

¹⁸See, for instance: *The Elements of Law* (London, Frank Cass and Co., 1969), Part I, chap.11, sec.5, p.55.

¹⁹See, for instance: *Leviathan* (Harmondsworth, Penguin Books, 1968), Part III, chap.32, pp.410-411; Part IV, chap.47, p.711.

²⁰Aubrey tells us that the *Historia Ecclesiastica* already existed in 1659, but scholars have recently argued that it was probably completed only in 1666. See: *Historia Ecclesiastica Carmine Elegiaco Concinnata*, Vol.5. *Thomae Hobbes Malmesburiensis Opera Philosophica quae Latine scripsit omnia in Unum Corpus*. Guilielmi Molesworth. 5 Vols. (Londini, Apud Joannem Bohn, 1839-45), pp.341-408; also, Patricia Springborg, "Hobbes on religion", *The Cambridge Companion to Hobbes* (Cambridge, Cambridge University Press, 1996), pp.346-380, pp.369-370 note 3.

²¹See: *Behemoth or the Long Parliament by Thomas Hobbes* (London, Frank Cass and Co., 1969), Dialogue I, passim, for instance, pp.10-26; *An Historical Narration concerning Heresy and the Punishment thereof*. Vol.4. *The English Works of Thomas Hobbes Of Malmesbury Now First Collected And Edited By Sir William Molesworth*. 11 Vols. (London, Bart, John Bohn, 1839-45), pp.387-408, pp.387-388.

²²See: *A Dialogue*, pp.122-132; pp.57-68.

²³*Leviathan*, Part IV, chap.44, pp.628-631.

²⁴See, Giuseppe Mario Saccone, "The ambiguous relation between Hobbes' rhetorical appeal to English history and his deductive method in *A Dialogue*", *History of European Ideas*, Vol.24, No.1, 1998, pp.1-17, pp.2-4.

²⁵See, Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, p.334.

²⁶See, *Ibidem*, for instance, pp.9, 257, 336.

²⁷This remains true even though, as pointed out by Quentin Skinner, Hobbes ostensibly rejected "rhetoric" in favour of "science" in *The Elements of Law* and in

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²⁸See, Giuseppe Mario Saccone, Hobbes' *Dialogue of the Common Laws* and the difference between "natural" and "civil philosophy", *Hobbes Studies*, Vol.XII, 1999, pp.3-25, p.6.

²⁹See, Giuseppe Mario Saccone, "The ambiguous relation between Hobbes' rhetorical appeal to English history and his deductive method in *A Dialogue*", p.3.

³⁰See, for instance: Johann P. Sommerville, "The Norman Conquest in Early Stuart Political Thought", *Political Studies*, Vol.XXXIV (Number 2 June 1986), pp.249-261, pp.251-255.

³¹See, John Aubrey, "*Brief Lives*", *Chiefly of Contemporaries*, Vol.1, 2 Vols. Edited by Andrew Clarke (Oxford, The Clarendon Press, 1898), p.341.

³²John Pocock famously ascribed this version of the immemorial common law of unchanging continuity to the common lawyers as such in his magisterial book: *The Ancient Constitution and the Feudal Law*, published in 1957. But Pocock acknowledges that the common lawyers' views were more complex than what previously thought in the "Retrospect" of the 1987 edition of his book. See: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, Cambridge University Press, 1987), pp.36, 37, 153, 189-190, 234-235; "Retrospect", pp.255-387, p.264.

³³See, Corinne C. Weston, "England: ancient constitution and common law", *The Cambridge History of Political Thought* (Cambridge, Cambridge University Press, 1991), pp.374-411, pp.388-389.

³⁴See, Charles M. Gray, "Bonham's Case Reviewed", *Proceedings of the American Philosophical Society*, 116 (1972) 1 pp.35-58, pp.36,49, and passim.

³⁵See: *Leviathan*, Part II, chap.26, p.328; *A Dialogue*, p.70.

³⁶Jury nullification is a sanctioned doctrine of trial proceedings wherein members of a jury disregard either the evidence presented or the instruction of the judge in order to reach a verdict based upon their own consciences. It exposes the concept that jurors should be the judges of both law and fact. Jury nullification occurs when a jury substitutes its own interpretation of the law and/or disregards the law entirely in reaching a verdict. The most widely accepted understanding of jury nullification by the courts is one that acknowledges the power but not the right of a juror or jury to nullify the law.

³⁷For a full account of Vaughan, see: J. Gwyn Williams, "Sir John Vaughan of Trawscoed, 1603-1674", *National Library of Wales Journal*, VIII (1953-1954), pp.33-48, 121-146, 225-243.

³⁸See, Richard Tuck, *Philosophy and government, 1572-1651* (Cambridge, Cambridge University Press, 1993), p.343.

³⁹See, Richard Tuck, "Hobbes and Locke on Toleration", pp.157-158.

⁴⁰See, Richard Tuck, *Philosophy and government*, p.344.

⁴¹*A Dialogue*, pp.54-55.

⁴²See: David Wootton, "Leveller democracy and the Puritan Revolution", *The Cambridge History of Political Thought*, pp.412-442, p.442; also, Edmund Burke, *Reflections on the Revolution in France* (London, Printed for J. Dodsley, in Pall-

Mall, 1790. Modern edition: Harmondsworth, Penguin Classics, 1986), for example, pp.171, 183.

⁴³*Leviathan*, Part I, chap.4, p.105.

⁴⁴*A Dialogue*, p.96.

⁴⁵See, *Ibidem*, p.56.

⁴⁶*The English Works of Thomas Hobbes*, Vol.V, p.176.

⁴⁷*A Dialogue*, p.55.

⁴⁸*The English Works of Thomas Hobbes*, Vol.V, p.176.

⁴⁹Edmund Burke, *Reflections on the Revolution in France*, (London: Penguin Classics, 1986), p.183; see also: passim, pp.110, 173, 188-189, 198-201.

⁵⁰George Wilhelm Friedrich Hegel, *The Phenomenology of Spirit*, Translated by A. V. Miller (Oxford, Oxford University Press, 1977), para.437, p.261.

⁵¹Sir Matthew Hale, *The History of the Common Law of England* (Chicago, The University of Chicago Press, 1971), chap.IV, pp.42-43.

⁵²*Ibidem*, p.43.

⁵³See, David Hume, *A Treatise of Human Nature*, pp.614-615,617.

⁵⁴See, Michael G. Roskin, Robert L. Cord, James A. Medeiros, Walter S. Jones, *Political Science: An Introduction, Eight edition* (Upper Saddle River, N.J.: Prentice Hall, 2003), p.321.

⁵⁵However, with regard to Locke we should also bear in mind that he is mostly only an indirect agent in this process via his undeniable influence on English and American politics, because, although like the common lawyers he rejected absolute sovereignty, he hardly speaks about common law itself, emphasizing instead that the “legislative power” is supreme in the commonwealth, which is not too distant from Hobbes’ view.

⁵⁶To take one prominent (counter) example, John Rawls implicitly recognizes the loss of objectivity of common law, but he goes on to defend a “contractual” theory of justice that relies on intuitions about moral equality and “natural facts” such as scarcity of material resources and limited benevolence. It is also worth noting that Rawls is a harsh critic of utilitarianism. See: John Rawls, *A Theory of Justice*, (Cambridge, Mass: Harvard University Press, 1971), pp.11-12, 60-63, 103-104, 136-137, 139-140.

⁵⁷Nevertheless, even though Hobbes was a good historian by seventeenth century standards, most of today historians would balk at his approach of selecting examples from history, and ignoring counter-examples, for the purpose of persuading people to adopt a political stance derived from “science”.