Richard Tuck, *Natural Rights Theories: Their origin and development* (Cambridge University Press, 1979)

Tuck opens with the strange status of the idea of natural rights today: "the language of human rights plays an increasingly important part in normal political debate, while academic political philosophers find it on the whole an elusive and unnecessary mode of discourse." (p. 1) Tuck's explanation is even more strange. He sees a problem from the argument "that to have a right is merely to be the beneficiary of someone else's duty, and that all propositions involving rights are straightforwardly translatable into propositions involving duties." This means, and this is what he sees as the problem, that "the language of rights is irrelevant, and to talk of 'human rights' is simply to raise the question of what kinds of duty we are under to other human beings, rather than to provide us with any independent moral insights." As he puts it more fully a few pages later:

> The notorious problem with this theory … is that it appears … to render the language of rights nugatory. If any right can be completely expressed as a more or less complex set of duties on other people towards the possessor of the right, and those duties can in turn be explained in terms of some higher-order moral principle, then the point of a separate language of rights seems to have been lost, and with it the explanatory or justificatory force possess by reference to rights. (p. 6)

But why is this *really* a problem for Tuck? If rights can be defined and explained in terms of someone else's duties toward the person with a right, and if conversely someone's duties can be defined and explained in terms of someone else's right, because it is just a matter of whether you start with the idea of a right and define duty from it, or start with the idea of duty and define a right from it, why is this a problem for rights and not a problem for duties? Furthermore, the fact that one can be defined from the other does not make the reality of them go away. For example, they could be described in a catalog of rights or duties. Tuck's problem has to be seen from his other point that "those duties can in turn be explained in terms of some higher-order moral principle." Why did he not mention the inverse, that if duties are defined in terms of rights, and rights are then defined in terms of some higher order principle, then the special status of these terms would likewise go away? The answer is in the way rights have historically played a special role in political theories, in a way that duties have not.

Consider first the negative case. Rather than resorting to a higher moral principle to give meaning to rights, the higher order principle is instead given as the starting point. Moses presents a body of law to a people and tells them these are the divine commands by which they are to order their lives. The moral obligation is toward God, and the norm (God's will) transcends society. The specifics of the law, however, specify obligations on people's conduct with respect to other people, thus creating duties, and these duties can be expressed as rights of those people to who the duties are owed. The duties and rights are real, and they have their explanation as well. Sometimes it is more convenient to speak of rights or to speak of duties.

Now consider a positive case. People in a state of nature, that is, not a state of society, have complete liberty. No one has a claim on them, or what they possess. But there is no curb on the behavior of others to keep one person from attacking, robbing or killing another. To solve this problem people come together and they give up some of their liberty by surrendering it to a government which then imposes order and lets a society with all its benefits develop. The government rules by virtue of some factor that people gave up and surrendered to the government. This liberty that people surrender in part is some form of original right. Because they had it before they gave it up to form the government, and because law, imposing duties, only came into being

through the formation of the government, it means that rights were some original possession of man, prior to the existence of of law and duties. Rights, than, can exist without duties, and so cannot be defined by duties. These rights, moreover, act as a sort of moral capital which men used in order to set op a social order of their own making from their own resources. This shows that it is a particular idea of rights and a particular political theory of social order based on purely human initiative and resources that is put in danger when rights are explained in terms of duties and vice versa. It is this humanistic idea that Tuck wants to preserve. His question then is, can he do it with a theory of rights? Can a theory of rights avoid the convertibility of rights and duties?

Medieval developments

To explore this problem, Tuck says two periods are especially important in the formation of the language of rights. One is the early to high Middle Ages, and the other is the period from Grotius to Locke. To begin with, Tuck raises doubts whether Roman law even had the concept of rights as we are using it. But the terminology of law underwent a transformation during the medieval period. What created the problem more than anything was a new highly complex social situation. "A great web of sub-infeudations, mutual infeudations and so on covered Europe." The complex crisscrossing obligations created by this system stretched the meaning of older legal terms to express them. In the early thirteenth century the "process had begun whereby all of a man's rights, of whatever kind, were to come to be seen as his property."

Without following all the twists of the development of the medieval legal concepts, a key point was reached in the theory developed by Jean Gerson at Paris. This was the description of *ius* as a *facultas*, of right as ability.

> In the process, however, he was able to make a further move of great importance. I have already stressed that for neither the Romans nor the early medieval lawyers could liberty be a *ius*, a *right*. The Romans had in fact contrasted *libertas* with *ius*, and emphasized its natural, non-moral character. … But by claiming that *ius* was a *facultas*, Gerson was able to assimilate *ius* and *libertas*. … '*Ius* is a *facultas* or power appropriate to someone and in accordance with the dictates of right reason. *Libertas* is a *facultas* of the reason and will towards whatever possibility is selected…"
> He was able to go further, and treat liberty as a kind of *dominium*, when he came to apply his analysis of *ius* to the problem of natural *dominium*. (pp. 26-27)

The Parisian nominalist school developed the theory further after Gerson. John Major pointed out the consequent that "in a sense private property was natural. Given that *dominium* was simply the *ius* to use something, it might be that the most effective way of using something was to appropriate it privately: hence there was no categorical break in this respect between the state of innocence under the law of nature and the present day." (p. 28.)

It will help to bring the concrete social picture implied in these legal terms into clearer view. Roman law accompanied a particular myth of original of law and society. Probably the myth was invented long after the introduction of law codes. We learn of it in a couple of passages in Cicero, with the one in *De Inventione* quoted here.

> There was a time when men wandered at large in the fields like animals and lived on wild fare; they did nothing by the guidance of reason, but relied chiefly on physical strength; there was as yet no ordered system of religious worship nor of social duties; no one had seen legitimate marriage nor had anyone looked upon children whom he knew to be his own nor

> had they learned the advantages of an equitable code of law… At this juncture a man – great and wise I am sure – became aware of the power latent in man and the wide field offered by his mind for great achievements if once he could develop this power and improve it by instruction. Men were scattered in the fields and hidden in sylvan retreats when he assembled and gathered them in accordance with a plan; he introduced them to every useful and honourable occupation, though they cried out against it at first because of its novelty, and then when because of his reason and eloquence they had listed with greater attention, he transformed them into a kind and gentle folk. (Quoted in Tuck, p. 33)

There is in this account no primitive or natural right or liberty, nor any reference to any such thing being surrendered to a central authority in order to constitute a society. In the Roman concept rights could only exist as a product of law or contracts recognized by law and law could only exist in society. So the society had to be formed before these things came to exist. Before society man existed in an animal state. The ancient mind had trouble conceiving of people as human apart from society. There is also a naivete about language in this depiction. Somehow before society existed its characteristics could be described to people and make them conceive of its possibilities. We moderns whose education includes learning languages and learning to approach the knowledge of other cultures though their literature in their own languages are much more aware of how culturally loaded language is, and of the impossibility of pre-cultural language.

By comparison, Gerson could not view man as existing naturally in an animal state, but had to Christianize the conception with the creaturely properties that man received from his creator. Therefore primitive man in this prehistorical state of nature was thought of as human and things like rights could more easily be ascribed to primitive man. But Gerson goes further, as for him the state of nature is not the true original state, but before that there was the state of innocence, which is the true natural state and the condition of man in which to look for an understanding of anything like man's natural rights.

> There is a natural *dominium* as a gift from God, by which every creature has a *ius* directly from God to take inferior things into his own use for its own preservation. Each has this *ius* as a result of a fair and irrevocable justice, maintained in its original purity, or natural integrity. In this way Adam has *dominium* over the fowls of the air …. To this *dominium* the *dominium* of liberty can also be assimilated, which is an unrestrained *facultas* given by God…. (Quoted in Tuck p. 27)

Moreover the medievals tended to view these things in the light of Adam as he was before the arrival of Eve, so there was no human society at all, though in some respects Gerson viewed God and man in legal relationships. The concept of natural rights, then, is a Christian concept that was inconceivable under paganism. The context for these rights, however, is not in the animalistic pre-cultural state of nature conceived of by the pagans, but in a created order. That is, it is a Christian concept insofar as it is a Christian invention, but it was invented to explicate the legal language inherited from Roman law, that had been stretched to cover new conditions.

Renaissance humanism

Tuck first of all wants to emphasize the simultaneity of the origins of several vectors of legal development although he will discuss have to discuss them in series.

> At Wittenburg in 1515-16, Martin Luther was writing a critique of Gerson's theology into his marginal notes on Tauler's sermons and preparing his seminal lectures on Paul's Epistle

> to the Romans. At Paris itself Francisco de Vitoria, the creator of the new scholasticism which was to dominate Catholic Europe in the sixteenth century, was a student from 1507 to 1522; while it was in the ten years from 1508 to 1518 that the basic and most significant works of Renaissance jurisprudence were composed or published. (p. 32)

It was the "insights of the juridical humanists" that were the most key element, Tuck thinks, and "were taken up by Vitoria and his followers, but they were also taken up by the Reformed intellectuals of the mid-century, particularly the Calvinists. At some very deep level the attitude with which both Catholic and Calvinist faced the world at this period was the same, and at a much more superficial level some of their explicit arguments were almost identical. The Calvinist was generally, however, a much better humanist." How was the Calvinist a better humanist? This will be explained at the end of this section, but with a qualification to Tuck's point.

Renaissance humanism was a major turning point in legal theories. On the one hand it embodied the cultural ideas of the city states of Italy and on the other it looked back to classical culture for a model.

> By virtue of their intellectual origins, humanist lawyers found it virtually impossible to talk about natural rights, and extremely difficult to talk about rights *tout court*. What was important to them was not natural law but humanly constructed law; not natural rights but civil remedies. (p. 33)

Tuck quotes Andrea Brezi as typical of many when he says that eloquence may "gather together men who originally like beasts wandered isolated in the fields and were bound by no laws, and to bring them from brutishness and barbarism to humanity and culture."

> Built into this picture was a contempt for untutored nature, and this contempt left little scope for any traditional theory of the natural law as revealing the necessary precepts of morality to all men (as in Aquinas, and indeed virtually all medieval theorists). Instead, the humanists were interested mainly in the laws which human societies imposed on themselves – the *ius gentium* rather than the *ius naturale*. Ulpian's remarks… that the *ius naturale* was 'what nature teaches to all animals' fitted in with this view for it emphasized the *brutish* character of such a pre-civil man. (p. 34)

Of course we are back to the pagan perspective of the pre-civil condition. Perhaps of all the disciplines in the Renaissance it was law that most reverted to the classical view, and this seems to have automatically pushed aside the concept of natural law. There did remain a low level *ius naturale*. Some legal thinkers rejected even that much. "Valla indeed questions whether such a state could properly be described in terms of *ius* at all. … This was going too far for most of his successors, who argued instead that man's natural promptings were a *ius naturale* in so far as they were morally permissible, but they agreed with him that it was the *ius gentium* which was really interesting." (p. 34)

There was a further move from *ius gentium* to *ius civile* "because under the *ius gentium* recourse could only be had to the uncertain and arbitrary judgments of primitive kings. Under *ius civile*, on the other hand, everything (including the magistrates) was regulated by settled law. … There was no idea of any social contract involved in this, simply because promises took their force from their convenience to social man, just as property did. Natural man had nothing to contract about: no *dominium* and no rights to renounce or transfer." (p. 37)

Mario Salamonio defined civil law as a contract of the people, while "*ius naturale* was merely what nature taught all animals (including self-defence), and that moral relationships such as the obligation to keep promises came in with the *ius gentium*." This created its own idea of boundaries. "Laws in the form of social compacts were necessary for the survival of society, and it made no sense for someone to be in a position where he could threaten the society. Consequently any prince who stepped outside the agreed law became a tyrant, and …. can honourably be killed." (p. 38) Thus there was an idea of a social compact which imposed logical implications for the conditions of its existence, though this necessary situation was not thought of as natural law.

For the humanist lawyer all rights were civil rights, and these were thought of in relation to the duties that the rights imposed on others, which could be enforced by recourse to the civil courts. Thus the idea of a right was the ability to force others though civil action to respect it.

Reformed humanist lawyers formed a distinct interest group and type of thinking.

> [François] Hotman is most famous in the general history of political thought for his contributions to the creation of a Calvinist resistance theory in the 1560s and 1570s. The relationship between the ideas of the humanist lawyers and those of the Huguenot propagandists is a complicated but important one. Many of the Calvinists (such as Beza) were trained in the law schools presided over by such men as Alciato, and their basic ideas were undoubtedly drawn from that environment. This explains, among other things, their noteworthy reluctance to talk about the law of nature as the foundation for their resistance theory – it occupies an extremely subsidiary place in all the major works – and their reiterated beliefs in pacts between king and people. It also explains the stress on the role of the lesser magistrates as the only people entitled to resist a prince, introduced by Lutheran thinkers of the 1540s and developed by Calvinists in the 1550s: for if what was important about a right or contract was the action attached to it, then the role of a judge as privileged executor of the law was indeed vital. It was after all a fundamental principle of Roman law that unilateral action to enforce a right entailed its loss: a plaintiff had to work though a judge. (p. 42)

But the Reformed humanists were also different, as "the Calvinists infused their humanism with a strong sense of the omnipotence of God and his part in human affairs." While accepting the pagan narrative of the state of nature changing to a social state, they reinterpreted the nature of the change. For example *De Iure Regni apud Scotus* "admits that the humanist picture of a time 'when men lived in huts and caves, and wandered around the place without laws or fixed habitations' is substantially true" but they left this state on the command of God. "The *De Iure Regni* denies that men construct political institutions for their own benefit: their political life is a direct gift from God, without being fully natural to them (i.e. coeval with them). This was to remain a fundamental feature of Calvinist political thinking, to recur in the great works of the seventeenth-century British Calvinists such as Rutherford." (p. 43) Earlier writers such as Knox, Goodman and Ponet, according to Tuck, "had taken political life to be the direct creation of God after the Flood", but Buchanan in his *De Iure Regni* modified this in a humanist direction. (p. 43)

These "Calvinists were not putting forward a theory of natural rights, and indeed were not particularly concerned with the notion of a right at all. Like the humanists, specific constitutional remedies were at the focus of their concern." So while the later Calvinists began with the essentially pagan, un-Biblical and unhistorical state of nature model, it is God's mandate that introduces civil government. Therefore they could reconcile their ideas with Romans 13 which teaches that all

powers are instituted by God. What God institutes, though, is a constitutional system not an absolute divine right kingship. This allows a recourse to the law to defend against unjust rulers.

A new influence came in during the later sixteenth century. Tuck does not really explain how it happened but a sort of modified Aristotelianism took over. This was "a humanist, a Renaissance Aristotelianism, with its roots in the Renaissance study of Aristotle in Italy." (p. 44) It continued, though, to have heavy recourse to Cicero's state of nature idea. This new Aristotelianism showed a divergence between Roman Catholic and Protestant versions, with the Catholic treatment of property rights included in commutative justice as with medieval scholasticism, while distributive justice did not involve property or rights. "The Protestant Aristotelians, on the other hand, treated both branches of justice the same way, and with greater fidelity to the historical Aristotle. I their treatises … we find that commutative justice is handled as an extension of distributive justice: it consisted of the principles whereby a fair distribution of possessions could be arrived at through exchange without one section of the human race ultimately being denuded of everything. There was no question of rights being primary, or of *dominium* being something basic about which the rules of justice had to be framed: all was a matter of social convenience…." (p. 45)

Meanwhile, Francisco de Vitoria had returned to Spain and was reviving Thomism. Vitoria defined *ius* as "what is allowed under law" and contrary to the nominalists like Gerson he distinguished *ius* from *dominium*. But this collided with the intent to restore Aquinas. "It is virtually impossible to combine a Renaissance concept of property, with its strict distinction between *dominium* and usufruct, with Thomism. The Renaissance concept belonged to a theory in which the natural life of man was right-less and therefore property-less, while the Thomist believed that by nature man did possess certain limited rights…. Nevertheless, the Spanish Dominicans continued to attempt such a combination. But they insisted all the time on the *limited* character of men's natural rights.

"The stress in a Thomist context on the limitations of what men were permitted to do was the central feature of the Spanish Dominican theory." A major practical result was that people could not enslave themselves except under very limited circumstances. "For a Gersonian, liberty was property and could therefore be exchanged in the same way under the same terms as other property; for a Vitorian it was not and could not be." (p. 49) This made trade in African slaves legally very doubtful, as it was unlikely that the legal conditions for slavery had been satisfied.

Later in in the sixteenth century, at or just after the new humanist Aristotelianism was gaining popularity, a new movement also appeared. This was based on free-will ideas analogous to Arminianism, and was centered in the University of Louvain in the Netherlands. The new movement appealed to the Jesuits. The most important thinker in this school was Luis de Molina, who saw a *ius* "in terms of the dispositional characteristics of its possessor: 'if anyone asks what actually is this *ius* or *facultas* I have been talking about, I would reply that it is nothing other than a disposition, or relation of the person who has it to the thing to which has the *facultas*.'" (p. 53) "[I]t was a theory which involved a picture of man as a free and independent being, making his own decisions and being held to them, on matters to do with both his physical and his spiritual welfare" and "it paid little or no attention to the niceties of humanism." (p. 54) The final figure to come along was Francisco Suarez who made "a kind of synthesis of Molinism and Vitorian Thomism, though with the emphasis very much on Molina." This also included the idea of voluntary slavery, which could be entered in by a whole people as well as an individual. "A natural rights theory defense of slavery became in Suarez's hands a similar defense of absolutism." (p. 56)

Unlike these movements from Vitoria to Suarez, Protestant legal theories stuck much closer Renaissance humanist legal theory. This is what Tuck means by the "Calvinist was generally,

however, a much better humanist." The "Calvinist", however did no go along with the humanist idea that the origin of a civil order was by man for man on his own initiative. The state of nature changed to a civil order by the intervention of God with a divine mandate and divine authority for the civil society. This is a major break from the Renaissance humanist idea to which Tuck does not give sufficient importance.

Grotius

Hugo Grotius was trained in the Aristotelian and also the older humanist law. He broke with these, however, to become the most important figure in the evolution of natural rights theory. Part of the motivation for changing his views was his involvement in the Arminian controversy on the Arminian side. The Arminians had relied on the States of Holland to force the church to admit Arminians to the ministry, and though the Stadholder eventually intervened against the Arminians, they still hoped for state support against the Calvinists. Grotius wanted a theory that gave to the state a greater authority than to the church, in which "State power was something different and by its nature irresistible." (p. 66) Ironically, as Tuck puts it, the side of state power he had counted on was overwhelmed by the Stadholder and Grotius was sent to prison, from which he managed to escape and go to France after two years. So despite developing a position in order to get an absolutist view of the state, and one with which he became identified, he was in practice a resister against state power.

There is a further quirk to this, as depending on who took up and developed his theory it could be turned to state absolutism or to the opposite position.

> Reading the *De Iure Belli* in this way, we can easily see why it should have been taken up by theoreticians of absolutism, why Felden should have said that it 'destroys civil society, which is a community of free men, and makes it an aggregation of slaves.' and why Rousseau should have attacked it so bitterly. And yet there are also in the *De Iure Belli*, as in the *Inleidinghe*, arguments of a different kind, which were to be taken up by much more radical political theorists. The book is Janus-faced, and its two mouths speak the language of both absolutism and liberty. The libertarian arguments are of a simple kind; they merely require that we consider what kind of agreements reasonable people might have made in the past. (p. 79)

Grotius put in the place of Aristotelian ideas of justice a very simple idea that "law was an injunction to respect another's rights." This threw the whole burden of explaining justice on developing an adequate account of rights. Of course, as law depended on rights, the concept rights could not come from law, but had to be given a different explanation. Grotius had at his disposal the old ideas of the state of nature and of the formation of a social order in some act in which people departed from the state of nature. Did rights come from natural rights, or did they come from the social act of consenting to an ordered, and governed society? Grotius answer was both. As part of this answer he downplayed the abrupt transition from one to the other and depicted a more evolutionary development of the social order from a state of nature.

Grotius made eclectic use of sources for his idea of the state of nature, quoting Roman historians and poets and making use of the Bible. His idea of the situation in the Garden of Eden was "They lived easily on the fruits which the earth brought forth of its own accord, without toil" but eventually "succumbed to a succession of different vices." The tree of the knowledge of good and evil was "a knowledge of the things of which it is possible to make at times good use, at times a bad use." Stephen Buckle, who quotes this in *Natural Law and the Theory of Property: Grotius to*

Hume (Oxford: Clarendon Press, 1991), says that Grotius "mainly has in mind the pursuit of frivolous enjoyments." His insertions of Biblical history at various points have no reference to their meaning in the context of the Biblical narrative, but seem to be to embellish his account. This should not surprise us if we bear in mind that the Arminianism that Grotius represented was not what is held by people who apply that label to themselves today, as they are generally Wesleyans or something derived from Charles Wesley. Those original Arminians had a free-thinking streak in their thought.

Under this earlier state of nature that devolved from an idyllic situation especially as competition for resources became more pressing something like half-way rights developed. They were natural rights, but not the form that rights assumed in a developed civil order. Instead of a property right there was a natural use right. That is, someone could appropriate something to his use as long as he had need of it, but then he surrendered it or what was left of it. But this developed into a property right, and behind the property right there always lurked the use right. In an emergency for example, someone could make use of another's property because the use right remained.

The construction of a social order was not an arbitrary voluntary act that people just decided to undertake. It had an obligation from nature. This obligation was in the principle of sociability. Man was compelled by in his interest of self-protection, in fact also in the protection of his rights, to seek the means to do this though association. "Grotius was now able to argue that the law of nature was in effect the obligation men are under to preserve social peace, and that the principal condition for a peaceful community is respect for one another's rights." (Tuck, p. 73) "Grotius was now able to treat the law of nature as totally to do with the maintenance of other people's rights, whether of property or merit. … Rights have come to usurp the whole of natural law theory, for the law of nature is simply, respect one another's rights." (p. 67)

> The picture of a political society or state which Grotius presented was of a group of individuals with a 'Community of Rights and Sovereignty' (*consociatio iuris atque imperii*) that is to say, a group who had in some way defined themselves as separate from the rest of human society by particular transfer of rights. One such transfer which he now took to be possible was the total alienation of all their original liberty by the members of a society to one ruler. (p. 77)

"Central among the rights which people renounce when they set up a sovereign … is the right of self-defence."(p. 78) "In particular, men no longer have a right to defend themselves against the sovereign; Grotius defended this elsewhere on the more general grounds that even in a state of nature, a man who is attacked by someone whose continued life would be more utile than his own ought not to resist." (p. 79) (Though this seems illogical, as if a man allows himself to be killed by the more useful man, then he certainly is not useful to him, nor is he useful to a society which in the state of nature does not, in fact, exist.)

Grotius also employed a large role for agreements in forming obligations, which he called a personal right.

> Essentially, what he argued was that men were naturally free to contract and bargain in all kinds of ways over all their property, and that it was only the civil law which stepped in to prevent certain kinds of bad bargain. Personal liberty was a part of man's property and in fact it was only because it was such a part that contracts were possible. (p. 69)

From one point of view, this whole theory depends of the creation of rights in some inaccessible and unverifiable prehistory. In essence it is based on a fantasy. From the other point of view, the historicity does not matter, as the theory is about what is, or is believed to be, implicit in the arrangements of existing society.

Selden

That natural rights theories had a history of development after Grotius is because his contemporaries and immediate successors, even if they accepted the natural rights premise, saw problems with the theory and sought after solutions. Tuck sums up the problems succinctly.

> Although, as we have seen, Grotius's achievement was a remarkable one, and his theory provided a formidable and exciting ideology for his mid-seventeenth-century audience, it was nevertheless incomplete in a number of important respects. In particular, it stressed individuality in the area of rights, but communality in the area of obligation, and though that might be logically coherent there was a certain psychological implausibility in it. Grotius's men were fiercely defensive of their original rights, and capable of so far controlling their own lives that they could commit themselves to slavery; and yet their moral world was informed by the principle of sociability with its distributive and unindividualistic implications, and *in extremis* their more harmful commitments could be disregarded. We have seen that Grotius reconciled these two sides of his theory with the claim that sociability necessitates respect for individual rights, but the psychology required to make this work was unconvincing. The history of natural rights theories during the next fifty years is indeed a story of arguments over precisely this issue: does a natural rights theory require a strongly individualistic psychology and ethical theory? (p. 82)

Some histories follow Grotius with a discussion of the views of Hobbes or Samuel Pufendorf, but Tuck chose the Englishman John Selden, whom he calls "one of the most important and yet neglected of the seventeenth-century figures."(p. 3)

Selden entered into controversy with the views of Grotius over the law of the sea. Grotius had based his maritime law on the primitive use right, which could never develop into the full property right because the sea could not be effectively appropriated or occupied. Selden did not accept the use right and held that the sea has simply been divided up as property along with the land and everything else.

> After the Flood, the world was once again (literally) a *tabula raza*, and was given in common to Noah and his children to divide between themselves. Here Selden relied mainly on non-Biblical Hebrew traditions, based ultimately on the Talmud, a reliance which was to prove increasingly central to his natural law thinking. (p. 87)

For Selden, though, there was a problem relating the law of nature and the rights of nature. "Why should rational individuals possessed of a full compliment of rights be under laws at all?" He approached the problem in his book *De Iure Naturali*. It was "the first example of the English interest in the nature of moral obligation, and of the scepticism found in many later seventeenth-century English philosophers over whether there can be an account of obligation distinct from one of motivation." "He first postulated a state of absolute liberty, on which obligations were supervenient – a move of greatest importance, as he was the first modern natural law thinker to put such a notion of *complete* freedom at the beginning of his account." (p. 90) Once law is introduced on top of "this condition of absolute liberty," they "are now restricted, and they can now be

regarded as culpable or dishonest according to the criteria laid down by whoever decreed the law." (Quoted in Tuck, p. 91) The nature of this obligation had to be a punishment for breaking the law. According to Selden "The idea of a law carrying obligations irrespective of any punishment annexed to the violation of it … is no more comprehensible to the human mind than the idea of a father without a child." (Quoted in Tuck, p. 91) How then could there be natural law, that is *obligation* in a state of *nature*? "For Selden, then, a necessary correlative to any obligation was a punishment, and the punishment in the case of the law of nature came from God." (p. 92) While Grotius had held that man's nature as a being with needs, and with sociability, and his location in a world of limited resources had necessarily brought in existence a totally immanent obligation, that is based on nature and nothing else, Selden's view was that natural laws were brought into existence by divine commandments, because in a state of nature there was nothing in nature that could produce obligation. "I cannot fancy to myself what the law of nature means, but the law of God. How should I know I ought not to steal, I ought not to commit adultery, unless some body had told me so? Surely 'tis because I have been told so." (Quoted in Tuck, p. 92) The law is natural law because it was in the state of nature, before civil government, but it was not a law from nature.

> It followed that before God's punishments came to be known, either through observation of the world or through God's pronouncements to an already created mankind, men were under no obligation: the historicity of natural law entailed a state of total freedom, as the traditional theory of natural law in terms of innate human reason did not. (p. 93)

Here there is some contradiction in what Selden had to say. He cited the typical juridical humanist ideas of the state of nature as found, for example, in Cicero, that "there was once a time when men wandered though the countryside like animals, sustaining a bestial existence and managing their lives by brute force rather than reason." (Quoted in Tuck, p. 93) But has God had immediately given the law to Adam and to Noah, there never had been an extended period without knowledge of the law and so without obligation, and so any state of total liberty was ephemeral.

This view of Selden's has to be contrasted to the view that Tuck calls voluntarism, but might better be called divine command theory.

> The voluntarists, including most Protestant thinkers in the sixteenth and early seventeenth centuries, believed that that 'formal cause' of a law's obligation is the command of a superior, that is, a law to be binding must be promulgated by someone in authority, and cannot be simply a rational principle. But it does not follow that the obligation is *constituted* by fear of a prospective punishment administered by such a superior, and most voluntarists were at pains to deny this. (p. 93)

There are a couple of points to observe here. Tuck has said that Selden was an innovator in making the motivation to be the source of the obligation. Second, besides that, the motivation that was acceptable to Protestant thinkers was not fear. One need only think of the first and greatest commandment to "Love the Lord your God with all your heart and with all your soul and with all your mind." (Matthew 22:37) It is not credible that Selden was not aware of this, so we must see his theory as a conscious break with previous Christian thought. Even so, Selden participated in the Westminster Assembly, representing the Erastian position.

> This extreme scepticism about the possibility of moral knowledge independent of an egotistical motivation, in which the moral 'ought' simply becomes the prudential 'ought', makes Selden the clear forerunner of Hobbes. … Hobbes altered this position by the simple

> expedient of dropping information about an after-life out of the prudent egotists's calculations….
> In Selden's arguments about the nature of obligation, we are at another of the roots of his Erastianism. The moral authority claimed by churches was merely a special case of the general claim that men can be bound by institutions independently of the latter's capacity to administer physical punishments. By refuting this general proposition, Selden automatically rules out the moral authority of churches. (p. 94)

The other part of Selden's theory was the origin of civil government. This was based on man's ability to enter into contracts, for which "an enormous variety of contracts was possible; the only definite rule was that whatever a contract specified had to be performed, on pain of divine punishment. In this way Selden was able to arrive at a strong form of the Grotian position on the origin and nature of political authority." (p. 96) "Selden's theory of obligation had taken him much further along the road to absolutism than ever Grotius had gone. It allowed no right of resistance *in extremis*; a bad bargain or a foolish contract had to be kept to even at the cost of death." (p. 97)

How then did Selden end up on the Parliamentary side, rather than supporting Charles I? It would "be wrong to conclude from Selden's acceptance of the idea of a contract of total servitude that he thought that the contract underlying the English constitution was of such a kind. … he consistently spoke in Parliament and law courts in favour of 'the liberty of the subject."' (p 97)

> We can now see clearly what kind of ideology Selden represented in England: it was in many ways close to Grotius's, but there were nevertheless important differences. They were both capable of sustaining the practices of mercantile capitalism such as slavery and usury … and prepared to accept a high degree of absolutism in theory while denying that the constitutions of their own countries were absolutist. But Selden pushed this theory much further than Grotius had done, and turned it into a completely brutal and illiberal doctrine. He did so, quite simply, because he was prepared to hypothesise an original state of total freedom, on which the laws of nature supervened, and because he made contracts play a much more important role at each stage of his theory. (p. 100)

It is useful to compare Selden's position with that of the Reformed resistance theorists that Tuck had described previously. They had believed that there was a wild state of nature, as in the humanist conception, but that this ended with a divine command to enter into a civil order. As the civil order was constitutional it provided recourse to law for the defense of the liberties of the members of society. For Selden the divine command came earlier and created natural law, that is law while still in the state of nature. Later contracts were entered into, but dependent of the obligation under natural law to keep agreements, and a contract established a constitutional political authority, under which the subject has legal rights from the constitution. So far the positions were broadly similar. But Seldon's theory was constructed out of talk of liberties and rights, where was the Reformed resistance theories used Aristotelian legal concepts.

The immediate followers of Selden included the Tew Circle, who met at Falkland's house at Great Tew. Selden sometimes also attended. They were royalists who were responding to the defenders of resistance and rebellion against the king, such as Henry Parker. Parker argued that it could not reasonably be supposed that people would have made an original contract to form a government that would include in the agreement their surrender of their right to self-defense. As "they which contract to obey to their owne ruin, or having so contracted, they which esteeme such a contract before their owne preservation, are felonious to themselves and rebellious to nature." (Quoted in Tuck, p. 104) To this the Tew theorists replied with a probability argument. The original contractors

calculated that the chances that the ruler would turn against them and kill them unjustly was much lower than the chance that they would gain through the security of the contract which created political power. Thus the contract was in fact a rational one.

The second major idea that the Tew circle introduced was in fact a change, not an addition, to Selden's view. They held that the power of the magistrate to kill was not a result of the contract, but came from divine command, just as had the obligation to keep a contract. In this way they moved away from Grotius and Selden toward a divine rights theory of politics.

Among the followers or successors to Selden Tuck gives a chapter to Thomas Hobbes. This is in three parts. The first explains the development of Hobbes ideas in the context of the sort of Seldenian theories current among the Tew Circle, and noting that Hobbes moved away from this to a mature position found in *De Cive* and in *Leviathan*. The most important change was that Hobbes abandoned the idea that in the civil contract people gave up the right to self-defense. Hobbes now portrayed the state of nature, not as one of unlimited freedom, but under an existing compulsion by nature for self-preservation. The second section of this chapter concerns Hobbes's controversies over the common law with Seldenians, which Tuck gives in support of his earlier arguments for Selden's influence over Hobbes early development. The third and final section takes up Hobbes's influence, principally in Holland, and it subsequent combination there with Cartesian psychology. Tuck does not give a general account of Hobbes's theory, perhaps because it is too similar to that of Selden, or perhaps because it is too well known from other sources.

The Radicals

Tuck next considers the radicals of the English revolution. But to do so he pauses for an important distinction.

> At the beginning of the English civil war, the work of ideological opposition to the King was still done (largely) by the radical Calvinism of the sixteenth century and its derivatives. Throughout the revolutionary period, Calvinist Presbyterianism continued to provide an ideology of opposition which must be distinguished from that of the radical natural rights theorists if we are to understand the latters' ideas. (p. 144)

These Calvinists were the ones who had joined juridical humanism with "their own strong sense of the divine, non-natural character of political association". He lists their principle works of the revolutionary period as: "Samual Rutherfords' *Lex, Rex* (1644), Philip Hunton's *A Treatise of Monarchy* (1643), Edward Gee's *The Divine Right and Originall of the Civill Magistrate* (1658) and George Lawson's *Politica Sacra et Civilis* (1660)". (p. 144) The Presbyterian made a distinction between God's institution of authority in general and "his communicating, conferring or conveying that power, which he hath so instituted to be, to particular persons." God's ordaining of the various sorts of authority: "husband, parent, master, or prince" is not the same as putting particular persons in these positions of authority.

> While the natural rights theorists from Grotius onwards believed that any form of *dominium* was constituted by a transfer by humans of their own natural rights of *dominium* over themselves and alien objects, the Presbyterians believed that the developed social forms of *dominium* were constituted by God as correlatives of his commandments, and in particular the commandments to punish evildoers and to honour parents. (p. 144)

Men were still free to decide who should have the exercise of this authority. So for the Presbyterians natural rights and their disposition through a social contract was not the bases for government power.

(The *Heidelberg Catechism* in Lord's Day 39 puts submission to all authorities under the fifth commandment, of obedience to father and mother. This drew the protest of libertarian Frederick Nymeyer in the 1950s in articles in *Progressive Calvinism*, because the state is not our parent, nor is it in the same relation to us as our parents. At this point he saw the Reformed theory as both un-Biblical and illogical.)

For Tuck it was the radicals, not the Presbyterians, who made the revolution. They took their theory from Grotius, but in doing so they amplified one of his ideas, and that is the "idea of interpretative charity applied to fundamental political agreements." (p. 143) While men might have renounced all their natural rights in the social contract, charity compels us to assume that they did not. "We must presume that our predecessors were rational, and hence that they could not have intended to leave us totally bereft of our rights." There were two groups of these; the more moderates, notably Henry Parker who represented the Army leadership, and the more radical Levellers. But these, Tuck thinks, were not actually very far apart in their actual political theory. Both sought to reserve liberty to individuals, but also to the social order. Because of these shared commitments, Parker could effectively appeal to the social order against the Leveller arguments.

"Parker used a combination of the principle of interpretative charity and the traditional idea of the natural duty of self-defence in order to argue that a people must always have reserved rights to itself in any bargain with its sovereign." (p. 146) Besides this, he explained the relationship between the sovereign and the people as one of t*rust*, so that "it was not the case that anything entrusted was irrevocably lost, for that was exactly the distinction between trust and alienation." (p. 147)

Richard Overton defended the Leveller case in pamphlets in 1646 and 1647. Overton expanded the rights which the principle of interpretative charity indicated could not be alienated to the enjoyment of "joynt and mutuall neighbourhood, cohabitation and humane subsistance." Which Tuck sees as "anything which it was reasonable to want, could now be construed as an inalienable right. … The principle of interpretative charity had been stretched very wide, and we have here clearly the eighteenth-century notion of the inalienable rights of mankind." (p. 150)

Late Modifications

Samuel Pufendorf attempted to restore the natural rights theory from the changes made by Hobbes. He saw a problem with the source of the obligation of law in the threat of punishment. Against the prudential theory, that the force of law was in the self-interest, as in escaping punishment, of those to whom it was given, Pufendorf introduced the idea of the source of law in a legitimate authority. Law then did not depend solely on self-interest but appealed to conscience. "Obligation is properly introduced into the mind of a man by a superior, that is, a person who has not only the power to bring harm at once upon those who resist, but also just grounds for his claim that the freedom of our will should be limited at his discretion." (Quoted in Tuck, p. 159) In the case of natural law this meant that the idea of natural law included God's possession of rights over man, not just power. Next, Pufendorf restricted the idea of right and made it different from *dominia*. "That not every natural Licence, or Power of doing a Thing is properly a *Right*; such such only as includes some moral Effect, with regard to others, who are Partners with me in the same Nature." So "a Hobbesian 'right' was *not* a right, since any right requires a definite obligation of someone else." (p. 160) Therefore the idea of men "having rights or property *in themselves*, outside of the network of social

obligations, was fundamentally misleading." (p. 160) A social system could not be build up out of transfers of natural rights. "Grotius could not be preserved if Hobbes was to be refuted … Out with Grotius and Hobbes went radical rights theories. … Instead, he retreated to a theory which laid stress on the fact that general agreements for social utility confer rights, and hence that rights may not be pleaded against them…." (pp. 161-162)

In England the modifiers of the natural rights theories were Mathew Hale and Richard Cumberland who tried to revive a view more like that of Grotius with an evolution of property rights in the state of nature. Tuck also briefly discusses Richard Baxter, "a known (though qualified) enthusiast for Grotius." (p. 168) All this leads up to Locke. As he did with Hobbes, Tuck refrains from a general overview of Locke's theory, and contents himself with a discussion of how some of Cumberland's ideas were adapted by Locke.

The early Enlightenment turned to an historical perspective of the development of legal theory, with a disparagement of scholasticism, which they did not understand, as it was really the Renaissance legal theories that were their target, and the building up of Grotius as the great mind that had brought in the modern legal era. Grotius thus became to foil for Rousseau when he rejected the entire natural rights tradition.

Tuck's final comment is a pessimistic evaluation of the natural rights tradition.

> It is remarkable how brief the two great *floruits* of rights theories were: at the c. 1350-1450, the second c. 1590-1670. Seen against a background of European thought as a whole, they are freakish and fitful, and their dismantling has been a matter of high priority for succeeding generations. (p. 177)

In view of this attitude we should not be surprised by the contempt which intellectuals show for the American constitutional system based on rights theory. Despite this, as Tuck noted at the beginning of this book, in the public mind rights remain the go to concept to justify human freedoms.