Making Legal Positivism: Thomas Hobbes and John Austin on Sovereignty and Civil Law

Even Yi-Ying Chao[1]

Commentator: Alvin Chen (Research Center for Humanities and Social Sciences, Academia Sinica)

[1] Graduate Student in Fundamental Legal Studies and Science, Technology and Society. Department of Law, National Cheng-chi University, and Institute of Science, Technology and Society, National Yang Ming Chao Tung University. (b03902104@ntu.edu.tw)

Introduction

Thomas Hobbes (1588-1679) is both a controversial and canonical figure in Western history of legal and political thought. Usually, we locate Hobbes in three contexts in intellectual history. One is the development of theory of state. In Quentin Skinner formation of genealogy of state, Hobbes's theory of state in his eminent work *Leviathan* (1651) developed a third way between absolutist and populist theory in the debate of political authority in 17th century England, which paves the way for our modern conception of the state. (Skinner, 2008b:348) The second context is the theory of liberty. As Isiah Berlin identified Hobbes as the iconic figure in stating negative liberty in contrast to positive liberty, Hobbes's formation of liberty as the absence of physical impediment piles up a brick upon the foundation of modern liberalism. (Berlin, 1958)

The third context, which is the main topic of this essay, is the theory of law. Within the scholarly discussion of Hobbes's theory of law, the positions and relationship between natural law and civil law is still debating. One of the debates surrounds the status and essence of civil law, as defined in the Chapter 26 of *Leviathan* Hobbes considers civil or positive law as the command of the sovereign who carries *persona* of the state. This formulation of the essence and role of civil law is analogous to the later legal positivism theorist John Austin (1970-1859) who formulates the command theory of positive law in his only published work, *The Province of Jurisprudence Determined* (1832). In modern jurisprudence or history of legal thought, we habitually classify legal theory in two main streams: natural law theorists and legal positivists. Students of jurisprudence often attribute the positivist approach of positive law to Hobbes for he is a pioneer elaborating one of the earliest version of command theory of law, which becomes the foundation of the positivist understanding of human law.

However, Hobbes would consider himself not as a legal positivist but a supporter of natural jurisprudence. In his early modern context, Hobbes succeeded Thomas Aquinas's hierarchical legal system, and also influenced by the later scholastic school of Salamanca which spread to Britain. (Fitzmaurice, 2014) Hobbes joins the allies of Protestant reorientation of natural law like Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694) to develop a secular version natural law theory.

The tension between the image of Hobbes as a natural law theorist and Hobbes as a legal positivist in the eye of early legal positivists such as Austin and Jeremy Bentham (1748-1832) emerges in the subtle role of civil law between the will of the sovereign and the integration of natural law. Some contemporary scholars insist that Hobbes is a natural law theorist of his time.[2] Other commentators, on the other hand,

[2] See Cuffaro (2011) and Murphy (1995, 2016)

tend to emphasize the role of sovereign voluntarism in Hobbes's understanding of civil law and therefore argue for his use of positive language[3], which also paves the way for the forthcoming challenge to natural jurisprudence from legal positivism.

Within this debate, this essay is an attempt to specify both Hobbes's own theory of sovereignty and civil law and how the early legal positivists use and appropriate Hobbesian idea about sovereignty, civil law and political authority to build their arguments, especially focus on Austin's jurisprudence. In this way, we can see more clearly at the image of 'positivist Hobbes' within the works of Austin's jurisprudence. This essay would be divided into three parts. The first part situates Hobbes's account of sovereignty within early modern debates about the relationship between sovereign and state. The second part would go on and elaborate both Hobbes and Austin's theory of civil/positive law and its relation to political authority; in the third part, I would investigate and depict how Austin's appropriate Hobbes's own ideas in order to support his positivist plan, which argued by Austin as the purpose of jurisprudential inquiry.

I. Theory of Sovereignty in Hobbes

Hobbes's Idea of Sovereignty in Early Modern Context

What intellectual historian Richard Tuck defines as the definite moment of the birth of modern democratic theory is when the idea of 'sovereignty' and 'government' becomes distinguishable, and Tuck marked the first person to emphasize the distinction is French jurist, Jean Bodin. (Tuck, 2016:9) Bodin criticizes that Aristotle failed to define the supreme power of the political community clearly, *summum imperium*, but only terms the government of state, *Reipublicae administratio*. (Tuck, 2016:11-12) Bodin defined the sovereignty as perpetual and indivisible, which contains "the right to choose magistrates and other members of a government, together with the power of ultimate legislation." (Tuck, 2016: 18) Loughlin also argues that Bodin's writing in *Les Six livres de la République* is not only a systematic account of political organization, but also the emerge moment of concept of public law. (Loughlin, 2017:15) Many scholar indicates that Bodin's writing reflects his time of the religious conflict, most notably the plotting of St. Bartholomew. (Dunning, 1986:86-87) Bodin himself is often categorized as the supporter of absolutism within the spectrum from absolutism to republicanism.

However Bodin's innovative, he was not the only author writing about sovereignty. Hugo Grotius, in contrast, argues for temporary and divisible sovereignty. Grotius's idea of sovereignty swayed between the scholastic idea of *summa potestas* and Hobbsian *summon imperium,* spatially between *civitas* and *populus*. (Brett, 2011: 134-138) Brett further indicates that Grotius's conception of sovereignty is based on the

[3] See Murphy(2005) and Dyzenhaus (2013)

principle of "morals" (or moral things) which debts to scholastic and Aristotelian tradition and the anti-Bodinian conception of sovereignty represent a modulation between law and "morals". (Brett, 2020: 621)

Hobbes's account of sovereignty emerged within the early modern construction of state, political authority and popular sovereignty. What innovative about Hobbes is that he considers the natural liberty as the content of natural rights. For Grotius, rights are the relationship between subject and their possession, but for Hobbes, rights are the capacity and will to act. (Brett, 2011:108-109) Hobbes's concept of natural rights serves as the foundation for his contractual theory and concept of sovereignty.

Hobbes adapt the radical individualism perspective on the formulation of society and government. It started from the scope of individual will and capacity to take actions. At the beginning of chapter 8 of *Leviathan*, he builds an original situation of human being: men are born radical qual, which means even though there are differences of intellectual capability, of physical power and of experience ('prudence'), the distinction is not large (Hobbes, 1996:86-87). Also, every individual has the right to everything and they are self-interested, men would need to fight with each other while they desire the same thing (Hobbes, 1996:87). In this way, any man cannot secure his own life, even you are stronger than others, you may suffer from violent death when you are in sleep. In Hobbes's own word, it is a war, in which every man is enemy to every man (Hobbes, 1986:89). In this state of nature 'the life of man, solitary, poore, nasty, brutish and short. (Hobbes, 1986:89)' Natural law which dictated by reason

Hobbes argues that we desire peace rather than living in state of nature. In his first law of nature, Hobbes says men will use his own power to secure his life, namely self-preservation (Hobbes, 1996:91-92). In order to reach peace, every man should relinquish his natural right to the sovereign and construct a covenant, which makes individual will subject to the only will of sovereign. For Hobbes, it is the only reasonable way to build a strong enough common-wealth which can prevent human being back to the state of nature.

Hobbes's Theory of Representation: Authorization Theory

The construction of commonwealth is resulting from a covenant which transfers our natural rights. In *Leviathan*, Hobbes specifics two model of transferring right: the simple version of right transfer, and the complex version of authorisation. The latter is the a novel step comparing to Hobbes's previous *De Cive*. For the simple right transfer, Hobbes says: 'Right is layd aside, either by simply Renouncing it; or by Transferring it to another…By **transferring**, when he intendeth the benefit thereof to some certain person, or persons. (Hobbes, 1996:92)' For authorisation, he specifies that 'Of Person Artificiall, some have their words and actions *Owned* by those who they represent. And

then the Person is the *Actor*; and he that owneth his words and actions, is the **author.'** (Hobbes, 1996:112) In today's understanding, authorisation means specific relationship such as a lawyer and his or her clients. When a lawyer is in front of a court, he or she represent his or her clients, and the court takes every word from the lawyer as the word from the clients themselves. Basically, the representation means that a person needs to take responsible for another person's action without reservation, and the relationship of representation is built by authorisation.

The key difference between two models is the character of contract. Transferring rights model implies a bilateral relationship between the transferer and the transferee, and both of them are bounded by the contractual relationship. Authorization, on the other hand, forms an unilateral relationship which allows the person who receives authorization does not carries duty to authors. By adopting the authorization model, Hobbes departs himself from what Carl Shaw called 'original democracy,' (Shaw, 2009) and popular sovereignty. Hobbes notes that the formation of commonwealth is through each individual authorized their capacity to act to the sovereign, who could be a person or a group of people, and just at the time the covenant comes into effect, the artificial personality (*persona*) of the state emerges, and sovereign is the representative of that personality (*Persona Civitatis*) (Hobbes, 1996:120-121).

As Pitkin notes, using authorization enables Hobbes's sovereign have no limit on action, and only subject to law of nature. (Pitkin, 1967:31) Skinner also argues that Hobbes adapt the concept of authorisation with the aim to against the parliamentarian claim. Parliamentarian like Henry Parker considered the political power is originally possessed by the people, and the parliament is the place to represent the composition of people. Skinner's radical reading reveals that Hobbes constructs a theory of monarchy state is the language of Parliamentarian ('representation') with the reference to Cicero's concept of 'persona.' Thus, *Leviathan* itself can be view as a political tract, which aims to attack Parliamentarian with their own weapon. In this reading, Hobbes's concept of sovereignty is similar to Bodin's conception of unalienable sovereignty as well as its political implication to support absolutism. But Hobbes himself develop a process of legitimizing political authority much closer to parliamentalism, and therefore as Skinner indicates, there is "no lawful sovereign can be said to enjoy a status any higher than that of an authorised representative." (Skinner, 2008b:343)

The sovereign acquires sovereign power through the process of authorization, forms a new relationship between himself and his subject: making law. This is the topic of next section.

II. Hobbes and Austin on Theory of Civil Law

Theory of Civil Law in Hobbes' Political Theory: From Elements to Leviathan

Hobbes starts to deal with the essence and understanding of civil law when he first wrote his political theory work *The Elements of Law* in 1640s. Although compared to the whole topic he covered in the book, civil law is relatively a minor topic. Lying in the last chapter of the whole book, Hobbes turns to the various kinds of law. "[A]ll laws are declarations of the mind, concerning some action future to be done, or omitted." (Hobbes, 1969:184-185) In this stage, Hobbes held a linguistic understanding of law. As he explained, there are three kinds of expressions: nature of covenant, consisted counsel and the command (Hobbes, 1969:185). But Hobbes notes that covenant and counsel are different from law because covenant is solely the declaration of one's will, and counsel is only a suggestion rather than an obligation since the counsellor cannot force the counselee to follow his counsel. Therefore, law can only be command, which can force someone to do something merely because it is command and leave no space for reconsideration, the law denotes the obligation and obedience.

For Hobbes, law (*lex*) and right (*ius*) are the two sides of the same coin, right is the scope of liberty, and law is the limitation of liberty. Therefore, Hobbes notes: "right is that liberty which law leaveth us; and laws those restraints by which we agree mutually to abridge one another's liberty." (Hobbes, 1969:186) In his distinction between law and right, Hobbes still maintains Aquinas' division between divine law (*lege divina*), natural law and civil law (*lege civili*), but accompany with its correspondent divide right (*jure divino*), natural right (*jure naturce*) and civil right (*jure civili*). Divine law and natural law is actually the same according to Hobbes, both of them engrave in the mind of men by God.

Natural law by the traditional definition is the "dictate of right reason" (Hobbes, 1969:188), but even in the state of nature, there is no one who can confidently maintain what the right reason is. The determination of right reason has to be supported by a political authority, namely the sovereign. In this sense, civil laws become the measurement of action within the political community. (Hobbes, 1969:188-189) However, civil law is not totally distinct from natural law, in virtue of what Chia-Yu Chou called the 'mutual-containment thesis' in Hobbes' political theory (Chou, 2019). The mutual-containment thesis is the requirement that the content of civil law has to in line with the content of natural law. Even since *The Elements of Law*, Hobbes argues for the mutual-containment thesis, he says: "The civil law containeth in it the ecclesiastical, as a part thereof, proceeding from the power of ecclesiastical government[.]" (Hobbes, 1969:189)

In *De Cive*, the discussion about civil law, joint with the discussion of sin, is located in the last chapter of the government part. Hobbes added more detail for his

theory of civil law as a command theory of law in *De Cive*. Distance himself with Aristotle's understanding of civil law as the common consent of the commonwealth, Hobbes argues that civil law is a command rather than an agreement (Hobbes, 1998:154-155). Hobbes says: "civil laws are commands about the future action of the citizens from the one (man or council) which is endowed with sovereign power in the commonwealth." (Hobbes, 1998:155)

The meaning of command is much complicated in *De Cive* than in *Elements of Law*, Hobbes considers command as "an *instruction* in which the reason for following it is drawn from *the will of the instructor*." (Hobbes, 1998:153) Here Hobbes opens the voluntary aspect of command, which indicates the command is someone's command, and the will of the commander has its role in the formation. In a commonwealth, the commander is a man or council who held the sovereign power and be the legislator of the land. (Hobbes, 1998:156) It associates with Hobbes' theory of state, in which the citizens constitute the commonwealth by the means of agreeing to show obedience of the command of the sovereign which becomes the political obligation of each citizen. (Hobbes, 1998:158)

Hobbes further distinguish two kinds of civil law in terms of subject matters, the sacred civil laws are human law about sacred things, and the secular civil laws are human law about secular things, which include the 'distributive' and 'vindicative or penal' duty of the legislator, the former is that the legislator has the duty to give the judgement and the latter means the legislator has to enforce his judgement. (Hobbes, 1998:157). Though Hobbes has already mentioned the function of imposing penalties and consider it as one of the central elements of secular civil law in *De Cive*, it was not until *Leviathan* did Hobbes develop more about the substantial function of some civil regulations.

Hobbes' view on civil law much elaborates in the *Leviathan*, which also marks his turning point to the criticism of common law principle and intentionally argue for an alternative theoretical formation of crime and punishment contrast to the traditional conception of treason and felony (Gutnick-Allen, 2016:21-25). In chapter 26 of *Leviathan*, Hobbes defines civil law as the command of the person of the commonwealth, also known as *persona civitatis*. (Hobbes, 1996:183) The idea of sovereign has changed from the commander who holds the sovereign power in *De Cive* to the personality of state in *Leviathan*. With the authorization theory, it is much clearer why the sovereign could have the power of legislation. The sovereign has the legislative power because the power is from the commonwealth itself, who has the relationship to its subjects in terms of subjection. Hobbes says:

> Civil Law, is to every Subject, those Rules, which Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule. (Hobbes, 1996:183)

The obligation of obeying the civil law is from the covenant, which is necessary for every citizen to agree on and therefore form the commonwealth. Part of the covenant contains the assignment of sovereign, who holds the capacity to set civil law as the sole legislator. (Hobbes, 1996:184) Moreover, Sovereign himself is not the subject of civil law, since the law is originated from his command, he frees himself from the subjection of civil law (Hobbes, 1996:184). Hobbes's conception of command is the sovereign's will, therefore Hobbes notes that "the Will of the Soveraign signified by his silence" (Hobbes, 1996:184) It reflects on the relation between law and right mentioned above, the freedom of subjects lies in where there is no law, namely the silence of the sovereign. Hobbes uses the conception of civil law against the discourse of customary law and common law, for him the real civil law would conform to law of natural and equity by the interpretation of judge constituted by the sovereign authority. (Hobbes, 1996:191)

Hobbes nevertheless mentions different categorization of laws, one of them is the distinction between natural law and positive law. As Hobbes notes, natural law is the law from eternity, and positive law is not from eternity but from the will of sovereign (Hobbes, 1996:197). Positive law can further distinguish as divine positive law and human positive law, for the human positive law, some of them are 'distributive' and some are 'penal.' (Hobbes, 1996:197) Here Hobbes clarifies distributive positive law as law which determines the property right and liberty of subjects. The penal positive law, on the other hand, declares the penalty for those who violate the laws and execute by the ministers or officials of the government (Hobbes, 1996:197).

Theory of Positive Law in Austin's Jurisprudence

Distinct from Hobbes, Austin develops his theory of civil law in totally different historical and political backgrounds. At the time of Hobbes, natural jurisprudence, namely, resort to natural reason in order to justify the end of law, is the main discourse for law. Natural rights theory was then competing with conventional understanding of historical rights and attempted to rationalize the language of rights. However, after the French and American Revolution, the language of natural rights became rather powerful and influential even sometimes with heavy criticism, the abstract idea of 'Rights of Man' in the *Declaration of the Rights of the Man and of the Citizen* (1789) and the idea of absolute individual rights in Blackstone's *Commentaries on the Laws of England* (1765) are exemplars.

Under the domination of natural jurisprudence in the late eighteenth-century legal thought, early legal positivists such as Bentham and Austin refuse to simply accept the continuity between morality and legality. For Bentham, the natural rights discourse is "nonsense upon stilts," and simply a constructive fiction. Austin, on the other hand, does not criticize natural rights severely as Bentham does, though he supports to separate the discussion of general morality rule and the idea of positive law. The concept of positive law for Austin, as James Murphy notes, is the translation from Latin's *ius positum*, which has two meanings: for one the positivity in the term positive law means the difference between position, especially the sovereign's position which can make legislation. The second meaning of positivity lies in the Roman distinction between universal law of nations (*ius gentium*) and particular regional civil law (*ius civilis*), the idea of positive law in terms of this distinction refers to the temporal and spatial contingency of particular legal regulation (Murphy, 2005:173-186). Also, according to Michael Lobban the idea and scope of positive law have been greatly influenced by German Historism such as Savigny, Thibaut and Gustav Hugo and the German debates on codification of positive law (German Pandectism). (Lobban, 1991) Not only did Austin name his lecture like the textbook by Hugo (Lobban, 2013:256), he also modified Hugo's theory of positive law in order to separate what law *is* from what law *ought to be*, and to centralize the discussion of jurisprudence on the empirical positive law (Lobban, 2013:258-259).

In his jurisprudence lecture at the University of London, later published as *The Province of Jurisprudence Determined*, Austin defines the end and the target of the study of jurisprudence: jurisprudence is not about the study of morality, but rather the study of positive law.

Positive law is the subject matters of the science of jurisprudence, in contrast with morality is the subject matters of the science of legislation. Austin says: "Every law or rule is a command. Or rather, laws or rules, properly so called, are a *species* of commands." (Austin, 1998:13) While Austin admits there are divine law, natural law and human law, all of them are commands. Divine law and natural law are commands of Deity, and they reveal as the doctrine of morality. Morality under Austin's system should be studied under the science of morality, in which Austin himself accepts Bentham's utilitarian deontology. In the aspects of human law, there are two kinds: the law set by political superiors, which is called law *proper* or the *positive law*, and the law not set by political superiors, which called *positive morality* and can analogue or resemble the law proper. (Austin, 1998:122-123) Positive law is the command of the sovereign, and to make this definition possible, it has to connect with a concept of sovereignty, subjection and independent political society (Austin, 1998:192).

In Austin's jurisprudence, the notion of sovereignty is a special kind of superiority, which "the given society are in a habit of obedience or submission to a *determinate* or *common* superior" (Austin, 1998:193-194) and the person who holds the office of sovereign is not in habit of obeying other political authority. Other members in this society are the subjects of the sovereign, they are in the state of subjection or dependence related to the sovereign (Austin, 1998:194). In addition to that, society has to be dependent in the sense that society does not depend on other society or authority. In this way, in a given society, the sovereign has the greatest political authority. I would elaborate on Austin's theory in more detailed when considering the way Austin uses Hobbes' idea of sovereign and the origin of political society.

III. Image of Hobbes in Austin's Theory

In the third part of the essay, I deal with two arguments: Firstly I want to argue against Mark Murphy, who believe Hobbes is absolutely a natural law theorist of his time without positivist tendency. In line with Norberto Bobbio, I am going to show that there is a reading that makes Hobbes rather close to legal positivism. Secondly, I will analyze the use of Hobbes or Hobbesian theory in Austin's Jurisprudence, and try to clear out how Austin appropriate Hobbes' understanding of law in order to construct his positivist theory of law.

The Positivist Tendency of Hobbes?

Mark Murphy argues that it is misleading to see Hobbes as a predecessor of legal positivism or the turning point departs from Aquinas' scholastic tradition, and he rejects the similarity or the continuity between Hobbes' command theory of law and Austin's (Murphy, 2016:339-340).

There are three main arguments in Murphy's claim: Firstly, the understanding of the concept of command and sovereign is quite different in Hobbes' theory and Austin's theory, so it is fairly plain to equalize Hobbes' command theory of law and Austin's command theory of law (Murphy, 2016: 340-346). Secondly, Hobbes' account of command theory of law differs functionally to Austin's theory, Hobbes' theory concentrates on the relationship of *obliging* or *obligating*, while Austin focuses on the relationship of *commanding*. This difference in focus, Murphy argues, allows us to modify Hobbes' theory but not Austin's theory in response to Hart's criticism of command theory of law in *The Concept of Law* (Murphy, 2016:346-350). Thirdly, Murphy attempts to refute a common myth that Hobbes is innovative on the break with scholastic tradition, he argues that on the one hand, Hobbes understanding of natural law does not distance himself from scholastic tradition, on the other hand, Aquinas would not necessarily reject Hobbes' account of civil law (Murphy, 2016:350-354).

Murphy's attempt to retort the mainstream discourse that "Hobbes pave the way for Austin" is rather unconvincing, for he seems to exaggerate the difference between Hobbes' theory and Austin's theory, and even oversimplifies Austin's theory of jurisprudence. Here I would argue against Murphy on his first two arguments and show it is better to admit the similarity between Hobbes and Austin.

The problem of Murphy's arguments is that he seems to ignore the earlier writing of Hobbes, and even see the philosophical project of Hobbes as a completely logical coherent cohort across his *Elements of Law*, *De Cive* and *Leviathan*. His argument highly relies on the theory Hobbes presents in *Leviathan*. Especially when Murphy argues that in Hobbes' theory law does not impose duties on individual but only oblige citizen in commonwealth, while the law in Austin's theory does impose duties on subjects. However, this is not exactly what Hobbes argues. In *Elements of Law*, Hobbes has mentioned that law and right are two sides of the same coin, and law does pose duty on its subjects. Also, I do not see the necessity to distinguish obligation and duty.

Concerning Murphy's first argument, Murphy argues that for Austin the command is the desire for one person to ask another person to do the same action, while Hobbes does not connect the command and sanction as clear as Austin (Murphy, 2016:341). This is not what Hobbes said, as I discuss in the previous section, in *De Cive* and *Leviathan*, Hobbes does mention the duty of sovereign to enforce the law, which he called 'vindicative or penal' function of the civil law. Even though Murphy does mention Hobbes' distinction between command and counsel, he ignores Hobbes' account that the reason why Hobbes sees law as command rather than counsel is that Hobbes insists the important part of civil law has a vindicative function. In other words, if the law is only counsel, there is no way to enforce the law, and if we extend this understanding of law to divine law or natural law, the natural law can no longer impose the duty on the sovereign, therefore it violates the mutual-inclusive thesis.

Murphy also argues in Austin's theory, the existence of sovereign is a social fact, while for Hobbes the sovereign has a special position as its superiority over subjects (Murphy, 2016:343). I would argue this is a misunderstanding of Austin's theory too. In *Province of Jurisprudence Determined*, Austin does construct the relationship between sovereign and subjects as Hobbes does. Why sovereign is unique, in Austin accounts, is its position which is superior to the ordinary subjects. The sovereign's position forms the relationship of subjection between the sovereign and its subjects and makes legislation as well (Austin, 1998:194). This is why Austin called the law proper, namely the command of the sovereign, the positive law because the positive law is derived from the position of the sovereign. Murphy does not see the specialty of the positivity in Austin's theory of jurisprudence, thus he oversimplifies Austin's theory and makes Austin's account of sovereign superficial.

To further response to Murphy's challenge, I would like to mention Bobbio's argument why Hobbes should be considered as a predecessor of legal positivism. Just as Skinner who argue that Hobbes uses the parliamentarian discourse of consent to justify the absolute authority of monarch in order to challenge parliamentarian discourse and republican liberty (Skinner, 2002, 2008), Bobbio argues that Hobbes usage of natural law is actually a parody of natural law discourse and attempts to restraint natural law's limitation to the absolute sovereign (Bobbio, 1993). Though I believe it is more convincing to take natural law seriously as other commentators believe rather than see it as a parody since the state of nature occupies essential role for Hobbes to construct his theory of commonwealth, Bobbio's account does provide a new lens for us to reconsider how Hobbes puts the self-preservation as the primary content of natural law leads to a utilitarian interpretation of his theory.

I am not arguing that Hobbes abandon his normative natural law tendency and embrace utilitarianism understanding of morality, but Bobbio raises a good point that in term of Hobbes understanding of reason as calculation, the morality can be calculated in virtue of reasoning even in the natural law context. The calculation of how to preserve his own life and take action accordingly is what Bobbio called "utilitarian principle" of Hobbes, while I do not really think it is utilitarianism for Hobbes himself. However, to see the principle of self-preservation as the calculation of reason can interpret as the application of the principle of utility in Austin and Bentham's science of morality. In this way, we can see how Hobbes' role in the history of positivist thinking of law: Hobbes is not necessarily a legal positivist, but his idea of reason and the way he compiles his idea of reason to his contemporary natural law discourse can accommodate the general principle of utility, which is the crucial foundation of legal positivism.

Austin's Appropriation of Hobbes: Sovereign and Origin of Political Society

It is time we turn back to Austin to see how Austin discuss Hobbes' theory. Austin does use Hobbes' language of sovereign and legal authority to construct his theory of positive law. In *The Province of Jurisprudence Determined*, Austin uses Hobbes' definition of sovereign as the primary legislator, and determines sovereign as the fountain of positive law, "the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be law." (Austin, 1998:193) In this small quote, Austin uses the Hobbes' wording in *Leviathan* to define the relationship between sovereign and positive law. From this quote, we can also see why Murphy was wrong, since Austin's conception of sovereign and its function of creating positive law, is the same and even derived from Hobbes.

Moreover, the great sovereign power raises the question of the form of government, whether the government should be a popular government in order to gain freedom, or the government ought to be a monarchy. Though Austin does not presuppose which form of government is the best, Austin also responses to the potential doubt about the sovereign power without the restraint of law by mentioning Hobbes' theory of state (Austin, 1998:275). In Hobbes' theory, the sovereign can be a man or an assembly of man, so the unlimited legislative power of sovereign does not necessarily imply a monarchy, and Hobbes provides the supporting argument that even the sovereign has unlimited legislative power, people are still willing to grant this power to avoid the inconvenience within state of nature. Another reason for the unlimited sovereign power for Hobbes and used by Austin is that the sovereign power is supposed to be the supreme power if the sovereign is limited by some civil laws, then it creates another sovereign above the current sovereign, which is inconsistent to the definition of sovereign power (Austin, 1998: 276).

In addition to the definition of sovereign, Austin also uses Hobbes' account of political community, or using Austin's terminology "independent political society." (Austin, 1998:213) Austin says: "Any political society is (I conceive) independent, if it be not dependent in fact or practice: if the party habitually obeyed by the bulk or generality of its members be not in a habit of obedience to a determinate individual or body." (Austin, 1998:213) In this passage, Austin focuses on the concept of 'independent,' which means both the internal strength to protect itself (raison d'état) and its member, and a self-sustained body politics out of natural society. On the origin of this political society, Austin again suggests for a Hobbesian social covenant. Even though the original covenant is not an exact historical event, according to Austin's perspective it is the "only sufficient basis of an independent political society." (Austin, 1998:341) The original covenant is the sources of duty, it is because of the acceptance of the original covenant oblige every individual the duty to obey the command of the sovereign, and the covenant forms the mutual relationship between the sovereign and subjects. Here Austin adopts a Hobbesian understanding of justice, the sovereign political government cannot be considered lawful or unlawful, rightful or wrongful, legal or illegal in terms of positive law, since the sovereign is the measure and the sources of positive law. (Austin, 1998:346) The civil law is originated from the political authority of the sovereign, which is distinctly the characteristics of Hobbesian political theory.

The last point I want to leave is on James Boyle's argument about the "invented tradition of positivism." Boyle argues that the way early legal positivist uses Hobbes' theory is substantially different from what Hobbes himself consider as the purpose of his works (Boyle, 1987:387). This is true for the inquiry of intellectual history that

Hobbes has quite a different intention when he wrote his seminal works from Austin's intention. Though I do not oppose Boyle's argument that Hobbes is much sophisticated than the image of Hobbes in many legal positivists' work, and I also agree that many legal positivists use Hobbes for strategic purpose, I doubt that Boyle's claim that image of Hobbes in Austin's work is an oversimplified case.

Even though Austin does not mention Hobbes a lot, especially compared to his friend Bentham's theory of utilitarianism, Austin does capture some essential aspects of Hobbes' political theory. The way how Austin divides concepts more specifically does not mean Austin underestimates the complexity and sophistication of Hobbes' political theory. I would argue that if we look back on early legal positivists such as Austin and Bentham, in contrast to the later centre figure H.L.A. Hart, the relation between natural law tradition and their jurisprudence is rather complicated and not simplified as Hart's separation thesis would suggest (Hart, 1958). As James Murphy mentions, it is interesting for us to see when Austin devotes almost half of lectures in his *The Province of Jurisprudence Determined* to the problem of divine law, morality and principle of utility (Murphy, 2005). If we take the *Lecture of Jurisprudence* into consideration, it would reveal a more complex image of how Austin interacts with the discourse of early modern natural law thinkers, and how he really derives his positivist standpoint out from those anti-positivist theories.

Conclusion

In this essay I briefly introduce Hobbes' theory of sovereignty and its relation to civil law and Austin's jurisprudence of positive law. Hobbes' idea of civil law, in contrast with his natural law theory, has gained more influence and importance in his latter writing like *De Cive* and *Leviathan*. Hobbes' formation of civil law as the command of the sovereign, though limited by the mutual-inclusive thesis with natural law, can accommodate the principle of utility and paves the foundation for the development of legal positivism. One of the most eminent early legal positivist, John Austin does adapt some of the Hobbesian elements of political theory, such as Hobbes' idea of sovereign and its relation to civil law as well as his contractual theory of the state when constructing his positive jurisprudence.

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