Max Weber Programme Conference

"Thomas Hobbes and the Modern State: A 21st Century Interdisciplinary Perspective"

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All abstracts

"Theorising Rights in the 21st Century: Neo-Hobbesian Possibilities"

Eleanor Curran

Hobbes develops a theory of rights in *Leviathan* which has often been overlooked. One reason for this is that the rights Hobbes describes for subjects are seen as lacking credibility or strength once a sovereign is instituted, because of the absolute power of the sovereign. Those rights that subjects hold are deemed to be *natural rights*, which exist in the state of nature only to be relinquished once the sovereign is in place. Hobbesian subjects, as some commentators put it, 'give up all their natural rights to the sovereign'.

Another reason why the theory has been overlooked comes from a more recent analysis of rights; namely that of the jurist Wesley Hohfeld. According to a Hohfeldian analysis, all the rights Hobbes describes for subjects are *liberty rights* or *privileges*, that is, rights which are 'bare freedoms', and are not attached to any correlative duties on the part of others. These are said not to be rights in any meaningful sense, as they lack the means of recognition and protection by the state or others.

I argue, against both of these analyses, that, first, Hobbes does not hold a theory of *natural rights* and second, that the rights he describes for subjects are not all mere *liberty rights*. On the contrary, Hobbes constructs a modern, secular theory of rights that provides for the protection of some rights. Furthermore, he uses the notion of liberty to ground the notion of a right, which offers an elegant alternative to other modern theories of rights which ground the notion of a right variously in claims, interests and the will.

"The Modern State Through the Hobbesian Lense"

Sharon Lloyd

The problems of the modern state are different in two major ways from the problem of the state Hobbes addressed. First, Hobbes did not foresee the possibility of states exercising totalitarian control over their subjects, or control anything close to the degree seen in the 20th Century in Nazi Germany, Stalin's Soviet Union, Mao's China, or present day North Korea. Second, Hobbes did not foresee the possibility that international conflicts could have any serious, let alone catastrophic, impact on the quality of life of civilians within the warring states, as WWII did in much of Europe and Asia. However, I'll argue, Hobbes's theory has the resources to address these modern problems, as well as a promising strategy for confronting emerging challenges to states, such as suicide terrorism.

"An Autocratic or Liberal Leviathan?: The Schmitt-Strauss Debate over the Hobbesian State"

John McCormick

Carl Schmitt famously asserts that all genuine political philosophies are pessimistic concerning the nature of man. Yet, in his commentary on Schmitt's *Concept of the Political*, Leo Strauss insists that Thomas Hobbes's notion of man as dangerous but educable--on which Schmitt extensively relies--is not sufficiently pessimistic to justify the kind of authoritarian state theory that Schmitt seeks to put in the place of the liberal theory of state. Hobbes's assumption that man is educable, Strauss avers, permits the expansion of the kinds of freedom that Schmitt himself thinks will develop into a threat to the stability of the Leviathan state. This paper explores the place of Hobbes in the respective efforts of these authors to develop a genuinely authoritarian alternative to liberal state theory in interwar Germany.

"Hobbesian Legal Reasoning"

Claire Finkelstein

No jurisprudential question is more important, and at the same time more difficult, than that of the status of morally repugnant laws. Indeed, one might say that this question has come to define post-war jurisprudence, as it is the central manifestation of the debate between those who think that the concept of law is limited by that of moral obligation and those who rather think it defined by the authority of political sovereigns over their subjects. The argument between these two camps has such far-reaching effects that we find it cropping up in one form or another in nearly every jurisprudential problem of continuing interest.

The former view is the position known as *natural law theory*, and it has existed in one form or another since at least the Middle Ages, when St. Augustine maintained that an unjust law would be "no law at all." The latter view is the positivistic picture of law that contemporary jurisprudence inherits from John Austin, and later from H.L.A. Hart. Positivists suggest that the concept of law is largely a formal one: any sovereign pronouncement with the right sort of structure and pedigree is a candidate for law. While there may be formal restrictions on the sorts of prescriptions that can be commanded and the sorts of commands that can be coerced, there is nothing to limit what can count as law based on the content of the command.

One important implication of this feature of positivism is that positivist theories have no basis for denying the status of law to wicked rules or wicked legal systems. Anti-Semitic legislation of the Third Reich, laws establishing racial segregation in the Southern United States or requiring East German border guards to shoot those seeking to escape to the West, in the eyes of the positivist, are as deserving of the title "law" as any others. Natural law theorists have accordingly been quick to accuse positivists of depriving jurisprudence of its most potent hedge against injustice: if the identification of law depends, in the first instance, on its satisfaction of a certain minimum moral content, officials in regimes like the Third Reich would not cloak their genocidal objectives in the mantel of legal legitimacy.

The standoff between the natural lawyer and the positivist on the question of the status of wicked laws, and the correlated question of the legitimacy of prosecuting individuals who act under such laws, is as timely a question today as it was when Hart and Radbruch sparred over the trials of the German informers. In our own time, the problem has recently made itself felt in the debate over whether former officials of the Bush administration should be prosecuted for violating international (and domestic) law governing the treatment of suspected terrorists by authorizing their torture. If we take a positivistic approach, such prosecutions are difficult to justify. Matters are potentially otherwise from the standpoint of the natural law theorist: if the legal opinions of Justice Department officials distort international and domestic sources of law, rendering them morally, we have reason to deny domestic orders that authorized such torture the status of law, and to prosecute both those officials who issued such authorizations and those who acted under their imprimatur.

In this essay I shall suggest that an examination of the legal philosophy of Thomas Hobbes may shed light on this well-worn but important debate between positivists and natural law theorists. In particular, I shall argue that Hobbes' approach to law presents a middle road between the two standard theories: it incorporates content-based restrictions on the notion of law without embracing tendentious natural law commitments. If this is correct, then although Hobbesian jurisprudence contains a number of elements of both positivist and natural law theory, it should ultimately be understood as constituting a third alternative to the traditional array of jurisprudential approaches to the nature of law. Ultimately, I shall suggest that legal contractarians garner the central benefit of the naturalistic approach on this question: they are able to deny evil regimes the status of law, on the one hand, but do so on the basis of rationalistic, rather than moralistic, assumptions. For this reason, the problem of wicked laws and legal regimes that has so vexed legal theorists of both natural and positivistic orientation is better resolved in a contractarian theory of the sort Hobbes proposes.