

# Hobbes's Theory of Rights – A Modern Interest Theory

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**Abstract:** The received view in Thomas Hobbes scholarship is that the individual rights described by Hobbes in his political writings and specifically in *Leviathan* are simple freedoms or liberty rights, that is, rights that are not correlated with duties or obligations on the part of others. In other words, it is usually argued that there are no claim rights for individuals in Hobbes's political theory. This paper argues, against that view, that Hobbes does describe claim rights, that they come into being when individuals conform to the second law of nature and that they are genuine moral claim rights, that is, rights that are the ground of the obligations of others to forbear from interfering with their exercise. This argument is defended against both Jean Hampton's and Howard Warrender's interpretations of rights in Hobbes's theory. The paper concludes that the theory of rights underlying Hobbes's writing is not taken from Natural Law but is probably closer to a modern interest theory of rights.

**Keywords:** claim rights, individual rights, liberty rights, rights, Thomas Hobbes, transferred rights

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## INTRODUCTION

The received view of Thomas Hobbes's political theory defines the individual rights described by Hobbes as being, without exception, "liberty rights," that is, rights that are merely freedoms.<sup>1</sup> Liberty rights are not correlated with any duties or obligations on the part of others nor do they provide a ground for such duties or obligations; they therefore fall outside the definition of rights that is used in modern political and moral

<sup>1</sup> See for example, D. P. Gauthier, *The Logic of Leviathan* (Oxford: Clarendon Press, 1969); G. S. Kavka, *Hobbesian Moral and Political Theory* (Princeton: Princeton University Press, 1986); J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986). Also, H. Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation* (Oxford: Clarendon Press, 1957), although Warrender does allow for what he calls "entitlements" (i.e., a right as that to which one is morally entitled which turns out, according to Warrender, to be better described by the duties it implies) these appear only in civil society when the individual "does collect some entitlements as against his fellow citizens, for the civil law does impose obligations upon them that secure him in some respects" (p. 195). This point is discussed in more detail below.

discourse (in other words, they are not claim rights). As a consequence of this, what Hobbes has to say on the subject of rights is dismissed as of little or no interest to modern rights theory. Hobbes's theory of rights, if we could even call it a *theory* of rights, has been perceived as having little to contribute, either historically, to theories of *natural* rights (where Locke's political theory is still accepted as the starting point for modern theories of natural rights) or to contemporary discussions that seek to build theoretical foundations for rights without recourse to discredited theories of natural rights and natural law.<sup>2</sup>

In this paper I will argue, against the received view represented by commentators such as David Gauthier, Gregory Kafka, Jean Hampton and Howard Warrender, that as well as describing liberty rights Hobbes also describes rights for individuals that are correlated with the duties of others, rights, in other words, that can be defined as claim rights.

In using the terms "claim right" and "liberty right" I am following the definitions given by Wesley Hohfeld when he distinguished four uses of the word "right" in the legal literature.<sup>3</sup>

1. A *claim right* is a right that is correlated with the duties of another or others. These duties consist in either refraining from actions that would impede the rightholder in her exercise of the right or, sometimes, of performing actions that will give the rightholder the thing she has a right to or help her to have or do the thing she has a right to. So, if *A* has a claim right to *X* against *B*, then *B* has a correlative duty to *A* to refrain from interfering with *A*'s having or doing *X*, or sometimes, a duty to give *X* to *A* or to help *A* to have or do *X*.

2. A *liberty right* is a freedom from a duty to refrain from doing something and it is not correlated with any duties on the part of others. Two or more people may have liberty rights to the same thing or action and will be in unrestricted competition with one another to exercise their rights. A liberty right is the opposite of a duty. So, if *A* has a liberty right to *X* against *B*, then *B* has a correlative no-right (i.e., no claim right) that *A* not do *X*. *A* has no duty to refrain from doing *X*; and *B* has no duty to refrain from interfering with *A*'s doing *X*. *A* and *B* may

<sup>2</sup> There has been a sustained attack on theories of natural rights since Bentham's infamous characterization of such theories as "nonsense upon stilts." J. Bentham, "Anarchical Fallacies," in J. Bowring (ed.), *Works of Jeremy Bentham* (New York: Russell and Russell, 1962), Vol. II, p. 105. Jeremy Waldron has recently commented that the theory has now been so discredited by attacks that "no-one now uses the phrase [natural rights] except in a disparaging sense" [J. Waldron, "Rights versus Needs," *The Journal of Ethics* 4 (2000), p. 119].

<sup>3</sup> W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

therefore be in competition for *X*, each has a liberty right to achieve *X*, neither has a duty to refrain from achieving *X* and each has no right that the other not achieve *X*.

When referring to Hobbes's theory of rights, I am referring on the whole to the theory that is given in his mature political work, *Leviathan*, although I will occasionally refer to other works.

First, Hobbes's definitions of a liberty and a right are as follows:

By LIBERTY, is understood, according to the proper signification of the word, *the absence of externall Impediments*: which Impediments, may oft take away part of a man's power to do what hee would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him.<sup>4</sup>

For though they that speak of this subject, use to confound *Jus* and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because *RIGHT*, consisteth in liberty to do or to forbear; Whereas Law, determineth, and bindeth to one of them: so that Law and Right, differ as much, as Obligation and Liberty; which in one and the same matter are inconsistent.<sup>5</sup>

These definitions are quite specific and it is helpful to try and stick with them rather than to go against the text where it is unequivocal, although it should be mentioned that Hobbes had changed his definition of liberty from the definition he gave in *De Cive*<sup>6</sup> and there has been some discussion of this and other "inconsistencies" in his use of the term liberty by scholars.<sup>7</sup> For the purposes of this paper, however, I shall stick with the first definition in *Leviathan* as given above.

So, to have liberty is to be (externally) unimpeded in the use of one's power to act. And a right is therefore an unimpeded freedom to do or to not do something. A right, then, according to Hobbes, is a species of liberty. We can see from the definitions above that any right will be a liberty, so

<sup>4</sup> T. Hobbes, *Leviathan*, ed. C. B. Macpherson (London: Penguin Books, 1968), II, Chapter 14, p. 189, my emphasis.

<sup>5</sup> Hobbes, *Leviathan*, p. 189, my emphasis.

<sup>6</sup> T. Hobbes, *De Cive* (1647) in *On the Citizen*, ed. and trans. R. Tuck and M. Silverthorne (Cambridge: Cambridge University Press, 1998), p. 111. "LIBERTY (to define it) is simply the *absence of obstacles to motion*; as water contained in a vessel is not *free*, because the vessel is an obstacle to its flowing away, and it is *freed* by breaking the vessel . . . Obstacles of this kind are external and absolute; in this sense all *slaves* and *subjects* are *free* who are not in bonds or in prison. Other obstacles are discretionary; they do not prevent motion absolutely but incidentally, i.e. by our own choice, as a man on a ship is not prevented from throwing himself into the sea, if he can will to do so."

<sup>7</sup> See for example, F. C. Hood, "The Changes in Hobbes's Definition of Liberty," *Philosophical Quarterly* 17 (1967), pp. 150–163; and J. R. Pennock, "Hobbes's Confusing 'Clarity': The Case of Liberty," *American Political Science Review* 54 (1960), pp. 428–436.

all rights in the theory are unimpeded abilities to act, or to forbear from acting, of one kind or another.

### UNPROTECTED RIGHTS, THE RIGHT OF NATURE

Hobbes takes as his starting point the right of nature, that is, the right to all things that every individual has in the state of nature. Before any form of political order, “every man has a Right to every thing; even to one another’s body.”<sup>8</sup> This is an aggregate right; a right to every and any action that I deem necessary to my preservation. Hobbes describes the state of nature in the following way:

[A] condition of Warre of every one against every one; in which case every one is governed by his own Reason; and *there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies*;<sup>9</sup>

In other words, any action that may help me preserve myself is justified in the state of nature and each man is at liberty to perform whatever action he sees fit.

The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.<sup>10</sup>

Rights held under the right of nature, as defined by Hobbes, conform to Hohfeld’s definition of liberty rights. Each individual is free to act or not act and that freedom imposes no restrictions on others or on the individual right holder, in the form of duties or obligations. This is taken by commentators to be the exemplar of a Hobbesian right and for some it carries with it the assumption that for Hobbes, this kind of right is a good thing to have. I would not want to argue with the view that rights held under the right of nature exemplify what a right is for Hobbes but I do want to question whether holding a right of this kind is, in Hobbes’s view, a good thing.

However much the right to all things in the state of nature may seem like an advantage to the individual, Hobbes makes the point that this is an illusion. First, in the *Elements of Law* he warns us,

<sup>8</sup> Hobbes, *Leviathan*, p. 190.

<sup>9</sup> Hobbes, *Leviathan*, pp. 189–190.

<sup>10</sup> Hobbes, *Leviathan*, p. 189.

. . . that right of all men to all things, is in effect no better than if no man had right to any thing. For there is little use and benefit of the right a man hath, when another as strong, or stronger than himself, hath right to the same.<sup>11</sup>

And in *De Cive* he says,

But it was of no use to men to have a common *right* of this kind. For the effect of this *right* is almost the same as if there was no right at all. For although one could say of anything, *this is mine*, still he could not enjoy it because of his neighbour, who claimed the same thing to be his by equal *right* and with equal force.<sup>12</sup>

And he reiterates the point in *Leviathan*: “as long as this naturall Right of every man to every thing endureth, there can be no security to any man, (how strong or wise soever he be) of living out the time, which Nature ordinarily alloweth men to live.”<sup>13</sup>

It is clear that Hobbes wishes to say that rights are not always beneficial to the right holders. If the right held is what we have been calling a liberty right, in the state of nature, then no one has any duty to stand out of the way of the right holder, or to uphold the right or to protect the right holder in her exercise of the right. And all other people have an equal right to everything, so that there is competition between people who are exercising their rights to the same things. In such a case, as Hobbes says, “there is little use and benefit” of having the right. If there is no protection of the exercise of the right, then holding the right leaves the individual as helpless as she would be with no right at all. This is an important point. If Hobbes is saying that a pure liberty right (that is, a right not correlated with the duty of any others), is of little use to the right holder then we are left with the conclusion that Hobbes’s own view of the rights of individuals, at least while we are in the state of nature, is that they are of little use to the right holder.

To summarize the right of nature; it is an aggregate right that covers any possible action that someone, living in the state of nature, might see as conducive to his preservation. By Hobbes’s own definition it is a liberty to do or to forbear that is unlimited. It is therefore an unimpeded and complete freedom to act. And yet there is a contradictory element to the right of nature that Hobbes points out. Individuals in the state of nature will be unable to enjoy an unrestricted exercise of the right of nature because others who may be stronger, have an equally unrestricted right to the same things and actions. In other words, individuals are in *competition* with one

11 T. Hobbes, *The Elements of Law Natural and Politic* (1640), in J.C.A. Gaskin (ed.), *Thomas Hobbes, Human Nature and De Corpore Politico* (Oxford: Oxford University Press, 1994), I, XIV, 10, p. 80.

12 Hobbes *De Cive*, p. 29.

13 Hobbes, *Leviathan*, p. 190.

another when they attempt to exercise their right of nature. Competition is unrestricted with no rules that would place an obligation upon anyone to refrain from any action. If we take Hampton's example of the right of every individual to the apples on a tree,<sup>14</sup> then anyone may make a run at the tree and may use any means to try to prevent others from getting there first. Suddenly, as I am tripped and pushed back and beaten by those faster than me, my *right* to the apples on the tree looks ineffectual. There is also a problem with the *definition* Hobbes has given us, of a right as an unimpeded freedom to do or to forbear, which now seems contradictory if the purest case of a right (the right of nature), is actually a freedom to act that will be impeded on all sides. The contradiction, however, is only an apparent one; there is no real contradiction, because a right that is *unprotected* is a right that is not worth having. If a right is to be effective for the right holder it must be protected in some way so that the impediments to its exercise are reduced as much as possible. Only if the right is *protected* does Hobbes's definition of a right as a liberty (that is, a freedom from external impediments) to do or to forbear, make sense. I shall argue that, contrary to the interpretations of the commentators, Hobbes does provide, in certain cases, for the protection of rights. Those rights do fit the definitions he gives and they are not mere liberty rights; they are claim rights.

#### **PROTECTED RIGHTS/CLAIM RIGHTS**

A claim right is a right that is correlated with the duty of another or others. So far, Hobbes has described only liberty rights, that is, rights held in the state of nature that are unimpeded freedoms to do or forbear. But he has also pointed out their weakness, which is that they are unprotected and therefore the right holder is vulnerable to the interference of others who are equally free and unrestricted. How might these rights be strengthened? Leaving aside for the moment questions of the *enforcement* of duties; if my right to the apples on the tree was correlated with the duty of all others to refrain from acts that would interfere with my exercise of my right, then my passage to the tree and the apples would be clear and my freedom to pick the apples would be unimpeded. (Or at least it would be unimpeded by any deliberate act directed at preventing my exercise of my right. It is always possible that someone crossing my path for another reason will accidentally block my way to the tree or someone climbing it for a better view will block my access, or a sudden earthquake will make me fall over; but my right to the apples is at least, cleared of the threat of sabotage.)

<sup>14</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 51.

Now we have a right that fits much better with Hobbes's own definition of a right as a liberty (absence of external impediments) to do or to forbear. It also seems reasonable to suppose that his use of the phrase "external impediments" refers to the impediments caused by other people's deliberate actions. When he points out the inefficacy of the right of nature in the *Elements of Law* and in *De Cive* and *Leviathan* (as quoted above), it is in terms of the danger of other individuals' use of their unlimited right. He does not mention other kinds of external impediments such as the accidental interference of others or natural physical impediments. I will show in the next section that Hobbes describes how individuals will choose to give up the right to all things (the right of nature) and thereby to put themselves under an obligation to refrain from interfering with the exercise of some of the rights of others. This process transforms some of the liberty rights held under the right of nature into claim rights, rights that are correlated with the duties of others not to interfere with the exercise of those rights. It should by now be clear that the result of this transformation will be that some of the liberty rights described above as being *unprotected* rights will become *protected* rights.

### THE SECOND LAW OF NATURE, THE INTRODUCTION OF CLAIM RIGHTS

Hobbes describes the way out of the state of constant and unending civil war, that is the state of nature, as being provided by a set of rational precepts or rules that set out what is necessary in order for individuals to best preserve their lives. These "convenient Articles of Peace, upon which men may be drawn to agreement"<sup>15</sup> are the laws of nature, the second of which explains how the right of nature, having failed to provide for the security of individuals, must be exchanged for a system of reciprocal transferring and renouncing of rights. Hobbes states the second law of nature as the law:

*That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.* For as long as every man holdeth this Right, of doing anything he liketh; so long are all men in the condition of Warre.<sup>16</sup>

The right of nature is so destructive of security that it must be given up, or at least some of the rights held must be given up and Hobbes defines

<sup>15</sup> Hobbes, *Leviathan*, p. 188.

<sup>16</sup> Hobbes, *Leviathan*, p. 190.

what it is to lay down a right in the following way. “To *lay downe* a man’s Right to any thing, is to *devest* himselfe of the *Liberty*, of hindring another of the benefit of his own Right to the same.”<sup>17</sup> In other words, if I lay down *my* right to the apples on the tree, then I am no longer free to interfere with another person’s exercise of *their* right to the apples on the tree. Once I have laid down the right (assuming whatever conditions are necessary for me to be able to do that), I will refrain from interfering with the right-holder’s exercise of *his* right. Hobbes states that this is not to give a *new right* to the person to whom the right is transferred, because in the state of nature everyone already has every possible right (the right to all things).

For he that renounceth, or passeth away his Right, giveth not to any other man a Right which he had not before; because there is nothing to which every man had not Right by Nature: but only standeth out of his way, that he may enjoy his own originall Right, without hindrance from him; not without hindrance from another. So that the effect which redoundeth to one man, by another mans defect of Right, is but so much diminution of impediments to the use of his own Right originall.<sup>18</sup>

So, on Hobbes’s analysis, the laying down of a right does not give the right-holder a *new right* but it does change the right or at least change the situation with regard to its exercise. This passage also supports the argument that when Hobbes says that liberty is the absence of external impediments he seems to be thinking of impediments caused by the deliberate actions of others.

There are two ways a right may be “layd aside,” according to Hobbes, either by renouncing it or by transferring it to another. “By *Simply* RENOUNCING; when he cares not to whom the benefit thereof redoundeth. By TRANSFERRING; when he intendeth the benefit thereof to some certain person, or persons.”<sup>19</sup> What does Hobbes mean by “benefit” here? Clearly, he intends to show that it is to the benefit of the right holder to whom the right has been transferred or who is left with the right another has renounced, to be the recipient of the effects of this new lack of liberty (on the part of the original right-holder), which will lessen the impediments to the exercise of his right. The man who is in receipt of the transferred right is now better able to enjoy his exercise of his right. “He that transferreth any Right, transferreth the Means of enjoying it, as farre as lyeth in his power.”<sup>20</sup> It now seems clear that something has changed for the right holder. He has received a *benefit* from the transference of

<sup>17</sup> Hobbes, *Leviathan*, p. 190.

<sup>18</sup> Hobbes, *Leviathan*, pp. 190–191.

<sup>19</sup> Hobbes, *Leviathan*, p. 191.

<sup>20</sup> Hobbes, *Leviathan*, p. 197.

the right of another and is now actually better able to enjoy the exercise of his right. I am not suggesting that he has a new right, a right he did not hold before, but that he has a *changed* right; some impediments to his enjoyment of his original right have been removed. Andrew Cohen makes a similar point. “Since people have such complete liberty, they can gain no new rights from some supposed transfer of right. Still, one person can give another something new. He can remove one obstacle in the other’s way when she exercises her native rights.”<sup>21</sup> Cohen stresses however, that this does not amount to a new right.

Let us suppose Charles wishes to transfer to Jane his liberty right to some coconut. In the natural condition, Charles, Jane and everybody else have rights to the coconut. This means that Jane can get no new rights from Charles. What she can get from him, however, is his agreement to stand out of her way. He can will no longer to hinder her use of the coconut. In this way, Charles obligates himself to Jane simply by willing not to impede her in the future.<sup>22</sup>

My interpretation differs from Cohen’s on two points. First, as I will argue below, the right that Jane now has, linked to Charles’s “agreement to stand out of her way,” is a different kind of right to the bare liberty right she had before. Second, according to Hobbes, Charles must do more than will not to impede Jane in the future, to transfer the right he must signify the transfer (I will discuss this in more detail in the next section).

So what does Hobbes say about the nature of the change in the position of the person who has renounced or transferred his right? He clearly states that an individual places himself under an obligation when he either transfers or renounces a right.

And when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he *Ought*, and it is his DUTY, not to make voyd that voluntary act of his own: and that such hindrance is INJUSTICE, and INJURY,<sup>23</sup> Anyone who transfers or renounces a right is therefore under an obligation and has a duty to refrain from any action that would hinder the recipient in his exercise of his right.

#### *Summary of Rights under the Second Law of Nature*

There is a *duty* then, on the part of the person who has transferred or renounced their right, that is related to the right of the recipient of the

21 A. I. Cohen, “Retained Liberties and Absolute Hobbesian Authorization,” *Hobbes Studies* XI (1998), p. 34.

22 Cohen, “Retained Liberties and Absolute Hobbesian Authorization,” p. 35.

23 Hobbes, *Leviathan*, p. 191.

transferred or renounced right. It seems reasonable to say therefore, that the duty of the person transferring or renouncing the right is *correlated* with the right of the recipient of the transferred or renounced right. There might be an objection that Hobbes does not intend there to be any “receipt” of a right on the part of the person to whom the right is transferred. The following passage on the second law of nature, however, makes his intentions clear.

The way by which a man either simply Renounceth, or Transferreth his Right, is a Declaration, or Signification, by some voluntary and sufficient signe, or signes, that he doth so Renounce, or Transferre; or hath so Renounced, or Transferred the same, *to him that accepteth it.*<sup>24</sup>

So, the right that is voluntarily and deliberately transferred or renounced is also accepted by the person to whom it is transferred or renounced. Hobbes makes the same point in *De Cive*: “The *transfer of a right* requires the will of the recipient as well as of the transferor. If either is missing, the *right* does not pass.”<sup>25</sup> How does this fit with Hobbes’s declaration that there is no resulting *new right* for the recipient, who, after all, already has a right to all things under the right of nature? He does not receive a *new* right but he receives *the* right (the “it” in “to him that accepteth it” above, is the right which has been transferred), that is, the right giver’s right, which right is now linked to the new duty of the previous right holder to refrain from all actions that would interfere with the recipient’s exercise of the right.

The recipient now has *a right that is correlated with a duty on the part of another to refrain from actions that would interfere with his exercise of the right*. This fits the definition of what we have been referring to as a claim right, as defined by Hohfeld. And to objectors who might still maintain that Hobbes did not intend to introduce claim rights at all, there is a passage in a manuscript, written by Hobbes, probably in the sixteen sixties or sixteen seventies, that contains the following passage, “Law and Right differ. Law is a command. But right is a Liberty or priviledge from a Law to some certaine person *though it oblige others.*”<sup>26</sup> Here Hobbes restates the distinction between law and right that he makes in Chapter 14 of *Leviathan* with the interesting addition of the phrase “though it oblige others” referring to a right being the ground of obligations for others.

<sup>24</sup> Hobbes, *Leviathan*, p. 191.

<sup>25</sup> Hobbes, *De Cive*, p. 35.

<sup>26</sup> T. Hobbes, MSS (Chatsworth) Box 1, (D), no. 5, in Q. Skinner, “Hobbes on Sovereignty: An Unknown Discussion,” *Political Studies* XIII (1965), pp. 213–218, my emphasis.

### ANSWER TO AN OBJECTION – HOBBS’S TALK OF LIBERTY EXCLUDES CLAIM RIGHTS

An objection could be raised that would state the following: Hobbes is saying simply that an individual is giving up liberty under the second law of nature, and therefore he sees liberty as pertaining only to the pure, unprotected freedom of the right of nature. Indeed from the way Hobbes refers to the giving up of liberty and to the retaining of rights or liberty it is easy to think, as most commentators have thought, that what he means by a right is purely and simply a liberty or freedom. And therefore, the rights he describes in the theory are liberty rights, they are held under the right of nature and all but the right to self-defense and self-preservation are given up upon entering a commonwealth. In other words, it seems that what Hobbes describes as happening under the second law of nature is merely the giving up of certain rights or liberties on the understanding that others will also give them up, and the result is a loss of liberty that is compensated for by a decrease in danger. On this interpretation, the result of the second law of nature is only a *decrease in rights*, rather than a *decrease* in liberty rights and an *increase* in protected or claim rights, as I have argued above. If we accept the standard interpretation of the second law of nature, however, how can we explain what happens to the recipient of the transferred or renounced right? We would have to say that they have not received a right that is correlated with a duty. Yet, as we pointed out above, Hobbes says:

And when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he *Ought*, and it is his DUTY, not to make voyd that voluntary act of his own: and that such hindrance is INJUSTICE, and INJURY, . . .<sup>27</sup>

and,

Whensoever a man Transferreth his Right, or Renounceth it; it is either in consideration of some Right reciprocally transferred to himselfe; or for some other good he hopeth for thereby.<sup>28</sup>

On reading these passages it is hard to see how it could be denied that:

1. Hobbes does say that a right is received as the result of a transfer and
2. that the right which is received is correlated with the duty of the person who transferred it, to refrain from interfering with the recipient’s exercise of the transferred right.

<sup>27</sup> Hobbes, *Leviathan*, p. 191.

<sup>28</sup> Hobbes, *Leviathan*, p. 192.

If 1 and 2 are correct, then even if Hobbes does sometimes speak as though a right is only a liberty right; he has in fact described what I would now define as a claim right.

### OBJECTIONS FROM COMMENTATORS

Commentators on Hobbes have argued against the notion that the rights resulting from the transfer and renouncing of rights under the second law of nature are anything other than liberty rights. I will defend the interpretation I have given above, against objections from two examples of such arguments, chosen from representatives of the two different and opposing “readings” of Hobbes’s moral theory. First, the argument given by Jean Hampton<sup>29</sup> who reads Hobbes as holding an egoistic subjectivist moral theory and second that given by Warrender<sup>30</sup> who famously argues that Hobbes is a deontologist.

#### *Hampton*

All the subjects’ rights in a commonwealth, says Hampton, “arise out of their fundamental ‘right of nature’ to preserve themselves.”<sup>31</sup> According to Hampton, whenever Hobbes uses the word “right” he is using it in the sense of Hohfeld’s concept of a right as a privilege or liberty, and she makes the point that a *right*, used in this sense, “is the opposite of a duty. If I have a liberty to use land in a certain way, I may do so or not, as I desire; in no way am I morally required to do so.”<sup>32</sup> Hampton wants to stress that liberty rights are non-moral; she argues that such rights carry no “objectivist” moral weight. They imply no duty or obligation either on the part of the holder of the right to perform the action she has a right to, or on the part of others to respect her right to that action. Liberty rights, in other words, are not claim rights.

Hampton links her analysis of Hobbes’s liberty rights to her assessment of his moral theory. According to her reading of the theory there is no objectivist moral claim attached to his notion of a right because there is no objectivist moral theory in his writing. And, the liberty rights that Hobbes does describe are precisely those rights appropriate to a subjectivist moral theory.

<sup>29</sup> Hampton, *Hobbes and the Social Contract Tradition*, pp. 27–57.

<sup>30</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, pp. 18–29, 48–53, 195, 253.

<sup>31</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 52.

<sup>32</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 51.

[Hobbes] makes a point of giving no objectivist moral reasons for attributing liberty-rights to human beings in the state of nature such that a claim-right would have to be linked to the exercise of them, and Hobbes accords a person liberty-rights only because of the subjectivist ethical position he espouses.<sup>33</sup>

Hampton defines Hobbes's ethical stance as subjectivist because he defines "good" as "an object or state of affairs desired by any individual in a particular place and time."<sup>34</sup> And the notion of a right used by Hobbes fits this definition "because he defines a right or rational action as one that is instrumentally valuable to that individual in attaining the object of her desire."<sup>35</sup> If an action is a means to the end of the desired object then "it not only can be described with the adjectives "right" and "rational" but also can be characterized as an action that the individual has a "right" to take."<sup>36</sup>

So, Hampton grounds Hobbes's notion of a right in a theory of morality that gives no other justification for an action other than as a means to a desired end. If the desired end is self-preservation then any action towards that end is rational and justified and "done with right." Fitting in with this subjectivism, a liberty right to an action or object exists "when reason determines that this object or action is necessary to accomplish his desired ends." Using "right" as a noun now, the word "indicates that the action is allowed by prudential rationality."<sup>37</sup> Indeed if Hobbes were to say that *x* had *no* right to *y* it "could only mean that the person's action was not an effective means to her desired end."<sup>38</sup>

Hampton does pull back a little from this interpretation by saying that what she has described is the notion of rights that Hobbes *ought* to hold "if he is a subjectivist" and she then asks the question "[b]ut does he actually hold it?"<sup>39</sup> Her answer to this question is that while there are passages in *De Cive* and *Leviathan* which seem to describe exactly this notion of a right,<sup>40</sup> there are other passages in *Leviathan* where he seems to introduce

33 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

34 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

35 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

36 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

37 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

38 Hampton, *Hobbes and the Social Contract Tradition*, p. 54.

39 Hampton, *Hobbes and the Social Contract Tradition*, p. 53.

40 Hampton refers to the following passages in Hobbes, *De Cive*, and Chapter 14 of Hobbes, *Leviathan*: ". . . each man is drawn to desire that which is Good for him and to avoid what is bad for him, and most of all the greatest of natural evils, which is death; . . . It is not therefore absurd, nor reprehensible, nor contrary to right reason, if one makes every effort to defend his body and limbs from death and to preserve them. And what is not contrary to right reason, all agree is done justly and *of right*."

what could be defined as a “claim right,” i.e., a right linked to an obligation on the part of others. This presents a problem of interpretation for Hampton because she has already stressed that given his ethical subjectivism “Hobbes *cannot* link the notion of obligation with any objective moral claim-rights individuals have.”<sup>41</sup>

The passage in *Leviathan* to which Hampton is referring is the following description of the second law of nature in Chapter 14 (and already quoted above in separate parts),

Right is layd aside, either by simply Renouncing it; or by transferring it to another. By *Simply* RENOUNCING; when he cares not to whom the benefit thereof redoundeth. By TRANSFERRING; when he intendeth the benefit thereof to some certain person, or persons. And when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he *Ought* and it is his DUTY, not to make voyd that voluntary act of his own: and that such hindrance is INJUSTICE and INJURY, as being *Sine Jure*; the right being before renounced, or transferred.<sup>42</sup>

Hampton admits that in this passage it sounds as though Hobbes is saying that once we have renounced our liberty right, we then have a duty to others not to try to exercise the right we have renounced, and that this duty or obligation is correlated with a claim right that the person(s) who is the recipient of the right now holds against us. Noting that this and other similar passages in *Leviathan* have been used by Warrender to support his view that Hobbes holds a deontological moral theory, Hampton goes on to argue that “there is a subjectivist way to interpret the passage on obligation and duty quoted . . . from chapter 14.”<sup>43</sup>

The textual evidence she uses to support her argument is from Hobbes’s discussion of “the fool” in Chapter 15 of *Leviathan*. When Hobbes gives his answer to the fool’s question as to why it would not be rational to break our contractual promises, when to do so might be in our interests, he replies that it is always in our (long term) interest to keep our promises, because if we do not we will be cast out of civil society back into a state of nature. We cannot expect the protection of those with whom we covenant if we are not to be trusted to keep our side of the agreement. Hampton says, of this reply, “his explanation does not invoke any normative obligation that we have incurred by promising to transfer our right. Instead he invokes self-interest. . . .”<sup>44</sup> And she concludes that while Hobbes may have apparently defined what it means to be obliged or duty-bound to do something in

<sup>41</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 55, my emphasis.

<sup>42</sup> Hobbes, *Leviathan*, p. 191.

<sup>43</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 56.

<sup>44</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 55.

Chapter 14 by linking it to a person's surrender of a right, what he shows in Chapter 15 is that the reason one should do one's duty is because it is prudent to do so. In other words there is no obligation or duty to *not* exercise the renounced right *unless* the non-exercise of that right is prudent and rational. Once it ceases to be in one's best interests to "do one's duty" Hampton says, Hobbes tells us that we can and indeed ought to renege on our contracts.

. . . all of chapter 21 of *Leviathan* is devoted to explaining when it is right (i.e., prudent) for subjects in a commonwealth to renege on their contract creating the sovereign. And in that chapter he repeats . . . what he had insisted on previously in chapter 14, namely, that 'A covenant not to defend myself from force, is always voyd.' So, for Hobbes, self-interest explains not only why we should do what we ought but also when our obligations arising from the surrender of right in a contract cease:<sup>45</sup>

Hampton goes too far when she argues that Hobbes tells us to renege on our contracts. After all, it is the third law of nature which, Hobbes says, is the "Fountain and Originall of JUSTICE" and which defines injustice as "*the not Performance of Covenant.*"<sup>46</sup> And, as she reiterates, it is when a contract is void that we are no longer obliged to keep it (and it is void if it involves contracting not to defend myself). It is one thing, however, to say that I cannot contract not to defend myself, or to put it another way, that a contract that did so would be void, it is quite another to say that Hobbes is telling us to renege on valid contracts. In Chapter 21, where, according to Hampton, Hobbes is explaining when it is right for subjects to renege on their contract creating the sovereign, Hobbes himself says that he will say "what are the things, which though commanded by the sovereign, he may neverthesse, *without Injustice*, refuse to do."<sup>47</sup> Having defined injustice as the not performing of contracts, it is improbable that he is now saying that subjects can sometimes renege on or break (valid) contracts without injustice.

Hampton summarizes her argument that Hobbes's subjectivism rules out any possibility that obligations could be inextricably tied to the surrender of a right thus, "[s]o, for Hobbes, self-interest explains not only why we should do what we ought but also when our obligations arising from the surrender of a right in a contract cease."<sup>48</sup> Her argument seems to be that there is no real link between rights and obligations because self-interest will dictate whether or not an obligation is binding. And an obligation that can cease to bind in this way does not, on Hampton's

<sup>45</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 56.

<sup>46</sup> Hobbes, *Leviathan*, p. 202.

<sup>47</sup> Hobbes, *Leviathan*, p. 268.

<sup>48</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 56.

view, constitute a genuine moral obligation. But Hampton is wrong to suggest that the obligations that come into force after the renouncing and transferring of rights are so easily annulled. Hobbes is not saying that self-interest will always, as it were, trump an obligation. Indeed his reply to the fool makes precisely this point. When self-interest tells us to break an agreement we should remember that there is a deeper reason for keeping our agreements than for breaking them. The whole project of entering civil society and living in peace is dependent upon our ability to keep our agreements. And the laws that set out our obligations cannot be ignored or annulled whenever it seems to be in our interests to act against them. If obligations ceased to bind people every time that self-interest suggested breaking a contract, the argument against the fool wouldn't work. Self-interest could always be used to justify breaking a contract. But Hobbes insists that the fool is wrong to think that "there is no such thing as Justice" and that as "every mans 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; keep, or not keep Covenants, was not against Reason, when it conduced to ones benefit."<sup>49</sup> Hobbes rails against this misinterpretation of what he is trying to argue. "This specious reasoning is neverthelesse false . . . Justice, that is to say, Keeping of Covenants, is a Rule of Reason, by which we are forbidden to do anything destructive of our life; and consequently a Law of Nature."<sup>50</sup> The laws of nature are not subject to the whims of individuals' interests, on the contrary "[t]he Lawes of Nature are immutable and Eternall; For Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acception of persons, and the rest, can never be made lawfull. For it can never be that Warre shall preserve life and Peace destroy it."<sup>51</sup>

There are of course notorious difficulties with Hobbes's moral theory, not least the fact that it is interpreted by some, like Hampton, as subjectivist and egoistic and by others, like Warrender, as deontological. I will not enter that debate here, except to say that Hobbes sets out to deduce a moral theory from a principle of self-preservation. All I want to argue is that the rights Hobbes describes, that result from the transfer and renouncing of liberty rights under the second law of nature, are claim rights. That is, that they are rights that are the ground of other people's duties or obligations. The person who has transferred or renounced a liberty right becomes obligated to the person who receives that right to not interfere with her exercise of her right and this obligation is morally binding.

<sup>49</sup> Hobbes, *Leviathan*, p. 203.

<sup>50</sup> Hobbes, *Leviathan*, pp. 204–205.

<sup>51</sup> Hobbes, *Leviathan*, p. 215.

Hampton's argument is that they are not really claim rights because such rights are not possible with the type of (subjectivist) moral theory Hobbes has and because the obligations he describes are not really binding ("... contractual obligations exist only insofar as it is in our interest to perform them").<sup>52</sup> My reply has been: while there will always be those who disagree with Hobbes's moral theory and who will argue that he cannot succeed in deriving moral concepts from his principle of self-preservation, nevertheless, even Hampton admits that it is a genuine attempt to create a moral theory and so, I would argue, that Hobbes derives, amongst other moral concepts, the concept of moral claim rights. Moreover, the obligations that arise from the transfer of liberty rights are indeed morally binding in that they arise from conforming to the second law of nature, (which is a moral law), it is a requirement of justice that they are honoured and they cannot be annulled by particular self-interest.

### Warrender

Hobbes uses the word "right" in two different ways, according to Warrender. On the one hand, he uses it to mean "something to which one is morally entitled,"<sup>53</sup> which he says is equivalent to a description of other people's duties and is the meaning usually given to the word in moral and political philosophy. Used in this way a right denotes the duties which other people have towards the right holder. He claims that Hobbes sometimes uses the word right to mean entitlement (or claim right), but this is usually when he is discussing the rights of the sovereign. The only other instance in which there are rights that are entitlements are in civil society, when the individual "does collect some entitlements as against his fellow citizens, for the civil law does impose obligations upon them that secure him in some respects."<sup>54</sup> These are rights *granted to him* by the sovereign when he makes the law and are therefore not to be confused with those rights which the individual has prior to civil society. When Hobbes is discussing the rights of the *subjects* he uses the word in a different way, according to Warrender, to mean freedom from obligation. In this sense rights "are the antithesis of duties."<sup>55</sup> This form of a right specifies "something that the individual cannot be obliged to renounce."<sup>56</sup> and is intended as a definition of the rights described by Hobbes as existing in the state of nature. "Thus Hobbes's 'right to all things,' for example, does not

<sup>52</sup> Hampton, *Hobbes and the Social Contract Tradition*, p. 56.

<sup>53</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 18.

<sup>54</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 195.

<sup>55</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 19.

<sup>56</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 19.

imply that men are entitled to everything, but that they cannot be obliged to renounce anything.”<sup>57</sup>

The word “right” is used by Hobbes with a particular meaning, according to Warrender, so that “a right to  $x$ ” should be translated as “a freedom from obligation to renounce “ $x$ ,” whereby rights do not imply corresponding duties in other people.”<sup>58</sup>

When an individual lays down a right, Warrender argues, he “resigns a freedom” but does *not* “transfer a right in the modern sense of making over to others an entitlement to some object or service to which he himself was entitled previously.”<sup>59</sup> And although the person transferring the right becomes thereby impeded in his future actions against the person to whom the right is transferred, this affects only him, according to Warrender, all other people are still free to interfere with the right holder’s ability to exercise his own right. Warrender also claims that the person to whom the right is transferred has only the same right that he had before. In other words, Warrender is arguing that the kind of transfer of rights described by Hobbes in the second law of nature does *not* create a new kind of right, a claim right; it does not in fact change the right in any way.

. . . the individual who resigns or transfers a right, takes upon himself a duty which he did not have before, but the rights of other people remain the same, whether the transference of the right in question was to them or not. Thus if, for example, the individual transfers a right to person “ $p$ ”, but not to person “ $q$ ”, he will have a duty not to hinder “ $p$ ” in some respect and no duty to “ $q$ ” in this respect; but the rights of both “ $p$ ” and “ $q$ ” will remain the same as before. This assertion appears less paradoxical if Hobbes’s special use of the word, right, is emphasized. Thus, to resign a freedom from obligation (a right), does not as such increase other people’s freedoms from obligation (rights), although, as Hobbes adds, it does affect the convenience of their exercise. Similarly, to transfer a right to a particular person, does not increase his freedoms from obligation, but it does increase the facility with which he can exercise these freedoms. It is of rights in this sense that the second law of nature requires a resignation or a transference.<sup>60</sup>

For the person “ $p$ ,” Warrender is arguing, his right remains unchanged, even in relation to the individual “ $x$ ” who has transferred his right to “ $p$ .” Yet he admits that “ $x$ ” now has a duty towards “ $p$ ” in that he is obliged not to hinder “ $p$ ” in his ( $p$ ’s) exercise of his right. So,  $p$ ’s right in relation to  $x$  is now correlated with a duty of  $x$ ’s. And this duty that  $x$  has, directly affects  $p$ ’s ability to exercise his right, because it ensures that  $p$ ’s ability to exercise his right will not be interfered with by “ $x$ ,”  $p$ ’s right is now correlated with a duty of  $x$ ’s to respect  $p$ ’s exercise of the right.

<sup>57</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 20.

<sup>58</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 50.

<sup>59</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 50.

<sup>60</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 50.

Even if one sticks with Warrender's definition of a right as a freedom from obligation, this freedom from obligation is now a *protected* freedom from obligation. In relation to  $x$  then,  $p$ 's right has changed in that it has lost its competitive aspect. If  $x$  has transferred his right to the apples on the tree to  $p$ , then  $p$  is no longer in a competitive situation with  $x$  in exercising his right to the apples, and this competitive aspect is one of the characteristics of a liberty right, as I have mentioned above. Warrender does point out that, although by transferring a right the individual restricts his own future actions against the person to whom the right is given yet "he does not impede the action of other men as against that person."<sup>61</sup> And he uses this to support his claim that the right holder's right has not changed even in its exercise, because there are many other people who may still interfere with his exercise of it. It is important to remember, however, that what is under discussion is the second law of nature and according to the second law of nature we must *all* lay down some of our rights and indeed, each one of us is only obliged to do so when everyone else agrees to do the same: "if other men will not lay down their Right, as well as he; then there is no Reason for any one, to divest himselfe of his: For that were to expose himself to Prey, (which no man is bound to)."<sup>62</sup>

So, the example Warrender has given of one person  $x$ , transferring his right to  $p$ , does not represent the laying down of rights that Hobbes describes under the second law of nature. The second law of nature operates as a collective system of the transfer and renouncing of all the rights that we would not wish another to hold against us in civil society. All rights that allow the invasion of the person of another, or a threat to peace, or interference with the means to one's preservation, would presumably be given up. Exactly which particular rights must be given up is to some extent a matter of speculation, as Hobbes himself does not specify exactly which rights would be transferred or renounced under the second law of nature. If we keep in mind the wording of the law, however,

[t]hat a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, *to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.*<sup>63</sup>

then we shall be able to say roughly what sorts of rights would have to be given up or transferred (it should be noted that when Hobbes says that we should be contented with only so much *liberty against other men*, he must be referring to the liberty to interfere with others that is given up every

<sup>61</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 50.

<sup>62</sup> Hobbes, *Leviathan*, p. 190.

<sup>63</sup> Hobbes, *Leviathan*, p. 190, my emphasis.

time one transfers or renounces a right. This loss of liberty to interfere, on the one hand, is replaced with the increased liberty on the other, to exercise the rights that have been transferred to us).

Under the second law of nature therefore, everyone would lay down their right, say, to *p*'s body so that his (*p*'s) right to his own body would then be protected by the fact that everyone else now has a duty not to interfere with his right to his body. His right has changed from being a simple liberty right, to a freedom or liberty right that is protected by the duties of others not to interfere with its exercise. In other words it is now closer to the definition of a claim right than a liberty right.

Warrender's argument can be defeated. His argument is that the right held by a subject after another subject has transferred the same right to him, is completely unchanged by the transfer. It remains a simple liberty right. I have shown above that after receiving the transferred right, the recipient now has a *protected* right, a right that is correlated with a duty of the transferer. That person now has a duty not to interfere with the right holder's exercise of his right. The right holder therefore has had something *added* to his original right. It is not, as Warrender argues, completely unchanged by this process.

#### **HOBBS'S THEORY OF RIGHTS – WHAT KIND OF THEORY?**

If I have been right in arguing that Hobbes introduces claim rights for individuals once they conform to the second law of nature, what implications, if any, does this have for his theory of rights? First, I will say something briefly about the way the theory is analysed currently. Commentators on Hobbes's *moral* theory over the last sixty years or so fall into one of two categories; those who interpret him as holding some form of egoism and those who argue that he holds a deontological moral theory. One might expect that those holding the latter view would see Hobbes as having a strong theory of rights but as I have shown in the discussion of Warrender above, this is not the case. I have not read any commentators with the one illuminating exception of Leo Strauss<sup>64</sup> who argue that Hobbes has

<sup>64</sup>L. Strauss, *The Political Philosophy of Hobbes, Its Basis and Genesis*, trans. E.M. Sinclair (Chicago: University of Chicago Press, 1952, Midway Reprint, 1984). Strauss argues that Hobbes was the first to place the rights of the individual at the centre of political theory. "According to Hobbes, the basis of morals and politics is not the 'law of nature,' i.e., natural obligation, but the 'right of nature.' The 'law of nature' owes all its dignity simply to the circumstance that it is the necessary consequence of the 'right of nature' " (p. 155). "Hobbes, and no other, is the father of modern political philosophy. For it is he who, with a clarity never previously and never subsequently attained, made the 'right of

a strong theory of rights or that the rights he ascribes to individuals amount to anything more than liberty rights. As I have demonstrated above, however, in the sections on Hampton and Warrender, it requires quite a strained reading of the text in order to argue that Hobbes does *not* introduce claim rights under the second law of nature. If we give a more straightforward reading of the text as I think I have given above and include the holding of claim rights against other individuals, how does this affect how we might see Hobbes's contribution to rights theory? In the remainder of this paper I will make a few remarks aimed at starting to answer this question.

*Claim Rights Held against Other Individuals versus Claim Rights Held against the State*

One reason for the tendency of Hobbes commentators to argue that there are no claim rights for individuals in the theory is the assumption of some, that to have a claim right is to have a claim right against the sovereign or the state. Warrender, for example, says “[n]atural rights for the citizen, in the traditional sense of substantive rights against sovereign authority, cannot on Hobbes's view be given any philosophical justification, and the claim to such rights argues only a complete misconception of the nature of sovereignty and law”<sup>65</sup>

The notion of the “traditional sense of substantive rights” as represented in Lockean theories of natural rights, where the individual holds, as a consequence of *natural law*, rights that carry correlative duties on the part of the state, is the notion of individual rights that informs modern discussion of Hobbes's political and moral theory. When Hobbes's pronouncements on rights are held up against the Lockean prototype they are seen to fall well short of a natural rights theory; indeed the very definition of a right given by Hobbes is seen to describe a system of rights that are “the antithesis of duties”<sup>66</sup> and carry no duties attached to them. The Hobbesian liberty right can therefore be characterised, and rightly so, as nothing more than a freedom to compete for the thing or action to which one has a so called right. This understanding of a Hobbesian right along with the assumption mentioned above, that claim rights are rights held against the sovereign (who therefore has correlative duties towards the

nature, i.e., the justified claims (of the individual) the basis of political philosophy, without any inconsistent borrowing from natural or divine law” (p. 156). This strikes me as a great insight into Hobbes's theory; that for Hobbes it is always the individual and his right to preserve himself that drives the political theory.

<sup>65</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 253.

<sup>66</sup> Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 19.

right holder) has been one reason for the dismissal of Hobbes's theory as containing no rights for the individual other than liberty rights.<sup>67</sup> If, however, we can interpret a claim right as a right that can be held against other individuals, then we have, under the second law of nature, claim rights in Hobbes's theory.

Jeremy Waldron describes the Hohfeldian claim right in the following way. "Hohfeld's *claim-right* is generally regarded as coming closest to capturing the concept of individual rights used in political morality. To say that P has a natural right to free speech, for example, is usually to say (maybe among other things) that *people* owe a duty to him not to interfere with the free expression of his opinions."<sup>68</sup> When individuals gain claim rights under the second law of nature they gain them against other individuals, not against the sovereign, although the sovereign, is obliged to obey the law of nature<sup>69</sup> and must make them part of the civil law and enforce them.<sup>70</sup> The sovereign himself is not party to the process of the transfer and renouncing of rights, however, and so does not take on duties towards subjects in the same way as individual subjects do to each other. The sovereign's relationship to the subjects in terms of their rights is a complicated one and will not be gone into here. For the purposes of this paper I have restricted my arguments to those concerning individuals and their rights under the second law of nature. It is enough for now to say that the sovereign is obliged to enforce the rights that individuals hold against each other, and the rights that result when individuals conform to the second law of nature can be defined as claim rights.

#### *An Interest Theory?*

In arguing against those who say that Hobbes includes no "substantive" rights or "natural rights" I do not want to make a case for Hobbes as a natural rights theorist. Traditional theories of natural rights are usually

<sup>67</sup> See for example, Warrender, *The Political Philosophy of Hobbes, His Theory of Obligation*, p. 253 (as in note 65 above), D. Baumgold, *Hobbes's Political Theory* (Cambridge: Cambridge University Press, 1988), and A. Ryan, "Hobbes's Political Philosophy," in T. Sorell (ed.), *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press), p. 235, who says that Hobbes gives "no suggestion that the sovereign's political self-control reflects the subject's rights. Indeed, Hobbes is at pains to deny it . . . , the subject, having given up his rights, cannot now appeal to them. Moreover, the one area in which Hobbes breaks entirely with later writers on human rights is his insistence that we have no right to have a share in the sovereign authority."

<sup>68</sup> J. Waldron, "Introduction," in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), p. 8, my emphasis.

<sup>69</sup> Hobbes, *Leviathan*, p. 265.

<sup>70</sup> Hobbes, *Leviathan*, p. 314.

attached to theories of natural law and often include theological premises and, as I pointed out at the beginning of this paper, they have been discredited by systematic attacks over the last two hundred years or so. Hobbes does share some of the terminology of natural law theories – he defines his laws of nature as given to each individual by reason and as comprising morality - but he does *not* share with natural law/natural rights theories, a commitment to essences, statements of “necessary natural fact”<sup>71</sup> or the inclusion of theological premises.<sup>72</sup> Hobbes’s theory differs from theories of natural law and natural rights in that the need for individual rights does not come from a need for natural justice as dictated by the law of nature with or without God as its creator. And in Hobbes’s theory it is not because of the dictates of a divine or ideal order that people have rights which must then be protected out of obedience to or respect for the natural law. In *Leviathan* there is no clearly stated divine origin of the law of nature, nor is there an ideal law of nature based on a notion of perfect justice.<sup>73</sup> Hobbes starts from premises about the nature of humans which show how, in a state of nature, we will be led inevitably into a war of each against each. If humans are to escape from the state of war and enter a state of peace certain conditions must be met and these conditions include the protection of certain liberties which Hobbes calls rights. The untrammelled freedom of the state of nature needs to be replaced with the protected freedoms that exist when individuals agree to give up some of their liberty rights and accept obligations towards others. The protected freedoms that I have defined as claim rights are required, according to Hobbes, if individuals are to have the possibility of living a commodious life. It is clearly in the interests of individuals to have these protected liberties. And it is *because* it is in what we might call our *vital interests*, that Hobbes says reason will tell us that we must give up some liberty rights in order that those liberties required for peace may be *protected* by the *obligations* of others rather than *violated* by the *liberties* of others.

Interest theories of rights base rights on the interests of the individual who is to hold the right. Joseph Raz, as an exponent of the interest theory, defines a right in the following way:

71 See M. MacDonald, “Natural Rights,” in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), p. 24.

72 See Y. C. Zarka, “First Philosophy and the Foundations of Knowledge,” in T. Sorell (ed.), *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 1996), p. 64, who says that Hobbes “excludes knowledge of God’s nature from the scope of philosophy.”

73 For an interpretation that does see Hobbes as a natural law theorist see Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. D. Gobetti (Chicago: University of Chicago Press, 1993).

*Definition:* “X has a right” if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person to be under a duty.

*Capacity for possessing rights:* An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an “artificial person” (e.g., a corporation).<sup>74</sup>

I want to suggest, though I am not going to argue for it in any further detail here, that Hobbes’s theory of rights could be defined as an interest theory. It sets out rights for individuals that are the ground for the duties of others towards the right holder and the justification for the individual holding such rights is that it is in her vital interest to do so, because the protection of certain liberties are necessary for the possibility of peace and a commodious life.

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<sup>74</sup>J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 166.