Natural rights theories
Their origin and development

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Nevertheless, there remained something slightly suspicious about Selden's theories to more traditional and conservative royalists, and Hale's equivocation cannot have reassured them. The new ideology remained exotic and rather daring, even after its exponents received high positions in Church and State after the Restoration. As such, it shared in the suspicion directed against apparently the most outrageous of all Selden's followers, whose relationship to this tradition is the subject of my next chapter.

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Thomas Hobbes

I

The nearest anyone has yet got to a proper assessment of the relationship of Hobbes to the line of thought which I dealt with in the previous chapter is Ernest Sirluck in his introduction to the Yale Milton, twenty years ago. He commented on *An answer to a printed book* that 'this anonymous pamphlet ... contains the essential elements of Hobbes's political thought (along with much that is foreign and even contradictory to it)', and pointed to the friendship between Hobbes and many of the Tew Circle, and the fact that Hobbes's manuscript *Elements of Law* had circulated among his friends after its composition in April and May of 1640.[1] The evidence for this friendship and the manuscript's circulation is good,[2] and it is clear that it is in just the *milieu* surveyed in the last chapter that Hobbes's theory was developed. His interest in and admiration for Selden is separately attested: not only is Selden's *Titles of Honour* one of the few books praised (or even mentioned by name) in *Leviathan,* but in 1635 when he was touring the Continent Hobbes wrote back to a friend asking for a copy of *Mare Clausum,* saying that he had 'already a great opinion of it'.[3] They did not actually meet until after the publication of *Leviathan,* when Hobbes sent Selden a complimentary copy – an act which in itself shows the esteem in which he held him. They apparently became quite close friends afterwards.[4]

However, the conventional interpretation of Hobbes would rule out too close a similarity between him and Selden or Digges. After all, central to their theory was the idea that men renounce their right of self-preservation in order to create civil society, and that they have no right to resist the magistrate subsequently. Hobbes in *De Cive* and *Leviathan* denied just this and was attacked by Hyde, among others, for doing so. Moreover if we accept the normal view of Hobbes's theory of natural law and its

[1] J. Milton, *Prose Works*, II, ed. E. Sirluck (New Haven, 1959), p. 35.
[2] See B. D. Greenslade, 'Clarendon's and Hobbes's *Elements of Law*', *Notes and Queries*, CCII (1957), p. 150; J. Aubrey, *Brief Lives*, I, ed. A. Clark (Oxford, 1898), pp. 333–4; and pp. 365–72 for a list of Hobbes's friends including most of the Tew Circle.
[3] Hobbes, *English Works*, VII, ed. W. Molesworth (London, 1839–95), p. 454.
[4] Aubrey, *Brief Lives*, I, p. 369.

obligatory force, nothing could be much further from Selden's picture, with God in a central place. In the first part of this chapter, I shall show that while the standard account of Hobbes's ideas on resistance is true for *De Cive* and *Leviathan*, and so true for Hobbes from 1642 onwards, it is not so obviously true for the *Elements of Law*. In the second part, I shall show the relationship between Hobbes's theory of natural law and Selden's.

One consequence of getting straight the relationship between Hobbes and Selden is that we can put the long argument between Professor Warrender and his critics in a new perspective. Warrender's case rests on the fact that in *Leviathan* Hobbes consistently refuses to treat self-preservation as a *duty* – it is the primary *right* of nature, and 'Law and Right, differ as much, as Obligation and Liberty; which in one and the same matter are inconsistent'. Duty, the law of nature, must therefore have some other basis than self-interest, and Warrender famously found its basis in God's will. But as his critics have always stressed, and as Hobbes's contemporaries also realised, the whole tenor of Hobbes's theory is that obligation is ultimately a matter of self-interest. As we shall see, Warrender isolated a real problem in the text of *Leviathan*; the solution to the problem, however, is not what he proposed but is to be found by looking at the development of Hobbes's thought during the 1640s.

The *Elements* is in fact ambiguous in just the area I want to consider first, the surrender of the right of self-preservation; but there are some passages which cannot really be interpreted in any way other than by accepting that he believed in such a surrender. In addition, contemporaries took him to be justifying the surrender, and that is evidence which cannot be disregarded. The general similarities between the *Elements* and the works of the Tew Circle or Taylor are clear: most obviously, Hobbes hung his argument on just the distinction between right and law which was central for Digges and others.

> The names *lex*, and *jus*, that is to say, law and right, are often confounded; and yet scarce are there any two words of more contrary signification. For right is that liberty which law leaveth us; and laws those restraints by which we agree mutually to abridge one another's liberty. Law and right therefore are no less different than restraint and liberty, which are contrary ... (II.10.5)

The primary right of nature is self-defence: 'that which is not against reason, men call RIGHT, or *jus*, or blameless liberty of using our own natural power and ability. It is therefore a *right of nature*: that every man may preserve his own life and limbs, with all the power he hath' (I.14.6). But although it is the primary right of nature, it is not the only right. Hobbes was quite explicit in the *Elements* that the state of nature was the state of *total* freedom hypothesised by Selden and the others.

> Every man by nature hath right to all things, that is to say, to do whatsoever he listeth to whom he listeth, to possess, use, and enjoy all things he will and can. For seeing all things he willeth, must therefore be good unto him in his own judgement, because he willeth them; and may tend to his preservation some time or other; or he may judge so ...: it followeth that all things may rightly also be done by him. (I.14.10)

As we shall see, this is significantly different from the theory put forward in *De Cive*. Moreover, in the *Elements* Hobbes at various points went on to argue that the right of self-defence has to be renounced by the contractors if a sovereign with coercive power is to be set up. Thus he explained the creation of a sovereign by remarking that 'the end for which man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defence from those to whom he doth so relinquish it' (II.1.5). And he said of the power of coercion that it

> consisteth in the transferring of every man's right of resistance against him to whom he hath transferred the power of coercion. It followeth therefore, that no man in the commonwealth whatsoever hath right to resist him, or them, on whom they have conferred this power coercive, or (as men use to call it) the sword of justice; ... (II.1.7)

After defining the power of domestic coercion in this way, he went on to say that

> forasmuch as they who are amongst themselves in security, by the means of this sword of justice that keeps them all in awe, are nevertheless in danger of enemies from without; if there be not some means found, to unite their strengths and natural forces in the resistance of such enemies, their peace amongst themselves is but in vain. And therefore it is to be understood as a covenant of every member to contribute their several forces for the defence of the whole ... (II.1.8)

His argument thus made a distinction between the case where the power of coercion is based on men renouncing their right of resistance against the sovereign, and the case where it is based on their agreement to help the sovereign against a common enemy. This is a distinction which makes little sense in the later Hobbesian theory, and of course disappears totally in *Leviathan*, having survived in a very emasculated form in *De Cive*.

Another example can come from his definition of a sovereign:

> In all cities or bodies politic not subordinate, but independent, that one man or one council, to whom the particular members have given that common power, is called their SOVEREIGN, and his power the sovereign power; which consists in the power and strength that every one of the members have transferred to him from themselves, by covenant. And because it is impossible for any man really to transfer his own strength to another, or for the other to receive it; it is to be understood: that to transfer a man's power and strength, is no more but to lay by or relinquish his own right of resisting him to whom he so transferreth it. (I.9.10)

While the last example can come from his account of the marks of sovereignty:

He that cannot of right be punished, cannot of right be resisted; and he that cannot of right be resisted, hath coercive power over all the rest, and thereby can frame and govern their actions at his pleasure; which is absolute sovereignty ... Secondly, that man or assembly, that by their own right not derived from the present right of any other, may make laws, or abrogate them, at his, or their pleasure, have the sovereignty absolute. For seeing the laws they make, are supposed to be made by right, the members of the commonwealth to whom they are made, are obliged to obey them; and consequently not to resist the execution of them; which non-resistance maketh the power absolute of him that ordaineth them. (II.1.19)

Against these passages, there are some others which point the other way, and imply that no man can relinquish his right of 'protecting and defending himself by his own power'. First, II.1.7, quoted above as defining the power of coercion, continues '... sword of justice; supposing the not-resistance possible. For (Part I. chapter 15, sect. 18) covenants bind but to the utmost of our endeavour.' However, one interesting thing about this is that the section referred to, which justifies this modification of his stated position, was added to the circulated copies of the *Elements* later by Hobbes, and is found in only two of the manuscripts. The evolution of the *Elements* text, despite Toennies's work, is still unclear, but there is a strong implication that Hobbes's original draft did not include the provision about the possibility of non-resistance.

Second, when discussing the rights which men retain from the state of nature into the state of peace (which in the *Elements* include, as Goldsmith has pointed out, rights founded on contracts made in the state of nature *before* the contract of society),[5] Hobbes observed:

As it was necessary that a man should not retain his right to everything, so also was it, that he should retain his right to some things: to his own body (for example) the right of defending, whereof he could not transfer; to the use of fire, water, free air, and place to live in, and to all things necessary for life. Nor doth the law of nature command any divesting of other rights, than of those only which cannot be retained without the loss of peace ... (I.17.2)

This is a passage which of course raises a number of problems for any account of Hobbes, as does the similar passage in *Leviathan* itself: men may, for example, have the right to the use of a place to live in, but do they have the right to take a place to live in without the sovereign's permission?

However, despite these pointers away from the idea that men must renounce their rights of self-defence in order to erect a sovereign, the *Elements* was undoubtedly read by its first readers as arguing for a renunciation. The relevant parts of the work were first published as a piracy in May 1650 under the title *De Corpore Politico*, from a copy supplied (prob-

[5] Hobbes, *The Elements of Law Natural and Politic*, ed. F. Toennies, second ed. M. M. Goldsmith (London, 1969), p. xii. (Goldsmith's Introduction). All quotations in the text of

ably) by Hobbes's former friend and later enemy, Seth Ward.[6] The first people to mention it were among the now well-known 'Engagers', but the Engagers who read the *Elements*, as distinct from *De Cive* or *Leviathan*, took him to be putting forward a royalist case for the complete renunciation of all rights.

The first reference to it came some ten days after its publication, in the answer of 'Eutactius Philodemius' to Hammond's attack on him; he remarked revealingly that Hobbes was 'one of this Doctors party', despite the difference between their treatments of the magistrate's penal powers.[7] But probably the best example is Marchamont Nedham, who in the second edition of his *Case of the Common-wealth stated*, published later in 1650, added an appendix rehearsing arguments for his position

out of *Salmasius* his *Defensio Regis*, and out of M. Hobbs his late book *de Corpore Politico*. Not that I esteem their Authorities any whit more Authentick than those which I have already alledged; but onely in regard of the great reputation allowed unto those Books by the two Parties, *Presbyterian* and *Royall*; And I suppose no man may triumph, or cry a victory, more honourably than my selfe, if I can foile our Adversaries with weapons of their own approbation ...[8]

He proceeded to quote the passage from the *Elements* about the creation of the sovereign (II.1.5), and continued:

From whence may plainly be inferred, that since no security for *Life*, *Limbs* and *Liberty* (which is the end of all Governments) are now to be had here, by relinquishing our right of self-protection, and giving it up to any other Power beside the present; Therefore it is very unreasonable in any man to put himself out of the Protection of this Power, by opposing it, and reserving his obedience to the K. of *Scots* ...[9]

Nedham thus believed that Hobbes had argued for the relinquishment of the right of self-protection. It is interesting that Ascham too thought that Hobbes had a very extreme theory about the abnegation of rights (indeed, a theory which was too extreme for Ascham himself). Ascham's book, *Of the Confusions and Revolutions of Government*, the second edition of his *A Discourse: Wherein is Examined, What is Particularly Lawfull during the Confusions and Revolutions of Government*, was published some months before the *De Corpore*, and he did not say what work of Hobbes he had read (which is itself interesting). What he says makes better sense of the *Elements* than *De Cive*, which seems to have been very scarce in England at this time, and it is possible that he had seen one of the manuscripts of it. What Ascham said was that

Mr. *Hobbes* and *H. Grotius* are pleased to argue severall wayes for obliging people to one perpetuall and standing Allegiance. *Grotius* supposes such a fixt Allegiance

[6] Hobbes, *Elements*, p. vii (Toennies's Preface).
[7] 'Eutactius Philodemius', *An answer to the vindication of Doctor Hamond* (London, 1650), B3.
[8] M. Nedham, *The case of the common-wealth of England stated* (London, 1650), O4.
[9] *ibid.*, P2v–P3.

in a people, because a particular man may give himself up to a private servitude for ever, as among the Jewes and Romans. Mr. *Hobbes* supposes, that because a man cannot be protected from all civill injuries, unlesse all his rights be totally and irrevocably given up to another, therefore the people are irrevocably and perpetually the Governours ... Such a totall resignation of all right and reason, as Mr. *Hobbes* supposes, is one of our morall impossibilities, and directly opposite to that antient *Ius zelotarum* among the Jewes ... Our Generall and Originall rights are not totally swallowed up either in the property of goods or in the possession of persons, neither is all that which was naturall now made Civill ...[10]

Given that Ascham himself, as his opponent Sanderson pointed out, believed in effect that self-preservation was 'the first and chiefest obligation in the world', it is hardly surprising that he felt it necessary to rebut Hobbes at this point. Later Engagers, however, such as Warren or Osborne, who had the *Philosophical Rudiments* (i.e. the English translation of *De Cive*) and *Leviathan* itself, were able to quote Hobbes as an authority for their position with a clear conscience, and not treat him (as Nedham had done) as an opponent to be subverted by the unforeseen consequences of his own theory.[11]

If later readers of the *Elements* were aware that it countenanced the idea that all men's rights could be renounced, so apparently was Hobbes himself, for in *De Cive* he systematically removed the ambiguities and altered his argument away from the Digges or Tew Circle line. This process seems to have begun while he was tinkering with the *Elements* itself, if the addition of the point about promises only binding to best endeavours is any guide; and perhaps one reason why he abandoned the manuscript and started on a basically new work is that the task of revising the *Elements* piecemeal proved too cumbersome.

Thus in *De Cive* Hobbes added to his general discussion of contracts a long defence of the proposition that 'no man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body', and of the consequent invalidation of compacts of self-accusation.[12] The insertion of this passage into what is otherwise a more or less straight copy of the *Elements* is very striking, given the way of reading the *Elements* which we have just been considering. Equally striking is the insertion of a new and rather forced explication of what non-resistance is, into his account of the union of contracting individuals (represented in the *Elements* by 1.19.10).

Submission of the wills of all those men to the will of one man or one council, is then made, when each one of them obligeth himself by contract to every one of the rest, not to resist the will of that one man or council, to which he hath submitted himself; that is, that he refuse him not the use of his wealth and strength against any

[10] A. Ascham, *Of the Confusions and Revolutions of Governments* (London, 1649), pp. 15–16.
[11] For these Engagers' reading of Hobbes, see Q. R. D. Skinner, 'Conquest and Consent: Thomas Hobbes and the Engagement Controversy', in G. E. Aylmer ed., *The Interregnum* (London, 1972), pp. 92, 95.
[12] Hobbes, *English Works*, II, p. 25.

others whatsoever; for he is supposed still to retain a right of defending himself against violence.[13]

In general, however, any talk of a right of resistance being renounced is avoided in *De Cive*, and even qualified passages of this kind are excised in *Leviathan*.

But perhaps the best example of the change is provided by his analysis of coercive power. In place of the passage on the power of coercion in the *Elements* (II.1.7), *De Cive* interpreted the power as the result of the citizens renouncing, not their rights of resistance, but their rights of assistance: 'the right of punishing is ... understood to be given any one, when every man contracts not to assist him who is to be punished. But I will call this right, *the sword of justice*.' He thus made the right of domestic punishment the same kind of thing as the right to wage foreign war, and in *Leviathan* he was to move even further in this direction.[14]

Not only did Hobbes argue after 1642 for the impossibility of renouncing the right of self-defence, he also revised his account of the state of nature. It is ironical that Hobbes's picture of an anarchic natural state should have haunted contemporaries who were indifferent to the Seldenians; for in *De Cive* Hobbes in fact outlined a much *less* frightening and anarchic picture than Digges, Taylor or Vaughan, or he himself in 1640, had put forward. We have seen that according to the *Elements*, natural man had the right 'to do whatsoever he listeth to whom he listeth', just as he did (for example) in Taylor: 'whatsoever we naturally desire, naturally we are permitted to'.[15] But in the later theory, he had the right merely to do what tended to his self-preservation, or what he judged to do so. That this was by no means the same was made clear by Hobbes in a note he appended to the second edition of *De Cive* in 1647. In the state of nature, a man 'hath a right to make use of, and to do all whatsoever he shall judge requisite to his preservation ... But if any man pretend somewhat to tend necessarily to his preservation, which yet he himself doth not confidently believe so, he may offend against the laws of nature ...'[16] Similar remarks have been marshalled by Wernham to show that Hobbes consistently in his later works limited man's natural rights to those actions which tended to preservation, and not to anything he wished to do.[17] In this, he was undoubtedly moving away from his own earlier position and that of his friends.

If what I have been suggesting is correct, and Hobbes in the *Elements* was much more like Digges and the others than he later became, and was taken by contemporaries to be saying the same kind of thing, then we have to

[13] *ibid.*, II, p. 68.
[14] *ibid.*, II, p. 75.
[15] See above p. 111.
[16] Hobbes, *English Works*, II, p. 10.
[17] B. de Spinoza, *The Political Works*, ed. A. G. Wernham (Oxford, 1958), pp. 12–14. See also L. Strauss, *The Political Philosophy of Hobbes* (Oxford, 1936), pp. 8 ff.

explain his move away from their position. To understand this, we have to bear in mind the distinction which I made when discussing the Tew Circle writers, between the general obligation to keep promises, and the rationality of making a particular promise. In Hobbes, both these issues were treated differently from the beginning.

The first point to be stressed is that in Selden, the obligation to obey the natural law, and hence to keep one's promises, is (as we saw) equivalent to a *motivation* – to the fear, that is, of suffering at the hands of God either in this life or in the next. It was because we can fear punishment in the after-life that it makes sense to talk of being obliged to keep a contract of non-resistance; if belief in the after-life or in the possibility of talking about it is dropped out, such a contract must go as well. It is fairly clear that Hobbes never in fact believed that the after-life was relevant to the prudential calculations of all men, even in 1640, although he did accept that it could be rational to accept death if one happened to believe that by doing so one would avoid a worse penalty in the life to come. His position was always (roughly speaking) Selden's without the premiss of God's eternal punishments, though it was not stated as clearly as it could be until the mature period of *Leviathan*. The famous passage on 'natural punishments' there shows what he believed:

> Having thus briefly spoken of the natural kingdom of God, and his natural laws, I will add only to this chapter a short declaration of his natural punishments. There is no action of man in this life, that is not the beginning of so long a chain of consequences, as no human providence is high enough, to give a man a prospect to the end. And in this chain, there are linked together both pleasing and unpleasing events; in such manner, as he that will do any thing for his pleasure, must engage himself to suffer all the pains annexed to it; and these pains, are the natural punishments of those actions, which are the beginning of more harm than good. And hereby it comes to pass, that intemperance is naturally punished with diseases, ... negligent government of princes, with rebellion; and rebellion with slaughter. For seeing punishments are consequent to the breach of laws; natural punishments must be naturally consequent to the breach of the laws of nature; and therefore follow them as their natural, not arbitrary effects.[18]

It was because of this view that Hobbes seems to have equivocated so often about the status of the laws of nature: 'they are but conclusions, or theorems concerning what conduceth to the conservation and defence of [men]; whereas law, properly, is the word of him that by right hath command over others. But yet if we consider the same theorems, as delivered in the word of God, that by right commandeth all things; then are they properly called laws.'[19] On Selden's account, the laws of nature are equally such 'conclusions, or theorems' – they prescribe what must be done if we are to avoid suffering, and they have no obligatory force except in so far as we are frightened of suffering by their neglect. But equally they

[18] Hobbes, *Leviathan*, ed. C. B. Macpherson (Harmondsworth, 1968), pp. 406–7.
[19] *ibid.*, p. 217.

can be seen as 'proper' laws, since there has been a definite decision by a law-maker that we shall suffer if we break them. Our suffering is the consequence of that decision, which could have been different. If God's construction of nature is taken to be a series of similar decisions, then the Hobbesian laws of nature are also 'proper' laws.

Hobbes's theory of obligation, despite its very different consequences, is thus not very different in its overall structure from Selden's: one empirical premiss has disappeared, that we know what we will be punished for after our death. Instead, we simply look at what we are punished for in this life, and act accordingly. Selden's attack on the deontology of the scholastics opened up a space for Hobbes's theory to slip into. Moreover, Hobbes's laws, like Selden's, are necessarily not coeval with mankind: they depend for their recognition, and hence for their force, not on intuition but on historically acquired experience of the natural punishments. This is the significance of another note which Hobbes added to the second edition of *De Cive* explaining what he meant by the 'right reason' by which the laws of nature are found out – 'by right reason in the natural state of men, I understand not, as many do, an infallible faculty, but the act of reasoning, that is, the peculiar and true ratiocination of every man concerning those actions of his, which may either redound to the damage or benefit of his neighbours'.[20] By a comparison of this kind between Selden and Hobbes, we can cut through much of the confusion that has surrounded Hobbes's 'theory of obligation', though we have still not sufficiently met Warrender's main argument, which will be dealt with presently.

But it remains true that in the *Elements* men are supposed to be bound to keep their covenants not to resist the sovereign. How could Hobbes justify this, given the absence of eternal punishment as a relevant feature of the situation? He did so simply by making the claim that if it is rational to *make* a promise, then it is rational to *keep* it: no separate source of obligation is needed.

> The law of nature mentioned in the former chapter, sect. 2, namely *That every man should divest himself of the right* [to all things, in order to bring about peace] were utterly vain, and of none effect, if this also were not a law of the same Nature, *That every man is obliged to stand to, and perform, those covenants which he maketh.* For what benefit is it to a man, that any thing be promised, or given unto him, if he that giveth, or promiseth, performeth not, or retaineth still the right of taking back what he hath given? (1.16.1)

This led him into the curious doctrine, perpetuated in *De Cive*, that to break a promise is equivalent to a contradiction: 'he that covenanteth, willeth to do, or omit, in the time to come; and he that doth any action, willeth it at that present, which is part of the future time, contained in the covenant: and therefore he that violateth a covenant, willeth the doing and

[20] Hobbes, *English Works*, II, p. 16.

the not doing of the same thing, at the same time; which is a plain contradiction'. (1.16.2)[21]

The problem about this argument is that it seems to be the wrong way round: a condition of its being rational to make a contract must be the independent expectation that it will be kept. It is true that there is no point in making a promise unless it is kept, but it could be that there is in fact no reason to keep a promise, and hence no point in making it. But by using this argument, Hobbes was able to conclude that it could be rational not to resist: it was rational to promise not to do so since such a promise was a necessary condition of leaving the state of nature, and any promise which it is rational to make, it is rational to keep.

This was clearly an unsatisfactory position to adopt, and Hobbes was hampered even more in his argument by his views on probability. We have seen that the Tew Circle writers explicated the rationality of making a promise of non-resistance in terms of probability calculations: we are less likely to suffer as a consequence of being held to our promise than we are by not making it in the first place. Hobbes was just as idiosyncratic in his relationship to this aspect of the Tew theory as to its other manifestations. Hacking has recently pointed out that Hobbes in the *Elements* clearly had a modern notion of probability[22] – his famous remark that 'experience concludeth nothing universally' was part of an argument that 'though a man have always seen the day and night to follow one another hitherto, yet can he not hence conclude that they should do so . . . If the signs hit twenty times for one missing, a man may lay a wager of twenty to one of the event; but may not conclude it for a truth'. (1.4.10) But the striking feature of Hobbes's argument is not so much that he shared this modern notion of probability with people like Chillingworth, but that he refused to apply it to his political theory. The men in his state of nature are not supposed to make probability calculations; they are supposed to be certain that they are going to be (at the very least) no worse off by making the covenant than they would be by staying in their original position. If certainty of this kind is required, then clearly it is going to be difficult to argue that it can ever be rational to promise not to resist someone else. Hobbes's reluctance to talk about men gambling in the state of nature, despite his firm grasp of the idea of probability calculation, stems from his general epistemology: he wanted to argue both that the laws of nature were learned through experience, and also that they could be presented as deductive conclusions comparable to those of Euclidean geometry, precisely because of his eccentric view of the logical status of geometry.[23]

If this is right, then we must conclude that Hobbes's argument in the

[21] Hobbes, *English Works*, II, p. 31.
[22] I. Hacking, *The Emergence of Probability* (Cambridge, 1975), p. 48.
[23] The best recent discussion of this relatively neglected feature of Hobbes's thought is in F. S. McNeilly, *The Anatomy of Leviathan* (London, 1968), especially p. 63.

Elements was simply inconsistent. While he agreed with Selden and the Tew writers about the means whereby a civil society is established, he disagreed fundamentally with them over a number of issues. That being so, we can now see why he moved away from his earlier position and why he took the particular direction that he did. First of all, the Seldenians were happy to talk about a state of total natural freedom: they did not have to link all men's natural rights up to the principle of self-preservation in this world. After all, one of the rights which men enjoyed in the state of nature was precisely the right to renounce their own self-defence. But Hobbes did not believe this, and in any consistent theory would have had to limit man's natural freedom: men could only have the right to do those things that conduced to their own preservation. This explains the move to the more limited account of the state of nature outlined particularly in the notes to *De Cive*, in which Hobbes explicitly denied that men can have a natural right to do anything other than what leads to their own protection.

Secondly, he had to propose a mechanism whereby a sovereign could be erected without his subjects losing their right of self-defence. In *De Cive* he suggested that all that was needed was for the natural men to promise not to assist the enemies of the sovereign – 'the right of punishing is then understood to be given to any one, when every man contract not to assist him who is to be punished'.[24] A great deal of fun was made of this by his opponents; as one of them, Roger Coke, said, 'what power of life or death is here any more, then if a company of Men contract one with another, that they will afford Mr. *Hobbs* no relief, if another man will kill, maim, or punish Mr. *Hobbs*, that then this Man hath power over Mr. *Hobbs* his life and person? and this Right forsooth he will call *gladium justitiae*'.[25] But in fact it would have been no poorer a theory than that of Selden or Digges, had Hobbes not altered his account of the state of nature.

As it was, while such a sovereign in the old theory would have had the unlimited right to do anything to anyone (for all men possessed that right in the state of nature which the ruler had never left), in the new theory all he could possess was the right to defend *himself* – for that was now the only right anyone possessed. And clearly, that was no use if he was to act in the way that sovereigns are normally supposed to. It was almost certainly a consideration of this kind that led Hobbes to drop this proposal, and replace it in *Leviathan* with the famous theory of *authorisation*. According to this, the only way for natural men to erect a sovereign is for them 'to appoint one man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things

[24] Hobbes, *English Works*, II, p. 75.
[25] R. Coke: *A Survey of the Politicks of Mr. Thomas White, Mr. Thomas Hobbs, and Mr. Hugo Grotius* (London, 1662), p. 29.

which concerne the Common Peace and Safetie'.[26] As a result, the sovereign did not simply defend himself: he acted as agent for the defence of each member of the community, and was thus capable of performing all the interventionary actions associated with sovereigns.

But although in this area by 1651 Hobbes had developed a consistent theory, there still remained one major difficulty in his account. This has caused great confusion among modern scholars, as a result of the interpretation of *Leviathan* put forward by Professor Warrender. At the beginning of the discussion of natural law in *Leviathan* occurs the famous passage distinguishing the right of nature from the law of nature:

> 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.

The right of nature is 'the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature'.[27] Now, in the *Elements*, just as in the Tew Circle pamphlets or Jeremy Taylor or Selden himself, this distinction does some real work. Self-preservation is a right and not a law precisely because a right does not have to be exercised – one is at 'liberty to do, or to forbear' in the matter. So it makes sense to promise not to exercise any right. But in *De Cive* or *Leviathan* this is no longer the case: men are not free *not* to exercise their right of nature, and its status as a right is therefore questionable.

One of Hobbes's first critics, Sir Robert Filmer, spotted this:

> If the right of nature be a liberty for a man to do anything he thinks fit to preserve his life, then in the first place nature must teach him that life is to be preserved, and so consequently forbids to do that which may destroy or take away the means of life, or to omit that by which it may be preserved: and thus the right of nature and the law of nature will be all one: for I think Mr. Hobbes will not say the right of nature is a liberty for man to destroy his own life. The law of nature might better have been said to consist in a command to preserve or not to omit the means of preserving life, than in a prohibition to destroy, or to omit it.[28]

But it is this discrepancy between the notion of a right as formally defined by Hobbes and the fact that men are apparently *not* at liberty to forbear to preserve themselves, which is at the heart of the case argued by Professor Warrender:

> Hobbes describes the fundamental *law* of nature as 'seek peace' and the *right* of nature as 'defend ourselves'; likewise his precept or general rule of reason is that men *ought to* endeavour peace when it is possible; and when that is impossible that they may use the advantages of war. If self-preservation were meant to be taken as the principal duty of each individual, one would expect Hobbes to have regarded the precept that we should defend ourselves as a law and not a right, and that we *ought to* use the advantages of war where peace is unobtainable. As his words stand, however, the fundamental law of nature is not 'preserve thyself', but 'seek peace', and the further laws of nature are derived from the latter precept ... 'Preserve thyself' plays the part of the supreme motive for the individual but 'seek peace' is his supreme duty.[29]

[26] Hobbes, *Leviathan*, p. 227.
[27] *ibid.*, p. 189.
[28] R. Filmer, *Patriarcha and other Political Works*, ed. P. Laslett (Oxford, 1949), p. 242.

This distinction between *motive* and *duty* in Hobbes is the gap through which Warrender is able to introduce his theory that the obligation to seek peace must be founded on something other than prudential calculations of self-preservation. I think it would be fair to say that were it not for this distinction, Warrender's case would have very little plausibility. As it is, many of his critics have failed to see the strength of his case, though there are one or two notable exceptions.[30]

But we are now in a position to provide a different account of the discrepancy from Warrender's, without simply ignoring it, as most of his more recent critics in particular have done. In the work in which the distinction between right and law first appeared, there was an important point in regarding self-preservation as a right, since it could be renounced: what we have to explain is thus not why the distinction was developed, but why it was retained into the later works. And here a number of factors become relevant. One of them is of course the fact that Hobbes had already publicly committed himself to treat self-preservation as a right and not a duty; explicitly to change his stand on this issue would have pointed up the oddity of his new position, and might also have laid him open to the sort of attack which the Tew Circle writers launched on Parker. But most importantly, it would also have rendered impossible his account of the state of nature in terms solely of *rights*, upon which the law of nature supervened. Instead, he would have had to postulate a primary law, from which both rights and further laws could be derived – in other words, a more traditional account of the natural state of men. The alterations in fundamental

[29] H. Warrender, *The Political Philosophy of Hobbes* (Oxford, 1957), p. 216.
[30] Thomas Nagel in particular focussed on this aspect of Warrender's case. He rehearsed Hobbes's position on rights and duties, and concluded that it 'appears in fact to be self-contradictory ... I confess that I do not know what is intended, but I do not think that it is possible on this basis to show that Hobbes felt we do not have an obligation to preserve ourselves.' T. Nagel, 'Hobbes's Concept of Obligation', *Philosophical Review*, LXVIII (1959), p. 71. But virtually none of Warrender's other critics (for the most up-to-date list of whom see McNeilly, *Anatomy of Leviathan*, pp. 257–61) have gone into the matter in any detail. Warrender himself replied to Professor Plamenatz's criticism of him by making just this point, which Plamenatz had not dealt with: 'personal self-preservation in Hobbes is not what makes actions obligatory, but what suspends the obligation from actions that would otherwise be obligatory ... personal self-preservation in Hobbes is a right, and not a duty, and so to be distinguished as a principle from the laws of nature'. H. Warrender, 'A Reply to Mr. Plamenatz', in K. C. Brown ed., *Hobbes Studies* (Oxford, 1965), p. 97.

features of his theory that would have been required were so many and so great that it is hardly surprising that he chose to continue treating self-preservation as a right.

If the interpretation of Hobbes which I have been suggesting is correct, then it follows that Sirluck got the relationship between Hobbes and the Tew Circle the wrong way round. The Tew writers developed a consistent theory out of Selden's ideas; Hobbes began along lines similar to theirs, and as a result was left with some awkward features in his theory when he diverged from them. But in some ways, what he did was to draw the logical conclusion from some of Selden's suggestions; his powerful vision proved a constant threat to the 'Seldenian' tradition when it revived in 1660, until what seemed to many to be the death-blow was delivered to it by Pufendorf in 1672.

II

Confirmation of this interpretation of Hobbes comes from the reaction to his later writings, particularly his post-Restoration *Dialogue between a Philosopher and a Student of the Common Laws*. Here too we can see that his ideas never fundamentally diverged from those of Selden's other followers, with embarrassing consequences for the more orthodox of them. To understand this, we must go back to Selden's original account, in his notes on Fortescue, of English legal history in terms of constant change and constant continuity. At the heart of his argument was the image of a ship altered plank by plank at sea – natural laws were originally

> limited for the conveniency of civil society here, and these limitations have been from thence, increased, altered, interpreted, and brought to what now they are; although perhaps, saving the meerly immutable part of nature, now, in regard of their first being, they are not otherwise than the ship, that by often mending had no piece of the first materials, or as the house that's so often repaired, *ut nihil ex pristina materia supersit* . . .[31]

As we saw earlier, in its acceptance of change in English legal history, this view developed from the standard attitude of late sixteenth- and early seventeenth-century common lawyers, but in the systematic account it gave of such change, and the full awareness that it was no argument against the laws of England, Selden's note was highly original.

Two people in particular, Matthew Hale and John Vaughan, developed Selden's ideas on the law in the years after 1660. It was Selden's picture of English legal history which Hale enlarged upon in his justly famous *History of the Common Law*, published posthumously in 1713 (Hale died in 1676). His relationship to Selden is much clearer than his relationship to Coke, though both his major recent commentators, Pocock and Gray,

[31] See above p. 84.

have wanted to associate him primarily with Coke.[32] Hale even borrowed Selden's imagery:

> Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho' not now extant, might introduce some *New* Laws, and alter some *Old*, which we now take to be the very Common Law itself, tho' the Times and precise Periods of such Alterations are not explicitely or clearly known: But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that Long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho' Physicians tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.[33]

He was clear that the reason for these changes was the constant attempt by law-makers to adjust to new circumstances, and that as a consequence it was a fruitless task to sort out the history of the English law; different parts had been introduced at different times, and the knowledge of the actual occasions could well now be lost.

Pocock has taken this picture of a constant change to have arisen from the idea of the English law as custom,

> or rather from that aspect of the idea of custom which emphasizes its universality and anonymity, the myriad minds who, not knowing the importance of what they do, have, each by responding to the circumstances in which he finds himself, contributed to build up a law which is the sum total of society's response to the vicissitudes of its history and will be insensibly modified tomorrow by fresh responses to fresh circumstances.[34]

But we need to make a distinction here in order to understand what both Hale and Vaughan thought. Pocock slides from talking (in the context of Hale) about the constant change and adaptation of law to new circumstances, to talking about *custom*, that is, the creation of law without the deliberate decision of a law-making authority. (It is for this reason above all that he wants to associate Hale with Coke, who undoubtedly did want to protect the common law from such an authority.) But this is not a necessary transition – after all, modern law is constantly being changed and adapted, but it is not at all a customary law. And it is precisely that transition which Hale and Vaughan were in fact rather unwilling to make.

Hale's remarks on this subject in his *History* need to be read in the light of the closely parallel remarks of Vaughan in some of his judgements. The

[32] See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957), p. 173; M. Hale, *The History of the Common Law of England*, ed. C. M. Gray (Chicago, 1971), pp. xxi ff.

[33] Hale, *History*, p. 40.

[34] Pocock, *Ancient Constitution*, p. 173.

important passages in Hale's *History* are in chapter IV, where he distinguishes between three 'formal Constituents' of the Common Law: common usage or custom, the authority of Parliament, and judicial decisions. But one cannot take it for granted that these three formal constituents are all alternative ways of making the common law. Hale specifically ruled this out in the case of the third:

> It is true, the Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is.[35]

This suggests that the formal constituents could simply be the various ways in which the common law could be *known*, rather than *made* – precisely the distinction which seems to have exercised Hale. On the other two constituents, he remarked first that 'Usage and Custom generally receiv'd, do *Obtinere vim Legis* ... And if it be enquired, What is the Evidence of this Custom, or wherein it consists, or is to be found? I answer, It is not simply an unwritten Custom, not barely *Orally* deriv'd down from one Age to another; but it is a Custom that is deriv'd down in Writing ...'[36] But it is his remarks on the role of Parliament which are most interesting:

> We are to know, that although the Original or Authentick Transcripts of Acts of Parliament are not before the Time of Hen. 3. and many that were in his Time are perish'd and lost; yet certainly such there were, and many of those Things that we now take for Common Law, were undoubtedly Acts of Parliament, tho' now not to be found of Record. And if in the next Age, the Statutes made in the Time of Hen. 3. and Edw. 1. were lost, yet even those would pass for Parts of the Common Law, and indeed, by long Usage and the many Resolutions grounded upon them, and by their great Antiquity, they seem even already to be incorporated with the very Common Law ... Those Constitutions and Laws being made before Time of Memory, do now obtain, and are taken as Part of the Common Law and immemorial Customs of the Kingdom; and so they ought now to be esteem'd tho' in their first Original they were Acts of Parliament.[37]

Here, Hale seems to have assimilated the first and second constituents: an unspecified proportion of the customs were in fact Acts of Parliament, that is, decisions by a clear and precise authority, which had simply continued in force for so long that lawyers ceased to refer to them as specific enactments. Hale was not entirely clear about the status of the customs which did not have this origin; Vaughan, characteristically, was much harder headed. In the case of *Edward Thomas* v. *Thomas Sorrell*, in 1667, he observed,

> many things are said to be *prohibited* by the *Common Law*, and indeed most things *so prohibited* were primarily *prohibited* by *Parliament*, or by a Power equivalent to it in

[35] Hale, *History*, p. 45.
[36] *ibid.*, p. 44.
[37] *ibid.*, p. 44–5.

> making Laws, which is the same, but are said to be *prohibited* by the *Common Law*, because the Original of the *Constitution* or *prohibiting Law* is not to be found of *Record*, but is beyond memory, and the Law known onely from practical proceeding and usage in *Courts of Justice*, as may appear by *Laws* made in the time of the *Saxon* Kings, of *William the First*, and *Henry the First*, yet extant in *History*, which are now received as *Common Law*. So if by accident the *Records* of all *Acts of Parliament* now extant, none of which is older than 9 H. 3. (but new Laws were as frequent before as since) should be destroyed by fire, or other casualty, the memorials of proceeding upon them found by the *Records* in Judicial proceeding, would upon like reason be accounted *Common Law* by *Posterity*.[38]

And in the case of *Edmund Sheppard* v. *George Gosnold*, in 1672, which turned on the status of the ancient customs chargeable upon imports and exports, Vaughan argued that they were originally due by an Act of Parliament (now lost) of Edward I. But he remarked:

> Nor is it a true Inference, That if the *Antiquae Custumae* were at *Common Law* (as every thing in one sense is taken for *Common Law*, if it be Law, when it appears not to be by *Act of Parliament*) therefore it was by *Arbitrary Imposition* of the King, for it might be by *Act of Parliament* not extant, as this of 3 E. 1. and in truth, most of the *Common Law* cannot be conceived to be Law otherwise than by *Acts of Parliament*, or *Power equivalent* to them, whereof the *Rolls* are lost; for alwaies there was a power and practise of making new Laws.[39]

Both Hale and Vaughan thus viewed the common law as possibly the creation of past Parliaments, or their equivalent (whatever Vaughan may have intended by that expression). If it was such a creation, then it was clearly not custom in Coke's (or Pocock's) sense; it was quite compatible even with a Hobbesian view of sovereignty, provided that the Hobbesian sovereign was taken to be Parliament. Neither Hale nor Vaughan were particularly worried about the uncertainty over the history of Parliament: the debates over the origin of the Commons which Pocock has traced were of course not debates over the antiquity of Parliament itself. Many people throughout the late sixteenth and seventeenth centuries (including Dodderidge, Selden and Spelman) could believe both that some kind of Parliament had been a continuous feature of the English constitution, and that the Commons had not always been part of it.[40]

It is worth remembering at this point Aubrey's reminiscences of how he got Hobbes to write his *Dialogue between a Philosopher and a Student of the Common Laws*, and how it was received. Some time after 1664 Hobbes yielded to Aubrey's persuasion, and wrote the *Dialogue* after studying Bacon's *Elements of Law*. 'He drives on, in this, the King's Prerogative high. Judge Hales, who is no great Courtier, has read it and much mislikes it, and is his enemy. Judge Vaughan has perused it and very much

[38] *Reports and Arguments*, ed. E. Vaughan (London, 1677), p. 358.
[39] *ibid.*, p. 163.
[40] For Dodderidge, see *A Collection of Curious Discourses*, I, ed. T. Hearne (London, 1771), p. 283; for Selden see his *Opera Omnia*, II, ed. D. Wilkins (London, 1726), cols. 1026–7; for Spelman, see *Reliquiae Spelmannianae* (London, 1723), pp. 57–66.

commends it, but is afraid to license it for feare of giving displeasure.'[41] Aubrey's remarks about people's reactions to each other are often the most misleading parts of his reminiscences, but it is clear that Hale felt much more strongly about the *Dialogue* than Vaughan. But it is also clear that in their ideas on the status of the common law, Hale and Vaughan did not diverge a great deal from each other – it was rather that Hale was prepared to accept a greater degree of unclarity. This should prompt us to read Hale's well-known attack on the *Dialogue* with some caution: what did Hale actually criticise in Hobbes's argument? Was there a fundamental difference between them?

To answer this, we have first to consider the arguments of the *Dialogue*, which have often been misunderstood (though less so by its most recent commentator, Joseph Cropsey). The Philosopher in the *Dialogue* accepted the Lawyer's distinction between the common law and statute law, and also the description proferred by the Lawyer (explicitly following Coke) of the common law as the law of reason. He gave a general Hobbesian account of law – 'I grant you that the knowledge of the Law is an Art, but not that any Art of one Man, or of many how wise soever they be, or the work of one or more Artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law . . .'[42] – but this was intended to apply to both common and statute law, and not to undermine the distinction. Hobbes had after all argued just this about the law of nature itself, so the Philosopher could accept the Lawyer's point about the common law being the law of reason in a way that statute law was not. He continued (in the passage which was the occasion for the first half of Hale's critique),

> 'Tis very true; and upon this ground, if I pretend within a Month or two to make my self to perform the Office of a Judge, you are not to think it Arrogance; for you are to allow to me, as well as to other Men, my pretence to Reason, which is the Common Law (remember this that I may not need again to put you in mind, that Reason is the Common Law) and for Statute Law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in two Months.[43]

Hale's response to this was by no means to come to Coke's defence in a straightforward way. His repudiation of Hobbes in fact rested more on a rejection of the distinction between common and statute law – a rejection that we should expect, given what we have seen of his theory of the common law's origins. He had to establish against Hobbes the conventionality and arbitrariness of the common law, such that it was not accessible to an untrained, natural reason, and he did so by arguing in the following kind of way:

[41] Aubrey, *Brief Lives*, I, p. 394; see also pp. 341–2.
[42] Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. J. Cropsey (Chicago, 1971), p. 55.
[43] [illegible] p. 56.

> It is a part of the Law of England that all the Lands descend to the eldest Sonne without a particular Custome altering it. That a Freehold passeth not without Livery and Seisin, or Attornement by an Act in Paijs. But where Statutes have altered, then an Estate made by Deed to a Man for ever passeth only for life without the word Heires and Infinite more of this kind. Now if any the most refined Braine under heaven would goe about to Enquire by Speculation, or by reading of Plato and Aristotle, or by Considering the Laws of the Jewes, or other Nations, to find out how Lands descend in England, or how Estates are there transferred, or transmitted among us, he would lose his Labour, and Spend his Notions in vaine, till he acquainted himselfe with the Lawes of England, and the reason is because they are Institutions introduced by the will and Consent of others implicitely by Custome and usage, or Explicitely by written Laws or Acts of Parliament.[44]

Hale's case was that whether one took the laws to be introduced by custom or statute (and he did not here enlarge on the difference between the two modes), they would appear arbitrary to a contemporary student, as the various occasions for their introduction had now been forgotten – the same point which he made in his *History*. It did not follow, he was at pains to emphasise, that such laws were now out of date or unjustifiable: the rational procedure was to assume that their original purpose still held good, even if no adequate historical account of it could now be given. It is this element in his argument which looks extremely Burkean, and which has led Pocock to think that Hale was putting forward a theory of the gradual and insensible modification of the common law through the decisions of innumerable private individuals;[45] but as we have already seen, that is an unfounded extension of Hale's more limited point. Hale's case is in fact perfectly compatible with a complete denial of the genuinely customary status of the common law, which Pocock takes to be the characteristic position of Hobbes. The reason why in Hale's theory we should not only obey but take as prudentially justified five hundred year old *statutes* was exactly the same as the reason why we should treat six hundred year old *customs* in the same way.

Hale's objection to the second part of the *Dialogue* was similarly compatible with at least some of Hobbes's premisses. Hobbes argued in the second and subsequent sections that the king of England was a genuinely Hobbesian sovereign, with the right and duty if he thought the common interest demanded it of taking his subject's goods without their consent. The justification for this was of course general considerations of what it was rational for a sovereign to do, and those same considerations (he believed) would generally lead a sovereign to consult with his subjects in something like a Parliament before issuing laws or demanding taxation. But that was a prudential constraint, and therefore to be disregarded in cases of need, such as a military emergency.

[44] *Reflections . . . on Mr. Hobbes His Dialogue of the Law*, printed as Appendix III to W. Holdworth, *History of English Law*, V (London, 1924), p. 505.
[45] Pocock, *Ancient Constitution*, p. 173.

Hale's reply to this consisted firstly of a discussion of what the law of England actually was, which he intended as a demonstration that the king was not allocated such powers. But secondly he tried to justify the limitations on the king, and he used two arguments to do so. The first was that a long succession of kings had promised to be so bound, and 'tho' it is true that the Kinges Person is Sacred, and not under any Externall Coertion, nor to be arraigned by his Subjects for the violation of that Sacred Oath yett no man can make a Question whether he be not in the Sight of God and by the bond of Naturall Justice oblidged to keepe itt'.[46] In other words, he was employing the characteristic Seldenian argument against Hobbes, about the obligation to keep any promises; but with a surprising degree of diffidence and qualification. More important to his case was a set of prudential arguments, based on the clearly Hobbesian (though also, of course, Seldenian – as shown in Hammond's works) principle of the relationship between protection and obedience.

> The greate happiness of any Government rests Principally in this, namely the Mutuall Confidencé that the Governours have in the people as to point of Duty and obedience and that the Governed have in their Governours as to point of Protection, and to Secure this mutuall Confidence was that Ancient and Solemne Institution of Oath of Fidelity of the People to the Prince and of Preotection and upholding their first Liberties & Laws by the Prince to the People. And the first breach that happens in this Golden Knott as by miserable Experience we have learned, [is when it comes to be believed that] the Prince is bound to keepe none of the Lawes that he or his Ancestours have by the advice of his great Councill Established that he may repeale them when he sees cause. That all his Subjects Properties depend upon his Pleasure [etc.].[47]

Against the claim that it might be necessary for a sovereign to act in this way, he made simple empirical points – 'this is but an imaginary feare as appeares by Experience. For this Kingdome hath been now these 500 yeares govern'd by Laws made by Parliamentary advise and noe time yett affords us an Instance wherein a Parliament might not be timely Enough called for such a Supply ...'[48]

It is clear from this that Hale was not in fact putting forward a radically different theory as an alternative to Hobbes's: many of his premisses were similar to Hobbes's, and what was at stake was the kind of conclusions to be drawn from them. Hobbes himself, as Cropsey has pointed out, provided one of his least outrageous accounts of government in the *Dialogue*.[49] It is not therefore particularly surprising that someone like Vaughan, who did not have very different views from Hale's in this area, should have admired the work. This is not to say, of course, that Hale did not genuinely

[46] Hale, *Reflections*, p. 511.
[47] *ibid.*
[48] *ibid.*, p. 512.
[49] Hobbes, *Dialogue*, pp. 9–10, 48.

feel strongly about it: the difference between his ideas on the actual constitution and Hobbes's was sufficient to make the attack very necessary. But this difference should not be seen as based on the kind of fundamental divergence which Pocock (for example) has suggested.

III

So far, the particular theory put forward by Hobbes has appeared rather isolated: in England, men who were attracted to this new way of looking at politics seem to have gone (as we have seen) for Selden's version of it. There was no one like Taylor or Vaughan to put forward a genuinely Hobbesian point of view, as I have diagnosed it, in the 1650s or 1660s. The one country where Hobbes's arguments as set out in *De Cive* or *Leviathan* rather than the *Elements* attracted support as well as abuse was Holland. There a whole series of writers, mostly associated with the liberal republican and anti-clericalist regime of the De Witts, produced works endorsing and utilising at least some of Hobbes's ideas, and in the process revealing some of the differences between Hobbes and the Seldenians.

The first person to do so was Lambert Velthuysen, who in 1651 published an *Epistolica Dissertatio de Principiis Justi et Decori* in which he defended his version of Hobbes's theory against an anonymous critic with whom he had recently been in correspondence. Velthuysen later became one of the political commissaries appointed by the Utrecht city council to attend the meetings of the church consistory, and achieved fame as an enthusiastic opponent of ecclesiastical power.[50] His ideas are perhaps best summed up in a work belonging to this period, *Tractatus de Poena Divina et Humana* of 1664. In this he argued that the right to punish derived from the right of self-defence, along orthodox Hobbesian lines; but he departed from them when he interpreted that right as derived from our knowledge of God's purposes. It is clear (he argued) from a consideration of our biological make-up and our passions, that self-preservation is the prime function of the organism, and such a biological fact carries moral overtones when we recognise God's design in it.[51]

This kind of interpretation of the right of self-defence was in fact common to all the Dutch Hobbesians that we shall be looking at, and was associated with another of their common features, their Cartesianism.[52] Although Hobbes and Descartes had been very critical of each other, there was in Descartes's *Passions de l'Ame* (published in 1649) material for a

[50] For Velthuysen, see E. H. Kossmann, *Politieke Theorie in het Zeventiende-eeuwse Nederland*, Verh. der K. Ned. Akad. v. Wet., Afd. Lett. N.R., LXVII, No. 2 (Amsterdam, 1960), pp. 34–6; see also P. Geyl, *The Netherlands in the Seventeenth Century*, II (London, 1964), p. 115.
[51] See his *Opera Omnia*, I (Rotterdam, 1680), pp. 54–75.
[52] See C. L. Thijssen-Schoute, *Nederlands Cartesianisme*, Verh. der K. Ned. Akad. v. Wet., Afd. Lett. N.R., LX (Amsterdam, 1954).

psychological theory which could easily be adapted to Hobbes's developed political ideas. In particular, there was the claim that 'the customary mode of action of all the passions is simply this, that they dispose the soul to desire those things which nature tells us are of use, and to persist in this desire, and also bring about that same agitation of spirits which customarily causes them to dispose the body to the movement which serves for the carrying into effect of those things.'[53] In Descartes, of course, this view of man's psychology was associated with a strong and very un-Hobbesian emphasis on his free will – man could control his passions and distinguish between their effective working and their harmful excess. But this in some ways made the task of linking Cartesian psychology to Hobbesian politics rather easier, for it allowed these Dutch Hobbesians to exploit Hobbes's point that the law of nature did not permit *everything possible*, but rather whatever was thought to be necessary to self-preservation (and in the process to reveal that this distinction was fully apparent to contemporary readers).

Thus Velthuysen argued that in a state of nature all men are judges of their own interests; in civil society the right to decide on such matters is transferred to the sovereign, and resistance to him is forbidden not because 'from subjection to a magistrate arises more right to inflict harm than individuals possess in a state of nature', but because 'the defendant is convicted in his conscience, and recognises that he has perpetrated a crime because of which his neighbour, or rather his *judge*, rightly expects vengeance in the public interest. And indeed even in the state of *nature* no one can resist their neighbour without sin, if their conscience tells them that he has been treated by them in an unworthy way, with cruelty, avarice or other vices . . .'[54] This is of course far more extreme than anything Hobbes ever said, though it is implied by his note to 1.10 of *De Cive*. It is also, it must be said, a more extreme argument than these Dutch writers usually put forward: in general, they insisted that one was always justified in preserving oneself, but one was not always justified in doing more than that, even in a state of nature. And they were able to combine this with their Cartesianism precisely because Descartes provided the psychological explanation of how men could refrain from doing whatever they had an impulse towards, and how they should restrict their activities to those things that were genuinely beneficial.

In addition to Velthuysen, we find the same kind of points being made by

[53] Descartes, *Philosophical Works*, I, ed. E. S. Haldane and G. R. T. Ross (Cambridge, 1931), p. 358.

[54] 'ex subjectione Magistratui jus magis [non] nascitur ad infligendum malum, quam singuli habent in statu *naturali* . . . reus in conscientia convictus, agnoscit se ea perpetrasse, propter quae proximus, vel dicam potius *iudex*, merito ad salutem reipublicae tuendam expetit vindictam. Et certe in statu *naturali* etiam nulli licet sine peccato resistere proximo, si conscientia ipsum arguet se concedentem crudelitati, avaritiae aut aliis vitiis, proximum indignis accepisse modis.' Velthuysen, *Opera*, I, p. 72.

the pseudonymous 'Lucius Antistes Constans' in his *De Jure Ecclesiasticorum* (1665) – a work which drew more explicitly than any other the anti-clerical implications of the theory, and which enjoyed a European reputation (the Earl of Shaftesbury is known to have possessed a copy)[55] – and most interestingly in the *Consideratien van Staat ofte Polityke Weeg-Schaal* (1661) of Johann de la Court (or, in Dutch, van Hove). The interest of de la Court's work is that while he argued in general very like Velthuysen, stressing that it was possible in a state of nature to break the law of nature,[56] and being if anything even more explicit in his use of a Cartesian psychology, he combined this with a Machiavellian political science.

It is notorious that Descartes and the early French Cartesians had no proper political theory – their ethics were entirely a nosology of an individual's emotions and a set of recommendations for coping with them. The one political theory they were interested in was Machiavelli's (though even then it was not a very deep interest), for Machiavelli portrayed politics as the public arena of the passions, and political techniques as based on a correct understanding of how those passions could be manipulated.[57] De la Court was the first person to marry this aspect of Cartesianism to Hobbesianism: the men in his state of nature were deemed to be capable of making Machiavellian calculations about what constitutions and social arrangements were likely to utilise and control their passions in such a way that the community benefited, and the conclusions they came to were taken to be those of the *Discorsi* – the republican regime of active citizens.[58]

It is with this group of writers that the most famous Dutch political theorist of the period, Benedict de Spinoza, is usually associated. He corresponded with Velthuysen (though on the basis of mutual opposition) and is known to have been deeply influenced by the 'political scientific' sections of the *Polityke Weeg-Schaal*. The book by 'Constans' was attributed to him by contemporaries, though he denied its authorship. He himself displayed the same kind of interest in Machiavelli as de la Court, and his relationship with Descartes, though complex and certainly not one of straightforward influence, is vital to any understanding of his work. And yet there is a striking and neglected fact about Spinoza, which is that a substantial part of his theory looks more like that of the *early* Hobbes or the Seldenians than like that of *De Cive*.

It is well known that he differed from the later Hobbes over the question of whether the law of nature permits *anything*: as he said, 'the right and law

[55] K. H. D. Haley, *The First Earl of Shaftesbury* (Oxford, 1968), p. 219.

[56] See W. Roed, 'Van den Hoves "Politische Waage" und die Modifikation der Hobbesschen Staatsphilosophie bei Spinoza', *Journal of the History of Philosophy*, VIII (1970), p. 37. See also Kossmann, *Politieke Theorie*, pp. 36–50.

[57] See G. Rodis-Lewis, *La Morale de Descartes* (Paris, 1957), pp. 100–5.

[58] This Dutch Machiavellianism and its links with later economic theory (as suggested by de la Court's brother Pieter's *Interest van Holland*) badly needs a good treatment; it is unfortunate that Pocock chose not to discuss it in his *The Machiavellian Moment* (Princeton, 1975), for it might have thrown a different light on some of his conclusions.

of nature, under which all are born and for the most part live, forbids nothing save what nobody desires and nobody can do: it forbids neither strife, nor hatred, nor anger, nor deceit; in short, it is opposed to nothing that appetite can suggest'.[59] The only contemporaries who said anything like this were men such as Jeremy Taylor:

> Whatever we naturally desire, naturally we are permitted to. For natures are equal, and the capacities are the same, and the desires alike; and it were a contradiction to say that *naturally* we are restrained from any thing to which we *naturally* tend. Therefore to save my own life, I can kill another, or twenty, or a hundred, or take from his hands to please my self, if it happens in my circumstances and power; and so for *eating*, and *drinking*, and *pleasures*

or John Vaughan:

> it is evident that nothing which *actually* is, can be said to be *unnatural*, for Nature is but the production of effects from causes sufficient to produce them ... so no *Copulation* of any man with any woman, nor an effect of that *Copulation* by *Generation*, can be said *unnatural*; for if it were, it could not be, and if it be, it had a sufficient cause.[60]

Clearly, no one could suppose that Spinoza had read either Taylor or Vaughan. But their basic theory was available to him in two places. One was Hobbes's *Elements of Law*, published in French (which he could read) in 1652, but the other was Selden's *De Jure Naturali et Gentium juxta disciplinam Ebraeorum* itself – a work which was likely to be particularly attractive to a Jew. This can be no more than conjecture, and it is equally probable that Spinoza simply converged on the same kind of theory as the Seldenians from his very different and idiosyncratic metaphysics; given the absence of references to any influences or analogous arguments which is so notorious a feature of Spinoza's work, we can say little more.[61] But it is certainly plausible to see Spinoza not against a background solely of Hobbes and Descartes, as has been customary, but against the more complicated background I have depicted, in which Hobbes had his rivals; and not all the positions which seem superficially to derive from *Leviathan* or *De Cive* did indeed do so.

[59] 'jus et institutum naturae, sub quo omnes nascuntur et maxima ex parte vivunt, nihil nisi quod nemo cupit et quod nemo potest prohibere; non contentiones, non odia, non iram, non dolos, nec absolute aliquid quod appetitus suadet aversari.' Spinoza, *Works*, pp. 126–7; see also pp. 15–16.

[60] See above pp. 111, 114.

[61] He did not possess a copy of either work at his death – see the probate inventory in J. Freudenthal, *Die Lebensgeschichte Spinoza's* (Leipzig, 1899), pp. 160–4. See also pp. 203–4.

7

The Radical Theory

The years 1640–3 saw not only the publication of the major works in the conservative natural rights tradition, but also the appearance of a rival way of talking about natural rights. As we saw in Chapter Three, Grotius provided the basic language for both traditions: the conservatives drew on the central idea of free men being capable of renouncing their freedom, while the radicals drew on the (in Grotius, more peripheral) idea of interpretative charity applied to fundamental political agreements. Radicalism of this kind seems in the present state of our knowledge to have been at this time an exclusively English phenomenon: some Dutch lawyers took up Grotius's remarks in the *Inleidinghe* about inalienable liberty and used them to attack slavery,[1] but no Dutchmen before the 1650s seem to have used the rather different and much more general arguments of the *De Iure Belli*.

It must be stressed that while the principle of interpretative charity led directly to the notion of 'inalienable rights', the radicals never abandoned the basic rights theory common to both traditions. *Logically*, according to both, it is possible for free men to renounce all their natural rights; but charity, according to the radicals, requires that we assume that they have not done so. We must presume that our predecessors were rational, and hence that they could not have intended to leave us totally bereft of our rights. This is the argument that Grotius had used to defend the possibilities of resistance and common ownership *in extremis*, and it is the argument that was to occur year after year in the pamphlets of the English radicals, sometimes with direct references to Grotius. There is no reason to suppose that anyone using this argument had to have read Grotius: interpretative charity is an obvious principle to use in order to modify a strong rights theory, and once the language of natural rights became sufficiently common it was likely to be developed independently of Grotius. On the

[1] See in particular Simon van Groenewegen van der Made, *Tractatus de Legibus Abrogatis* (Leiden, 1649), on *Institutes* 1.1.8 (2nd edn Nijmegen, 1664, p. 5). For a discussion of the influence of both the *Inleidinghe* and *De Iure Belli* on Arnold Vinnius, greatest of the mid-century Dutch lawyers, see R. Feenstra and C. J. D. Waal, *Seventeenth-Century Leyden Law Professors and their Influence on the Development of the Civil Law*, Verh. der K. Ned. Akad. v. Wet., Afd. Lett. N.R. XC (Amsterdam, 1975), p. 30.