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THOMAS HOBBES IS A SOCIAL CONTRACT THEORIST. Like all contract theorists he has difficulty explaining why a promise to perform in the future creates a contract that always obliges the promiser. Trying to answer this problem forces him to deal with the question of promises that later turn out to be against the best interest of the promisor. How this problem is stated and how it is resolved—if it is resolved—is the crux of any social contract doctrine of obligation. In Hobbes's social contract theory, the problem is stated in seventeenth-century legal terminology: "consideration," "vow," "oath," and so on. This dependence by Hobbes on legal concepts limits the ways in which he can resolve the problem of contractual obligation. In this essay I intend to show that Hobbes had considerable knowledge of the law, that he derived his concept of contract very strictly from an English legal source of the previous century, probably Christopher St. German's *Doctor and Student*,[1] and that his debt to this legal source influenced his justification of political obligation.

If Hobbes was so indebted to legal thought, why has this debt gone unnoticed? There are three reasons for this, one of which lies with Hobbes himself. In his autobiography of 1681 he concentrated on his contacts with the continental rationalists and with the exponents of Galileo's "New Science."[2] At that time Hobbes obviously wanted to be remembered as a leading member of this new thinking, as indeed he was. Furthermore, twentieth-century philosophy has been much more interested in philosophy of science than in philosophy of law. This contemporary interest has made the materialist, determinist, and nominalist aspects of Hobbes's thought appear to be the most significant

In preparing this essay, I have incurred a number of debts. One is to His Grace the Duke of Devonshire and the trustees of the Chatsworth Estate for their permission to use the library at Chatsworth and to quote from the unpublished Hobbes papers there. Another is to the librarians at Chatsworth, Mr. Thomas Wragge and Mr. John Day, for their thoughtful and imaginative help. Others are to Professor Charles Gray of Yale Law School, Professor Zbigniew Pilczenski of Pembroke College, and Professor John Barton of Merton College for their painstaking criticism of earlier drafts of this essay. Anyone who has ever stepped off the beaten scholarly tracks knows that progress is nearly impossible without advice from scholars in the field and without access to the necessary records. I have been given both in generous quantities, and I am deeply grateful.

[1] *A Dialogue in Englysshe betwyxt a Doctoure of Dyuynytie and a Student of the Lawes of England of the grounds of the sayd Lawes and of Conscyence*, ed. T. F. T. Plucknett and John L. Barton as *Doctor and Student* (London: Selden Society, 1974).

[2] In *The English Works of Thomas Hobbes*, ed. Sir William Molesworth, 11 vols. (London: John Bohn, 1839); hereafter cited as *Works*.

part of his writings, to the neglect of the more traditional legal material. Finally, Hobbes's legal debt is to some rather obscure sixteenth-century writings that are difficult in their own right and are usually interpreted as a tract for the supremacy of the common law and of Parliament.[3] The actual texts by St. German are more complex than this,[4] but their obscurity and apparent opposition to Hobbes's ideas have been enough to turn all inquiry toward other sources.

I. How much law—civil or common—did Hobbes actually know? There is documentary evidence that, although he never studied law formally, Hobbes had by 1636 a good working knowledge of the common law, especially that of contracts.[5]

Hobbes was at Magdalen Hall, Oxford, from January or February of 1602–3 until 1608. In February of 1608 Hobbes, then twenty years old, became tutor to William Cavendish, the son of the first Earl of Devonshire, who was also named William Cavendish.[6] Hobbes remained with his pupil, first as tutor and then as companion, secretary, and adviser, for twenty years; he left the family in 1628 only with the death of the second Earl. He returned to tutor the son of the second Earl in 1631 and stayed until the outbreak of the Civil Wars in 1640. As secretary (as well as tutor) to two successive earls, Hobbes would have had daily contact with business matters. He would often have seen the contracts and bills of sale connected with the Cavendish's Derbyshire lead operation.[7] The Hobbes papers in the Devonshire collection at Chatsworth contain proof of Hobbes's familiarity with such business procedure.[8]

> The note I have of a hundred pound [invoiced] by me to Mr. Poole to buy lead and which I should have now cancelled if I had it [here?] is void. In witness whereof I have this 15 day of Sept. 1640 [hereunto?] set my hand at Hartwicke.
>
> Th. Hobbes

Apparently, Hobbes was used to dealing with business affairs and with large sums of money.[9] He was confident enough to adopt an unorthodox procedure—apparently at his own discretion—in an unusual situation.

A second circumstance of importance is that the library at Chatsworth was unusually large, even for a rich nobleman of the seventeenth century, and contained a number of legal texts. Moreover, by great good fortune, there is actually a catalogue of the early library in Hobbes's own hand.[10] The second section of this catalogue lists about 775 entries in history, classics, geography, masks, mathematics, and law. There are about

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[3] F. L. Baumer, "Christopher St. German," *American Historical Review* 42 (July, 1937):631.

[4] Cf. Barton's introduction to *Doctor and Student*.

[5] This date is used because it is the best estimate of the start of *De Corpore Politico*, Hobbes's earliest political treatise, by date of composition, not publication.

[6] *Dictionary of National Biography*, s.v. "Cavendish, William."

[7] *A New Historical Geography of England*, ed. H. C. Darby (Cambridge Cambridge University Press, 1976), pp. 284–87. See also, Chatsworth Library Papers, Mining Records.

[8] Chatsworth Library, The Hobbes Papers, MS D5.

[9] Comparative values are hard to estimate, but a year's wages for a skilled workman would be about £20.

[10] Chatsworth Library, Manuscript Collection, "Early Catalogue." The Catalogue is undated. It appears to list no book published after 1627, but many of the listings are very brief and consequently unclear. At a conservative guess, I would estimate that it was compiled by Hobbes sometime after he returned to the Devonshire's service in 1631 and before he fled England in 1640. Most of the books, of course, would have been in the library long before those dates.

eighteen specifically legal texts listed, including St. German's *Doctor and Student*. This catalogue proves that Hobbes had access to a fair collection of legal texts. Obviously, it also proves that Hobbes knew exactly what was available in the library.

Granting, then, that Hobbes lived in a house with some law books and had some regular contact with business documents, was he confident enough of his legal knowledge to use it in any way? Again, documents at Chatsworth prove that Hobbes felt himself quite able to offer knowledgeable opinions on complex legal matters. When the third Earl (Hobbes's second pupil) came of age in 1638, a controversy arose between the Earl and his mother about her stewardship of the estate during the Earl's minority. Hobbes served as mediator in the disagreement, and finally prepared a quasi-legal document setting out his actions throughout the affair.[11] The last paragraph reads:

> Also, that if it were reasonable to bequeath away those goods and lands by which the debt was contracted, from him that was to pay the debt, there would be no use of Entayles, nor need for a Parliament to cut them off, for the father might buy what quantity of Land he pleased, for which he might enter into debt or giving the said Land to whom he pleased, might enjoin his son and heir to pay the said debt, which would be (if a father pleased) equivilent to the disinheriting of the sohne.

This *Narration* of 1639 or 1640 shows that Hobbes was familiar with the common law of inheritance and perfectly able to state a fairly complex legal case in correct legal terminology and to make a telling legal argument about the effect of an adverse legal interpretation on the law of entail. Hobbes was no lawyer, but he was no stranger to the law, even in its technical aspects.

Finally, it must be remembered that Hobbes spent twenty-five years out of twenty-eight years between his twentieth and forty-eighth birthdays as a servant in one of the great Tudor houses of England. The first William Cavendish made his fortune closing monasteries for Henry VIII and Cromwell.[12] His wife, Bess of Hardwick, whatever her ambitions for her grandchildren, was deeply loyal to Elizabeth. When Hobbes began to think about political matters, he had already spent half his life with a noble family that owed it origins and successs to the Tudors, and where the Tudor doctrine of royal supremacy would be part of the air he breathed.[13] It is hardly surprising, then, that his political theory places the sovereign above both the church and customary law. Nor is it surprising that one of his legal sources was the renowned Tudor lawyer Christopher St. German.

II. Hobbes had access to legal concepts, in the sense of both physical access to the relevant books and psychological access to contemporary legal thinking. Given all this, does Hobbes actually use any of these legal sources when he formulates his own political thought?

I believe that the answer to this is yes, for two reasons. First, Hobbes's entire political theory shows a tendency to understand and to state political questions as legal questions. "Do I have a political obligation?" becomes "Did I make a contract? With whom? About what? Is the contract enforceable? Who will interpret its provisions?" These are

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[11] Chatsworth Library, Hobbes Papers, MS D5.
[12] *DNB*, s.v. "Cavendish, William."
[13] David N. Durant, *Bess of Hardwick* (New York: Atheneum Press, 1978).

legal questions, or at least questions modeled on legal concepts and on a legal approach to the problem.

Moreover, there is evidence that Hobbes actually used a specific legal source in formulating his political theory. That is, he is indebted to sixteenth-century common law for specific concepts and for specific arguments, not just to legal thought in general for his overall approach. The rest of this section will prove this claim, specifically that Hobbes used Christopher St. German's *Doctor and Student* in developing his concept of contract.

Christopher St. German (1460–1540 approx.) attended Oxford and was a member of the Inner Temple. He wrote a number of polemical works of increasing radicalism against the claims of the canon-law courts to have any jurisdiction whatever in secular matters.[14] Two of these works provoked replies by Thomas More. His major work was generally used as a students' introduction to common-law jurisdiction during the sixteenth, seventeenth, and eighteenth centuries. However, the original purpose of the work was to discuss the difference between canon law (the Doctor) and common law (the Student) concerning the legal status of moral obligations that bind in conscience. St. German's position is that the common-law solution to these problems is to be preferred to the canon- or civil-law solution.[15]

St. German can be read as a late follower of Gerson and Marsilius of Padua but is usually taken to be an early spokesman for parliamentary supremacy. In one sense this is justified, since Parliament is the source and highest court of the common law, and he was defending the common law. In another sense this is anachronistic, for it assumes an opposition between the King or the King's prerogative and Parliament or the common law. This explicit opposition was indeed a feature of the seventeenth century, but St. German was writing a century earlier.[16] In his time Tudor policy was to work through Parliament and to assert the right to control canon-law courts by parliamentary acts.[17] Neither in 1523 nor in 1532 was there anything contradictory about defending both the common law and Tudor royal supremacy. This in turn is why there is nothing contradictory about Hobbes, living in a royalist household, turning to St. German for his legal concepts.

Hobbes certainly read the *Doctor and Student* at some time in his life, because he quotes from it in his *Dialogue on the Common Law*.[18] Since the title of Hobbes's work is modeled on St. German's, we can infer that Hobbes not only had read the work, but that he had a good opinion of it. But when did Hobbes first read the *Doctor and Student*? It is usually assumed that since Hobbes's *Dialogue* was written about 1673, his reading of St. German dates from that time. However, I believe that Hobbes had read St. German years before, probably in the 1620s, and certainly before 1635. The proof of this lies in the degree to which Hobbes echoes St. German's legal concepts, particularly the concept of contract, in his earliest political writings. Forty years later, when he composed his *Dialogue*, Hobbes turned to much more specific questions about the precedence of chancery courts over common-law courts. He returned to St. German's *Doctor and Student* and its discussion of the precedence of common-law courts over

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[14] Baumer, p. 633.

[15] *Doctor and Student*, pp. xxix ff.

[16] See, for example, Baumer, p. 649.

[17] G. R. Elton, *Reform and Reformation* (Cambridge: Harvard University Press, 1977).

[18] Compare Hobbes's full tile, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, with St. German's full title.

canon-law courts in his arguments about these legal jurisdictions. However, all this is a much narrower topic concerning the proper structure of the legal system within the framework of civil society. Hobbes's earlier debt to St. German (or at least to sixteenth-century legal thought) concerns the general concept of a contract and our obligation to keep it. The relative jurisdictions of common-law and equity courts is a topic of a much later time.

Chapter 24 of the second dialogue of *Doctor and Student* is about the binding force of a "nude contract." A nude contract is a pact or promise to perform some act but where nothing is given by the other party. "A nude contracte is where a man maketh a bargayne or sale of his goodes or landes without any recompence appoynted for yt."[19] The legal question is, does a nude contract oblige? St. German's Student of the Common Law says no, not without some external sign, such as consideration or accepting performance. His Doctor of Divinity (canon law) says yes, at least if the promise was meant *in foro interno* and especially if it was given to a charitable institution. In other words, a mere promise to give property to a charity such as the church could be enforced in a canon-law court but not in a common-law court.[20] The controversy is not just a sixteenth-century jurisdictional dispute, because the question at issue is really when a mere promise becomes a binding contract. The crucial step taken by St. German (and followed by Hobbes) is to argue that a mere promise (a nude contract) is *not* binding in the secular courts. Some other element must exist in addition to the promise in order to convert it into an obligatory contract.

St. German's Student argues that a promise becomes a binding common-law contract in two circumstances. One circumstance occurs when the promise is made for some specific consideration, either given or promised.

> . . . as yf Johan at style letteth a chambre to Henry herte & it is ferther agreed bytwene theym that the sayd Henry herte shall goo to borde with the sayd Johan at style / and the sayde Henry herte to paye for the chambre & bordynge a certayne summe .&c. thys is properly called a concorde / but yt ys also a contracte & a good accyon lyeth vppon yt /

The second basis for a contractual obligation is something very close to what we now call detrimental reliance, where the one of the parties does something to his own disadvantage, relying on the promise of the other party to pay for it.

> Yf he whome the promyse ys made: haue a charge by reason of the promyse whyche he hathe also perfourmed: than in that case he shall haue an accyon for that thyng that was promysed thoughe he that made the promyse haue no worldely profyte by yt.

Note that St. German does *not* say that a contract obliges merely because a bargain has been made; nowhere does he say that a bargain without specific consideration or limited detrimental reliance is enforceable. Indeed, a nude contract is a promise made without specific consideration, and he specifically denies that nude contracts are binding. Likewise, he appears to deny that a benefit to the promisor creates a binding obliga-

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[19] Unless otherwise noted, all quotations from *Doctor and Student* may be found in pp. 228–32.

[20] A. W. B. Simpson, *A History of the Common Law of Contract: The Rise of "Assumpsit"* (London: Oxford University Press, 1976), chaps. 3, 4. See also, C. H. S. Fifoot, *History and Sources of the Common Law* (London: Stevens and Sons, 1949), chap. 14.

tion. It is the "charge" to the promisee that matters; the benefit, if any, to the promisor seems to be irrelevant.

Hobbes follows St. German closely in his analysis of why promises are binding. Promises become contracts and are binding when they are made for good consideration. "Promises therefore upon consideration of reciprocal benefit are covenants and signs of the will or last act of deliberation, whereby the liberty of performing or not performing is taken away."[21]

Hobbes does not discuss the concept of detrimental reliance in *De Corpore Politico*. In *Leviathan*, he argues that

> if there be other signs of the Will to transferre a Right, besides Words, then, though the gift be Free, yet may the Right be understood to passe by words of the future: as if a man propounded a Prize to him that comes first to the end of a race. The gift is Free, and though the words be of the Future, yet the right passeth: for if he would not have his words so be understood, he should not have let them runne.[22]

This is St. German's limited detrimental reliance. The only difference between Hobbes's and St. German's analysis is that Hobbes uses a secular example, St. German a charitable example.

Moreover, Hobbes does *not* accept the idea that mutual promises are binding just because a bargain has been made: "Contracts of mutual trust, is of no validity in the estate of hostility."[23] Nor does he accept the idea that contracts can be made binding because of the benefits received. "It is a law of nature that he that is trusted, turn not that trust to the damage of him that trusteth."[24] "But seeing in this case there passeth no covenant, the breach of this law of nature is not to be called *injury*. It hath another name, to wit, ingratitude."[25]

To summarize, the Student in St. German's *Dialogue* gives two criteria that will convert a promise into a contract. These are that the promise be made for good consideration or that the promise cause the other party to undertake some burdensome act. Hobbes cites these same two reasons, and only these two, as the basis for contractual obligation. St. German rejects the idea that the mere fact of making a bargain creates a contract; so does Hobbes. St. German also rejects the idea that a promise becomes binding on the promisor because it is to his benefit. Hobbes also rejects the idea that a benefit received, for which we ought to be suitably grateful, creates a contractual obligation. It may create a *natural law* obligation, but not a *contractual* one.

Hobbes has an even more specific debt to St. German than his general use of St. German's concept of a common-law contract. A number of passages in *Doctor and Student* and in *De Corpore Politico* are remarkably parallel in the topics they discuss. Moreover, these passages occur in the same order (with one exception) within a few short pages in both works.

1. Both men begin with the concept of a law of nature, which they identify with reason and which applies uniquely to human beings. However, this rational law of nature has been corrupted and obscured by man's will and passions.

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[21] Hobbes, *Works*, 4:90.
[22] Pt. 1, chap. 14, para. 16.
[23] *Works*, 4:91.
[24] Ibid., p. 98.
[25] Ibid., p. 99.

St. German: . . . though the lawe of reason may not be chaunged nor hollye put away: neuertheles byfore the lawe wryten it was greatly lette and blynded by euyll customes.[26]

Hobbes: But forasmuch as all men are carried away by the violence of their passion, and by evil customs do those things which are commonly said to be against the law of nature; it is not the consent of passions, or the consent in some error gotten by custom that makes the law of nature.[27]

2. This rational law of nature gives rise to a series of secondary laws of nature. One of these secondary laws of nature is gratitude.

St. German: Also from this, that good is to be belouyd it foloweth that a man shall loue his benefactour.[28]

Hobbes: It is a law of nature that he that is trusted turn not that trust to the damage of him that trusteth.[29]

3. Another is the right to defend ourselves.

St. German: And that it is lawfull for euery man to defende hym self and his goodes agaynst an vnlawful power.[30]

Hobbes: It is also a law of nature of help and endeavor to accommodate each other as far as may be without danger to their persons and loss of their means, to maintain and defend themselves.[31]

4. Both men argue that some process of transferring rights is important. In such transfers, both parties must will the transfer: one must will to give, the other must will to receive.

St. German: . . . suche bargaynes and sales be called contractes / & be made by assent of the partyes vppon agrement betwene theym of goodes or landes for money or for other recompence /

Hobbes: In transferring of right, two things therefore are required: one on the part of him that transferreth, which is a sufficient signifcation of his will therein; the other on the part of him to whom it is transferred, which is a sufficient signification of his acceptation thereof.[32]

5. A vow or advow is a specific sort of promise involving God.

St. German: Fyrste thou shalte vnderstande that there ys a promyse that ys called an aduowe / and that ys a promyse made to god /

Hobbes: First of all, therefore, it is impossible for any man to make a covenant with God Almighty, further than it hath please him to declare who shall receive and accept of said covenant in his name.[33]

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[26] *Doctor and Student*, first dialogue, question 2.
[27] *Works*, 4:87.
[28] *Doctor and Student*, first dialogue, question 2.
[29] *Works*, 4:98.
[30] *Doctor and Student*, first dialogue, question 2.
[31] *Works*, 4:99.
[32] Ibid., p. 88.
[33] Ibid., p. 91.

The parallel passage in *De Cive* is even clearer on this point since it uses the specific term "vow":

> Neither can any man covenant with God, or be obliged to him by vow, except so far forth as it appears to him by Holy Scripture, that he had substituted certain men who have authority to accept of such-like vows and covenants as being in God's stead.[34]

6. In general, promises, in order to be obligatory, must be possible and lawful.

St. German: And also suche promyses yf they shall bynde they muste be honest / lawfull / and possyble /

Hobbes: For a covenant is void that is once impossible. . . . for if by the law the performance of such a covenant be forbidden, then he that promiseth anything to a thief not only may, but must refuse to perform it.[35]

7. Oaths, as distinct from vows, are a form of affirmation involving a religious sanction, that is, an appeal to God to punish if the promise is not kept. They appear to add little to the binding power of a promise.

St. German: . . . yf he intendyd to be bounde by his promyse / then they say that an othe nedeth not but to enforce the promyse for they say he breketh the lawe of reason / . . . as well when he breketh his promyse . . . as he dothe when he breketh his othe thoughe the offence be not so grete by reason of the periury /

Hobbes: An oath is a clause annexed to a promise, containing a renunciation of God's mercy by him that promiseth, in case he perform not as far as is lawful and possible for him to do. . . .

And by the definition of an oath, it appeareth that it addeth not a greater obligation to perform the covenant sworn, than the covenant carrieth in itself but putteth a man into a greater danger and of greater punishment.[36]

These examples of parallel expressions in sequence are too close and too numerous to have happened by chance. Either Hobbes was following St. German or he was following some other legal writer who paralleled St. German's thoughts. In any event, Hobbes is in debt to the legal thought of the preceding century. I believe that, in fact, Hobbes had read St. German's *Doctor and Student* carefully, probably the copy at Chatsworth, and that, when he came to write his own theory of contract, he adopted the theory of contract outlined in the *Dialogue* by the Student.

III. How much does this debt to legal sources influence Hobbes's political theory? On the positive side, it gives Hobbes a stock of ready-made, or easily adaptable, answers to his philosophical problems. Moreover, these answers fit neatly into Hobbes's individualistic metaphysics. On the negative side, it leaves Hobbes with very difficult problems concerning the enforcement of contracts in a state of nature. The enforcement of a contract, once we have decided which promises to enforce, is no problem for St. German because he assumes the existence of the coercive legal system. Hobbes is using

[34] Ibid., 2:14–28.
[35] Ibid., 4:92.
[36] Ibid., pp. 93–94.

the concept of contract to establish the whole of civil society, including the legal system, and cannot make St. German's assumptions without committing a circularity in his argument.

Hobbes's problem becomes clearer if we break it into two separate parts. First, what is a contract and in general why is the practice of creating an obligation by contract justified? This is where the legal concepts are most useful. Second, why should I be obliged to keep a contractual promise that is harmful to me? This is where the legal concept of a contract does not help Hobbes. He cannot give the lawyer's answer—because the courts will enforce it—since there are no courts as yet; but he has great difficulty finding an adequate answer in terms of his own philosophy.

For both men a contract is a rational, voluntary promise. It is justifiable on strictly prudential grounds. "Fyrst it is to be vnderstood that contracts be grounded vpon a custome of the realm . . . and not dyrectly by the lawe of reason . . . after property was brought in: they were ryght expedyent to all people. . . ." This is important for Hobbes as well, because his individualistic metaphysics demands that all political obligation be derived from our natural-law obligation to preserve ourselves as individuals. Such a derivation, he assumes, can be achieved only by a voluntary agreement to accept some new obligation as a means of preserving ourselves.[37] He then argues that as rational egoists we will accept a new obligation only if it can be rationally shown to be self-preserving.[38] A contract in St. German's sense of a voluntary binding promise made in exchange for good consideration or on detrimental reliance exactly describes the sort of contract that Hobbes's metaphysics calls for.

Moreover, St. German insists that contracts must be "lawful and possible." This is because he conceives of contracts as only one of the ways in which legal obligations may arise. Having different origins, legal obligations can conflict, and such a conflict must be guarded against. Hobbes takes this limitation and uses it for his own purposes. He argues that contracts must be lawful and possible; they must not conflict with prior obligations derived from prior contracts or from our natural-law obligation to preserve ourselves.[39] Except for self-preservation, which is an ultimate, unmodifiable obligation that is the basis for all other obligations, Hobbes assumes that obligations are binding only in the order in which they are assumed.[40] They are not binding on the basis of some metaphysical order of value or some social order of importance. Prior contracts invalidate conflicting later contracts. Contractual obligation, therefore, is not only voluntarily assumed; it is voluntarily assumed on the basis of a *personal* assessment of its prudential worth. The practice of contracting for new obligations is justified because it is prudent for a rational man to better his condition by doing so. The practice of contracting is justified by expediency, not by a direct appeal to the law of nature. Contracting is a secondary, not a primary, law of nature.

Finally, St. German insists that there must be some overt sign of agreement on the part of both parties to make a contract binding in common law. He rejects the canon-law idea that a mere promise made with no overt sign can be legally binding, and he rejects this position precisely because, if no jury ought to judge about internal things, the overt sign is essential. Hobbes also insists that there must be some overt sign of agreement on

[37] Ibid., vol. 4, chap. 1.
[38] Ibid., chap. 2.
[39] Ibid., para. 11.
[40] Ibid., para. 14.

the part of both contracting parties.[41] For Hobbes, this doctrine is attractive because it allows him to reject all promises or vows to God as a source of political obligation.[42] Since, as a practical matter, God gives no unambiguous signs of acceptance of any promise, He cannot be a party to any contract. Hence, there can be no binding contracts with God. Furthermore, St. German's position is that if the promise is not already lawful, no oath can make it so, because the oath calls on God to punish the breaker of only a lawful promise. Hobbes uses this argument exactly as does St. German. The oath creates no new category of sinfulness, although it may make the act a slightly greater wrong.[43]

Hobbes's argument about oaths is worth considering because it is an example of his following St. German to the detriment of his own general position. There are two separate points here: first, we cannot covenant with God because, without special revelation, we do not know that he has assented to the agreement; second, oaths to God are no more binding than the original promise they support. The first point was a matter of great importance to Hobbes; it was part—a crucial part—of his general attack on the pretentions of the Puritan ministers.[44] But the argument about binding oaths runs at cross purposes with what Hobbes argues elsewhere. If the swearer thinks that the oath is effective, then it will bind him through fear, and Hobbes argues that covenants made through fear are valid.[45] If they are valid when made from fear, surely they are also valid when enforced by the fear of oath breaking. Hobbes uses St. German's argument and simply rejects the efficacy and importance of oaths. He might better have argued, consistently with the line he takes elsewhere, that oaths are an important means of securing political obedience through fear and awe. Even if we take Hobbes to be an atheist who did not believe in an afterlife or heaven or hell,[46] he should have admitted that the popular fear of eternal punishment can be quite real and can serve as a goad to promise keeping.

What Hobbes has done is to transfer the legal justification of contractual obligation to the political sphere. The legal concept justifies obligations deriving from promises because they are secondary natural laws.[47] As such they are not based on natural reason and therefore not known to all men, nor identical at all times or places. Instead, they are justified by prudential reason. Because of this, they vary and so must be identified by external, overt signs of some sort, such as consideration or detrimental reliance. Hobbes adopts all these points: the fundamental natural law known to all is to preserve ourselves; prudential reason tells us that covenants are necessary; overt signs of agreement tell us what promises have actually been given and accepted. All this achieves three things Hobbes needs: it gives the rational, prudential egoist scope to establish his own set of obligations; it gives groups of rational individuals the freedom to choose whatever secular organization they want; and it closes off any *further* appeals to a divine natural-law origin for political obligation.

However, when Hobbes comes to the question of why a rational individual should keep a burdensome contract he runs into difficulties. It is not enough for Hobbes to claim that contracts are *generally* useful, as St. German does. If we really have a right to do

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[41] Ibid., para. 4.
[42] Ibid., para 11.
[43] Ibid., para. 17.
[44] See, for example, *Behemoth, A History of the Long Parliament*, *Works*, vol. 5.
[45] *Works*, 4:92.
[46] But, per contra, see H. W. Schneider, "The Piety of Hobbes," in R. Ross and H. W. Schneider, eds., *Thomas Hobbes in His Time* (Minneapolis: University of Minnesota Press, 1974).
[47] Barton's introduction, parts 3 and 4, to *Doctor and Student*.

whatever we will in the state of nature, and if contractual obligations can be traced back to this willing and they oblige because they are derived from our willing choice, then Hobbes will have to show that each and every contractual obligation is willed when we are called upon to perform it and not just when we make it. It is not enough to show that these obligations are generally thought to be useful (for each individual). That still leaves the case in which keeping this particular promise will be detrimental to me in this particular situation. Hobbes himself is well aware of the problem. He states it clearly in *De Corpore Politico*.

> Promises therefore, upon consideration of reciprocal benefit, are covenants and signs of the will, or last act of deliberation, whereby the liberty of performing, or not performing, is taken away, and consequently are obligatory. . . . Nevertheless, in contracts that consist of such mutual trust . . . he that performeth first, considering the disposition of men to take advantage of every thing for their benefit, doth but betray himself thereby to the covetousness. . . . And therefore such covenants are of none effect.[48]

In Chapters 3 and 4 *De Corpore Politico*, Hobbes tries to show that men should "stand to their covenants."[49] First, he argues that the law of nature about seeking peace plus the principle that "if we will the end, we must will the means" together entail a further law of nature—"*that every man is obliged to stand to, and perform, those covenants he maketh.*"[50] The problem remains, of course, why we should keep our promise if this promise turns out to appear to have consequences that harm our survival. If we stupidly promised, why should our past stupidity create a present obligation?

First, Hobbes argues that the ability to revoke at will destroys the utility of all promises: "For what benefit is it to a man, that any thing be promised, or given unto him, if he that giveth, or promiseth, performeth not. . . ."[51] However, he does not pursue this argument here; he does return to it several pages further on.

Next he argues that giving and breaking a promise is like asserting a fact and then denying your own assertion.

> And therefore he that violateth a covenant, willeth the doing and the not doing of the same thing, at the same time, which is a plain contradiction. And so *injury* is an *absurdity* of conversation, as absurdity is a kind of injustice in disputation.[52]

This is a facile, but weak, argument. To begin with, the contradiction results from denying and asserting the same thing at the same time. The broken promise results from willing and refusing to do the same thing at different times. The analogy is seriously defective. Even if we allow the analogy, the argument is weak; if it is to my benefit, why not commit an absurdity? The broken promise is bad only in the case in which the consequences are bad for me, not in the cases in which I contradict my earlier will for my own benefit. It is the consequences of promise breaking, not the contradiction of it, that make it bad, and Hobbes has not proven that the consequences will be bad in every single case.

Next, Hobbes argues that there is a law of nature that prohibits ingratitude. Hobbes's

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[48] *Works*, 4:90.
[49] Ibid., pp. 95–111.
[50] Ibid., p. 95.
[51] Ibid.
[52] Ibid., p. 96.

strategy here seems to be based on an attempt to prove that we have a noncontractual obligation to perform our part of a contract once the other party has performed. Here Hobbes seeks to establish this obligation by appeal to a new natural law—gratitude—and not just to the fact of there being a past promise: "It is a law of nature, *That no man suffer him, that thus trusteth to his charity, or good affection towards him, to be in the worse estate for his trusting.*"[53]

Hobbes is saying that the failure to obey this law of nature is not injustice but ingratitude. Either way you read this he is in trouble. Hobbes can either be saying that the obligation to keep promises is based on a second, different obligation to not be ungrateful, or he is saying that both promise breaking and ingratitude are similar violations of the law of nature. In the first case he would have to say that the obligation in civil society is based not on contracts but on gratitude. But if this is so, why bother with contractual obligation at all? In the second case, he would be in the odd position of saying that one breach of this law of nature is an unjust act while the second is merely an ungrateful act. This seems unduly complex. Moreover, if this is so, why does the obligation to be grateful create an obligation to be just? Taken seriously, this argument undercuts the whole system of contractual obligation that Hobbes is trying to construct by making the key type of contractual obligation rest on gratitude. Put most simply, either the law against ingratitude is derived from the law against promise breaking or it is not. If it is, what Hobbes says about ingratitude not being injustice is obviously wrong. If it is not, and if contracts of mutual trust in a state of nature are binding because of gratitude, then the basis of Hobbes's political theory rests on a noncontractual element. Neither explanation leads to a happy conclusion.

Finally, Hobbes returns to the suggestion that the ability to revoke promises at will destroys the utility of promises, but in doing so he is forced to redefine the concepts of "good" and "reason." "He that foreseeth the whole way to his preservation, which is the end that every one by nature aimeth at, must also call it good, and the contrary evil. And this is that good and evil, which not every man in passion calleth so, but all men by reason."[54] First, Hobbes distinguishes between each individual's "natural passion" that is for the good of each individual insofar as that individual can see it for himself and a "reasonable passion" that is for the good of each individual insofar as "all men by reason" can foresee it. Hobbes's distinction is not a crude prototype of the distinction between the Individual Will and the General Will, nor is it a proto-utilitarian concept of "good" defined in terms of "the greatest happiness for the greatest number." Rather, it is a distinction between what I think is the best outcome for me, based on my own estimate at this moment, and what all men would universally agree was the best outcome for me, based on a rational and complete analysis of the situation. If I were smart enough to "foresee the whole way to my preservation," then my estimate and the estimate of "all men by reason" would coincide; but nature is so complex and passions so binding that this is rarely the case.

In effect, Hobbes has redefined the terms "reason" and "passion" so that they no longer refer to the particular rational process that I have gone through to get to a conclusion about what I must do, nor to the particular emotion that I feel and that impels me to do certain things. Rather, "reason" and "passion" now refer to the process that all ra-

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[53] Ibid., p. 99.
[54] Ibid., p. 109.

tional men could go through and to the emotion that rational men would feel that would impel them to do certain things. What Hobbes has done by this distinction is to create a concept of rational selfishness. He is arguing not for altruism but for what all rational men would say is good for me as opposed to what I in my shortsighted way believe is good for me, with "good" in both cases defined in terms of my survival. What we have here is a concept of universal, rational egoism for each individual.

We can now deduce the general obligation to keep all promises, even those we ourselves think to be against our best interests, from our general obligation to preserve ourselves and from Hobbes's redefinition of our obligation in a state of nature as a rational obligation, that is, one that is based on universal human assent and not just on our immediate passions. Apparently, Hobbes believes that—as a factual matter—we would never have universal assent that promise breaking would be good for an individual's survival, despite the fact that the individual's own passions may lead him to believe this. Hobbes can now justify contractual obligation by appeal to what "all men by reason" call good. But he has achieved this defense of contractual obligation at considerable cost, for he has had to redefine two of his key terms in the process. In doing this, he appears to have taken a significant step away from the subjectivism or relativism that he often appears to hold. He is not withdrawing from his egoism: "good" is what the individual desires, and individuals desire their own preservation first and their own pleasure second. But a subjunctive element creeps in here to modify the subjectivism. The question is not what I *do* desire, but what I *would* desire if I *were* rational enough to see what *would* lead to my preservation. Hobbes equates his modified egoism with what all men would agree to; that is, what all men would—passion put aside—agree was to my best interest.

Normally, egoism is thought of as both self-centered (the welfare of the individual is paramount) and also subjective (the individual's judgment as to what is desirable is paramount). In this passage, Hobbes retains the self-centered aspect of egoism while suggesting an objective or universal standard as to what is of value (self-preservation) and how it should be achieved (what all men would rationally agree was most apt to preserve the individual). What we have here is the germ of a new type of egoism, an "objective egoism."

The fascinating question is whether or not Hobbes really appreciated what lay in the few short sentences he wrote in Chapter 4 of *De Corpore Politico*. Does he fall back into the more usual subjective egoism or does he develop his new objective egoism further?

There is no clear answer to this in *De Corpore Politico* because Chapter 5 turns to proofs from Scriptures for the necessity of keeping contracts. In Chapter 6 he discusses the need for a common covenant between all men. This leads directly to Part 2 of *De Corpore Politico*: "The Nature of the Body Politic." There is nothing inconsistent with Hobbes's modified egoism in these two chapters, but neither is there any further direct discussion of the concept. Hobbes appears to feel that he has dealt with the problem, and he turns his attention elsewhere. In order to come to more definite conclusions, we will have to turn to the parallel discussions in *De Cive* and Leviathan.

IV. The same problem confronts Hobbes in his other two political works, *De Cive* and *Leviathan*. Indeed, students have often found it curious that he should have bothered to write three works that are so often so nearly identical. However, if the works are set side by side, it becomes clear that Hobbes alters his argument from one work to

another. Often these alterations are for obvious rhetorical purposes, but sometimes the change appears to be a matter of dissatisfaction with the previous argument. One place that shows unusual and extensive rewriting is his discussion of the obligation to keep promises.

In *De Cive*, Hobbes restates some of the arguments from *De Corpore Politico* and drops his argument about good being that which all men call so by reason. He also adds to the English texts several rather confusing footnotes. The overall impression is that Hobbes was unsatisfied with his earlier discussion but had no clear plan for improving it. He begins with the argument about breach of contract being an absurdity.

> And there is some likeness between that which in the common course of life we call injury, and that which in the Schools is usually called absurd. For even as he who by arguments is driven to deny the assertion which he first maintained, is said to be brought to an absurdity; in like manner, he who through weakness of mind does or omits that which before he had by contract promised not to do or omit, commits an injury, and falls into no less contradiction than he who in the Schools is reduced to an absurdity.[55]

He also makes the same argument about ingratitude. Ingratitude is against natural law but is not a breach of contract and so it is not a case of injustice.

> The third precept of natural law is, that you suffer not him to be the worse for you, who, out of the confidence he had in you, first did you a good turn; or that the giver shall have no just occasion to repent him of his gift. . . . But because the breach of this law is not a breach of trust or contract, (for we suppose no contracts to have passed among them,) therefore is it not usually termed an injury; but because good turns and thanks have a mutual eye to each other, it is called ingratitude.[56]

At the end of Chapter 2 of *De Cive*, Hobbes brings in a new argument. This is given under the heading that the natural law is identical with the moral law. The argument is that individuals live under differing conditions and therefore have different responses (passions) to different present situations. However, the future is known by reason, which is common to all men, rather than by sense-perception, which is inherently personal. Therefore, it is possible for all men to agree to seek peace, which can be known by reason, even when they cannot agree on a specific present course of action.

> They therefore who could not agree concerning a present, do agree concerning a future good, which indeed is a work of reason; for things present are obvious to the sense, things to come to our reason only. Reason declaring peace to be good, it follows by the same reason, that all the necessary means to peace be good also. . . . The law, therefore, in the means to peace, commands also good manners, or the practice of virtue: and therefore it is called moral.[57]

Along with this new argument Hobbes drops his arguments about "what all men by reason call good." The change seems to indicate that he was unhappy with this argument as given in *De Corpore Politico*. However, the new argument has much the same effect. It is another attempt to establish an objective—or at least general—standard by which to judge actions aimed at self-preservation. Unfortunately, it suffers from the obvious

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[55] Ibid., 2:31.
[56] Ibid., p. 35.
[57] Ibid., p. 48.

weakness that it forces Hobbes to assert that all men agree about the long-term consequences of their acts when they obviously do not.

The most revealing parts of *De Cive* are two notes, both concerned with our knowledge of the laws of nature. Commenting on his own statement that "nature hath given to everyone a right to all" Hobbes says,

> The same man therefore hath a right to use all the means which necessarily conduce to this end. . . . But those are the necessary means which we shall judge to be such. . . . He therefore hath a right to make use of, and to do all whatsoever he shall judge requisite for his preservation. . . .[58]

The key phrase here is "whatsoever he shall judge." That appears to be an unequivocal stand in favor of a subjective standard. But compare this with what Hobbes says several pages later commenting on "right reason":

> By right reason in the natural state of man, I understand . . . the peculiar and true ratiocination of every man concerning those actions of his which may either redound to the damage or benefit of his neighbours. . . . I call it true, that is, concluding from true principles rightly framed, because that the whole breach of the laws of nature consists in the false reasoning, or rather folly of those men who see not those duties they are necessarily to perform towards others in order to their own conservation. But the principles of right reasoning about such like duties are those which are explained in the second, third, fourth, fifth, sixth, and seventh articles of the first chapter.[59]

The discussion about "true" reasoning is another attempted appeal to an objective standard. There is a fallacy here, or at least a strange ambivalence, for a subjective standard cannot be "true" to anything other than itself. In such a case, "true" is either meaningless or tautological.

In *De Cive*, Hobbes appears to waver between a subjective and an objective egoism. He understands the problem before him clearly. He must show that it is *always* correct to keep promises. Only from this basis can he derive the binding obligation that creates contracts out of mere promises. But he is painfully aware that if he turns to personal decisions there will be many cases where our emotions will cause us to break our promises. On the other hand, setting up an objective standard "(true reason," "all men by reason") subverts his most effective argument, because it takes away authority from our personal will to preserve ourselves.

V. In *Leviathan*, Hobbes finally appears to resolve his own confusion and to settle on subjective egoism as his basic position. He makes—even more briefly than before—an argument about promise breaking as a form of absurdity. Only this time he puts the argument forward into his discussion of what it is to transfer a right.[60] It fits better there, for this is where Hobbes introduces the notion of injustice; but in this context it no longer appears as a justification for performing our contracts made, as it does in *De Corpore Politico* and in *De Cive*.

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[58] Ibid., p. 10.
[59] Ibid., p. 16.
[60] Ibid., 3:117.

Hobbes also makes the same argument about gratitude being a secondary law of nature, but before he gets to gratitude, he restates the problem:

> Every man's conservation and contentment being committed to his own care, there could be no reason why every man might not do what he thought conduced thereunto; and therefore also to make or not make, keep or not keep covenants was not against reason when it conduced to one's benefit.[61]

He then adds a new argument for keeping our promises:

> He, therefore, that breaks his covenant, and consequently declares that he thinks he may with reason do so, cannot be received into any society that unite themselves for peace and defense, but by the error of them that receive him; nor, when he is received, be retained in it without seeing the danger of their error, which errors a man cannot reasonable reckon upon as the means of his security; and therefore if he be left or cast out of society he perishes, and if he live in society, it is by the errors of other men, which he could not foresee nor reckon upon. . . .[62]

The justification that Hobbes is now offering for keeping covenants is that no man can reasonably expect to profit from the breaking of them. The argument is designed to convince the reader as well as to demonstrate the point.[63] His final position is that it is against all reason and expectation to be able to live in civil society with its advantages and still break covenants. Furthermore, this is something that all individuals can reason out for themselves. Therefore, we do not need to appeal to some universal or objective or external standard. Each man's private intelligence will convince him of this point. Hobbes finally opts for a subjective egoism; what I think will conduce to my survival is what is good for me, but with the proviso that all men will agree that the long-term effect of breaking any promise will be harmful.

In the remainder of Chapter 15, Hobbes goes on to discuss gratitude, but without trying to convert it into a justification of contract keeping.[64] Likewise, he ends the chapter with a discussion of the laws of nature as "true moral philosophy," but this time he takes an unquestionably subjectivist position: "And therefore so long as a man is in the condition of mere nature, which is a condition of war, private appetite is the measure of good and evil."[65]

Essentially, Hobbes's argument in *Leviathan* is a simplified version of what he has already said in *De Cive*, and, because it is simpler, it is rhetorically more powerful. It is not, for all of that, any better as an argument. In *Leviathan*, Hobbes emphasizes our need for security and our fear of death with far better rhetoric than he found for *De Corpore Politico* or for *De Cive*. Likewise, he states over and over that all voluntary actions aim at what the individual thinks good for himself. It follows from this that in a state of nature no one will ever make a covenant to his disadvantage, nor keep a covenant if it appears at the moment of performance that the performance of the covenant will be harmful. Hobbes states this too—over and over: "He that performs first has no assurance that the other will perform after, because the bonds of words are too weak to

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[61] Ibid., p. 132.
[62] Ibid., p. 134.
[63] This is characteristic of *Leviathan*, which has a more polemical and less deductive style to it than either *De Corpore Politico* or *De Cive*. See C. H. Hinnant, *Thomas Hobbes* (G. K. Hall Co., 1977), chap. 5.
[64] *Works*, 3:138.
[65] Ibid., p. 146.

bridle men's ambition, avarice, anger. . . ."[66] Or better, and more simply: "And covenants without the sword are but words."[67]

He argues that making covenants can be justified pragmatically and that keeping covenants can always be justified because the failure to do so would violate the natural law to seek peace. This, too, is a weak argument. If by "peace" we mean universal brotherhood or altruism, then his conclusion is correct, but at the expense of his whole philosophy, for it now rests on a most un-Hobbesian premise. If "peace" means our personal security and well being, as it must if we are to make sense of Hobbes, then the conclusion does not follow. It is easy to imagine a contract it would be better not to keep, even counting our subsequent reputation as a promise breaker.

Hobbes's argument is weak in two ways, for it rests on two unprovable (and implausible) assumptions: first, that no civil society will ever tolerate, or can ever be expected to tolerate, a known promise breaker; second, that all human beings can be expected to understand and act on this fact. In view of the number of recognized but forgiven frauds in history, the first claim seems false. In view of Hobbes's own insistence on our ability to misread facts, to misjudge consequences, and generally to delude ourselves, the second premise should have been doubted by Hobbes himself.

In *Leviathan*, Hobbes chooses to turn the defects of his argument into a great rhetorical triumph. He has had enormous trouble providing a justification for universal promise-keeping in a state of nature. He now capitalizes on this defect by arguing that no one will in fact keep burdensome promises in a state of nature and that we therefore must have a civil government with effective coercive power to insure that they are kept. He switches our attention from the problem of a philosophical justification for promise keeping to a political explanation of the terms under which the institution must operate. But these are two separate problems. The rhetoric is marvelous, the argument defective.

What is so singular about Hobbes's political theory is his attempt to prove the existence of political obligation and also to allow that the citizen may have a legitimate obligation to *any* system that the sovereign creates. All of Hobbes's laws of nature—save the first—are formal; they provide no specific content, only the necessary conditions for all effective political life. In order to achieve this singular conception of a justified political obligation to obey any form of government, Hobbes turns to the concept of a legal contract. Here, too, the obligation to keep the contract is fixed; the content of the contract is—within certain formal limits—open.

The difficulty is that in the legal contract the obligation to obey is coersive in the short run and subsumed under the general obligation to obey the law in the long run. Hobbes tries to do something similar in his arguments, but it does not work very well. He tries to subsume the obligation to keep contracts under the general obligation to preserve ourselves. This causes him to generate a number of ingenious arguments, most of which turn on the claim that it is *always* in our long-term interests to keep our contracts. The arguments are skillful but ultimately unconvincing. Hobbes is forced to try to show that this contingent factual premise is a universal and necessary truth. Since he cannot do this, he turns the whole argument on its head and claims that the implausibility of everyone's always keeping his promises is proof of the need for a civil power to enforce those promises. However, if we have an effective coercing power, we do not need contracts in the first place, as Hobbes admits in his discussion of a commonwealth

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[66] Ibid., p. 123.
[67] Ibid., p. 154.

by acquisition.[68] Coercion will justify our doing any act, not just the things we have promised to do. His reliance on the concept of a legal contract leads Hobbes into an impossible dilemma. It is too useful to give up, for it provides a mechanism by which a rational, selfish man may convert his obligation to preserve himself into all sorts of other political obligations. It also limits political obligations to contracts between human beings. However, the concept of a legal contract will not do the one job for which it was
originally intended. It will not justify the creation of the civil society and the sovereign. They can be justified only if Hobbes can show that all promise keeping should always be enforced, and he can do that only if he can show that promise keeping is always advantageous to every individual; and that he simply cannot show.

Perhaps, in his later years, Hobbes was still dissatisfied with his arguments. Perhaps that is why he was reluctant to discuss the legal origins of his concept of contract. Nevertheless, the fact remains that Hobbes knew a great deal about the law, that he used legal concepts in his political theory, and that his political theory can best be understood as a series of attempts to fit this concept of a legal contract to the needs of his political theory. Indeed, understanding this conflict between St. German's sixteenth-century legal theory and Hobbes's seventeenth-century philosophical goals is the key to any adequate explanation of Hobbes's theory of contractual obligation.

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[68] Ibid., vol. 3, chap. 20.