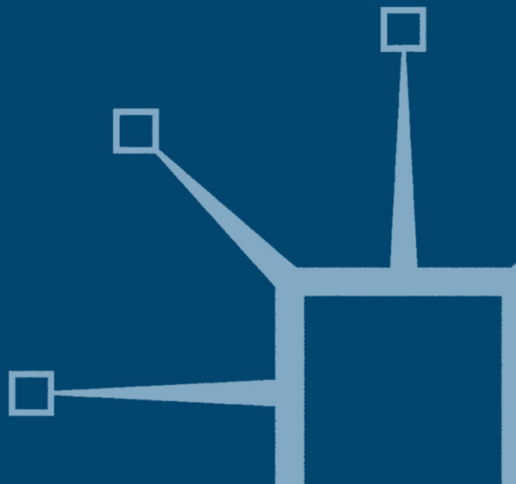


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# Reclaiming the Rights of the Hobbesian Subject

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Eleanor Curran



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Eleanor Curran  
*Kent University*

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*This book is dedicated to the memory of my father, Michael Joseph Curran. With love and thanks for his kindness, his wit and for all the conversation and argument around the table.*



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# Preface

In the time that has passed since I started writing about Hobbes's theory of rights, there have been some significant changes in the way that I think about the rights that Hobbes describes for individuals. The core argument – that, contrary to much Hobbes scholarship, Hobbes does describe substantive rights for individuals – remains, but how I think that those rights should be analysed has changed considerably.

I argue that in *Leviathan* Hobbes describes what could be characterised as *claim rights* for individuals in his discussion of the second law of nature, and this is argued against the received view of most Hobbes scholarship, that Hobbes describes only liberty rights for individuals but never claim rights. The use of Hohfeldian language and the assumption of a Hohfeldian analysis of rights are present in most modern discussions of Hobbesian rights, and it seemed to me initially that my discussion should also be conducted in this way. I no longer hold this view, however, and what is argued here is that although the rights that individuals come to hold after conforming to the second law of nature *could* be characterised as claim rights, there are other rights Hobbes describes for individuals that cannot be categorised within the Hohfeldian analysis. The claim right, with its Hohfeldian assumptions, is not the best way to characterise the protected rights that exist after individuals conform to the second law of nature. The aggregate right to self-preservation also comes to be protected, but not by directly correlated duties, and so it cannot be characterised as a claim right. These observations led me to focus more specifically on the *Hohfeldian* analysis of Hobbesian rights and to argue that this approach has itself contributed to the misreading of Hobbesian rights, which cannot all be explained within it.

An examination of the historical context of Hobbes's pronouncements on rights has proved illuminating in demonstrating the political significance of his support for the right to self-defence even against the king and of the inalienability of the broad right to self-preservation. It has proved unfruitful, however, in providing a philosophical context for the theory. I argue that Hobbes's theory of rights

is not a theory of natural rights with its basis in natural law like Locke's far more famous and more celebrated theory. And so I turn to modern, secular theories of rights, which seem a more suitable theoretical home for Hobbes's own secular theory.

In searching for a theory of rights that Hobbes's theory might fall under, I first argued (2002) that a Razian interest theory might be the one. I now argue that Neil MacCormick's interest theory probably comes closest but that this attempt to capture Hobbes's theory also fails in the end. Hobbes's definition of a right as a liberty and his argument that not all rights should be protected set his theory apart from MacCormick's and demonstrate again the difficulty of fitting Hobbes's theory of rights into a philosophical context. My conclusions here are more tentative than those of some of my earlier articles on Hobbes's theory of rights, and yet I think they demonstrate a better, though still not complete, understanding of the theory as Hobbes presents it in *Leviathan*.

# Acknowledgements

The central argument of this book, that Hobbes presents a substantive theory of individual rights in *Leviathan*, has its origins in my doctoral dissertation, and the greatest influence on my thinking about Hobbes has been my then supervisor Stefan (Bernard) Baumrin. He has been an inspiring teacher and a valued adviser and friend since my time at the Graduate School of the City University of New York, and I am very grateful to him for all the help he has given me.

I have benefited enormously from the helpful comments and suggestions of various people who read drafts of what were papers and have ended up, with revisions, as chapters. I would particularly like to thank William Lucy, John (G.A.J.) Rogers and Stuart Toddington. And I would especially like to thank Sean Coyle for his many valuable and enlightening comments on various parts and stages of this project and for the many fruitful e-conversations we have had.

Material in Chapters 1 and 2 has already been published in the *British Journal for the History of Philosophy* as 'A Very Peculiar Royalist: Hobbes in the Context of his Political Contemporaries'. I am grateful to the editor G.A.J. Rogers and the publishers for permission to republish it with revisions here. Material in Chapter 3 was originally published in the *Journal of Ethics*, 6 (2002) 63–86, as 'Hobbes's Theory of Rights – A Modern Interest Theory', Eleanor Curran, copyright 2002 Kluwer Academic Publishers. It is republished here, with revisions, with kind permission of Springer Science and Business Media. Material in Chapter 4 was first published in *Law and Philosophy* as 'Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-Preservation, Duties of Sovereignty and the Limitations of Hohfeld'. I am grateful to the editor, Michael Moore, and the publishers for permission to republish that material, with revisions, here. Much of the material in Chapter 6 was originally published in *Hobbes Studies* as 'Lost in Translation: Some Problems with a Hohfeldian Analysis of Hobbesian Rights'. I am grateful to the editor, Martin Bertman, and the publishers for permission to republish it, with revisions, here.

I should add that while I have included material from these articles, my argument has developed and sometimes changed so that,

for example, the very simple and brief argument in the article in the *Journal of Ethics*, that Hobbes's theory of rights could be characterised as a modern interest theory, has changed to a much less conclusive and somewhat more detailed discussion here in the conclusion. Similarly, while I first argued that commentators had missed the presence of Hohfeldian claim rights that come into being when individuals conform the second law of nature, I later came to the view, and argue here, that the Hohfeldian analysis itself is flawed and cannot capture all the rights that Hobbes describes.

Two papers forming part of my argument at various stages were given to the Jurisprudence section of the Society of Legal Scholars, and I would like to thank the participants for their helpful comments. A paper that formed most of Chapter 6 was given to the International Hobbes Association at the Pacific Meeting of the American Philosophical Association at Portland, Oregon, in March 2006. I would like to thank the participants for their helpful and stimulating comments. I have also given papers on parts of the developing argument to a senior staff seminar at King's College London (philosophy department) and to staff seminars at Keele and Kent Law Schools. I would like to thank all my colleagues for their helpful comments.

I am very grateful to the Shelagh Anne Venning Trust for choosing to support this project by awarding me a grant, which enabled me to finish the book. And I would like to thank John Wightman, my head of department, for allowing me to reduce my teaching load in spring 2007.

I would like to acknowledge a rather strange debt of gratitude to Eileen Gallagher for hitting a nerve with her persistent question, late one evening, 'yes, but what has Hobbes got to say to us today?' This question stayed with me and helped to push me towards what became the final chapter of the book.

I have been inspired and fascinated by many writers on Hobbes. Bernard Baumrin's articles on Hobbes's egalitarianism and on the coextensiveness of the natural and the civil law helped to change the way I look at Hobbes's theory. Quentin Skinner, C.B. Macpherson and Johann P. Sommerville have added to my fascination with the theory's historical context, and Leo Strauss, it seems to me, captured something of importance in his famous remark that for Hobbes 'the basis of morals and politics is not the "law of nature", i.e. natural

obligation, but the “right of nature”, ... i.e. the justified claims (of the individual)’ (Strauss, 1952, pp. 155–156). I am grateful for the benefits of their scholarship on Hobbes and aware that I cannot aspire to anything approaching it. And while they and many others have influenced me, all the flaws and shortcomings are, of course, my own.

I would like to thank Dan Bunyard, philosophy editor at Palgrave Macmillan for all his support and encouragement, and the staff of Macmillan India Ltd. for their efficiency and courteousness while running the production side of things.

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# Introduction

A book setting out the rights of subjects in Hobbes's political theory would, in the view of most Hobbes commentators and rights theorists, be a very short book indeed. The received wisdom, that Hobbesian subjects give up all their rights to the sovereign or that any rights that are retained are retained in name only, is so entrenched that to question it may seem strange. And these assumptions are closely tied to other assumptions of Hobbesian orthodoxy; the assumption that Hobbes was an arch-royalist during the English Civil War, a staunch supporter of Charles I; that in his political theory he champions an uncompromising and extreme form of absolutism and that his egoistic, subjectivist view of morality cannot support any genuine moral concepts, including those required for a theory of moral rights. These assumptions are seen to support each other and they buttress a view of Hobbes's political philosophy that has found few detractors in the last hundred years or more.

There are, of course, many disagreements about Hobbes's theory among the scholars who study it, but there are also many orthodoxies and these orthodoxies have such a grip on our minds that when we read Hobbes we are inclined to see his theory through them. When Hobbes is studied seriously and the details of his argument are subjected to scholarly scrutiny, differences do emerge: about his psychology, about his moral theory, about how integrated the theory is, about his scientific method and so on. And Hobbes's style of writing, with its apparent adherence to strict logical principles combined with a tendency to make statements and arguments that can be read in different and conflicting ways, also gives rise to contradictory

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interpretations. This is nowhere as clear, perhaps as in the polarised 'readings' of his moral theory, which argue variously for Hobbes being an egoist and subjectivist, a relativist, a utilitarian, a natural law theorist and a Kantian deontologist. And yet, despite these widely differing interpretations of some aspects of his political theory, some of the strongest orthodoxies remain. And among the most stubborn of these are the convictions that he was a royalist, who was entirely on the side of Charles I during the Civil War, that his absolutism is extreme and unflinching and that he fails to provide any substantive rights for subjects.

It has not always been this way, however. Once one starts to look at the historical context of Hobbes's writing, some interesting facts emerge. Two men who knew Hobbes personally and who were well-known supporters of Charles I and the royalist cause (Edward Hyde, who became the Earl of Clarendon, and Bishop Bramhall), both wrote attacks on *Leviathan* 1668 in which they accused Hobbes of supporting Cromwell and the parliamentarians and even the radical Levellers. Bramhall said that Hobbes had written a 'Rebells catechism' and Clarendon accused Hobbes of publishing 'false and evil Doctrines' which were 'pernicious to the Sovereign Power of Kings, and destructive to the affection and allegiance of Subjects' (Bramhall in Rogers ed., 1995, p. 145; Clarendon, 1676, Epistle Dedicatory).

It is not so much that we should immediately take these attacks at face value; after all they do not offer any sort of proof of Hobbes's beliefs or allegiances. But they do raise some interesting questions. What does it say about Hobbes's theory, that two well-informed royalists such as Clarendon and Bramhall could make such public accusations as these? Presumably, to suggest that Hobbes might be sympathetic to the parliamentarians was not so outrageous at the time that it would not be taken seriously. To make such a suggestion today does seem outrageous or even ridiculous; so what did these men see in Hobbes's political theory, that we do not see, 350 years later?

One of the things they saw, that modern Hobbes scholars do not always see, is that there are positions Hobbes takes on certain issues which had a particular resonance at the time he was writing. When Hobbes says, in *Leviathan*, that the individual subject retains her right of self-defence, even against the sovereign, he is saying something

that was of the utmost political importance and sensitivity during the 1640s. In the political debates that raged during the period of the English Civil War (1642–9), the question of the right to self-defence was particularly contentious. Royalists argued that the right to self-defence, along with all other rights, must be given up to the sovereign and that an individual was never justified in attacking any superior, let alone the king, even in self-defence. ‘According to Michael Hudson (a chaplain to Charles I), our duty to obey the civil magistrate is of a higher order than the obligation to defend ourselves. So we may never defend ourselves against the king’ (Sommerville, 1992, p. 35). This was the standard view of royalists and the text of Romans 13 was often used to add religious weight to it:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.

(The New Testament, Romans 13, 1–5  
The Gideons International)

This text fits nicely with divine right theory, according to which, a monarch’s right to rule comes directly from God in a line of succession beginning with Adam and continuing down to the kings of this period. Divine right theory still enjoyed wide acceptance during Hobbes’s lifetime and, so, if we start to look at his theory in the context of these sorts of beliefs we can begin to see how controversial some of his arguments, such as that of the subjects’ retained right to self-defence, must have been.

The argument I want to make in this book is not primarily historical, however, although an examination of the historical context of Hobbes’s political theory does provides its starting point. My purpose is to analyse Hobbes’s theory of rights, as given in his mature political work, *Leviathan*, and to argue that, contrary to the analysis of most commentators, he does have a genuine theory of substantive political rights. My method, therefore, is analytical as much as historical. I examine the text to pick out Hobbes’s arguments regarding

the rights of individuals, independently from the historical context within which those arguments were developed. And in the tradition of analytical philosophy, the analysis of the arguments should stand on its own if it were taken away from the historical context. What I think the chapters on historical context add, however, is an equally important insight into the meaning that specific issues, terms and claims had at the time Hobbes was writing. This gives us more information and evidence of a different kind about the arguments he was making and what he might have intended to convey by them and what their political implications might have been. Much Hobbes scholarship has been purely analytical, with Hobbes's arguments being removed entirely from any commentary about their historical context. Scholars including Howard Warrender, David Gauthier, Gregory Kavka and Bernard Gert have written extensively about Hobbes's political theory, without reference either to the extraordinary political events that were taking place in England as he wrote or to the outpouring of political thought and debate that accompanied those events. There are signs that this trend is coming to an end. Recent work on Hobbes pays far more attention to historical context than that of even 25 or 30 years ago and in my view this has added a great deal to our understanding of his political theory.

What of the theory of rights itself? Most commentators who discuss Hobbes's theory of rights in any detail argue that it is a weak theory; hardly a *theory* of rights at all. And the main point of agreement is that Hobbes is said to describe only liberty rights for subjects and not claim rights. This is the language of Wesley Hohfeld, the legal theorist and his well-known analysis of the use of the term 'right' in the legal literature (1919). The debate about Hobbes's theory of rights, such as it is, is now usually conducted in Hohfeldian terms. On Hohfeld's analysis it is the claim right that is the genuine right, the one with the strength to determine enforcement because claim rights are correlated with the duty or duties of others. And the rights described by Hobbes for subjects are said to lack these correlated duties; to be mere liberty rights, bare freedoms that are correlated with no duties and therefore leave subjects helpless, with no means of enforcing the rights they have been allowed by an all-powerful sovereign.

In modern political and moral theory generally, the Hohfeldian analysis also dominates. The terms 'right' and 'claim right' are often

used synonymously and it is accepted that genuine political rights must be claim rights.

My exploration of Hobbes's theory of rights leads me to argue, first, that Hobbes does describe rights for subjects that are correlated with the duties of others, and second, that the Hohfeldian analysis has hindered rather than helped our understanding of the rights he sets out. And further, that there are some rights that Hobbes describes that are protected by the duties of another or others, but that cannot be described using the Hohfeldian analysis. These are the rights held under the aggregate right to self-preservation, which are retained by all individuals and carried into the Hobbesian commonwealth.

Hobbes's theory of rights is a theory of substantive political rights, I argue, which come to be protected in various ways. And this theory cannot be explained using Hohfeld's categories of claim rights and liberty rights. This leads me to search for an appropriate theory of rights to categorise it and I explore first, theories of natural rights, then, the Hohfeldian analysis and finally (briefly), modern will and interest theories. My conclusion is that the closest theory to Hobbes's on offer is Neil MacCormick's interest theory of rights but even this cannot explain all the features of a Hobbesian theory of rights, which has its own contribution to make to discussions of political rights.

In Part I, Chapter 1, I examine the assumption of Hobbes's royalism and argue that it is much harder to establish with any certainty than most commentators have assumed. In Chapter 2, I extend my historical investigation to the political writing of Hobbes's contemporaries. I directly compare what Hobbes says on four important political concepts, one of which is the natural rights of individuals, with what his contemporaries on either side of the Civil War were saying. It turns out that Hobbes is closer to the parliamentarians than he is to the royalists on at least two out of the four and arguably close to the radical parliamentarians. These two political concepts are: equality and natural rights. What the comparison enables me to do is to throw into enough doubt the group of orthodoxies I have mentioned, to clear the way for a new exploration of what Hobbes has to say on the rights of subjects that is no longer encumbered by the convictions that would preclude such an exploration from taking place. The radicals of the Leveller and Digger

movements of the 1640s were saying things about the rights of individuals that still sound progressive today and the acceptance and use of some of those radical ideas by Hobbes, provides the motivation and justification to explore anew, what he argues in *Leviathan*, about the rights of individuals.

Part II of the book uses textual evidence to formulate arguments about two sets of rights described by Hobbes and the protections he provides for those rights. In Chapter 3, I look at the unlimited rights of the right of nature and what happens when individuals conform to the second law of nature and transfer some of those rights over to others, taking on duties to stand out of the way of the receiver's exercise of their right. This leaves individuals with rights that look surprisingly like Hohfeldian claim rights (which are usually accepted as substantive political and/or moral rights), and this possibility is explored against a background of denial and alternative readings by Hobbes commentators. In Chapter 4, I turn to the all important right to self-preservation and I argue that this right has often been defined too narrowly and that it comprises a much broader right: what I term a right to full preservation. I also argue that this right has far greater political importance than is usually ascribed to it. It is never given up but is retained by all individuals and carried into the commonwealth, where it comes to enjoy some protection, afforded by the duties of the office of sovereign. And so these two chapters mark the beginning of a reconstruction of Hobbes's theory of rights; as a theory that provides some substantive political rights for individuals that are strengthened and protected in a Hobbesian commonwealth.

In Part III I turn to the neglected question of the philosophical justification for Hobbes's theory of rights and ask whether it should be categorised as a natural rights theory in the natural law tradition of contemporaries like Hugo Grotius. I argue that Hobbes does not demonstrate sufficient support for traditional natural law premises to be rightly regarded as a natural rights theorist.

In Part IV I continue to ask how we might categorise Hobbes's theory of rights philosophically or theoretically and in Chapter 6 I spell out what was hinted at in Part II that the currently dominant Hohfeldian approach to the analysis of Hobbesian rights has contributed to the misreading of Hobbesian rights and the distortion of

what can be said about the rights and their protection because they fall outside the Hohfeldian definitions.

Finally, in the conclusion, I suggest that we turn to modern rights theories and particularly to the interest theory of Neil MacCormick to try to fit Hobbes's theory into an appropriate theoretical context. But although I argue that this comes closest to an explanation of rights that fits with Hobbes theory, it is not a perfect fit and there are aspects of Hobbes's theory of rights that are original and unique and are yet to be fully explored and understood.

# **Part I The Historical Context of Hobbes's Political Theory**