

## Some Basic Hobbesian Concepts

The major masterpieces of philosophy are never out of date. They continually stimulate us to fresh questioning, present us with ideas about the world, mankind, and history that can enrich, clarify, and correct our own ideas, and offer us reflections, challenges, and options on living that may be of value to us in our coping with our own human problems and moral difficulties. Thomas Hobbes was a great systematic philosopher and one of the foremost universal minds of the seventeenth century.<sup>1</sup> Although his writings encompassed a wide range of subjects, including various branches of philosophy, the natural sciences, mathematics, psychology, religion, history, and other areas, his largest fame has always been due chiefly to his work as a political philosopher and as the author of *Leviathan*, one of the classics of Western political theory, no less important as a distinctive view of man and government than are *The Republic* of Plato, the *Politics* of Aristotle, and *The Prince* of Machiavelli. As a political philosopher Hobbes has most commonly been identified especially with two ideas. The first is the concept of sovereignty. He has been considered the first thinker to achieve a clear and unambiguous comprehension of the principle of sovereignty in its various attributes as the defining characteristic of the state or commonwealth. The second is the concept of the prepolitical, antisocial state of nature as a condition of endless war and unrestricted natural right and his development of the principle of covenant, contract, and consent as the necessary presupposition and basis of the existence of the political order, sovereign power, and political obligation. Assessments of his significance as a political thinker in light of these ideas typically picture him as essentially a theorist of the unity and comprehensive sovereignty of the state over all its subjects, concerned above all with the preservation of civil peace and obedience and accordingly an uncompromising proponent of governmental absolutism and centralized power. Otto Gierke, a great historian of political theory and natural law, said of Hobbes that by “remorseless logic and arbitrarily assumed premises . . . he created the idea of a single State personality” that overwhelmed the rights of the individual. Carl J. Friedrich, a noted political theorist, described Hobbes as “the philosopher of power par excellence” who held “the most secular view of the all-powerful state as a system of ordering the universe of human life.”<sup>2</sup>

While not erroneous or false, these characterizations of Hobbes as a political philosopher are nevertheless one-sided and unbalanced, and hence fail to convey an adequate understanding of his political thought and values. Hobbes was much more than a theorist of sovereignty and political absolutism. He was likewise a great moral philosopher and philosopher of law. Because his moral philosophy and analysis of law were a vital part of his political theory, he belongs as much to the history of ethics and legal philosophy as to the history of political thought. His moral philosophy derived from his theory of natural law, and it also included his theory of natural right. Natural law and natural right were thus the twin foundations on which he built the entire structure of his moral and political theory. No reader of Hobbes can fail to notice the pivotal importance he assigns to the law of nature in his political writings. Few readers understand, however, why he based his moral philosophy on this principle or what its point or purpose is in his political theory. In particular, there is little understanding of the role played by natural law in qualifying his theory of political absolutism.

This book, which can perhaps be termed a historical-philosophical essay, is primarily a discussion of Hobbes as a theorist of natural law and moral philosopher in relation to his political philosophy. The literature on Hobbes has become almost overwhelmingly large and is also very controversial. While every work concerned with his political thought has had to pay some attention to his treatment of the law of nature, the writings dedicated to the exploration of this subject in depth and that attempt to define its historical relationship to the tradition and the wider stream of natural law theory and to explain the particular features that make for its profound originality are comparatively few.<sup>3</sup> As far as I know, there is no modern study by an Anglophone or other scholar that concentrates mainly on Hobbes's interpretation of the law of nature and its implications. While numerous authors have recognized his unorthodoxy as a natural law theorist, persisting disagreements and divergences in the Hobbes literature regarding the meaning of his concept of natural law are the rule rather than the exception and make it difficult to gain a clear grasp of his unique historical position as a natural law theorist and moral philosopher. In an interesting essay on Hobbes's moral philosophy dating from the 1960s, Michael Oakeshott, a leading Hobbes scholar, spoke of "the obscure heart of Hobbes's moral theory" and noted a number of conflicting interpretations of his concept of the law of nature, as well as apparent contradictions in his moral philosophy. This caused him to conclude that "every interpretation" of Hobbes "leaves something that [he] wrote imperfectly accounted for." One of the main questions about Hobbes's thought that Oakeshott believed remained unresolved was whether he held

that the law of nature was really law, and therefore obligatory as law upon all mankind.<sup>4</sup>

This situation has not changed much in the intervening years. In a 2001 essay, the distinguished Hobbes scholar David Gauthier points to various inconsistencies in the philosopher's discussion of the law of nature and maintains that he was confused as to whether its precepts should be understood primarily as theorems of reason, commands of God, or commands of the civil sovereign. Gauthier decides in favor of the first alternative as the only choice available to Hobbes, and also holds that he failed to think through the issues connected with the roles the law of nature had to play in his argument.<sup>5</sup> Gauthier's interpretation is in striking contrast to the one proffered by A. P. Martinich in his debatable 1992 study, *The Two Gods of Leviathan*, which contends that Hobbes was an orthodox religious Christian of Calvinist persuasion and that inherent in his concept of natural law was its character as a divine command, which alone made it genuine law.<sup>6</sup>

Among the issues posed by Hobbes's moral and political theory and its thought on law is not only his understanding of the relationship between natural law, divine law, and civil law but whether or not he should be considered a legal positivist. Legal positivism holds that there is no such thing as natural law and that the latter involves a conceptual confusion between law as it is and law as it ought to be. For this reason, legal positivism has always been considered antithetical to natural law. It is a doctrine whose origins are associated with the philosophy of utilitarianism and the jurisprudence of Jeremy Bentham (d. 1832) and John Austin (d. 1859). Both of these thinkers defined law exclusively as a command of the sovereign or a superior addressed to those who are obligated or accustomed to obey (the imperative theory of law). They also denied that the concept or definition of law and the criterion of legal validity had any necessary connection with moral values, whether justice or any other (the separation of law and morals). Austin called the confusion between law and morals a "most prolific source of jargon, darkness, and perplexity." Bentham, besides rejecting the existence of natural law, was no less skeptical of the theory of natural rights, which he dismissed as nonsense. Legal positivism in the form of the thesis of the separation between law and morals is widely prevalent in contemporary Western legal philosophy and has been espoused by such influential thinkers as the Briton H.L.A. Hart and the Austro-German Hans Kelsen.<sup>7</sup> Hobbes's discussion in his political theory of the supremacy and scope of civil law as the will of the sovereign has often caused him to be seen as one of the founders of legal positivism. M. M. Goldsmith describes him as a legal positivist in a recent survey of his concept of law. So likewise do Gregory Kavka, Jean Hampton, and S. A. Lloyd in their studies of Hobbes's moral

and political philosophy.<sup>8</sup> On the other hand, Gauthier considers it misleading to regard him as a forerunner of legal positivism, because for Hobbes the obligation to obey the civil law of the sovereign stems ultimately from the consent of subjects and is therefore prior to the existence of civil law and outside the positive legal system itself.<sup>9</sup> The late distinguished Italian political philosopher and legal scholar Norberto Bobbio, while emphasizing Hobbes's importance and distinction as a natural law theorist, has pictured him nevertheless as fundamentally a legal positivist, that is, a thinker in whose system "the laws of nature finally have no other role than that of providing the ground of validity for a state that recognizes only positive law, and who therefore accepts natural law only "in the service of a consistent and coherent theory of positive law."<sup>10</sup> Is it possible that Hobbes could have been both an exponent of natural law and a legal positivist? If the answer is yes, we shall need to explain how he could have combined these two positions, which are historically and intellectually opposed to each other, within the body of his philosophy.

Hobbes never doubted the rigor, logic, or scientific character of his moral and political philosophy and frequently stated that he had proved the truth of the arguments propounded in his political writings. Not hesitating to rank himself with such eminent scientific inaugurators as Copernicus, Galileo, and Dr. William Harvey, he claimed that he had founded the science of civil or political philosophy in his book *De Cive*.<sup>11</sup> He considered that in the latter he had "demonstrated by a most evident connexion . . . the rudiments both of morall and civill prudence." Of *Leviathan* he stated that its "whole doctrine" and the principles he set forth in it "are true and proper, and the ratiocination solid."<sup>12</sup> He was fully aware, nevertheless, of the problem and frequent difficulty of interpretation in determining the true meaning of a text. His penetrating comment in *Leviathan* on the subject of interpretation should always be borne in mind when we read and analyze his own work:

For it is not the bare words, but the scope of the writer, that giveth the true light by which any writing is to be interpreted; and they that insist upon single texts, without considering the main design, can derive nothing from them clearly, but rather . . . make everything more obscure than it is.<sup>13</sup>

This is very sound advice that instructs us to pay attention not only to particular passages in his work but to its main design, or to what Oakeshott called "the structural principles of Hobbes's view of things."<sup>14</sup> Hobbes had a sweeping intellectual ambition, and he thought so much and wrote so much on such a variety of subjects that he could hardly have failed at times to create puzzles for his readers or to be guilty of slips, inconsistencies, and

confusions. These are faults from which no philosopher can be free, and in discussing Hobbes's work I have not been particularly concerned to give them much attention. This is because I believe that Hobbes was a great constructive thinker whose moral and political philosophy sprang from a few fundamental insights that, despite any lapses or inconsistencies we may detect in his development of them, shaped the general character and dominant tendencies of his thought. These insights constitute a large view of life, and it is they, particularly as they are expressed and involved in the Hobbesian concepts of natural law and natural right, that are the main subject of this essay.

## The Law of Nature

Natural law or the law of nature is a grand and venerable concept dating back to classical antiquity, one whose importance can hardly be overestimated, exerting as it did a profound influence on Western thought and culture for many centuries. In the sense in which Hobbes and his predecessors employed it, it had nothing to do, needless to say, with the scientific, empirical investigation of the physical world and should not be confused with the belief that physical phenomena are governed by causal necessity or uniform laws of nature. It pertains wholly to the moral, legal, and political domain and is a metaphysical and teleological doctrine that conceives the basic rules of morality as genuine and universal law whose source is not in any human legislator but in Nature, and ultimately in the reason or will of God the creator. But why should ancient philosophers have added the word "Nature" to the word "Law"? "Nature" in Greek (*physis*), Latin (*natura*), and the modern Western languages covers an exceptionally broad semantic field containing a multiplicity of meanings that are by no means invariably consistent with one another. Underlying the idea of natural law as it emerged in Greek philosophy is that of nature as a norm, whose historical background and vocabulary have been traced by Lovejoy and Boas in their exemplary study of primitivism and related ideas in antiquity. This idea is at bottom and in its origins an animistic personification and endowment of nature with an intelligent, rational, purposive, and ethical character. Lovejoy and Boas observe that "one of the strongest, most potent and persistent factors in human thought" has been the use of the term nature to express a standard of value and hence to identify the good with that which is natural or according to nature. By the fifth century BCE, the word *physis* or nature had already acquired, they tell us, "a peculiar sanctity in Greek usage and carried a definitely eulogistic connotation." The difference pointed to by the Sophists, Plato, and other Greek

philosophers between nature, on the one hand, and its opposite, *nomos*, or custom, convention, and local law, on the other, signified a constant contrast between that which is normal, permanent, objectively right, and the same everywhere and that which consists of varying, dissimilar, and hence arbitrary human laws and practices. Nature could also mean the original form of something and therefore its right or best condition.<sup>15</sup>

While Aristotle's *Nicomachean Ethics* may be regarded in retrospect as a work of moral philosophy, it is much more concerned with the formation of character, the virtues, human happiness, and the good life for man than it is with moral obligation and imperatives of good and evil. The philosophy of Aristotle did not allude to the moral law of nature, but it is shot through with a teleological view of nature as a purposive agency that does nothing in vain and whose works have a universal validity. He distinguished in his ethics between natural justice and the merely legally and conventionally just, the former being that which has the same force everywhere and does not depend on or vary with people's opinions. His *Politics* famously invokes the idea of nature as an end-directed process to explain that man is by nature a *zoon politikon* or political animal who in order to fulfill his needs is impelled to seek association and cooperation with others. The creation of the *polis*, the city or state, is then shown to be due not to prior convention or deliberate agreement but to an unfolding teleological process in which the natural union of male and female in forming families in order to supply basic human needs, and the natural inclination of families to unite in villages and larger communities, leads eventually in an evolutionary development to the emergence of the state as a natural political order that, originating in the bare necessities of life, continues its existence as a self-sufficient association for the sake of a good life for its human members.<sup>16</sup>

Although some of its elements are traceable to earlier Greek thinkers, the concept of the law of nature as a moral norm or standard was first formulated in the philosophy of Stoicism during the Hellenistic era in the fourth and third centuries BCE. This philosophy, which also dealt with logic and physics but whose most lasting influence was in the field of ethics and politics, looked upon nature and the cosmos as a harmonious order pervaded by divine reason and universal law. Its ethical teaching exalted reason and virtue as necessary to happiness and disparaged the emotions. It conceived natural law as a dictate of reason grounded in nature which prescribes what is right and just to human beings and is knowable to them through the faculty of reason with which nature has endowed them. With Stoicism, the idea of duty or *kathēkonta* seems to make its earliest appearance in moral philosophy.<sup>17</sup> In the second and first centuries BCE, Greek Stoic philosophers brought their conviction of a moral world order under the guidance of na-

ture and reason to Rome, where it was absorbed by many Romans of the highest rank. Among the latter was the statesman, orator, and man of letters Cicero (d. 43 BCE), one of the most important thinkers of the ancient world in his influence on posterity, who discussed the law of nature in several of his works.<sup>18</sup> In a famous description in his dialogue *On the Commonwealth*, he defined it as right reason in agreement with nature, universal, unchanging, and everlasting, summoning to duty by its commands and averting from wrongdoing by its prohibitions, valid for all nations and all times, binding on everyone in its obligation, and deriving from God as its author and promulgator.<sup>19</sup> This classic statement would have been known during the succeeding centuries to every writer on natural law in early Christian, medieval, and early modern Europe, including, of course, Hobbes. Through Cicero and other ancient authors the law of nature also left its stamp on Roman law. The eminent jurists of imperial Rome whose opinions were later recorded in the *Digest* as a part of the Emperor Justinian's great legal codification of the earlier sixth century CE, the *Corpus Iuris Civilis* (*Corpus of the Civil Law*), viewed the *ius naturale* or law of nature as belonging to the general structure of law. They related it to justice as a universal law and described it in several different ways. According to one opinion, natural law was not limited to the human species but was an ordinance that nature taught to all living creatures, and from which came such things as the union of the sexes and the procreation and rearing of offspring. Another opinion identified the law of nature with the law of nations or peoples, *ius gentium*, as a common law that natural reason had ordained for all mankind. A third declared that the law of nature was a name applied to that which in all circumstances is good and equitable.<sup>20</sup>

Roman jurists did not place the law of nature above their own civil law, but the normative character of natural law as an implicitly higher moral law applicable to all of humanity was one of its features that became increasingly prominent with the spread of Christianity and the Christianization of the law of nature in the following centuries. St. Paul affirmed the existence of the universal law of nature in a remarkable passage of his letter to the Romans, which stated that although the Gentiles, unlike the Christians, lacked the law of Moses, they nevertheless did by nature the things required by the law, which was written in their hearts and attested by their conscience (Romans 2:14–15). With the decline of Roman civilization, it was in part owing to Christian authors such as the church fathers St. Ambrose, St. Augustine, and St. Isidore of Seville that the classical conception of the immutable natural law and its association with justice and other moral values was transmitted to the Christian Middle Ages to become an essential element in medieval and early modern moral, legal, and political philosophy.<sup>21</sup>

Medieval theologians, church lawyers, and philosophers who discussed the law of nature were in agreement that its origin lay in God and nature and that its principles were identical with the law of God contained in Scripture and the Gospels. An early authoritative expression of this opinion appeared in the canonist Gratian's twelfth-century compilation of the canon law, the *Decretum*. This work began with the dictum that two laws, the law of nature and of custom, rule mankind, and that the first of these is contained in the law and the Gospel in the command that everyone should do to another as they would be done by and forbidding the doing to another of what one does not wish to be done to oneself. Gratian also stated that natural law began with the creation of man as a rational being and is unchangeable. Because he conceived it as an offspring of divine law, he ranked the law of nature above all other laws in its antiquity and dignity. Its superiority was emphasized in his further comment that "whatever has been recognized by custom, or laid down in writing, if it contradicts natural law, it must be considered null and void."<sup>22</sup>

The transcendental foundation of natural law in God and nature, its in-nateness in human minds and equivalence with reason, and its position above other kinds of law except divine law were among the principles stated by many scholastic philosophers of the later Middle Ages. The works of Aristotle on ethics, politics, metaphysics, and other subjects, which became available in Latin translations in the later twelfth century and the thirteenth century, introduced Aristotelian naturalism to Christian philosophers and made known to them its teleological conception of everything in nature being directed toward an end and its distinction between natural and conventional or local justice. The revival of the study of Roman law in Italy and elsewhere from the eleventh century onward passed on to medieval canonists and lawyers the legacy of Roman jurisprudence and its reflections on the law of nature. The list of medieval thinkers who concerned themselves with natural law is a long one. It includes such distinguished names as Abelard, Alexander of Hales, Bonaventura, Albertus Magnus, Thomas Aquinas, Duns Scotus, William of Ockham, Jean Gerson, and numerous others.<sup>23</sup> The most important of medieval natural law theorists was Aquinas (d. 1274), the harmonizer of Aristotelian naturalism with Christian supernaturalism, who dealt architectonically and comprehensively with the subject of law and envisaged natural law as participating in the eternal law through which God ruled the universe. I return to this great Catholic philosopher of natural law in relationship to Hobbes later in this essay.

Historians of natural law and moral philosophy have noted and stressed the distinction that appeared in the later thirteenth and the fourteenth century among scholastic thinkers and philosophers of natural law between vol-

untarism and intellectualism. Voluntarism gave primacy to God's sovereign will and divine omnipotence as the source of the dictates of the law of nature and the determination of moral rules and values. According to this view, actions are good not because they are inherently so and rooted in the nature of things but because God's will has chosen to define them as such, and so in this sense, the rules of morality are arbitrary, being based entirely on God's infinite power. The alternative view, intellectualism, gave primacy to God's intellect and held that God ordained the rules of morality because he knew them to be good; these rules were accordingly recognized by God's supreme reason as objectively real and right, and thus could not be other than they were. While Aquinas was an exponent of intellectualism, Duns Scotus (d. 1308) and William of Ockham (d. c.1349) were among the foremost exponents of voluntarism. The differences between these two positions, which philosophers discussed in a very sophisticated way, were connected with additional questions concerning God's freedom and human free will and determinism.<sup>24</sup> We should not exaggerate their opposition, however, since philosophers usually seem to have tried to make allowance for both God's will and his reason in dealing with the basis of natural law.<sup>25</sup> Hobbes has often been considered to be a voluntarist in his treatment of natural law, and voluntarism has sometimes been seen as the forerunner of legal positivism.<sup>26</sup>

The law of nature remained an essential concept in the moral and political philosophy of early modern Europe, discussed in various contexts by many authors, most of whom are now very obscure, between the sixteenth century and the late eighteenth century. During the Middle Ages the doctrine of natural law was assimilated into the moral theology of the Catholic Church and used in Catholic casuistry in the guidance and direction of the moral conscience in matters of conduct. Aristotle's *Nicomachean Ethics* was the most widely studied work of moral philosophy in the early modern universities, and Aristotelian logic, metaphysics, science, and teleology based on the philosopher's doctrine of final causes dominated the university curriculum in both Catholic and Protestant countries after the Reformation. In Protestant Germany, the eminent scholar, humanist, and teacher Philipp Melanchthon, a close associate of the reformer Martin Luther, equated moral philosophy with explication of the law of nature by the use of reason in order to establish rules to govern behavior. Some of the foremost Protestant theologians of the sixteenth century, despite their belief in the sinfulness and corruption of human nature, appropriated the doctrine of natural law as a guide to human conduct implanted in man by God. Neostoicism, an intellectual movement originating in the later sixteenth century, was based on the ethics of Stoicism as a model for living and enlisted the allegiance of a number of noted European thinkers and statesmen. In

England the principal sixteenth-century writer who discussed the different kinds of law and the law of nature was the Elizabethan theologian and political philosopher Richard Hooker, author of *The Laws of Ecclesiastical Polity*. In Catholic Spain in this period, a line of Dominican and Jesuit theologians and jurists belonging to the scholastic tradition, such as Francisco Vitoria, Domingo Soto, Gabriel Vazquez, Gregory of Valencia, and Francisco Suárez, were among the noted figures who dealt with the law of nature in treatises on law and justice and commentaries on the work of St. Thomas Aquinas.<sup>27</sup> As Gierke pointed out, the belief was very general among early modern theorists of law and politics that natural law was unalterable by any human power, that all positive law was derived from it, and that an enactment contrary to the law of nature was null and void.<sup>28</sup>

In 1625 the Dutch Protestant jurist Hugo Grotius published his celebrated work, *The Law of War and Peace* (*De Iure Belli ac Pacis*), one of the founding texts of international law, which was also concerned with the law of nature. Grotius (d. 1645) and Suárez (d. 1617) were Hobbes's most important immediate predecessors as natural law theorists. In 1641 the English lawyer John Selden, a great scholar, antiquarian, and Orientalist renowned for his Hebraic learning, brought out his treatise, *De Iure Naturali et Gentium juxta Disciplinam Ebraeorum* (*The Law of Nature and Nations According to the Teaching of the Hebrews*), which discussed natural law in light of the Jewish tradition and the commands God gave to Noah and his sons and descendants after the flood. After the appearance of Hobbes's main political works, the Anglican cleric Richard Cumberland and the philosopher John Locke were the chief English writers on the law of nature in the later seventeenth century. On the continent in the same period the foremost theorist of natural law was the German jurist and philosopher Samuel Pufendorf. The literature of natural law continued to increase in Germany and other countries during the eighteenth century until the time of the philosopher Kant.<sup>29</sup> Hobbes was widely recognized in his own time and later as a great thinker and exerted a large influence on his contemporaries and successors as a political and natural law theorist, though mainly more negatively than positively, through the critical reaction his work provoked.

When we survey the idea of the law of nature over its long history prior to its gradual decline and widespread rejection in the course of the nineteenth and twentieth centuries, there is one observation to be made about it that I find rarely, if ever, mentioned in the historical literature on the subject and that is also very germane to Hobbes. This is that the concept of natural law is a very comforting and consoling one that suits our human desire for cosmic meaning. It is linked to the kind of theism that affirms a beneficent nature and God's providential government of the world. Historically, however, it

belongs to a prescientific outlook based on a belief in final causes, one that assumes a teleologically directed cosmic order and tends to exalt mankind above all other created beings as the possessor of a divinely ordained and naturally implanted reason that makes known to human beings the universal principles of the moral law of nature. This fact is of great importance when we recall that the scientific revolution of the seventeenth century, of which Hobbes was part, undermined the traditional Christian, value-graded picture of the universe and its hierarchically structured levels of being, demoting man and the earth from their central position in the pre-Copernican universe and giving gradual rise to a nonanthropomorphic, mechanistic, frequently materialist, and nonteleological view of nature. This transition is what the historian of science Alexander Koyré aptly summed up in the phrase, “from the closed world to the infinite universe.”<sup>30</sup> In a recent comment by the British moral philosopher John McDowell, published in a *Festschrift* dedicated to another distinguished moral philosopher, Philippa Foot, the author remarked that “modern science has given us a disenchanted conception of the natural world. A proper appreciation of science makes it impossible to retain the common medieval conception of nature as filled with meaning. . . . The tendency of the scientific outlook is to purge the world of meaning.”<sup>31</sup> The idea of natural law, however, which continued to flourish in the seventeenth and eighteenth centuries, is an exception to this development. What this idea precisely helped to do in the same century that witnessed the eventual victory of Copernicanism, the growth of empiricism and experimentalism, and the unprecedented development of science, mathematics, cosmology, and various forms of scientific philosophy in the work of Bacon, Kepler, Gilbert, Telesio, Bruno, Harvey, Galileo, Descartes, Hobbes, Spinoza, Boyle, Hooke, Leibnitz, Newton, and many others, was to preserve meaning in the world by positing the existence of universal, immutable moral principles that derived from nature and the will and reason of God and existed as law on a rational foundation as part of human knowledge. Hobbes, however, although an exponent of scientific philosophy, occupies a unique position within the historical development of European thought in the era of the scientific revolution, for while he retained the concept of natural law as a rational construct, he was also to subvert and transform it.

### Hobbes’s Critique of the Natural Law Tradition

In his distinguished and still valuable history of Western political theory, G. H. Sabine commented that “it would have undoubtedly been easier for Hobbes if he could have abandoned the law of nature altogether, as his more

empirical successors, Hume and Bentham, did.”<sup>32</sup> Such a move, however, would probably have been impossible for him, for at least two reasons. First, natural law was a doctrine he could hardly have avoided or ignored, because it occupied such a dominant position in the classical and Christian philosophical tradition of reflection on morality and law and their transcendental or cosmic grounding in nature, the order of the universe, and the reason and will of God. Second, from the later sixteenth century onward, natural law constituted one of the strands in the development in Europe of a revolutionary political theory sanctioning a right of resistance to kings and unjust governments. During these years the law of nature was among the doctrines French Protestant writers invoked to justify and legitimize the Huguenot rebellion in the religious civil war against the French Catholic monarchy, and it was likewise advanced in the next century by radical English political publicists during the civil war of the 1640s to justify resistance to and the overthrow of the monarchy of Charles I.<sup>33</sup> Hobbes, who lived through the English civil war as an exile in France, condemned this revolutionary theory as a false moral doctrine and political philosophy and lamented its destructive consequences. “How many kings,” he asked,

. . . hath this one error, That a Tyrant King might lawfully be put to death, been the slaughter of? How many throats has this false position cut, That a Prince for some causes may by some certain men be deposed? And what blood-shed hath not this erroneous doctrine caused, That Kings are not superiour to, but administrators for the multitude?<sup>34</sup>

Since his chief aim as a political philosopher was to demonstrate the necessity of the absolute obedience of subjects to their sovereigns and the error of any pretended claim to a right of resistance, he had to take the theory of natural law into account in framing his argument.

Not only did Hobbes need the concept of natural law, it is impossible to overestimate the importance he attributed to it. Although natural right was an equally essential concept for him and one I shall come to presently, he devoted much less space to its explication than he did to the law of nature. As its title indicates, his first political work, *The Elements of Law Natural & Politic*, was intended in part as a treatise on natural law. In *De Cive* he told the reader that the whole book consisted of his endeavor to “unfold” the law of nature.<sup>35</sup> He regarded moral philosophy and natural law as one and the same, and in defining moral philosophy as “the science of virtue and vice,” he also affirmed that “the true doctrine of the laws of nature is the true moral philosophy.”<sup>36</sup> Yet within the long and venerable tradition of natural law, he seems to have been the first thinker of any stature who ventured

to criticize and fault this tradition for its persisting intellectual deficiencies and failure to advance. He expressed a low estimate of the way previous moral philosophers had dealt with natural law and disparaged them for their erroneous opinions on the nature of right and wrong and for their endless disputes on moral questions in which they contradicted both one another and themselves. Complaining that moral philosophers had built the foundations of natural law in the air, he claimed that knowledge of this law had not made the slightest progress since the time of antiquity and that it had “become of all laws the most obscure.”<sup>37</sup> These negative comments on his predecessors leave no doubt that the moral philosopher Hobbes envisaged himself as a reformer or renovator of natural law and was particularly conscious of the necessity of repairing its foundations and providing it with a firm and irrefutable grounding.

It is possible that Hobbes first discussed the law of nature in “A Discourse of Laws,” one of three discourses published in 1620 as part of an anonymous publication entitled *Horae Subsecivae (Leisure Hours)*. Until a few years ago, the author of this work was usually thought to be Hobbes’s pupil and employer William Cavendish, second Earl of Devonshire, but more recently a stylometric analysis by Noel B. Reynolds and Arlene W. Saxonhouse led them to attribute the three discourses to Hobbes himself.<sup>38</sup> Since the publication of their work, however, Andrew Huxley has shown that a part of “A Discourse of Laws” consists of an English translation of Francis Bacon’s unpublished *Aphorismi de Jure Gentium Maiore sive de Fontibus Justitiae et Juris (Aphorisms on the Law of Nations or the Sources of Justice and Law)*. Huxley has also speculated that Bacon may have written the entire discourse or that William Cavendish wrote it for Bacon.<sup>39</sup> “A Discourse,” which is a eulogy of law, is quite conventional in its brief remarks on the law of nature, which are unlike Hobbes’s later views. It describes the law of nature as common to human beings and all other living creatures and responsible for such actions as “the commixture of the several sexes which we call Marriage, generation, education, and the like.” It also distinguishes natural law from the law of nations, which is “the rules reason has prescribed to all men in general, and such as all Nations one with another do allow and . . . observe for just.” Although it has not been previously noticed, these passages derive directly from the well-known statements by the Roman jurists Ulpian and Gaius on the law of nature and nations dating from the second century and earlier third century CE, which, as I have pointed out above, were later incorporated into the *Digest* as part of the law code authorized by the Emperor Justinian.<sup>40</sup> Despite the claims of the editors of *Three Discourses*, it seems to me doubtful that any part of “A Discourse of Laws” was written by Hobbes or casts any light on his understanding of natural law.

We might wonder about Hobbes's knowledge of the literature of natural law. In 1640, when he wrote his first political treatise, *The Elements of Law*, in which he discussed the law of nature at length, he was already fifty-two years old and a mature philosopher. By then it is probable that he possessed a wide acquaintance with writings on the law of nature as well as with those in the related area of ethics or moral philosophy. Save for Aristotle, whose opinions on ethics, politics, and metaphysics he often criticized as mistaken, absurd, and ignorant,<sup>41</sup> he was usually very sparing in mentioning or citing other authors and their books by name in his published works. We have little direct evidence, therefore, to indicate what he may have read pertaining to natural law.

During his long life, however, he had available to him the substantial library of the second and third Earls of Devonshire, his employers, patrons, and friends, at their country mansions of Chatsworth and Hardwick Hall. Among the Hobbes manuscripts at Chatsworth is a catalogue of the Hardwick Hall library dating mainly from the 1620s, with some additions in the 1630s apparently compiled by the philosopher himself. It includes more than fourteen hundred titles in various languages by classical, medieval, modern, and contemporary writers dealing with theology, religion, philosophy, civil and ecclesiastical history, Roman law and English common law, politics, science, mathematics, geography, travel, and other subjects. Although it does not reveal which of the books in the Hardwick library Hobbes actually read, the catalogue lists numerous works that might have been of use to him in the formation of his moral and political theory and his critical conception of natural law.<sup>42</sup> His classical education, early humanistic interests, and proficiency as a classical scholar, as shown by his English translation of Thucydides' *History* in 1629, would have made available to him the main sources of ethical reflection and natural law in ancient philosophy and Roman law and jurisprudence. He would likely also have known some of the patristic and medieval scholastic writers on the law of nature, foremost among them Thomas Aquinas, and possibly even including William of Ockham and Marsilio of Padua.<sup>43</sup> He could also have looked into the works on law and natural law by some of the sixteenth-century Spanish school of philosophers and theologians, who were mainly Thomists, in particular the Jesuit Francisco Suárez. In *Leviathan* he quoted from a book on theology by Suárez, whom he criticized by name along with other scholastic thinkers for what he called their abuse of language and insignificant speech.<sup>44</sup> He might therefore have been acquainted as well with Suárez's discussion of the law of nature in his *Tractatus de Legibus ac Deo Legislatore* (1612) (*On Laws and God the Lawgiver*), which, like other treatises of this kind, contained a great many references to a host of authors. He

had certainly read widely in the works of the Italian Jesuit philosopher and theologian Cardinal Robert Bellarmine (d. 1621), to whom *Leviathan* devotes more space than to any other modern author in attacking him for his erroneous opinions in favor of the power and independence of the papacy.<sup>45</sup> In *The Elements of Law* Hobbes refers to the concept of sovereignty in Jean Bodin's *De Republica* (1576), a famous political treatise that also discusses the law of nature as a rule sovereigns are obliged to observe.<sup>46</sup> He had probably also read Machiavelli's *Discourses on the First Ten Books of Livy*, which, however, like Machiavelli's other political writings, totally ignores the subject of natural law.<sup>47</sup> Although he never refers to Hooker, he would probably have been aware of the discussion of natural law among the several kinds of law in the first book of Hooker's *The Laws of Ecclesiastical Polity* (1593). He might have also read the well-known work on common law, *Dialogue Between a Doctor of Divinity and a Student of the Laws of England* (1530), by the eminent English lawyer Christopher St. German, which includes a discussion of the law of nature and conscience.<sup>48</sup>

Except for Suárez, all of these authors who preceded Hobbes are included in the Hardwick library catalogue, as is likewise Grotius's *The Law of War and Peace*. Subsequent Protestant authors on natural law in the seventeenth and eighteenth centuries tended to regard this treatise by Grotius, despite the faults they may have found in it, as marking a new era in the philosophy of natural law. In the preface to his own famous work, *De Iure Naturae et Gentium* (1672) (*On The Law of Nature and Nations*), Pufendorf praised Grotius's pioneer achievement and described him as the man who first taught his age to value the study of natural law. Elsewhere he commended him as the first thinker to distinguish correctly the laws of nature from human positive law and to put them in the proper order. As a critic of Grotius, however, Pufendorf also observed that the former had omitted many subjects, treated others too lightly, and made errors that proved he too was only human.<sup>49</sup> Jean Barbeyrac (d. 1744), a French Protestant natural law theorist, disciple of John Locke, and erudite editor and commentator on the treatises of Grotius and Pufendorf, which he translated from Latin into French, was another of Grotius's admirers. His perspective on natural law was heavily influenced by Pufendorf. In a brief critical survey of the history of moral philosophy and natural law first published in 1706, he disparaged ancient and especially medieval moral philosophy while picturing his own time as an enlightened age that had "shaken off the Yoke of ill grounded authority" and raised "the Science of Morality . . . from the Dead." It was Grotius, he believed, who, inspired by Francis Bacon's earlier reform of philosophy, "first . . . broke the Ice" and effected the revival of the philosophy of natural law by his renowned work, *The Law of War and Peace*. But though

he praised Grotius, Barbeyrac also noted some of his flaws, such as his lack of mastery in the art of reasoning and methodizing his thoughts, his passing over some important subjects, his false and confused ideas in various matters, and the inadequacy of his treatment of law and natural law. On these grounds he concluded that as a thinker, Grotius was much inferior to Pufendorf, for whom he expressed the greatest esteem.<sup>50</sup>

Two other recent natural law theorists to whom Barbeyrac gave some attention were Selden and Hobbes. He did not assign a high rank to Selden's treatise on natural law. Although remarking on its vast erudition, he placed it well below the work of Grotius and called it obscure and poorly organized. He observed that Selden did not derive the principles of the law of nature from "the pure Dictates of Reason" but from the seven precepts given by God to Noah, which were founded on a doubtful tradition.<sup>51</sup> Referring to Hobbes, Barbeyrac called him "one of the most penetrating Genius's of his age," but pointed to his "dangerous errors," such as basing the origin of civil society on self-preservation and self-interest and giving an unlimited authority to kings even in matters of religion. He also noted that Hobbes had a reputation as an atheist because of his belief that everything was corporeal, and conjectured that certain "seeming Contradictions" in Hobbes's work were due to the fact that the philosopher "durst not speak all he thought." Barbeyrac nevertheless endorsed Pierre Bayle's judgment that "no one had ever yet so far discover'd the Foundations of Civil Policy" as Hobbes did.<sup>52</sup> Pufendorf, who was both much influenced by Hobbes and had various disagreements with him, similarly spoke very highly of him, praising his deep understanding of human and civil society and crediting him with applying to moral philosophy the type of precise demonstration used by mathematicians.<sup>53</sup>

Grotius's *Law of War and Peace* was not primarily a treatise on the theory of natural law or political and moral philosophy but a work of jurisprudence dealing mainly with the law of nations or international law. Witnessing the widespread wars of his time, which involved large parts of Germany and the Holy Roman Empire and all the greater states of Western Europe, Grotius was deeply troubled by what he called the Christian world's "lack of restraint" in the prosecution of war. Aiming to moderate the conduct of war, he sought principally in *The Law of War and Peace* to present a systematic treatment of "the body of law . . . concerned with the mutual relation among states," to show how this law applied even in war, and to explain the conditions of a just war.<sup>54</sup>

Pufendorf's and Barbeyrac's view of Grotius as a major innovator in the domain of natural law has been followed by a line of recent historians who regard him as the founder of the "modern" theory or school of natural law. Richard Tuck, for example, echoing Barbeyrac, states that "Grotius made

the breakthrough into a modern science of natural law.”<sup>55</sup> It has remained a matter of debate, however, in precisely what way the Grotian theory of natural law was either modern or a science. Sabine associated the “modernized” idea of natural law with secularism, rationalism, and a detachment from theology, and other scholars have mentioned its introduction of the concepts of the state of nature and natural rights.<sup>56</sup> Grotius’s *Law of War and Peace* certainly differed from its medieval predecessors in its style of presentation. Unlike the work of scholastic thinkers, it was not structured in a logical order of questions, replies, arguments, and objections and was far more the creation of a classically educated humanist lawyer than of a rigorous systematic philosopher. Yet it has been recognized by numerous scholars that Grotius was by no means a revolutionary and that the content of his natural law theory was continuous with that of medieval scholasticism. As historians of natural law, Rommen and d’Entrèves have stressed the element of rationalism as a new feature of the law of nature in the seventeenth century, but have nevertheless also emphasized Grotius’s indebtedness to medieval natural law and scholasticism.<sup>57</sup> Haakonssen too has commented that Grotius’s theory of natural law “conveyed to Protestant Europe large parts of natural law material utilized by the great scholastic thinkers, especially those of sixteenth-century Spain.”<sup>58</sup> Reviewing the question of Grotius’s modernity, the medievalist Brian Tierney observed that despite the belief that he inaugurated a new era of modern natural law, there is little agreement about what was distinctively modern in his work, and on the whole affirmed his continuity with the medieval tradition.<sup>59</sup>

One of the grounds for the claim that Grotius initiated a new and modernized interpretation of the law of nature is the famous sentence, often referred to with the shorthand *etiamsi daremus*, that is included in the Prolegomena of *The Law of War and Peace*. In this passage Grotius declared that the law of nature would possess “a certain validity even if we should concede [*etiamsi daremus*] what cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”<sup>60</sup> But far from inaugurating a new era in the theory of natural law by severing it from its theistic roots, as some scholars have mistakenly imagined, Grotius’s statement, which was not original with him, merely reiterated a well-known speculative notion familiar to natural law theorists since at least the fourteenth century. The possibility that natural law might be binding even if God did not exist was entertained as a hypothesis by Gregory of Rimini (d. 1358) and Gabriel Biel (d. 1495), and was also discussed by some of their Catholic successors in the sixteenth century.<sup>61</sup> As far back as 1880 the German historian Gierke remarked on the fact that “already medieval Schoolmen had hazarded the saying, usually referred to

Grotius, that there would be a Law of Nature discoverable by human reason and absolutely binding, even if there were no God, or the Deity were unreasonable or unrighteous.”<sup>62</sup> It could well be the case that Grotius first learned of this hypothesis from Suárez’s treatise *On Laws and God the Lawgiver*, who mentioned it and previous authors on the subject in his discussion of natural law. Among the points he touched on was the possibility that natural law does not have the character of a command that depends on the will of God but merely indicates what ought and ought not to be done, and is therefore licit even if there is no God.<sup>63</sup> Needless to say, however, Grotius never accepted for a moment the possibility of God’s nonexistence and expressly stated that the acts of moral baseness or moral necessity prohibited or required by the laws of nature are also “either forbidden or enjoined by the author of nature, God.”<sup>64</sup> Since both he and other theorists who cited this hypothesis totally rejected it as not only false and wicked but contrary to reason, they continued to assume that God was the ultimate source and sanction of natural law. At times, however, Grotius appears to suggest that the dictates of reason could in themselves create obligation. As between intellectualism and voluntarism, he was an intellectualist and therefore contended that not even God, though infinite in power, could change the law of nature, because this would be a contradiction in his godhood. Just as God could not cause two times two to be more or less than four, so likewise he could not cause what is intrinsically evil not to be evil.<sup>65</sup> Suárez, however, held that law and obligation could not be created simply as an effect of reason but required the will and command of a superior or legislator.<sup>66</sup> This was later also the position of Hobbes, who consistently defined law as a command and an expression of the sovereign’s will.

Although the reform of method in philosophy and science was a question of profound importance to many seventeenth-century thinkers and was discussed by such outstanding minds as Francis Bacon, Galileo, and Descartes, as well as by Hobbes, Grotius seems to have given it little attention.<sup>67</sup> Richard Tuck, who has written extensively about Grotius, has contended that he broke with humanism by making mathematics his methodological model in the moral sciences, but there is scarcely anything in Grotius’s writings to substantiate this dubious thesis.<sup>68</sup> If we look particularly at his major work, *The Law of War and Peace*, Grotius said in the Prolegomena that he had tried to avoid the controversies of his time, and that “just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.”<sup>69</sup> Actually, this statement was less than accurate, since Grotius mentioned a great many particular facts in his treatise, but it is also almost the only thing he says in it that has any relation to mathematics. In a later part of the work he specifically de-

nied that mathematics could be applied to moral philosophy and expressed his agreement with Aristotle's well-known opinion that unlike mathematics, moral questions are not capable of certainty. The reason he gives is that mathematical science separates form from substance and considers only the former, whereas in moral questions even trifling circumstances alter the substance and forms that are the subject of inquiry.<sup>70</sup> It is worth noticing that Jean Barbeyrac, in praising Grotius, never said anything to suggest that he used mathematics as a model. Instead, Barbeyrac named Hobbes, whom he called a "great Mathematician," and Pufendorf as the thinkers who deserved the credit for introducing the "Geometrical Method" into the study of political philosophy and law.<sup>71</sup> Grotius's main comment in *The Law of War and Peace* about his method was his admirable short remark that he had aimed in his work at three things above all: to make the reasons for his conclusions as evident as possible, to expound in a definite order the matters needing to be treated, and to distinguish clearly between things that seemed the same but were different.<sup>72</sup>

To my mind, Grotius was hardly more reliant on reason than Thomas Aquinas and other major scholastic thinkers, and, as will be pointed out presently, he failed to formulate a well-developed theory of natural rights. While it is possible (but not likely) that he wished to propound a theory of natural law on rational foundations independent of theology, his concept of the law of nature was certainly not independent of theism, since he needed the Christian God as a source of natural law just as much as his medieval predecessors did.<sup>73</sup>

There can be little doubt that Hobbes had read Grotius and would have been aware of his reputation as a celebrated European thinker, Protestant opponent of Calvinism, and a prominent figure in the early seventeenth-century religious and political controversies of the Dutch Republic, which forced him into a lifelong exile from his country. Grotius was well-known in England, which he had visited during the reign of James I. In 1604–5 he wrote *De Iure Praedae Commentarius* (*Commentary on the Law of Prize*), a youthful work that remained in manuscript and unread for more than three hundred years until its publication in 1868. This treatise, which touched on the law of nature, was a legal and theoretical defense and justification of the incursions and privateering activities of the United Dutch East India Company in the East Indies in regions that were claimed as a monopoly by the Portuguese and Spanish crowns, which were then united in the king of Spain. A single chapter from it was printed in 1609 with the title *Mare Liberum* (*The Freedom of the Sea*), prompted partly by the growing Anglo-Dutch commercial rivalry.<sup>74</sup> In 1636 Hobbes reported from Paris that he was reading John Selden's recently published book *Mare Clausum* (*The Closed Sea*), written in

reply to Grotius's earlier *Mare Liberum* to uphold the English monarchy's claim to the dominion or ownership of the sea surrounding Britain. In one of its chapters Selden mentioned Grotius's *Law of War and Peace* as an excellent work, and this reference would have brought it to Hobbes's attention if, as is most improbable, he had not seen it previously.<sup>75</sup>

Despite the total absence of Grotius's name from Hobbes's political writings, he made several indirect allusions to the Dutch thinker that indicate he did not think much of him as a philosopher of natural law. Indeed, G. Croom Robertson declared in his 1886 monograph on Hobbes, which is still worth reading, that Grotius was the author "plainly pointed at by Hobbes throughout as an opponent."<sup>76</sup> In *The Law of War and Peace*, Grotius wrote that to prove the existence of the law of nature, he had availed himself of the testimony of philosophers, historians, poets, and orators, and that when many people at different times and places affirmed the same thing as certain, it should be considered a universal cause and accepted as a correct conclusion drawn from the principles of nature or common consent.<sup>77</sup> It was this argument Hobbes obviously had in mind when he stated in *Leviathan* that he avoided quoting ancient poets, orators, and philosophers "contrary to the custom of late time," partly because in matters not of fact but of right there was no place for the testimony of witnesses, and also because all of those old writers sometimes contradicted themselves and each other.<sup>78</sup> In claiming to prove the existence of the law of nature from common consent, Grotius had also said that what all or the most civilized nations believe accords with natural law.<sup>79</sup> In *The Elements of Law* and again in *De Cive*, Hobbes specifically rejected this opinion affirmed by "certain writers," noting that there was no agreement about who shall judge which nations were the wisest, and denying that the consent of all mankind could determine what was contrary to the law of nature, because in that case, no man could offend against the law of nature.<sup>80</sup> Aside from these allusions, we must also suppose that Hobbes would have included Grotius in his blanket critique of the failure of the doctrine of natural law to make any progress since the days of antiquity. Hobbes was much more of an innovator in the theory of natural law than Grotius ever was, and compared with his originality in this area, the influence on him of his predecessors was relatively small.

## Natural Rights

Natural right or the right of nature originated centuries later than the concept of natural law, but like the latter, it occupies a vital place in Hobbes's thought. Together with natural law, it constitutes, as I have said earlier, the

foundation of the entire structure of his moral and political philosophy. The language of natural rights, which affected a good deal of political theory in the Anglophone world during the later seventeenth and the eighteenth centuries, is familiar to us today as an essential part of the Western liberal and democratic political tradition as expressed in certain of its most renowned emancipatory proclamations, in particular the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen of 1789, the products respectively of the American and the French revolutions. Invoking in its first sentence “the laws of nature and nature’s God,” the American declaration announces as a “self-evident truth” that “all men are created equal and endowed by their Creator with certain inalienable rights,” including “life, liberty, and the pursuit of happiness.” It then goes on to affirm that governments are instituted “to secure these rights” and derive “their just powers from the consent of the governed.” The French declaration states that “men are born and remain free and equal in rights” and that “the aim of every political association is the preservation of the natural and inalienable rights of man,” which are “liberty, property, security, and resistance to oppression.” Natural rights were thus pronounced to be the inborn and inalienable possession of every human being and to be rooted in a natural or original condition of personal freedom. As a matter of historical evolution, it is of the utmost consequence to observe that natural rights are also the direct and immediate forbear of the present concept of human rights, which emerged during the twentieth century to be enshrined after the Second World War in the United Nations’ Universal Declaration of Human Rights of 1948 and later international covenants. In our own time, human rights, the offspring of natural rights, have become a global shibboleth, a supreme moral demand, and a worldwide rallying cry in the opposition to totalitarian, authoritarian, and theocratic regimes.<sup>81</sup>

The concepts of natural and human rights have been exhaustively discussed in recent decades in countless books and articles by moral and legal philosophers, political theorists, and historians, who have attempted to explain their origin, their meaning, and their foundation. Although throughout today’s world there is a profound and passionate belief shared by many ordinary people, political activists, intellectuals of different stripes, and various philosophers that every human being possesses innate rights that all persons, authorities, and governments are morally bound to respect, a very noticeable feature of the literature on this subject is its failure to offer any convincing ground or proof for the claim that such rights actually exist.<sup>82</sup> The 1948 United Nations’ Universal Declaration of Human Rights gave no reason to justify its assumption that the large number of human rights it mentioned were real or universal. The declaration simply asserted their

existence as a recognized fact, and insofar as it tried to explain how mankind came by these rights, it attributed them to the dignity of the human person, another moral proposition that, however admirable and appealing, was itself in need of proof and does not refer self-evidently to anything that exists.

The utilitarian Jeremy Bentham, who disbelieved in natural rights as strongly as he did in natural law, stated that “right is with me the child of law. . . . A natural right is a son who never had a father.”<sup>83</sup> Put another way, rights that derive from positive law, whether statutory or constitutional, are unproblematic in origin and their existence is not a mystery or puzzle. Rights of this kind also usually impose or imply a legal obligation on persons and governmental institutions either to refrain from hindering their exercise or to assist in giving them effect. By contrast, rights universally imputed to mankind as an innate possession based on nature or the dignity of the human person have not been known or recognized until very recent times. Unless they acquire legal standing as part of international treaties or are enacted by the legislatures of particular countries, these rights do not in themselves impose legal obligations on anybody and can only be regarded as the wishful creation of philosophers, political writers, and activists in social and political causes. During the seventeenth and eighteenth centuries, however, when the concept of natural rights flourished, skepticism about their existence was hardly typical, because nature was still widely conceived as a normative moral force imbued with intelligent purpose and the agency of God the creator. We need have no doubt that Hobbes would have given serious thought to the difficult question of how the natural rights he posited could be grounded.

Natural rights are personal rights that pertain to every individual, and the theory of natural rights is therefore highly individualistic. A natural right is an assertion on the part of individuals of a normative or moral claim, entitlement, or power to act or refrain that belongs to them simply in virtue of their rational human nature. It is based on the abstract conviction that members of the human race are born with rights imparted to them by nature that entitle them to personal freedom and civil equality. As the legal philosopher H.L.A. Hart has argued in his classic paper, “Are There Any Natural Rights?,” if there are any such rights, then at least one of them is the equal right of all human beings to be free.<sup>84</sup> In any political conception of natural rights, and for Hobbes too, as we shall see, the natural right to be free is the primary or original right, and with this right, in the case of Hobbes, is also closely associated the right of self-defense of one’s life and body. Historically, to give effect to this principle, one of the political claims most natural rights theorists have made is that governments are legitimate only if they derive from or are

based in some way on the consent of the governed and are accountable to the governed for their actions.

The theory of natural rights was unknown in Greco-Roman antiquity and the early Middle Ages.<sup>85</sup> Although the absence of a word in a particular language does not necessarily mean that the speakers of this language also lacked the corresponding concept, it is significant that in neither Greek nor Latin was there any term for rights in the sense of a claim, entitlement, or power to act inhering in an individual as an expression of a natural freedom. The Greeks could speak of *to dikaion*, a term related to *dike* or justice, as that which is objectively just or right, but they lacked a conception of individual rights.<sup>86</sup> It is a striking and often overlooked fact that the original and for many centuries the predominant meaning of right, or in Latin the word *ius*, was not something attributed to individuals as a claim or entitlement but an objective property of rightness pertaining to various actions that made them just or right. *Ius* was accordingly closely akin in its meaning to such terms as *iustitia* and *iustum*, “justice” and the “just.” Although the Roman legal system included provision for the rights of persons with respect to the ownership and inheritance of property and a variety of other matters, such rights were the creation of Roman civil law, not nature.<sup>87</sup> The closest that Roman jurists came to the idea of a rightful natural freedom was their supposition that men were born free in the earliest times according to natural law, and that the subsequent existence of slavery, an institution found throughout the world, was due to the *ius gentium* or law of nations, even though contrary to nature.<sup>88</sup> The fact that human slavery was contrary to nature never caused them to question its existence or call for its abolition.

Natural rights were historically an outgrowth of what present-day scholars and theorists have termed subjective rights in the sense that they are thought to be inherent in each individual person by nature. Natural rights are also closely related in their historical development to the doctrine of natural law, which was commonly thought of as a law of reason that conferred certain basic rights on human beings. The emergence of the subjective sense of a right signified a shift or extension from the primary and original meaning of right as the objectively just or right thing to do to that of a moral power, claim, entitlement, or liberty with which God and nature had endowed the individual. Although this liberty could be termed a right partly because it was considered just and right, the concept of natural rights added a subjective side to this meaning that was valid because it was derived from nature.

The concept of subjective and natural rights took shape between the twelfth and sixteenth centuries, as the most recent research has shown.<sup>89</sup>

It first appeared in the writings of some of the twelfth- and thirteenth-century legal commentators and canonists on Gratian's *Decretum* and papal legislation. It underwent further development in the thought of William of Ockham, Jean Gerson, and other medieval philosophers, and from thence was transmitted in the sixteenth century to the philosophers of natural law in Catholic Spain and other countries. In the course of this evolution, the Latin word *ius*, which primarily signified law, including the idea of justice, was coupled with the term *naturale* to acquire the meaning in various contexts of natural right, or *ius naturale*. Brian Tierney has cited examples from twelfth-century canonistic texts in which *ius naturale* was defined as a faculty, power, or force. He suggests that William of Ockham's fourteenth-century antipapal polemic *Breviloquium* may have been the first rights-based treatise on political theory, and quotes it as stating that the abuse of papal power was "opposed to the rights and liberties granted by God and Nature." He also quotes Gerson's subjective definition of *ius* as "an immediate faculty or power pertaining to anyone according to the dictate of right reason" or "according to the dictate of primal justice."<sup>90</sup> More than two centuries later Suárez equated *ius* with a right and said that it meant a faculty or moral power that every man has over his own property or with respect to that which is due to him.<sup>91</sup> Although subjective rights were not necessarily called natural rights, it is easy to see how the idea of a natural right might be introduced when the claim, entitlement, faculty, or power referred to something as fundamental as freedom, which God or nature and natural law were thought to have granted mankind.

The Latin phrase *ius naturale* has been called a semantic minefield, since it had the dual meaning of both natural law and natural right and could shift from the one meaning to the other.<sup>92</sup> The Latin *lex* means law and was often used interchangeably with *ius*, as Aquinas sometimes did, who referred to both *ius naturale* and *lex naturalis* in affirming that right is the object of justice.<sup>93</sup> Suárez pointed out that the word *lex* could be synonymous with *ius*, and that justice was a requirement of each.<sup>94</sup> Natural law and natural rights were accordingly closely related and could even be considered identical, since natural rights were generally regarded as a dictate and product of the law of nature.

Grotius has been seen as a strong and original theorist of natural rights who influenced Hobbes, but I can find no justification for this view.<sup>95</sup> Grotius was far more concerned with the law of nature, which he applied in various contexts, than with natural rights. When he comes to the discussion of rights in the first book of *The Law of War and Peace*, these are subjective rights that he treats under the heading of law. There is a meaning of law, he

says, in which it can be regarded as rights that refer to the person, and in this sense, “right is a moral quality of a person, which makes him competent to have or do something lawfully” (“Quo senso jus est, qualitas moralis personae, competens ad aliquid juste habendum vel agendum”); when this moral quality is perfect, it is called a faculty, and when not perfect, an aptitude; a faculty corresponds to an act, an aptitude to a potency. He then goes on to explain that a faculty or legal right is what jurists call a right to one’s own, and that he will henceforth regard this as signifying a right or *ius* properly and strictly so called. Included in legal right is a power over oneself, which is called liberty, or over others, such as that of a father or a master of slaves. Also included in it are the right of ownership of property, whether more or less absolute, and contractual rights, to which there are corresponding obligations.<sup>96</sup>

Grotius’s discussion of *ius* as a faculty seems to be based entirely on Roman law, as is indicated by the marginal annotation in which he says that “the Roman jurists very properly define liberty as a *facultas* or legal right.”<sup>97</sup> I have pointed out in a previous note the close connection in Roman law between the meanings of *facultas*, *potestas*, and *ius* as a legal right.<sup>98</sup> One of the best accounts of subjective rights in Grotius has been provided by the French Grotian scholar Peter Haggenmacher, who has traced their development in the Dutch jurist’s writings and noted the clear differences between him and Hobbes.<sup>99</sup> As treated by Grotius, subjective rights have no affiliation with natural rights but are the creation of law, a part of the juridical order, as Haggenmacher says,<sup>100</sup> and ultimately traceable to natural law. Unlike Hobbes, Grotius never mentions a prepolitical state of nature in which human beings possess natural rights grounded in their desire for self-preservation and the conveniences of life. It is also evident that rights in the sense of the liberty of individuals are not an important theme in *The Law of War and Peace* and that Grotius never achieved a well-defined and fully articulated conception of natural rights.<sup>101</sup> In occasional passing remarks he explained how civil society originated when men in isolated households joined together to resist attack, and thus gave rise to civil power. From those who associated themselves to form civil society, he said, “derives the right which passes into the hands of those who govern.” He therefore envisaged that some kind of agreement or consent and a conveyance of rights were necessary to the establishment of government.<sup>102</sup> But he nevertheless rejected as erroneous the opinion that sovereignty always resides in the people and maintained that just as any man may enslave himself if he wishes, so a people may by their own choice legally transfer their right to govern in such a way that they no longer to retain any right in themselves.<sup>103</sup>

He specifically denied the existence of an individual's right to freedom and included among the unjust causes of war the desire of freedom by a subject people.<sup>104</sup>

Hobbes was the first political philosopher to criticize the conflation of right and law as an error and to unpack the difference between the two and hence also between natural right and natural law. In *Leviathan* he pointed out in a manner highly relevant to Grotius that “even the most learned Authors” that speak of the subject

confound *ius* and *lex*, right and law, yet they ought to be distinguished, because Right consisteth in liberty to do or 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>105</sup>

*De Cive* explained that “Law is a Fetter, Right is freedome, and they differ like contraries.”<sup>106</sup> In other formulations, Hobbes identified right or *ius* with “a blameless liberty of using our own natural power and ability” and defined it as “that liberty which every man hath to make use of his naturall faculties according to right reason.”<sup>107</sup> For him, therefore, a right, generally speaking, “is that liberty which the civil law leaves us;”<sup>108</sup> it is the freedom to do what we wish in any and all matters in which we are not subject to the obligation of law to do or forbear. “Naturall liberty” is thus “a Right not constituted but allowed by the Lawes; For the Lawes being removed, our liberty is absolute” and “where Liberty ceaseth, there beginneth Obligation.”<sup>109</sup> Hobbes's conception is generally one of subjective right, but it also retains some of the older meaning of right as an objective rightness when the acts resulting from the freedom to do or forbear accord with right reason.

It is of great interest that some years later, in the second of his *Two Treatises of Government* (1689), the philosopher Locke took issue with Hobbes's conception of law as a restriction on liberty. While not naming him, it was surely against Hobbes that Locke aimed his comment that

Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the Law, as a useless thing would of it self vanish; and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices. . . . [T]he end of Law is not to abolish or restrain, but to preserve and enlarge Freedom . . . where there is no Law, there is no Freedom. . . . But Freedom is not, as we are

told, A Liberty for every Man to do what he lists: (For who could be free when every other Man's Humour might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.<sup>110</sup>

Locke's position as here expressed is actually close to Hobbes's, for it implicitly recognizes the benefits of exchanging unlimited freedom for the rule of law. Hobbes said almost the same thing in language from which Locke may even have borrowed, when he observed that

the use of laws (which are but rules authorized) is not to bind the people from all voluntary actions, but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness, or indiscretion, as hedges are set, not to stop travelers, but to keep them in the way.<sup>111</sup>

What, then, is the right of nature or a natural right, as Hobbes understood it? For him, this is the fundamental human right, rooted in what he believes is empirically observable as the most elemental feature of human nature, namely, its instinct and desire for self-preservation and fear of and aversion to death, especially violent death, as the greatest of natural evils. He therefore defines the right of nature, "which writers commonly call *jus naturale*," as "the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto." Hobbes can justifiably call this a "natural right" because it is in the highest degree natural in the human being, arising, he says, from "a certain impulsion of nature, no lesse then that whereby a Stone moves downward." Hence he concludes concerning this right that

it is neither absurd, nor reprehensible, neither against the dictates of true reason for a man to use all his endeavours to preserve and defend his Body, and the Members thereof from death and sorrowes; but that which is not contrary to right reason, that all men account to be done justly, and with right; Neither by the word Right is any thing else signified, then that liberty every man hath to make use of his naturall faculties according to right reason. Therefore the first foundation of naturall Right is this, That every man as much as in him lies endeavour to protect his life and members.<sup>112</sup>

Elsewhere he states the conclusion of this reasoning as follows: "It is therefore a right of nature: that every man may preserve his own life and limbs, with all the power he hath."<sup>113</sup>

The clarity and logic of Hobbes's analysis of the distinction between right and law and the relationship between the two was unrivaled in the natural law tradition up to his time. Within this tradition as it evolved in the later Middle Ages and the early modern era, the law of nature was generally thought to be the source of rights and natural rights. Without natural law there could be no natural rights. Because it preceded and authorized certain rights, the law of nature occupied a more significant place in legal, moral, and political philosophy than rights did. Indeed, Hobbes's view of natural rights differed radically from that of his predecessors. The law of nature and the right of nature are correlative concepts in his moral, legal, and political theory. The most distinctive feature of Hobbesian natural right is its character as an original prepolitical freedom inherent in human beings and sanctioned by right reason. For Hobbes, natural rights are not the creation of natural law but a primordial entitlement grounded in the most basic instinct and reasonable desire of human nature, the passion and wish to go on living. Hobbes could have argued that the right of nature was not a philosopher's thought imputed to mankind but a rational claim immanent in human nature, since the wish and freedom of individuals to preserve their lives was the ever-present condition of all their other activities and aims.

A half-century ago Leo Strauss's book *Natural Right and History* distinguished between two categories or types of rights, which he designated "classic natural right" and "modern natural right."<sup>114</sup> A celebrated conservative thinker, learned scholar, and inspiring teacher, Strauss is well-known for his critical opposition to the relativism of modern political philosophy and for his belief in the superiority of ancient philosophy, which is reflected in its concern with such profound questions as the highest type of life for man and the best regime. He created some confusion for the readers of his book by referring to classic natural right when he really meant natural law and by speaking at times as though natural law and natural right were synonymous terms. The essential point he makes, however, is that whereas classic natural right as developed in the philosophy of the ancient world and the Middle Ages affirmed the primacy of duties, modern natural right affirmed the primacy of rights. "The premodern natural law doctrines," he observes, "taught the duties of man; if they paid any attention at all to his rights, they conceived of them as essentially derivative of his duties." In the seventeenth and eighteenth centuries, he also noted, rights were given a far greater importance than ever before, so that natural rights tended to displace natural duties. Strauss regarded Hobbes as the seminal thinker who

was most responsible for effecting the shift in moral and political theory from duty to rights and thus for the creation of a new political doctrine that was the begetter of liberalism. He deplored this change and associated Hobbes very questionably with the amoral political theory of Machiavelli, despite the fact that the latter lacked any conception of natural rights. He also described Hobbes as the creator of political hedonism, whatever that may mean. He ignored altogether the moral significance of modern natural rights in their contribution to the progress of political freedom, constitutional government, and civil equality in Western society.<sup>115</sup>

The valid core in Strauss's thesis is the fact that Hobbes did propound an original concept of natural rights by making them one of the foundations of the political order. Hobbesian natural right and a certain idea of freedom are interwoven. The right of nature entails an indefinitely wide freedom of each person to decide and act with respect to what conduces to his self-preservation. Hobbes conceived this right, however, as greatest and most absolute in the prepolitical condition he called the state of nature, in which there existed neither government nor law. In the following chapter I discuss his understanding of this condition and the further development of his moral and political philosophy, including the role of the law of nature in curtailing the absolute liberty conferred by the right of nature. During Hobbes's lifetime the principle of natural rights often assumed a revolutionary character when it was invoked in the name of freedom by rebels and radical political movements to justify resistance to divinely ordained kings and to demand far-reaching political reforms. Hobbes, who was a believer in authoritarian government, never intended the doctrine of natural right to be used for revolutionary purposes and took care in his philosophy, as we shall see, to strip it of its revolutionary import.