HOBBES AND PERFORMATIVES

MARTIN A. BERTMAN
State University of New York,
College at Potsdam

Since Howard Warrender published his influential and stimulating *The Political Philosophy of Hobbes: His Theory of Obligation* in 1957 there have come to the foreground certain problems of the relationship of language to politics in Hobbes. This paper discusses one such relationship: performative utterances. Hobbes' view of performatives or speech acts is central in that if he is taken to hold them in an Austinean manner, as Warrander reads Hobbes, then Hobbes is squarely in the natural law tradition. This jeopardizes Hobbes' originality and, therefore, erodes his claim to have founded a science of politics. This paper does not agree with Warrender. It is contended here that Hobbes' performatives are not like those of John Austin's in the crucial case of the sovereign.

The historical question as to whether or to what extent Hobbes anticipated Austin's useful discussions of performatives is not this paper's concern. As a matter of fact, Austin states that the notion did not originate with him but is common to the English legal tradition where, he tells us, a performative is called an "operative." For present purposes the focus is on (1) how performatives are differently conceived by Austin and Hobbes and, (2) the place that Hobbes' performatives —for the sovereign— have in his political theory. Initially, let us attend to Austin's characterization of performatives as

> . . . a kind of utterance which looks like a statement and grammatically, I suppose, would be classed as a statement, which is not nonsensical,

> and yet is not true or false... furthermore, if a person makes an utterance of this sort we would say that he is *doing* something rather than merely saying something.[1]
>
> ...it is obvious that the conventional procedure which by our utterance we are purporting to use must actually exist. ...the convention invoked must exist and be accepted. And the second rule, also a very obvious one, is that the circumstances in which we purport to invoke this procedure must be appropriate for its invocation.[2]

Hobbes would agree with Austin's point that a performative is a doing rather than a merely saying something. Hobbes, however, would not agree with the contentions that a performative is not true (though he would hold that it is not logically possible for it to be false) nor with the custom burdened rules that Austin provides, viz., "the convention invoked must exist and be accepted." Since, for Hobbes, as will be shown, political truth depends on the sovereign's speech actions which result in the civil law. In the crucial case of these performatives what is invoked is the authority (and power) of the sovereign and not custom. Performatives are properly conventional in that different sovereigns make diverse civil laws; nevertheless, performatives are not conventional if one takes the meaning of the word to include arbitrary. For it is argued by Hobbes at length that the sovereign establishes the measure of political truth through the civil laws; such constitutive rules are the very need that brought anti-social man from the anarchic state of nature to the political condition where interpersonal relations are ordered.

Further, the sovereign's performatives —civil laws— have a systematic context; that is, unlike two customs that may

[1] "Performative Utterances," in *Philosophical Papers* (Oxford: Clarendon Press, 1961) p. 235.
[2] *Ibid.*, p. 237.

oppose each other, the civil law, as an expression of the will of the sovereign, must be consistent with itself. The performatives are a source of truth not of falsehood. The systematic character of the law is provided by ordering itself through definition. It is this "scientific" character of the law that he opposes both to the custom oriented common-law tradition and as a shield against tangential emotional considerations which subvert the will of the sovereign and, thus, his function as the creator of the social mortar of civil truth. In his *The Whole Art of Rhetoric* Hobbes says:

> We see that all men naturally are able in some sort to accuse some by chance; but some by method. This method may be discovered; and a discovered method is all one with teaching an art. If this art consisted in criminations only, and the skill to stir up the judge's anger, envy, fear, pity and other affectations; a rhetorician in well ordered commonwealths and states, where it is forbidden to digress from the cause in the hearing, would have nothing to say. For all those perversions of the judge are beside the question. And that which the pleader is to shew, and the judge to give sentence on, is this only: *It is so*, or *not so*. The rest hath been decided already by the law-maker, who judging of universal and future things, could not be corrupted. Besides, it is an absurd thing for a man to make crooked the ruler he means to use.[3]

Austin is not concerned with a formally systematic or, in Hobbes' sense, a scientific use of language; Austin says, "If ordinary language is to be our guide, it is to evade responsibility, or full responsibility, that we most often make excuses, and I have used the word myself in this way above".[4]

[3] *E. W.* 423. (*English Works*, Molesworth edition.) Cf. Martin A. Bertman, "The Natural Body and the Body Politic," *Philosophy and Social Criticism* I, (Jan. 1978).

[4] "A Plea for Excuses," in *Philosophical Papers*, p. 181.

Deep philosophic issues surface here, as Bell is right to point out, on their broader differences over the nature of language: "Hobbes does, unlike Austin, think of such first-person forms as susceptible of truth or falsity in virtue of denoting or not denoting an act of will of the appropiate kind."[5]

In the commonwealth the important instance of "an act of will of the appropriate kind" is the sovereign's making law. We have seen Hobbes believes the sovereign authorized by the original contract represents the will of the contractors through his will. ". . . the sovereign power . . . is as great, as possibly men can be imagined to make it. And though of so unlimited power men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are worst. . . . The skill of making, and maintaining commonwealths, consisteth in certain rules, as doth arithmetic and geometry; not, as tennis-playing, on practice only."[6] Consequently, the sovereign's will, as an artificial person—one representing the contractors, is expressed in formal and systematic imperatives or civil laws, properly promulgated. Thereby, the civil law can damage but not injure: "no law can possibly be unjust."[7]

Eschewing common law —compare his *A Dialogue between a Philosopher and a Student of the Common Laws of England*— Hobbes finds the performative utterances of the sovereign to be an intention toward the creation of a systematic standard to regulate behavior. The difference between Hobbes' and Austin's philosophical tendencies becomes sharper in that Hobbes' sovereign creates institutional facts by his performative utterances. The sovereign's performative utterances are not only a doing but, further, a creating of new institutional facts.

[5] David R. Bell: "What Hobbes does with Words," in *Philosophical Quarterly* 19 (1969) 157.

[6] *Leviathan*, p. 136. (Oakshott edition) Cf. Martin A. Bertman, "Homo Lupus Covenanted," *International Studies in Philosophy IX* (1977) 13-32.

[7] *E. W.*, IV, 252.

The thrust is against the contention by Howard Warrender that "The sovereign is concerned with the fulfilling of validating conditions of obligation, in a system of rights and duties that he does not himself control or create except in the most trivial sense."[8] Warrender's exegesis of Hobbes, or rather his reconstruction, sets the sovereign's performative utterances too close to the traditional conception of natural law. Indeed, this interpretation would be apt if Hobbes' performatives were somewhat more like Austinean performatives; that is, if they did not create truth but merely were an action according with a standard that existed (though with Austin conventionally, not naturally) outside of the speech act. If, for example, as Warrender and Hood[9] assert, "the validating condition" was in the will of God rather than of that "mortal god," the sovereign.

As evidence for an interpretation of Hobbes against the Austinean vantage of Warrender a number of passages follow:

> Before there was any government, *just* and *unjust* had no being, their nature only being relative to some command; and every action in its own nature is indifferent; that it becomes *just* and *unjust*, proceeds from the right of the magistrate [the sovereign's deputy]. Legitimate kings therefore make the things they command just, by commanding them, and those which they forbid, unjust by forbidding them.[10]
>
> . . . nor any common rule of good and evil, to be taken from the nature of the objects themselves;

[8] Howard Warrender, *The Political Philosophy of Hobbes* (Oxford: Clarendon Press, 1957), p. 28.

[9] F. C. Hood, *The Divine Politics of Hobbes* (Oxford: Oxford University Press, 1964), p. 196: "Civil philosophy is the science of just and unjust only if laws of nature are Divine laws."

[10] *E. W.*, II, 181.

but from the person of the man, where there is no commonwealth: or, in a commonwealth, from the person that representeth it. . .[11]

For the civil sovereignity, and the supreme judicature in contraversies of manners, are the same thing: and the *makers of civil laws, are not only declarers, but also makers of the justice and injustice of actions*; there being nothing in men's manners that makes them righteous or unrighteous, but their conformity with the law of the sovereign.[12]

. . . it belongs to the same chief power to make some common rules for all men, and to declare them publically, by which every man may know what may be called his, what another's, what just, what unjust, what honest, what dishonest, what good, what evil: that is summarily, what is to be done, what is to be avoided, in our common course of life. But those rules and measures are usually called the civil laws, or the laws of the city, as being commands of him who hath the supreme power in the city. The CIVIL LAWS (that we may define them) are nothing else but the *commands of him who hath the chief authority in the city, for direction of the future actions of his citizens.*[13]

. . . we have therefore set over ourselves a sovereign governor, and agreed that his law shall be unto us, whatsoever they be, in the place of right reason, to dictate to us what is really good. In the same manner as men in playing turn up trump, and as in playing their game their morality consisteth in not renouncing, so in our civil conver-

[11] *Leviathan*, p. 32.
[12] *Ibid.*, p. 368.
[13] *E. W.*, II, 77.

> sation our morality is all contained in not disobeying of the laws.[14]

But perhaps there is a middle ground. Weiler, a supporter of Warrender's position, thinks that Austinean performatives are in the main *not* held by Hobbes but, nevertheless, he argues for the force of moral predicates as derived prior to the sovereign's civil law. He thus keeps Warrender's "validating condition" viewpoint. Weiler reasons as follows:

> What the sovereign decrees is that this act or object should henceforth be referred to by an already *meaningful* word. Indeed, only because these words already have the meaning they have is there any point for the sovereign to issue such commands. And since these words are meaningful predicates prior to the sovereign's command about their use it is not absurd to dispute the question whether, for *this* act or object *this* meaningful predicate is appropriate or not. In other words; since the meaning is given it is significant to argue about the question whether the reference is to be properly fixed or not.
>
> ...Hobbes' doctrine can be taken as meaning that once the sovereign has allocated the moral predicates it is absurd to ask (1) whether they have been validly allocated or (2) whether they have been all allocated rationally, judiciously, fairly, etc. I have shown that, because moral predicates have a prior meaning, it is significant to raise the latter question.[15]

Against Weiler, it can argued that (1) Hobbes is quite explicit

[14] *Ibid.*, 194. Cf. Martin A. Bertman, "Hobbes on 'Good'" *Southwestern Journal of Philosophy* VI, 2 (July, 1975) 59-74; also, "Hobbes and Aristotle" *Review of Politics* 38, 4 (Oct., 1976) 534-544.

[15] Gershom Weiler, "Hobbes and Performatives," *Philosophy*, XLV (1970) 213. Cf. Martin A. Bertman "Language for Hobbes," *Revue internationale de philosophie*, 1979. Forthcoming.

that in the state of nature, previous to the establishment of the sovereign, at least certain moral predicates (and I think all) have no fixed signification, e.g., 'justice'. We argue that the private dimension constitutive of the state of nature, where each man uses 'good' in terms of his own interest where the private is not superseded by the public objectification of moral predicates through the agency of the sovereign, provides no meaning for moral predicates. A meaning arises when a public standard, the civil laws, exists to issue imperatives for the politically desirable, rather than for mere private desires. Therefore, moral predicates in the state of nature cannot be used in a performative sense: there is no conventional or institutional context to sustain such a use. So though a word like 'good' is meaningful in the state of nature, it is meaningful in an entirely different way than Weiler imputes it to be. Its reference is to non-moral desires for satisfaction and not to the political condition as a restraining form for those desires. Utterances using such words, which have a conventional and constitutive import in the commonwealth and a regulative meaning in the state of nature, are like a physical object, e.g., a green, rectangular paper, which can be described as five dollars in the added constitutive sense when once the institution of money exists. Or, again, like an object used in two different games where its designation rests upon its function within each.

(2) Weiler is correct about the legitimacy of asking whether or not certain moral predicates have been rationally, judiciously (though perhaps not 'fairly') allocated. Yet, he is misguided in what he takes Hobbes' interpretation of moral predicates to be and, therefore, in what he, Weiler, takes to be the implication of the legitimacy of the question. The question, as we have stressed, is not legitimate on the grounds that moral predicates have a prior meaning to which the sovereign only adds the "validating condition" but, rather, it is legitimate in respect to the sovereign's will. That is to say, according to Hobbes it is appropriate to question the

sovereign's will under the following conditions: (*a*) when counselling the sovereign, (*b*) when in a court case against the sovereign, and, (*c*) in a qualified sense, when the sovereign's power is lost. These can be profitably considered to bring forward the concrete relationship of the sovereign's performatives to the political dimension.

(2*a*) Counselling the sovereign, or anyone, is to enter into an activity similar to the process or part of the process of deliberation. Counsel only becomes the will of the commonwealth under appropriate conditions. First, of course, is when it is accepted by he who has the power to make it into a standard of other men's behavior: this is the sovereign's ability through the civil law. Second, when it is appropriately promulgated. Only then does counsel, as the conclusive will or desire of the sovereign, result in a performative utterance.

> Therefore between counsel and command, one great difference is, that command is directed to a man's own benefit: and counsel to the benefit of another man. And from this ariseth another difference, that a man may be obliged to do what he is commanded; as when he has covenanted to obey; but he cannot be obliged to do as he is counselled, because the hurt of not following it, is his own; or if he should covenant to follow it, then the counsel turns into the nature of a command.[16]

(2*b*) Counsel brings the sovereign to the position of making moral predicates, that is, civil law. It is worth noting that taking the sovereign to court questions the promulgated civil law. This not in respect to the authority of the sovereign to make civil law, which is granted under the original covenant, but in regard to the proper interpretation of the sovereign's will or the meaning of the enunciated legal predicates. Laws can obviously lack clarity or adequacy in many respects:

[16] *Leviathan*, p. 166.

e.g., they can contradict one with another, or their intention is obscure, etc. Since the civil laws formally express the will of the sovereign, bringing him to court is a process for the sake of discovering the sovereign's will. In a proper sense, this adjudicates what is the performative utterance. The logic of law, and the function of the civil law for peace and security of the commonwealth, demands non-contradictory and clear rulings, otherwise no standard to regulate behavior is possible.

> The sovereign of a commonwealth... is not subject to the civil laws. For having the power to make and repeal them, he may when he pleaseth free himself from that subjection.[17]
>
> The difficulty consisteth in the evidence of the authority derived from him... by which laws are sufficiently verified; verified, I say, not authorized: for the verification, is but the testimony and record, not the authority of the laws; which consisteth in the command of the sovereign only.[18]

(2*c*) When the sovereign's power is lost, by whatever means, by usurpation or by foreign conquest or by natural hazard, the moral predicates or civil laws of the (former) sovereign are not as much questioned as they lose all significance. With the loss of power the imperative force of previous constitutive rules —the civil law— is no longer operative; the circumstances are altered so that they can no longer be considered constitutive. In a power vacuum, performative utterances of the Hobbesean sort, are impossible. Behavior, in this state of nature, is regulated by the regulative rules of the prudential intelligence. When a new power replaces the old, obedience to the new constitutive rules or civil law goes, *pari passu,* with the new sovereign. Moral predicates via civil

[17] *Ibid.*, p. 173.
[18] *Ibid.*, p. 179.

laws may change or not, but in either case what they are is legitimated by the will of and only by the will of the present sovereign. A dethroned sovereign's statements cannot be considered as performative utterances; though they may be obeyed by the charity or by the foolishness of the individual who considers them so: "for no man is obliged, when the protection of the law faileth, not to protect himself, by the best means he can."[19]

The logic of Hobbes' centralization of all authority in the sovereign implies that no one in the commonwealth can properly make performative utterances (of course not in the Austinian sense of performative utterance) unless, within their charge, they are appropriately delegated to act in his behalf by the sovereign: "...plainly, and directly against the essence of commonwealth, is this, that the sovereign power may be divided."[20] Ministers, judges, generals, etc., do not formally divide the power or authority of the sovereign; rather, on the basis of his power and authority, on his charge and for his purposes, these act in his name. Thus, they properly make performative utterances at the pleasure of the sovereign.

Hobbes' distrust of the authority-drain of precedent, whether by common law or by ordinary language or by other customary forms of life, all working against centralization of power and authority, is at a great distance from Austin's perspective. Austin develops his notion of performative utterances against the customary: "the common law... is the richest storehouse."[21] Such emphasis on custom and ordinary language goes counter to Hobbes' formalist and systematic tendencies. Characteristically, Hobbes says, "because others have built their houses on sand, it is no reason for me to so build mine,"[22] where Austin says, "Our common stock of

[19] *Ibid.*, p. 197.
[20] *Ibid.*, p. 312.
[21] "A Plea for Excuses", p. 88.
[22] *Leviathan*, p. 43.

words embodies all the distinctions men have found worth making, in the life-times of many generations."[23]

In sum, it is Hobbes' broader systematic approach to human behavior which makes for his taking performative utterances to exist in the work of an artifice, the state, in the service of natural self-interest. Regulative rules demand and are instrumentally served by constitutive rules. Their logic is different but their function is necessarily interrelated in the ordering of human behavior. Just so the fundamental natural law which is to obtain peace demands that the self-interest of basically anti-social but fearful man be consummated by the artifice of commonwealth. Natural law doesn't speak the traditional word in Hobbes: imitate. Instead, it teaches the proper condition of self-interest, viz., the finding of standards for interpersonal behavior through the performative utterances of the sovereign, that is, the civil laws. Different as these are from commonwealth to commonwealth each serves to establish peace; thus, each serves the natural law in preventing the destruction of the citizen's life.

[23] "A Plea for Excuses," 83.

RESUMEN

El artículo se ocupa de una cuestión específica dentro de la relación lenguaje-política en Hobbes: las expresiones realizativas. En particular quiere mostrar (1) que en contra de lo que opina Warrender, las expresiones realizativas son concebidas de manera distinta por Hobbes y por Austin, y (2) el lugar que ocupan tales expresiones hechas por el soberano en la teoría política de Hobbes.

Respecto a (1) señala que para Austin una expresión realizativa exige que "la convención invocada exista y sea aceptada". En Hobbes, cuando el soberano formula una expresión realizativa que crea derecho, se invoca su autoridad y no una convención. El soberano crea con ello un hecho institucional. La interpretación austiniana de Warrender convierte a las expresiones realizativas del soberano en acciones conformes a una pauta preexistente. Esto contradice textos expresos de Hobbes y, además, lo coloca muy cerca de la concepción tradicional del Derecho Natural.

Weiler apoya parcialmente a Warrender al sostener que los predicados morales usados por el soberano tienen un significado previo y que tiene sentido preguntar si el soberano los empleó juiciosa, racional o equitativamente. El autor argumenta que, según Hobbes, en el estado de naturaleza los predicados morales, como "justicia", carecen de un significado fijo. Sí puede preguntarse, en cambio, si los emplea juiciosa o racionalmente (no equitativamente) ya que se puede cuestionar la voluntad del soberano: al aconsejarlo, en un pleito judicial contra él y cuando ha perdido su poder.

Respecto a (2) analiza los casos en que se aconseja al soberano; se le enjuicia para que interprete una ley confusa o contradictoria, y cuando ha perdido su poder. El autor dice que en los tres casos los predicados morales que aparecen en las leyes se legitiman solo mediante la voluntad del soberano. Él, o sus delegados, son los únicos que pueden formular una expresión realizativa (en el sentido de Hobbes). Queda claro entonces que el soberano no está sometido al derecho. Para Hobbes las expresiones realizativas únicamente existen en el estado y al servicio del interés propio. Esta es la gran diferencia con Austin.

(*Resumen de Javier Esquivel*)