The Recovery of Natural Law for the
Sociology of Human Rights

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Bachelor of Arts (Honours)

This thesis is submitted for the degree of Doctor of Philosophy
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I declare that this thesis is my own account of my research and contains as its main content work which has not been previously submitted for a degree at any tertiary educational institute.

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Angela Leahy
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Abstract

This thesis argues that the sociology of human rights is more restricted in its treatment of natural law than it should be. In building this argument the thesis explores the different ways in which the subdiscipline is restricted and demonstrates how a different approach to natural law can make it stronger. It notes the enduring influence of the traditional sociological dismissal of natural law, an approach to natural law thought that relies on a reactive reading of natural law as doctrine. This traditional approach grounds both the dismissal of the notion of human rights in broader sociology and the continued rejection of natural law and natural rights thought within the sociology of human rights. The thesis takes a descriptive approach to natural law, treating natural law as theory rather than doctrine. It explores concepts within the early modern natural law theories of Grotius, Hobbes and Pufendorf that challenge a number of traditional sociological assumptions about natural law that are echoed within the subdiscipline. The thesis also points to ways in which major ideas in these early modern natural law theories are relevant to key themes and issues that have emerged within the sociology of human rights, including the distinction between foundationalist and constructionist approaches to human rights, the distinction between description and advocacy of human rights, the treatment of the role of the state in securing human rights, and the social import of human rights. It argues that as early examples of rights thought in which great importance is placed on the social conditions of the rights bearer, and in which connections are made between the achievement of society and the protection of individual rights, the natural law theories recovered in this thesis have much to offer the sociology of human rights.
# Table of Contents

Acknowledgements ........................................................................ iii  
Abstract ...................................................................................... iv  
Table of Contents ........................................................................ v  
Introduction: The Sociology of Human Rights ........................................... 1  
The Increasing Social Resonance of Human Rights .................................... 1  
The Emergence of the Sociology of Human Rights .................................... 3  
Approaches to Human Rights within the Subdiscipline ............................. 9  
Chapter 1: Key Themes and Issues within the Sociology of Human Rights ...... 15  
  Foundationalist versus Constructionist Approaches to Human Rights ...... 15  
  Description and Advocacy in the Sociology of Human Rights ............... 37  
  The State and Human Rights .................................................................. 41  
Chapter 2: Moving Beyond the Classical Sociological Dismissal of Natural Law: 
  A More Detailed Examination of Natural Law ....................................... 50  
  The Classical Sociological Critique of Natural Law ................................. 50  
  A Brief Overview of Natural Law ............................................................. 62  
Chapter 3: The Importance of the Social in Grotian Natural Law ............... 75  
  Grotian Natural Law Theory ................................................................ 75  
Chapter 4: The Importance of the Social in Hobbesian and Pufendorfian Natural 
  Law .................................................................................................... 89  
  Introduction .......................................................................................... 89  
  Hobbesian Natural Law Theory ............................................................. 90  
  Pufendorfian Natural Law Theory .......................................................... 109  
Chapter 5: The Treatment of Natural Law by Sociologists of Human Rights .... 145  
  Introduction ........................................................................................ 145  
  References to Natural Law within the Sociology of Human Rights ............ 146  
  The Rejection of Natural Law by Sociologists of Human Rights ............... 154  
Chapter 6: The Recovery of Natural Law: Functional and Literalistic Approaches 
  ............................................................................................................. 187  
  Thornhill’s Recovery of Natural Law ....................................................... 187  
  Wickham’s ‘Hobbesian Sociology’: A Descriptive Literalistic Approach ...... 207  
  An Expanded Distinction: Functional, Descriptive Literalistic and Reactive 
    Literalistic Approaches ...................................................................... 215  
Chapter 7: The Recovery of Natural Law by Sociologists of Human Rights .... 218  
  A Functional Approach to Natural Law within the Sociology of Human Rights 
    ........................................................................................................... 218  
  The Literalistic Recovery of Natural Law within the Sociology of Human Rights 
    ........................................................................................................... 225  
  Turner’s Descriptive Literalistic Recovery of Natural Law ......................... 233
Chapter 8: Conclusion: The Relevance of Natural Law for the Sociology of Human Rights .......................................................... 250

The Importance of the State for Human Rights: Making Arendt’s Paradox Social via Natural Law Theory .................................................. 250

Description versus Advocacy and the Difficulty of Appealing to Human Rights Norms ........................................................................ 264

Foundationalism, Constructionism and Natural Law Theory .................. 270

A Descriptive Literalistic Recovery of Natural Law ............................... 274

In Conclusion: The Social Import of Human Rights ............................ 275

References .......................................................................................... 277
Introduction: The Sociology of Human Rights

The Increasing Social Resonance of Human Rights


A number of thinkers argue it is difficult for sociology to continue to ignore human rights as a valid object of sociological study given the increasing social importance of the notion of human rights (see Connell, 1995: 26-28; Hynes et al., 2010: 811-812, 817; Sjoberg et al., 2001: 12-14; Somers and Roberts, 2008: 390, 414; Turner, 1993: 489-490; 2002: 602; 2006b: 5-6). Writers note, for example, the increasing utilisation of human rights language by various social actors, including social activists, political actors, social institutions, social movements, and international governmental and nongovernmental organizations (see Bauman, Bigo, Esteves,
Commentators also observe the increasing utilisation of human rights language by social actors as a way to articulate social inequalities or social issues (see Elliott, 2007: 343; Frezzo, 2011a: 207; Lamb, 2010: 997; Somers and Roberts, 2008: 414; Turner, 1993: 490; 1995: 2, 6; 2006b: 5-6; Verschraegen, 2002: 259). While sociology has long studied social inequality and social movements, it has neglected the rights language expressed by social movements (Connell, 1995: 26; Hynes et al., 2010: 823; Somers and Roberts, 2008: 399; see also Hosie and Lamb, 2013: 192).

The increasing use of human rights language by social actors follows a significant moment in the emergence and development of human rights discourse, namely, the institutionalisation of human rights in the Universal Declaration of Human Rights in 1948 which, according to Woodiwiss, “became the definitive grid of specification” of human rights (Woodiwiss, 2002: 141; emphasis in original) and subsequently expanded in the form of the two major covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (141-142; see also Woodiwiss, 2003: 1-2). As Hynes and her co-authors point out, there are now several major international human rights treaties that specify a range of human rights and form a significant backdrop to the operation of “human rights norms” across “international, regional, national and sub-national levels” (Hynes, Lamb, Short, and Waites, 2012a: 788; see also Basok, 2009: 183).
According to da Silva, the current period can be described as “the age of rights” (da Silva, 2013: 458; see also Shor, 2008: 119).

It is thus becoming increasingly difficult to ignore the sociological significance of human rights. Somers and Roberts argue, in somewhat strong terms, that given the contemporary resonance of human rights and “exigencies” at various levels in the social world, to continue to overlook human rights in sociology is “morally and intellectually indefensible” (Somers and Roberts, 2008: 390; see also Bhatt, 2012: 815, 821; da Silva, 2013: 457-458; O’Byrne, 2012: 830; Turner, 1993: 508; 1995: 2; 1997: 565).

In dealing with the sociology of human rights, the thesis is not aiming to deliver a comprehensive account of the subdiscipline but to offer an account of its emergence, to set out major approaches to human rights within the subdiscipline, and to explore a number of key issues and themes that have taken shape within this rapidly expanding subfield.

The Emergence of the Sociology of Human Rights

While as early as 1981 Young calls for “a more encompassing scholarship on human rights” in sociology (Young, 1981: 283) and considers possible issues a “sociology of human rights” might be concerned with (285), it is the 1990s, a decade following Young’s call, that observers generally point to as the period in which sociologists began to explore in earnest the concept of human rights as a valid sociological object (see Frezzo, 2011a: 203; Elson, 2006: 94; Woodiwiss, 2005: 134). The 1993 article by Bryan Turner, ‘Outline of a Theory of Human Rights’, can be seen as a watershed
moment in this regard (see Hosie and Lamb, 2013: 193; Hynes et al., 2010: 816; 2012a: 789). The increased attention to human rights by sociologists during the 1990s inspired Roach Anleu to assert that “human rights have become a central topic of discussion for sociology at this point in history” (Roach Anleu, 1999: 201). By the turn of the century, however, the number of sociologists exploring human rights remained small, a number of writers arguing a distinct subfield within sociology devoted to the study of human rights is yet to emerge.

Hajjar, for example, remarks that “[a]t present, there is no such thing as a ‘sociology of human rights’” (Hajjar, 2005: 207), while Somers and Roberts argue “to date there exists neither a sociology of rights nor a sociology of human rights” (Somers and Roberts, 2008: 385), noting that the small number of sociologists who study human rights “operate in isolation” (406), although Somers and Roberts attempt to outline existing contributions to “what has the potential to become a viable if embryonic sociology of rights” (406). Turner too as late as 2013 argues “there is not yet anything approaching a sustained sociology of human rights” although he notes there has been “[a] recent spate of handbooks and companions of human rights from sociologists” (Turner, 2013: 249).

A recent rise in sociological interest in human rights is reflected in Woodiwiss’ observations over a number of years. While in 2003 he identifies only six contributors to the field and suggests that broadly speaking “there simply is no sociological approach” to human rights (Woodiwiss, 2003: 4), two years later he signals a small change in this regard. While he still notes at that time that “the sociological presence in the human rights field is currently restricted to a small
number of exploratory texts” (Woodiwiss, 2005: 134), he observes a shift “from a scepticism to an enthusiasm” amongst sociologists towards the notion of human rights (xvii). By 2011 he observes a “small but now rapidly growing number of sociologists in many different countries” who are ‘interested’ in human rights but notes “their still small numbers and geographical separation” that has made for ‘slow progress’ (Woodiwiss, 2011a: 1-2).

For a number of scholars, this expanding interest in human rights in sociology in recent years amounts to the emergence of the sociology of human rights as a distinct subdiscipline (see Hynes, Lamb, Short, and Waites, 2012b). O’Byrne, for example, describes his work as “a contribution to the fast-emerging ‘sociology of human rights’” (O’Byrne, 2012: 829; see also Grigolo, 2010: 910; Hilhorst and Jansen, 2012: 892; Koo and Ramirez, 2009: 1342; Kremakova, 2013: 407; Woodiwiss, 2011b) and argues “such has been the interest in this area over the past decade that one could be excused for describing it as an intellectual revolution” (O’Byrne, 2012: 830). Deflem and Chicoine refer to “the newly emerging specialty of the sociology of human rights” and observe that “[i]n recent decades, the topic of human rights has taken on a more prominent role than ever in the discipline of sociology” (Deflem and Chicoine, 2011: 102; see also De Feyter, 2011: 54; Ferrie, 2010: 866; Hosie and Lamb, 2013: 193; Short, 2007: 857-858), while Kollman and Waites speak of “the new sociology of human rights” (Kollman and Waites, 2009: 3; see also 10). Hynes and her co-authors state that “as human rights laws, language, values, discourses, principles and practices have gathered momentum, so has sporadic interest from sociologists developed into more sustained engagement” (Hynes et al., 2010: 818). They later identify an “enormous appetite for the further development of the
sociology of human rights field” (Hynes et al., 2012a: 790) and observe that the sociology of human rights is “a rich, dynamic and fast developing field of sociological enquiry” (795).

The assertion of subdisciplinary status for the sociology of human rights can also be found in “special editions” of sociological journals (see O’Byrne, 2012: 830), special sections in sociological organisations, including the British Sociological Association (see O’Byrne, 2012: 830), the American Sociological Association (American Sociological Association, 2015), and the International Sociological Association (International Sociological Association, 2015), to name a few (see Frezzo, 2011a: 204) - although the thesis observes this is yet to occur within The Australian Sociological Association - and undergraduate and graduate programmes of study (204; see also Hynes et al., 2010: 818). Robert Fine, for example, convenes an undergraduate module at the University of Warwick entitled The Sociology of Human Rights (University of Warwick, 2010), while the University of Roehampton’s Crucible Centre for Human Rights Research and the Department of Social Sciences “holds events which explore themes within the Sociology of Human Rights” (University of Roehampton, 2013).

Frezzo also notes the organisation Sociologists for Women in Society fosters “both the analysis and the advocacy of ‘women’s rights as human rights’” (Frezzo, 2011a: 207, quoting Sociologists for Women in Society; emphasis in original), while Sociologists without Borders “has actively encouraged sociologists to integrate human rights into their research, teaching, and service” (Frezzo, 2011a: 207). Recent books also assert the existence of, or at least make a case for the recognition...
of, the sociology of human rights as a distinct sociological subfield (see Frezzo, 2015; Brunsma, Iyall Smith, and Gran, 2013). Morris (2010a) prefers the term ‘sociology of rights’, perhaps in recognition of the role of the state in securing human rights, a position explored in detail later.

Besides noting the emergence and expansion of the subdiscipline, sociologists also discuss the epistemological or methodological parameters of the sociology of human rights as a sociological subfield (see O’Byrne, 2012: 839), including whether certain approaches to human rights are in keeping with the disciplinary requirements of sociology (see, for example, Ferrie, 2010: 866; Hajjar, 2005: 210-212; Woodiwiss, 2003: 4-5; 2012: 966-967). Deflem and Chicoine, for example, conduct what they call a “Sociology of the Sociology of Human Rights” (see Deflem and Chicoine, 2011: 102); they review extant approaches, perspectives and commentary within the subdiscipline and discuss the kinds of approaches the sociology of human rights, as a sociological subdiscipline, ought to take and ought to avoid (109-113). Frezzo provides a ‘Teaching and Learning Guide’ for the sociology of human rights in which he sets out the remit of the subdiscipline:

In a nutshell, the field involves the analysis of (a) the social conditions under which human rights treaties and laws are drafted, debated, implemented, and enforced, and (b) the manner in which human rights treaties and laws constrain and/ or enable nation-states, societies, communities, and individuals. (Frezzo, 2011b: 395; emphasis in original)
He also provides a “[s]ample syllabus” for the sociology of human rights including a course description, objectives, readings, schedule and focus questions (Frezzo, 2011b: 396-398; see also Canning, 2010: 860). The American Sociological Association’s Section on Human Rights sets out its vision for the purpose of the sociology of human rights:

The Sociology of Human Rights is conceived broadly and inclusively as a scholarly and human pursuit of understanding the social, political, cultural, and comparative construction of human rights histories, institutions, discourses, and futures as well as the social structures, relations, and practices that will most fully support the realization of human rights in the world. (American Sociological Association, 2015)

Given the increasing number of sociologists who refer to ‘the sociology of human rights’ and treat it as a distinct body of work to which they contribute, this thesis follows suit and treats the sociology of human rights as an identifiable subdiscipline within sociology and accordingly employs the terms ‘sociology of human rights’ and ‘subdiscipline’ or ‘subfield’ throughout to refer to this body of work. Broadly speaking, the thesis defines the sociology of human rights as a body of work within sociology whose writers treat human rights, or practices surrounding the idea of human rights, as valid sociological objects of study and who examine, analyse or theorise human rights or human rights practices, or study as a distinct object the subdiscipline itself. It is a term that encompasses a wide range of work and diverse approaches to human rights.
The thesis accordingly also refers to ‘contributors to the subfield’, ‘contributors to the subdiscipline’ and, following Deflem and Chicoine, to ‘sociologists of human rights’ (see Deflem and Chicoine, 2011: 103-106, 109-110, 112), while acknowledging that these terms may not sit comfortably with those writers who question the subdisciplinary status of this body of work or those who may have devoted only one or two pieces of work to the study of human rights to date; many contributors have produced much work outside the subdiscipline. These terms are therefore employed merely as helpful shorthand terms to refer to authors who have produced work that falls into the above described category of ‘the sociology of human rights’.

**Approaches to Human Rights within the Subdiscipline**

There are diverse definitions of and approaches to human rights across the subdiscipline, reflecting the diversity of approaches to human rights in the broader social world; as Basok points out, there is “no consensus” on which kinds of rights or principles human rights encompass; they remain ‘controversial’ (Basok, 2009: 184). Within the subdiscipline the term “human rights” is used to refer to many different kinds of rights as objects of study, including labour rights (see Woodiwiss, 2003; Li, 2011), indigenous rights (see Richards, 2005; Samson and Short, 2006; Short 2007), social and economic rights (see Blau and Moncada, 2005), gay, lesbian, bisexual and transgender rights (Nash, 2005; Kollman and Waites, 2009), the right to care (Glucksmann, 2006), the right to mobility in relation to migration and immigration (Golash-Boza and Menjívar, 2012), women’s rights as human rights
(Elson, 2006; Walby, 2002), “food sovereignty” rights (Claeys, 2012: 846), and cultural rights (Turner, 2006b: 49), to name a few.

In addition to these diverse approaches to human rights, the term ‘human rights’ also takes both nounal and adjectival forms within the subdiscipline. When employed as a noun the term usually refers to rights that are codified as human rights, including the many human rights that are written into international human rights instruments. It also refers to human rights that are currently not written into law but whose existence is asserted by activists or scholars who may argue they should be enshrined in law or at least recognised in some socially significant way. Claeys, for example, examines the human right to food sovereignty, a “new” human right asserted by activists but not codified at the present time (2012; see also Golash-Boza and Menjívar, 2012). The nounal form of ‘human rights’ is also employed to refer to human rights as a concept rather than as human rights qua rights, as demonstrated in the phrase ‘the concept of human rights’ or ‘the notion of human rights’.

The thesis therefore employs as a noun the term ‘human rights’ to refer to the codified, pre-codified or post-codified rights that are labelled human rights either by social actors or scholars, and also uses ‘the notion of human rights’, ‘the concept of human rights’, and so on, to refer to human rights as ideas or concepts, in order to distinguish between the two different nounal forms of the word as described above.

In its adjectival form, the term ‘human rights’ is applied to a range of human rights ‘things’, that is, practices, processes, structures, discourses and so on, associated with human rights. Lamb, for example, refers to “human rights ideas, language, values, laws, practices and policies” (Lamb, 2010: 994). The thesis employs the
term ‘human rights practices’ as a general term that encompasses the various processes, practices and so on associated with human rights that sociologists of human rights examine, analyse or theorise.

There is, however, some slippage between these two grammatical uses of the term ‘human rights’ within the subdiscipline: a number of writers employ as a noun the term ‘human rights’ when referring to human rights practices, which leads to some confusion particularly where authors use ‘human rights’ to refer to both human rights as rights \textit{per se}, and human rights practices. It is useful to again recall Lamb’s use of the term to illustrate this point. Lamb states that she explores ways in which activists in Belfast “understand, negotiate and incorporate human rights into their community activities” (Lamb, 2010: 995), by which she means the incorporation of human rights language and norms, and also speaks of activists “claiming their human rights” (997), a reference to human rights \textit{qua} rights.

Similarly, Landy argues “human rights is necessary for … distant issue activists to successfully conduct their activism”, by which she means the use of human rights language by activists, employing the term ‘human rights’ as a singular noun (Landy, 2013: 411; see also 409, 415). A number of contributors to the subdiscipline employ the term ‘human rights’ as a singular noun. Waters, for example, states that “human rights is an institution” (Waters, 1995: 32) while O’Byrne argues that “human rights is a social concept” (O’Byrne, 2012: 831). O’Byrne deliberately employs ‘human rights’ as a singular noun as a way to mark out the differences between some of the above usages in order to make a case in relation to the particular concerns of the subdiscipline:
The sociology of human rights is the sociological study of the *language* of human rights, an institutional framework within which meanings are negotiated and practices formalised. Put simply, it is less concerned with what human rights ‘are’ than with what human rights ‘is’. (O’Byrne, 2012: 832; emphasis in original)

In addition to the above subdisciplinary approaches to human rights, a number of key themes and issues have emerged within the sociology of human rights including the distinction between foundationalist and constructionist approaches, the distinction between description and advocacy of human rights, the issue of the role of the state vis-à-vis human rights, and the concern among contributors to the subfield to demonstrate the social import of human rights. What follows is divided into seven chapters, the first of which explores these major subdisciplinary issues and themes.

Chapter 2 discusses the dismissal of natural law in classical sociology then moves beyond the traditional sociological critique, relying instead on the work of natural law scholars in order to provide an overview of a number of natural law concepts that are relevant to the thesis. Chapters 3 and 4 examine in detail the work of three early modern natural law theorists, focusing on each author’s respective theorisation of the importance of the social conditions of the individual rights bearer. Chapter 3 focuses on the work of Hugo Grotius, who dismantles the traditional theological basis for the recognition of natural rights, instead describing rights in social terms. Chapter 4 examines the work of Thomas Hobbes and Samuel Pufendorf. Hobbes, in his ideal-typical portrayal of both civil society and the state of nature, demonstrates the importance of the social conditions within which individual rights operate, while
Pufendorf provides an almost dramaturgical treatment of social relations according to which rights are attached to social personae.

Chapter 5 explores the treatment of natural law within the sociology of human rights including the rejection of natural law ideas therein. It discusses ways in which the natural law theories of Grotius, Hobbes and Pufendorf challenge a number of assumptions held about natural law within the subdiscipline. It also looks at ways in which a small number of sociologists challenge some of these enduring sociological assumptions about natural law.

Chapter 6 examines the respective approaches of Thornhill and Wickham to the recovery of natural law in broader sociology. It expands on Thornhill’s methodological distinction between the traditional sociological “literalistic” treatment of natural law and his proposed “functional” approach (Thornhill, 2013) by identifying a third approach to natural law that it calls a ‘descriptive literalistic’ approach. Chapter 6 further argues that both Wickham’s recovery of Hobbesian natural law and the recovery of early modern natural law in this thesis can be seen as examples of the latter approach.

Chapter 7 examines the work of a small number of sociologists who consider the relevance of natural law for the sociology of human rights. Although none of the writers examined in Chapter 7 describe their work in terms of Thornhill’s distinction, it is argued their work can be seen as taking either a broadly functional or literalistic approach to natural law. Chapter 7 discusses in some detail the work of Bryan Turner, identifying his work as a descriptive literalistic approach and proposing ways
in which his recovery of Hobbes can be buttressed by a closer examination of the connection between individual rights and social relations in Hobbesian natural law.

The final chapter explores ways in which a number of ideas in the natural law theories recovered in this thesis speak to the abovementioned key issues and themes that have emerged within the subfield. It also points to ways in which natural law concepts can be utilised in future research within the sociology of human rights. The concluding chapter argues that the descriptive literalistic recovery of natural law thought can contribute significantly to the sociology of human rights.
Chapter 1: Key Themes and Issues within the Sociology of Human Rights

*Foundationalist versus Constructionist Approaches to Human Rights*

Besides the differences, as explored in the Introduction, in relation to both the usage of the term ‘human rights’ and the kinds of human rights researchers focus on, there exists much controversy in the subdiscipline regarding the ways in which the term relates to its human subject, an issue that goes to the heart of the problem of defining human rights. Two distinct approaches to human rights within the subdiscipline are at the centre of this definitional issue, approaches Roach Anleu calls foundationalist and constructionist approaches (Roach Anleu, 1999: 202). The former approach “identifies underlying or essential qualities that belong to human beings” as a basis for universal human rights (202), while the latter position “argues for examining the way in which specific cultural and historical conditions shape the emergence of rights claims or rights discourse” (205).

A frequently referenced debate in this regard (see Hynes et al., 2010: 817; Levy and Sznaider, 2006: 663-664; Morris, 2006a: 241-242; 2010b) is that between Bryan Turner (1993; 1997), who presents a foundationalist theory of human rights, identifying a universal human condition as the basis for universally applicable human rights, and Waters (1995; 1996), who outlines a social constructionist theory of human rights and argues sociological accounts of human rights ought to view human rights as “an institution that is specific to cultural and historical context just like any other, and that its very universality is itself a human construction” (Waters,
He stresses the role of power relations between “political interests” in relation to the “institutionalisation” of human rights (Waters, 1996: 595).

Constructionist Approaches to Human Rights

Human Rights as Legal Entities

One particular constructionist approach is a legal positivist view of human rights, an approach Woodiwiss favours as it allows sociologists to examine ways in which positive rights arise and apply to the individual, and to examine the social effects of human rights laws (Woodiwiss, 2005: xi-xii). For Woodiwiss, human rights are formal protections, entitlements or restrictions set down in law that operate as instruments of social discipline or represent social ‘expectations’ and rely on “social relations” for their “protective effectiveness” (2005: 3-4). He argues human rights also set out duties of states towards individuals (xi) and speak to the intentions of states and the value accorded to particular kinds of persons and “social relations” within society (2005: xxiii-xiv; see also 2012: 967), Woodiwiss stressing throughout his work the connection between “law and the social” (2011b: 131; see also Hajjar, 2005: 207-208).

In his discussion of the emergence and development of human rights discourse, Woodiwiss draws Foucaultian cross sections of human rights discourse at significant historical points (Woodiwiss, 2002), including the establishment of the Universal Declaration of Human Rights in 1948 (141) and the subsequent institutionalisation of various human rights in international human rights instruments. He explores the ways in which differing levels of enforcement in various treaties reflect political power imbalances between states (141-150). Human rights are for Woodiwiss legal
positive rights as well as “discursive entities” (2003: 15), that is, “products of
discursive formations” reflecting relations of power (2005: 32), and the international
rights regime is an instrument of governmentality, a productive and disciplining
discourse (2005: 26-31; see also 2012: 967; Landy, 2013: 412-413).

In his later work he underscores the discursive and social nature of human rights in
his expanded definition of a human right “as a discursive entity that can take the
form of either a liberty, a claim, a power or an immunity and whose attachment or
otherwise to individuals is socially determined” (Woodiwiss, 2011b: 131), while
maintaining his positivist view that human rights take a “legal form” (2012: 967).

Hajjar similarly holds a legal positivist view of human rights as “legal constructs”
(Hajjar, 2005: 207) and argues the law itself is “a social phenomenon - used, made,
changed, fought over, interpreted, and so on, by people” (207; emphasis in original),
again a position that stresses the social and legal nature of human rights. She adds
rights generally are “practices that are required, prohibited, or otherwise regulated
within the context of relations governed by law”, a definition that speaks to the
constraining and enabling effects of rights (207; emphasis in original; see also
Frezzo, 2011a: 209). By treating rights as practices, Hajjar foregrounds the role of
“social actors” (Hajjar, 2005: 207). These practices also include challenges to extant
“power relations” and to values reflected in laws, including by the assertion of
“counterhegemonic” rights claims (207).

A focus on the “concrete existence” of human rights in law allows sociologists to
look at the operation of human rights ideas in the legal sphere and the ways in which
human rights function as “legal tools, amenable to judicial deliberation over their
meaning and application” (Morris, 2010a: 7). Much research focuses on the interpretation of human rights by legislators and courts, as well as social implications of the use of human rights language in these arenas. A great deal of European research looks at the operation of human rights language in the European Court of Human Rights (for a brief history of the European Court of Human Rights see Johnson, 2014: 548), including: ways in which court decisions act as measures of social control that can influence the practices of states and individuals across Europe (554-558); “discursive constructions” of social identity in court decisions, including the addition of hitherto marginalised identities into the category of the ‘human’ subject of human rights (558-561); instances where court decisions echo contemporaneous social and moral conditions in Europe (549-554); ways in which the utilisation of human rights language as a means to articulate the practice of adoption by same sex parents necessitates a narrative of ‘homonormativity’ where advocates present same-sex couples as conforming to traditional notions of family (Ammaturo, 2014); and instances where court interpretations of human rights laws impact the daily living conditions of asylum seekers (see Morris, 2010a), impact the framing of the right to privacy (see Baghai, 2012: 960-961), and impact the rights of transgender citizens (Hines, 2009).

Research in other jurisdictions includes the operation of human rights language in judgments of the Delhi High Court (Waites, 2010) and United States Supreme Court (Baghai, 2012: 959). Further research includes the construction of the notions of gender and transgender via human rights language in the United Kingdom Gender Recognition Act, 2004 (Hines, 2009). Writers also examine the social impacts of the incorporation of human rights language in state policies (see Ferrie, 2010), including
negative outcomes associated with the invocation of human rights by policymakers in relation to child trafficking in the UK (see Hynes, 2010). Much of the above work bears out Johnson’s assertion that sociologists are well equipped to analyse human rights jurisprudence and bring new sociological insights to the field (see Johnson, 2014: 547-548).

As a number of the above studies demonstrate, social outcomes associated with the definition of social statuses, practices and so on in legal human rights terms are not always beneficial for the immediate parties involved and the broader groups of people they affect (see Ammaturo, 2014; Morris, 2010a). Hagan and Levi warn against the juridification of social inequalities and “the recruitment of sociology to law’s disciplinary enterprise”, observing that disciplinary law wields significant power (2007: 378; emphasis in original; see also Landy, 2013: 424), an argument reflected in Claeys’ assertion that the appropriation of human rights language by legal experts has the effect of reducing social problems to legal issues (Claeys, 2012: 853; cf. Blau and Moncada, 2007a: 366; Woodiwiss, 2002: 148-149). Deflem and Chicoine note that a number of sociologists of human rights appeal to human rights laws as a way to ameliorate social inequalities (see Blau and Moncada, 2007a), a move that Deflem and Chicoine argue is “profoundly unsociological” as it ignores important research in the sociology of law that points to ‘gaps’ between intended and actual outcomes of laws (Deflem and Chicoine, 2011: 112; see also Roach Anleu, 1999: 204). They point out that many human rights sociologists “argue against the restricted idea that human rights must relate to legal protections” (Deflem and Chicoine, 2011: 104; see also Morris, 2006a: 240-241).
For O’Byrne, a focus on law turns attention away from the “most important function” of human rights, that is, “to stand outside and be critical of state practices” (O’Byrne, 2012: 835; see also Claeys, 2012: 852; Connell, 1995: 28). Like Woodiwiss, O’Byrne emphasises the “discursive” nature of human rights, but stresses the socially constructed, rather than legally constructed, nature of human rights discourse (O’Byrne, 2012: 831), within which rival “voices” participate in a “discursive struggle” (831-832). He takes “a ‘structural’ approach”, highlighting the “socially constructed language-structure of human rights” (839). According to this approach, the notion of human rights holds “meaning” for actors within the human rights “framework” (831; emphasis in original).

To illustrate his structural understanding of human rights, O’Byrne points to the presence of the Universal Declaration of Human Rights that, although not enforceable, nevertheless raises “the language of human rights to the level of an institution, or framework of action” and inspires the assertion of “claims or demands made in the name of this language-structure” that he argues are of “enormous sociological relevance” (833). A range of social actors, including social movements, non-governmental organisations, individuals and corporations are able to make claims “precisely because this language exists, and because the UDHR provides the legitimacy of that language” (833; see also Holzer, 2013: 838-839, 862-866). It is thus the social rather than legal significance of the Universal Declaration of Human Rights that O’Byrne points to (see also da Silva, 2013: 469). He argues the language-structure of human rights ought to be the central concern of sociologists of human rights while “legal” and “philosophical” understandings of human rights are the province of other disciplines (831-832).
Indeed, much empirical research within the subdiscipline focuses on ways in which social actors other than legal actors employ human rights language. A great deal of this research demonstrates the ways in which human rights language holds meaning for its users and also explores the kinds of discursive struggles O’Byrne refers to. It includes examinations of: the utilisation of human rights language by local indigenous women as a preferred means by which to articulate their specific concerns, as compared to a feminist framework (Richards, 2006); the utilisation of “extra-governmental” human rights language by indigenous Australian groups as a language that allows for assertion of identity outside the colonial relationship (Short, 2007; see also Samson and Short, 2006: 168-169); the ways in which the use of human rights language influences practices of both humanitarian workers and those in receipt of humanitarian aid (Hilhorst and Jansen, 2012); and the ways in which refugees come to see themselves as “legal subjects” or “wards of international law” subsequent to the use of human rights language by United Nations personnel and the influence of human rights campaigns (Holzer, 2013: 840; emphasis in original; see also 854-858, 862-865).

It also includes work that examines the utilisation of human rights language by advocacy organisations in order to assert greater rights for migrants and migrant labourers (Abji, 2013; Basok, 2009: 193-196; see Hacket, 2009 for an overview of international laws and state practices relating to the human rights of migrant workers); the ways in which local migrant support agencies carefully navigate human rights migration policies (Grigolo, 2010); and the introduction of human rights language into public discourse in South Korea and the ways in which it competes with the continuing influence of Confucian values (Lee-Gong, 2010).
Research also includes exploring the ways in which the operation of human rights language as “a transnational norm” lends legitimacy to anti-racism advocacy and policy (Ruzza, 2006: 117); the ways in which human rights discourse in relation to “modern-day slavery” foregrounds western assumptions about experiences of slavery and western constructions of black women, reinforcing racist conceptions of “blackness” (Woods, 2013); the ways in which a deployment of human rights discourse by British Jews critical of Israel’s actions strengthens their universalist arguments against nationalistic Zionism, but constructs Palestinians as simple objects of humanitarian aid (Landy, 2013); the different ways in which Republican and Unionist advocates in the years following the 1998 Northern Ireland Good Friday Agreement have engaged with human rights ideas and utilised human rights language (Lamb, 2010); the adoption of human rights discourse by feminist activists (Elson, 2006: 102; Walby, 2002: 533-549); and the integration of queer and human rights discourses in grassroots social movements (Collins and Talcott, 2011; see also Hines, 2009: 96-100).

**Human Rights as Social Entities**

Like O’Byrne, a number of contributors to the subdiscipline foreground the social creation of human rights (see Glucksmann, 2006: 61; Stammers, 1999), portraying human rights as “social constructions”, “socially constructed” (see Hilhorst and Jansen, 2012: 894; Gregg, 2010b: 632, Stammers, 1995: 508) or “social inventions” (Carrabine, 2006: 207). Many researchers focus on human rights as constructed *claims*, including claims developed and asserted by social groups, for example, social movements or interest groups, including local groups (see Richards, 2005), more dispersed interest groups or associations (see Claeys, 2012) and online
communities (see Gregg, 2012). A number of thinkers point to the construction and assertion of “anti-hegemonic” (see Claeys, 2012: 845) or “counter-hegemonic” human rights claims by activist groups, in opposition to “hegemonic” understandings of human rights, that is, human rights laws or norms that enjoy widespread legitimacy (see Basok, 2009: 184, 190; Burawoy, 2008: 358; Collins and Talcott, 2011: 581). Claeys, for example, examines the anti-hegemonic “creation of new human rights” by the international peasants’ and farmers’ movement Vía Campesina (Claeys, 2012: 844-845; see also Turner, 2001b: 205).

The conceptualisation of human rights as socially constructed claims, however, may highlight rather than challenge the importance of law in relation to human rights; while many human rights claims, including counter-hegemonic claims, are made prior to law, many are also made in response to extant laws - a point that Hajjar makes, as noted earlier (Hajjar, 2005: 207) - or are asserted by social groups in order to effect change of a legal nature, as seen in some of the abovementioned research in relation to the utilisation of human rights language by social actors (see Abji, 2013; Basok, 2009: 193-196; Holzer, 2013; Samson and Short, 2006; Short, 2007). These instances underscore Woodiwiss’ assertion of a connection between “law and the social” (see Woodiwiss, 2011b: 131). Morris argues that sociologists are well placed to account for all aspects of rights formation, including the social practices and processes that underlie the eventual codification of rights in law and operation of rights in social institutions, that is, “the means whereby a claim moves from the initial engagement with a rights issue, through the process of garnering support, to formal recognition and finally institutionalisation” (Morris, 2006a: 242-244).
Johnson too argues sociology is well equipped to highlight “the influence of the social upon the jurisprudential and vice versa the impact of jurisprudence on the social world” (Johnson, 2014: 549; see also Woodiwiss, 2003: 16-18). In his research he points to various social factors underlying diverse judgments in the European Court of Human Rights (552), observing that judges are socially embedded actors: they hold a “partial vision of the world that is the inevitable outcome of inhabiting a particular position in social space” (553).

Authors also emphasise the social embeddedness of the human subject to which human rights refer (Blau and Moncada, 2005: 28; Verschraegen, 2002: 274-276). Somers and Roberts treat human rights as “social relationships”, an approach that counters the traditional conceptualisation of rights as possessions and focuses instead on the individual as residing “in a fluid network of social relations” (413). Rowland too emphasises the importance of “issues of relationship” inherent in the notion of human rights, challenging the traditional “individualism” of rights language (Rowland, 1995: 24; see also O’Byrne, 2012: 835).

Drawing on the work of Luhmann, Verschraegen argues human rights address “the specific social environment of modern human beings”; they are a crucial feature of modern societies and they enable individuals to ‘participate’ in those societies (Verschraegen, 2002: 275-276). Human rights perform a dual function of protecting the individual and reinforcing functional differentiation (269). While in pre-modern societies individuals enjoyed the social protection that accompanied a fixed social identity and recognised position within the community (265-268), in modern society individuals no longer hold fixed social roles, but modern freedom is instead matched
by increased risks (269-230). Human rights, including “freedom of speech, conscience, religion and association” allow the modern individual to “develop a social identity” and a degree of “autonomy” (274), necessary characteristics of the individual in a functionally differentiated society:

By formulating rights as ‘human rights’ it is further ensured that everyone regardless of social position and status, can participate in the different function systems and thereby build up their own personality. (Verschraegen, 2002: 268)

Human rights also protect against the “totalising tendencies” of a range of social systems within modern society, including the “economy, mass media, religion, and so on” (273). Verschraegen treats human rights as social institutions (262-263; see also da Silva, 2013: 458; O’Byrne, 2012: 830), a position that is compatible with Morris’ concern, as outlined earlier, to focus on the social construction, legal recognition, and eventual institutionalisation of rights (Morris, 2006a: 242, 244).

In connection with an emphasis on social embeddedness, many sociologists of human rights highlight the importance of social and economic rights over civil and political rights as the former directly address the social conditions of the rights-bearing individual (see Benton, 2006: 32-34; Blau and Moncada, 2005: 23-24, 130; Ertürk and Purkayastha, 2012: 149; Hosie and Lamb, 2013: 192-193; Nash, 2006: 197-198; Ramos, Ron, and Thoms, 2007: 401; Somers and Roberts, 2008: 387-388, 391, 411; Turner, 2003: vii-viii; 2005: 148; 2006b: 10; Yoo, 2011; for an account of the ways in which power relations underlie the foregrounding of civil and political
rights over social and economic rights in the international human rights regime, see Woodiwiss, 2002: 141-150).

Blau and Moncada argue social and economic rights are in some contexts as essential to ensuring bodily security as are so-called basic rights pertaining to life, limb and liberty; they argue “the right to food security and to a job”, for example, may be considered to be “fundamental” human rights as they are rights that directly impact upon the security and survival of the individual (Blau and Moncada, 2005: xviii; see also 5; Turner, 2006b: 36-37), a point that touches on the problem of identifying the content of human rights (see Burawoy, 2005: 158). As Hosie and Lamb point out, a focus on civil and political rights over social, economic and cultural rights by non-governmental organisations also touches on the problem of “what constitutes a human rights violation” (Hosie and Lamb, 2013: 192-193; see also Woodiwiss, 2002: 150-151). Woodiwiss suggests the ‘translation’ of “some civil and political rights … into social and economic terms” might address the imbalance between the two sets of rights in the current international human rights regime (Woodiwiss, 2002: 151; see also 2003: viii, 5-9), a possibility he explores in depth in his empirical investigation into labour rights (2003).

Writers also point to ways in which human rights operate as social norms or values (De Feyter, 2011: 54). Carrabine, for example, argues human rights operate as “not simply legal entitlements but … moral obligations that ought to condition social relations” (204), while Basok argues counter-hegemonic assertions of human rights constitute “emergent norms” (184). Besides observing ways in which human rights per se act as norms, writers also point to the ways in which the notion of human
rights in a more general sense operates as a normative framework (see Ruzza, 2006: 117). Hilhorst and Jansen, for example, argue the idea of human rights represents one of several “international normative orders” or “normative frameworks” that social actors appeal to (Hilhorst and Jansen, 2012: 892), visible in the employment of “[h]uman rights-speak” by social actors (902).

A number of scholars build on Meyer’s neo-institutionalist ‘world society’ theory (see Meyer, 2000; 2007; Meyer, Boli, Thomas, and Ramirez, 1997) as an explanation for the global diffusion of human rights norms or cultural values (see Cole, 2005; 2009; 2012a; 2012b; Elliott, 2007: 349, 359; Hafner-Burton and Tsutsui, 2005; Shor, 2008; Tsutsui and Wotipka, 2004; cf. Basok, 2009: 186-187). Hafner-Burton, Tsutsui and Meyer argue given human rights norms have become a powerful international moral standard, it is relatively easy for states to gain moral legitimacy by ratifying international human rights treaties regardless of whether they intend to comply with or enforce those treaties, a practice that engenders isomorphic effects: more and more states tend to ratify treaties (Hafner-Burton, Tsutsui, and Meyer, 2008: 116-121).

There are thus many ways in which human rights are conceptualised and examined within a constructionist framework; human rights represent multiple sociological objects and register in multiple spheres (see Koenig, 2008: 99; Morris, 2006a: 252). However, as argued below, the above constructionist conceptualisations of human rights do not necessarily sit in opposition to foundationalist approaches to human rights.
**Foundationalist Approaches to Human Rights**

Thinkers who take a foundationalist approach provide an account of the ‘human’ to which human rights pertain. They identify a single or small number of universal characteristics of the human or human condition (see Turner, 2002: 59), an account that is sufficiently minimalist to allow for social difference across time and place and therefore allow for the universal relevance or applicability of human rights. In short, foundationalist thinkers conceptualise a minimalist sociological account of the human condition as a basis for human rights (see Turner, 1993; Sjoberg, 1996).

Bryan Turner is a major foundationalist theorist within the subdiscipline. The twin foundational concepts that ground human rights in his theory are vulnerability and social precariousness. For Turner, vulnerability or frailty is a biological feature of the individual and therefore represents a “minimal criterion of commonality” (Turner, 1993: 505; see also 1995: 4). This biological characteristic is also an inherently social one, as the human response to frailty is to establish social institutions including “courtship, the family, religion, rituals, eating patterns, sleeping arrangements, and political ceremonials” (2006b: 28) in order to mitigate our vulnerability (2006b: 10). However, the inherent precariousness of these institutions in turn impacts human vulnerability (2006b: 28). This ongoing relationship between the biological and the social is a universal feature of the human condition (2006b: 126) and represents Turner’s “foundational justification” (1995: 4) for human rights “defined as universal principles” (2006b: 6).

Sjoberg, like Turner, argues “any theory of human rights must be grounded in a theory of human nature” (Sjoberg, 1996: 280). He identifies “the social mind” as the
defining characteristic of the human, that is, the human capacity to be reflective in relation to one’s “own thoughts and actions”, a capacity necessarily realised within a social context (280-281). Sjoberg’s foundationalist human trait, like that of Turner, is sufficiently minimalist to accommodate social diversity and therefore makes possible the “general acceptance of a set of universal principles based on human rights” (289). Sjoberg further argues variations in social and cultural practice are themselves partly the result of the operation of universal human reflectivity, or the social mind (281). Like Turner’s concepts of frailty and social precariousness, Sjoberg’s social mind and the social environment within which it operates exist in an ongoing relationship: ‘collectivities’ including “organizations” influence the social mind, which in turn “may reshape” those organisations, and so on (281).

Foundationalist approaches are asserted in the face of a traditional anti-foundationalism in sociology that is grounded in a preference for positivism and empiricism where “epistemology” and “method” are favoured over “metaphysics” (Somers and Roberts, 2008: 408). This preference within broader sociology is echoed within the subdiscipline where a number of writers favour analysing rather than theorising foundations for human rights (see da Silva, 2013: 458; Morris, 2006a: 240, 243; Waters, 1995, 1996).

This anti-foundationalism within sociology follows a traditional hostility towards the idea of “a universal or natural conception of humanity or the human” (Roach Anleu, 1999: 201; see also Nash, 2005: 342; Sjoberg et al., 2001: 29; Turner, 1993: 496, 500; 2006b: 5). One problem associated with universalistic approaches, according to Morris, is that grounding human rights in human universals requires identifying
universal human characteristics and therefore introducing particulars that are always open to challenge. She points out that different societies conceive of the ‘human’ in different terms, while others deny a common humanity, rendering any attempt to provide an account of the human subject of human rights difficult. However, she adds that “the appeal of some form of universalism has been difficult to resist” given the increasing resonance of the idea of “universal human rights” as a basis for social “coherence” in the face of a “loss of collective value frames” (Morris, 2006a: 240-244; see also Habermas, 2001: 55-57, 108; O’Donnell, 2007: 260-263).

A number of commentators criticise the abstraction of the individual that is required to arrive at a minimalist account of the individual, a device seen in much rights thought (see Hajjar, 2005: 207; Somers and Roberts, 2008: 411-412; cf. O’Donnell, 2007: 262). Blau and Moncada point in particular to the universalist abstraction of the individual in classical liberal rights thought where the individual is conceived as residing within an homogenous social sphere (Blau and Moncada, 2005: 175; see also Benton, 2006: 21-22; Carrabine, 2006: 204, 207; Stammers, 1995: 492; for a detailed critique of the liberal human rights perspective, see Blau and Moncada, 2005). They argue focusing on commonalities downplays social diversity and discourages the examination of the particular social contexts of the operation of human rights: “distinctive human identity” arises out of “different human conditions, from being, say, a Turk or a Peruvian, a child or an elderly person, a migrant or a citizen” (Blau and Moncada, 2005: 2; see also Ertürk and Purkayastha, 2012: 146; Freedman, 2007: 42). As noted above, however, the minimalist conception of the individual in the work of Turner and Sjoberg does not discount the importance of the individual’s place in the social world.
Avoiding Foundationalist Discussion of the ‘Human’

Treating human rights in strictly constructionist terms obviates the need to define or account for the ‘human’ subject of human rights, notwithstanding constructionist accounts wherein the human subject is conceptualised as socially embedded, as noted earlier (see, for example, Blau and Moncada, 2005: 6, 28). Constructionist accounts can simply treat ‘human’ rights as those rights that are labelled as such by the actors that so construct them, including within social, legal or moral spheres.

There is a number of ways in which constructionist approaches to human rights may avoid defining the ‘human’ to which human rights pertain, one of which involves merely accepting the internal assumptions of human rights language in relation to the human at face value. O’Donnell, for example, avoids any definitional discussion of the ‘human’ subject of human rights, stating that he takes as a given “the human rights assumption that human beings are equal in their humanity” (O’Donnell, 2007: 250) and that he prefers to explore the social implications of the employment of human rights language rather than seek to provide a “philosophical justification” for human rights (260; see also Elliott, 2007: 359; Somers and Roberts, 2008: 390). Woodiwiss too observes “‘human’ is an inherently inclusive noun” (Woodiwiss, 2005: 147) and argues “the present range of protected humans is only a selection from a far wider range of human types who should be protected” (148), in a discussion in which he avoids defining the human. Stammers argues this kind of approach is evident in much legal positivist human rights discourse, which he portrays as “generally acceding to the claims to universality contained in the various international instruments and taking them as given” (Stammers, 1999: 991).
A further approach is to conceptualise human rights as not addressing the ‘human’ *per se* but as representing particular social standards. O’Byrne, for example, suggests a distinctively sociological approach to human rights does not define the human to which they pertain but examines breaches of human rights as “violations of what is presented as being normatively acceptable within that language” (O’Byrne, 2012: 839; emphasis in original). Similarly, Barbalet argues the “basic necessities of human existence” that human rights speak to are contingent upon particular social expectations as to what those basic necessities might entail (Barbalet, 1995: 37; see also Woodiwiss, 2011b: 132). For Barbalet, human rights claims “arise as a consequence of transgressions of particular social expectations or boundaries, or acceptable social exchanges” (37); that is, they “arise out of breaches of status - not denial of need” (40; see also Habermas, 2010: 466-468, 472-475; Lechte and Newman, 2012: 524-525).

A further approach is to historicise the human subject of human rights or “humanity” (see Woodiwiss, 2005: xiii), an approach akin to Morris’ argument above that the human is conceived differently across time and place (Morris, 2006a: 240-244). Joas, for example, points to a process of “inclusion” in modernity where increasingly more individuals come to be seen as human, and that the human itself comes to be seen as a sacred being (Joas, 2008: 174). The “sacralisation of the person” goes hand in hand with the “creation of human rights” (174).

Similarly, Verschraegen notes that for Luhmann the idea of the all-inclusive “human” subject of human rights as a “member of a common human race, regardless of colour, creed, social status, and so on”, is a modern invention central to the
identity of the modern individual, as it is sufficiently inclusive to allow the individual to access a range of function systems in a functionally differentiated society, as noted earlier (Verschraegen, 2002: 263, 268), an argument that challenges the notion that the minimalist abstraction of the individual pays no heed to social context. Johnson too identifies human rights as “codifications of historically contingent ways of imagining human beings”, pointing to a number of different versions of the human subject in different human rights documents (Johnson, 2014: 549). Hynes and her co-authors similarly point to the contingent nature of both the ‘human’ and ‘rights’ of human rights discourse, recalling Foucault’s work on the role of the “human sciences” in relation to the concept of “humanity” (Hynes et al., 2010: 815-816).

A further approach that avoids foundational discussion of the human extends the ‘human’ to which human rights pertain. For Woodiwiss, for example, human rights-bearers include not just individuals but also other entities including “trade unions, corporations, or states” (Woodiwiss, 2005: xi), a move that treats the ‘human’ subject of human rights as a “social actor” (see also Hajjar, 2005: 207) or any entity recognised in human rights discourse as a human rights-bearer.

Authors also reject the idea that human rights are naturally attached to or inherent features or ‘possessions’ of the human (Carrabine, 2006: 207; O’Byrne, 2012: 835; Somers and Roberts, 2008: 413; Stammers, 1995: 491; Woodiwiss, 2005: xi; see also 2005: 3), a view that, according to Morris, “echoes Durkheim’s view of social facts as things” as it treats rights as “bestowed” on individuals “by society” (Morris, 2006a: 243; see also Grigolo, 2010: 897). However, foundationalist thinkers hold
similar positions to these in relation to the idea of inherency, rendering the distinction between constructionism and foundationalism less clear.

Challenging the Constructionism/Foundationalism Distinction

Apart from the work of Feuer, who conceives of ‘natural rights’ as innate, albeit dormant and dependent upon social conditions for their recognition (Feuer, 2002), sociological foundationalist approaches, while identifying a universal human characteristic or condition that is the basis for human rights, nevertheless treat human rights as constructs rather than inherent properties of this human condition or inherently possessed by or attached to the human (see Turner, 2001b: 205). This is demonstrated in the work of Smith, who identifies “agency” as a universal characteristic of the human to which human rights pertain, while referring to human rights in constructionist terms, arguing “[i]deas of what is minimally necessary to live, what protects agency, and what protects agents are socially constructed” (Smith, 2004: 414).

Similarly, Sjoberg’s conception of the “social mind” as a foundation for human rights (Sjoberg, 1996: 280) is complemented with an historical account of the emergence of human rights as a legal and moral concept following the Second World War (278). Sjoberg and his co-authors later treat human rights as constructed “claims”, the following quote demonstrating the compatibility of constructionist and foundationalist approaches:

Human rights, as we conceptualize them, are claims made by persons in diverse social and cultural systems … in order to advance the dignity of (or, more concretely, equal respect and
concern for) human beings. (Sjoberg et al., 2001: 25; parentheses in original)

Turner’s foundationalist theory also accounts for human rights as “social claims for institutionalised protection” (Turner, 1993: 489). For Turner, human rights arise in response to a recognition of human vulnerability (Turner, 2001b: 206). Different human rights therefore arise according to different circumstances that render the human vulnerable. He argues a number of human rights may be necessary in order to ensure the basic security and well-being of the vulnerable individual, including rights relating to both physical and mental well-being (Turner, 1997: 566), including environmental, indigenous and cultural rights (Turner, 2001b: 206; Turner, 2006b: 49). Although they form part of the protective canopy that humans establish in order to mitigate their frailty, they are nevertheless constructed entities (see Turner, 1997: 566). Turner states that he promotes the ‘general’ applicability of human rights rather than the “universality” of human rights (2003: 278) and also promotes the application of human rights standards as a basis for the “evaluation of rights abuse” (Turner, 1997: 566; see also Sjoberg, Gill, Williams, and Kuhn, 1995: 8). As Morris points out, “[t]he purpose of his outline theory of human rights is … to offer an account both of what makes human rights necessary, and what makes them feasible” (Morris, 2010b: 323).

What is more, Turner’s foundationalist account of the human contains within it a degree of constructionism. He recalls Mauss’ contention that “human beings are equipped with foundational capacities” (Turner, 1997: 565) such as an ability to walk, “which can nevertheless be developed, modulated and constructed by cultural
processes”, pointing to Mauss’ example of the cultural variation evident in different ways of walking (566). For Turner, these examples demonstrate that a strict distinction between foundationalism and constructionism in the sociology of human rights “is both artificial and unnecessary” (565-566). The foundationalist account of the human in the work of Sjoberg similarly implies a degree of constructionism, as the social mind develops and operates in relationship with the social world, as seen above.

To recall Roach Anleu’s description of constructionist approaches to human rights as those that look at “the way in which specific cultural and historical conditions shape the emergence of rights claims or rights discourse” (Roach Anleu, 1999: 205), it is clear that the above examples demonstrate that both foundationalist and non-foundationalist approaches alike allow for the examination of the construction of human rights. The chapter argues that it is therefore preferable to describe these two broad approaches to human rights within the subdiscipline as foundationalist and non-foundationalist, rather than foundationalist and constructionist, approaches.

The identifiable point of distinction between foundationalists and non-foundationalists is their respective approaches to the ‘human’ the subject of human rights, rather than to human rights per se. While foundationalists treat the human as a universal category whose condition makes human rights relevant, non-foundationalists either avoid definitional discussion of the human or treat the category of human as a contingent concept, in the ways described earlier. What is clear is that both foundationalist and non-foundationalist approaches within the subdiscipline stress the social import of human rights.
Description and Advocacy in the Sociology of Human Rights

Besides the distinction between foundationalist and non-foundationalist approaches, an additional distinction that has emerged within the subdiscipline is that between the description and advocacy of human rights, or what Frezzo calls “the analysis and the advocacy of human rights”, which he identifies as a major “tension” within the sociology of human rights (Frezzo, 2011a: 204; emphasis in original). Frezzo describes “advocacy” work as the use of “sociological research, teaching, and service to advocate for human rights - defined as a set of remedies for enduring inequalities” (Frezzo, 2011a: 209; see also Hynes et al., 2010: 826). The thesis includes in this category written work that does not necessarily draw on “teaching and service” to promote human rights. Advocacy work includes the advocacy or promotion of human rights as social goods, either as human rights per se, or human rights values, norms, standards, and so on. ‘Descriptive’ work is that which engages in the analysis, description or theorisation of human rights and human rights practices, but avoids advocating human rights.

A number of thinkers defend the advocacy of human rights within the subdiscipline via a defence of ‘normativity’. Blau and Moncada observe an increasing number of sociologists adopting explicitly “normative positions” (Blau and Moncada, 2007b: 383); similarly, Somers and Roberts note a rise in an “an unapologetic normativity” in sociological work (Somers and Roberts, 2008: 409; see also Sjoberg, 1996: 274). Various arguments put forward in support of the production of ‘normative’ work in the subdiscipline include: the idea that sociologists ought to be able to participate in moral debates in relation to human rights (see Kollman and Waites, 2009: 10; Somers and Roberts, 2008: 390); the idea that the subdiscipline is well equipped to
produce “normative” or “moral theory” (Sjoberg, 1996: 273; see also Turner, 2006b: 6); and that sociologists can employ human rights principles as “an extrasocietal moral standard” by which to evaluate social practices (Sjoberg et al., 1995: 8; see also 1996: 289; Ferrie, 2010: 866, 875; Turner, 1997: 566, 569).

Thus the category of ‘advocacy’ includes the work of sociologists who promote human rights or human rights norms or practices as a way to effect either disciplinary change, or change within the broader social world. The former includes the promotion of human rights principles or values as an academic tool to evaluate social practices, with or without a view to changing those social practices (see Frezzo, 2011a: 210; Stones, 2006: 150; Turner, 1997: 566, 569), while the latter includes the promotion of human rights and human rights values, norms, and so on as a way to ameliorate social inequalities or change social practices (see Abji, 2013: 326; Blau and Moncada, 2007a: 366; Connolly, 2012: 1242; O’Donnell, 2007; Garrett, 2005: 85-89; Gregg, 2010a; Sjoberg et al., 2001: 12; Turner, 2001b: 206-207; Woodiwiss, 2003: 15; 2005: xvi; 2012: 970). A deal of overlap exists between these approaches, a number of sociologists advocating the adoption of human rights principles or values both within the academy and in the broader social world (see, for example, Burawoy, 2005: 157-158, 165; 2008: 353-354, 359; Canning, 2010: 858; Carrabine, 2006: 204, 207; Collins and Talcott, 2011: 577, 581; Frezzo, 2011a: 206; Nash, 2002; Sjoberg et al., 2001: 12, 27-28, 39).

*Sociology as Value-Free*

A number of writers observe a traditional opposition to normative analysis within broader sociology (see Sjoberg et al., 2001: 12; Somers and Roberts, 2008: 390;
Turner, 1993: 491-3; 2006b: 5-6). Turner argues sociology’s traditional elevation of value neutrality has hampered its ability to enter into meaningful debate in relation to human rights issues, particularly in relation to human rights abuses (Turner, 2006b: 13; see also Somers and Roberts, 2008: 406-407). He adds a value-neutral, strictly descriptive sociology cannot comprehensively deal with human rights practices, as the topic of human rights is an inherently normative one; the identification of certain actions as “evil” inform “human rights legislation”, for example (Turner, 2006b: 12). Similarly, Woodiwiss argues that the sociological examination of the construction and operation of human rights “instruments” can be considered to be a “normative” project in itself, as it entails the sociological examination of measures to “alleviate human misery” and therefore “may be able to contribute to the further alleviation of this misery” (Woodiwiss, 2012: 967).

A number of authors further argue that a purportedly value-neutral or descriptive sociology often harbours implicit normative positions (see Sjoberg, 1996: 280, 292; 2002: 65; Sjoberg et al., 1995: 13, 15; Somers and Roberts, 2008: 408; Turner, 1993: 491-3; 2006b: 5-6). Turner, for example, argues “the (factual) separation of facts and values is a value position” (Turner, 1997: 570), while Burawoy states “[s]ocial science without values is impossible” (Burawoy, 2005: 154). In less general terms, Sjoberg and his co-authors argue the absence of moral commentary in strictly descriptive sociological analyses of extreme events such as genocide implies a normative justification for these events (Sjoberg et al., 1995: 13; see also Sjoberg, 1996: 292).
Sociology as Explicitly Normative

A number of scholars also argue explicitly normative positions can be found in classical sociology. Sjoberg, for example, identifies overt value positions in the work of Durkheim and argues they represent part of a “countertradition” within sociology that “proponents of value neutrality” have effectively buried (Sjoberg, 1996: 274; see also Sjoberg et al., 1995: 9; Turner, 2006a: 140-141, 149). Morris points to explicit value positions in Marx’ work, in particular his “commitment to an alternative morality of emancipation”, adding “Marx does not espouse a value-free model of the social sciences” (Morris, 2006b: 6).

Sjoberg and his co-authors identify further perspectives within sociology they argue are explicitly normative, including moral relativism, communitarianism and utilitarianism (Sjoberg et al., 2001: 15; see also Sjoberg, 1996: 274), and therefore question the sociological dismissal of the notion of human rights on the basis that it is a normative concept (Sjoberg et al., 2001: 15; see also Sjoberg, 1996: 291-292; 2002: 67-68; Lukes, 1993). They also contrast an “ethicist perspective”, which they argue is a normative position generally adopted within sociology (Sjoberg et al., 2001: 41), with a human rights perspective, arguing the latter is a preferable alternative to the former (16-17). Deflem and Chicoine argue, on the other hand, that to promote human rights norms is an unacceptably normative position and instead emphasise the strengths of sociological description for the sociology of human rights (Deflem and Chicoine, 2011: 109-113; see also Brint, 2005: 49, 60-62).
Hajjar argues a clear distinction ought to be maintained between advocacy, which “tends to be imbued with a teleological logic”, and analysis, which she describes as “anti- or counter-teleological” (Hajjar, 2005: 209). However, there is a deal of overlap between the two approaches. Freazzo observes that advoacy usually relies on some form of analysis (Frezzo, 2011a: 208-209; see also O’Byrne, 2012: 840). A number of advocacy writers suggest descriptive sociological work can usefully inform human rights advocacy, including via descriptions of the ways in which human rights values can be used to effect social change (see Golash-Boza and Menjívar, 2012: 1223-1224; Morris, 2006a: 249; Turner, 2006b: 60; Woodiwiss, 2005: xvi; 2012: 967).

The State and Human Rights

A further issue that has arisen within the sociology of human rights relates to what Beck and Levy call “methodological nationalism” (Beck and Levy, 2013: 4), an approach a number of commentators suggest represents a major obstacle to the sociological study of human rights (see Nash, 2006: 194; Turner, 2013: 240). It is a term that refers to the traditional sociological treatment of society as coterminous with or contained within the nation-state (see also Hynes et al., 2010: 812; Kunz, 2013: 387-388; Morris, 2010a: 8; O’Byrne, 2012: 832-833; Sjoberg, 1996: 279-280; Sjoberg et al., 1995: 13; Turner, 1990: 343; Woodiwiss, 2003: 12). Analysts suggest that this sociological understanding of society is problematic for the sociology of human rights as human rights norms, practices and so on often operate at a social level beyond that of the nation-state, including at a global level (see Ertürk and

Turner also points to ways in which the ‘global’ level of the social world has long been of interest to sociologists, referring to these elements in Saint Simon’s work
that inspired Durkheim (Turner, 1990: 344-348, 356; see also 2006a: 141) and the presence of global concepts in the historical work of Marx and Weber (Turner, 1990: 351-354; 2006a: 139, 142).

However, Meyer and his co-authors argue that while increasing globalisation may impact state practices in many respects, it also reinforces state sovereignty in a number of ways (Meyer et al., 1997: 157). They observe that as key carriers and actioners of ‘world cultural models’ (164), “most states are capable of doing more now than they ever have been before” (157). This is also the case in relation to human rights; despite much sociological work relating to ways in which global human rights norms and international human rights laws affect state practices, a number of thinkers note the continued importance of the sovereign state for the realisation or protection of human rights (see Grigolo, 2010: 909; Hajjar, 2005: 207, 209; Koenig, 2008: 100; Lechte and Newman, 2012: 523; Morris, 2006b: 10, 145; Nash, 2006: 195-196; Smith, 2004: 416-417; Soysal, 2012: 16; Turner, 2006b: 4; Woodiwiss, 2012: 969).

Koopmans, for example, challenges the notion of the emergence of post-nationalism (Koopmans, 2012: 22-23) and argues in relation to “immigrant rights” that “there is no empirical basis to support the theory of post-national rights” (29). He asserts the state retains an important role in relation to human rights, pointing to the vastly different human rights outcomes faced by migrants within the European Union depending on the particular states they migrate to (Koopmans, 2012: 23-24). In response to post-national theory in general, and Soysal’s post-nationalist treatment of human rights in particular (2012), he states:
The most evocative way to illustrate to what extent the theory has become decoupled from reality is to imagine a prospective immigrant who has the choice between several possible destination countries. Soysal asks that immigrant to have faith in the supranational human rights discourse and tells her that in terms of rights it doesn’t really matter where she goes, to France or Canada, to Japan or Sweden, to the United Kingdom or the United Emirates. 

(Koopmans, 2012: 29)

Hajjar too observes while human rights are “international” in the sense that “they are constructs of international law”, the state remains the crucial means by which human rights are secured as they “are (still) the primary makers, arbiters, and enforcers of law - both domestic and international” (Hajjar, 2005: 207; parentheses in original), a point echoed by Donnelly:

We must not confuse the increasing constraints under which states discharge their international human rights obligations with a serious challenge to the state as the principal protector of internationally recognised human rights. (Donnelly, 1999: 94)

Woodiwiss argues “enforceability” of human rights is a significant issue for the sociology of human rights and one sociologists are well positioned to address (Woodiwiss, 2003: 4; see also 2002: 149-150). Much work within the subdiscipline deals with the issue of enforceability (see Cole, 2009: 565; Golash-Boza and Menjívar, 2012: 1216-1217; Hilhorst and Jansen, 2012: 892; Johnson, 2014: 556; Smith, 2004: 418-419; Somers and Roberts, 2008: 412; Soysal, 2012: 15; Turner,
Empirical work includes the exploration of the role of the state vis-à-vis international human rights laws, including the examination of state actions in relation to specific human rights treaties or conventions and macro analyses of patterns of ratification across states (see Cole, 2011; Koo and Ramirez, 2009; 1321-1322; Yoo, 2011).

A number of contributors point to instances of what they call “decoupling”, that is, the mismatch between states’ purported commitment to human rights standards, usually in the form of ratifying or signing human rights treaties, and various state practices that contradict this purported commitment (see Clark, 2010; Cole, 2005, 2009; Hafner-Burton and Tsutsui 2005; Meyer et al., 1997: 154; 2008; Ron, Ramos, and Rodgers, 2006: 23), or “loose coupling”, where states introduce new policies that reflect a commitment to a particular human rights treaty while maintaining practices that contradict those policies (Clark, 2010: 67-68; Meyer, 2007: 264).

Morris argues state interests often outweigh the importance given to the implementation of human rights laws (Morris, 2010a: 5). She also discusses, following Lockwood, the phenomenon of “civic stratification”, a result of the state’s decision to ‘grant’ or ‘deny’ a range of rights to certain groups (10; see also 13-17; 2002: 410; 2010b: 328; 2013: 82-86). In her extensive research in relation to the treatment of asylum seekers in the United Kingdom, for example, she documents state denial of human rights of resident non-citizens via immigration policies and domestic laws and the ways in which such laws are interpreted by courts (see Morris, 2002; 2009a; 2009b; 2009c; 2010a; see also Richards, 2005: 207-208 in relation to indigenous rights). Morris observes that while the Universal Declaration of Human
Rights allows for a right to seek asylum, it “places no obligation on countries to offer asylum” and is in any case “non-binding” (Morris, 2010a: 2; parentheses added; see also Golash-Boza and Menjívar, 2012). This sociological research in relation to the capacity of the state to deny certain human rights, together with research documenting weak enforcement mechanisms of human rights laws at an international level (see Cole, 2011; Hajjar, 2005: 208), underscore the continued importance of the state in relation to the enforceability of human rights laws.

Arendt’s Paradox

The issue of enforceability is part of a broader problem Morris calls “Arendt’s paradox”, after political theorist Hannah Arendt, an idea that Morris argues is a central issue for the sociology of human rights (Morris, 2010a: 1-7; see also Lechte and Newman, 2012; Somers and Roberts, 2008: 394-395; Turner, 2006b: 3). The paradox Arendt identifies, first set out in her work produced during the 1940s, is that the human subject of “supposedly inalienable” human rights (Arendt, cited in Bauman, 2002: 284) loses their human rights at the point in which they are rendered a “bare” human (see Morris, 2010a: 3) or nothing more than a human, a description referring to persons who are “no longer citizens of any sovereign state” (Arendt, cited in Bauman, 2002: 284), that is, those who have “lost every trace of a civil identity” (Lechte and Newman, 2012: 525). Human rights become “unenforceable” at the point at which the person becomes the human (284), as such persons have “no institutionalised means of claiming their ‘inalienable’ human rights” (Morris, 2010a: 2), as Bauman explains:
On the earth sliced into estate properties of sovereign states, the homeless are without rights, and they suffer not because they are not equal before the law - but because there is no law that applies to them and to which they could refer in their complaints against the rough deal they have been accorded or whose protection they could claim. (Bauman, 2002: 285)

Simply stated, these are individuals who no longer possess “the right to have rights” (J. Cohen, 1996: 168; Morris, 2010a: 1). Lechte and Newman argue human rights discourse therefore reinforces the “vulnerability” of the stateless individual by rendering its subject mere biological life, as there are no laws or institutions outside the state that enforce the human rights of the stateless individual (Lechte and Newman, 2012: 523). Thus for Arendt, as Morris points out, the ostensibly universalistic “natural law” language expressed in the French Declaration of the Rights of Man and Citizen that secures the inalienable rights of the individual in actuality refers to the rights only of the individual who is a member of the “political community” or state (Morris, 2010a: 2). The mere human who possesses human rights is an entity that does not exist (Bauman, 2002: 284-285), a paradox that interrogates the very idea of the ‘human’ to which human rights pertain.

Arendt’s formulation arose out of her awareness during the 1940s of “the appearance of stateless persons on a large scale” (Morris, 2010a: 2). Arendt’s paradox continues to be relevant in a world that is again witnessing the appearance of such stateless persons in large numbers, including people seeking asylum (see Morris, 2010a: 4-5).
Lechte and Newman add to the “stateless” person other categories to whom this paradox applies:

[D]enaturalised citizens, deported asylum seekers and ‘illegal’ migrants, and even terrorist suspects - those who in one way or another have been removed from the protections of the legal system and excluded from the polity, and whose condition is of extreme vulnerability. (Lechte and Newman, 2012: 524)

These categories of bare human persist despite the presence, post Arendt’s work, of an international human rights regime. Hajjar points to the establishment of international human rights laws following the Second World War and strengthening of those laws via new “accountability” mechanisms, including “ad hoc UN tribunals, ‘mixed’ international-national courts, and an International Criminal Court” in which prosecution of “state agents” accused of “genocide, war crimes, crimes against humanity, torture, and terrorism” takes place (Hajjar, 2005: 210-211; see also Elliott, 2007: 344; Woodiwiss, 2002: 148). However, she also notes while international law now prohibits “genocide”, this has not put a stop to such practices (Hajjar, 2005: 208; see also Dunne and Wheeler, 1999: 2). It continues to be the case that “people only have the rights enshrined in international law if those rights are made available and enforced where they are” (209; parentheses in original). The individual continues to be both reliant on and at the mercy of sovereign states (Lechte and Newman, 2012: 523-524; Turner, 2006b: 4). As Morris observes, “citizenship of a nation-state remains the most certain and secure means of access to many of the
fundamental rights which we now regard as universal, at least in principle” (Morris, 2010a: 145; see also Hines, 2009: 88; Turner, 2006b: 2-4).

Regardless of whether sociologists of human rights treat the state as central to human rights or reject methodological nationalism as it impedes the study of the operation of human rights at extra-national social levels, it is clear that contributors to the subfield, including those who take foundationalist or non-foundationalist approaches, descriptive or advocacy approaches, emphasise the social importance of human rights. The thesis argues that each of these subdisciplinary issues can be considered afresh following an examination of key ideas in early modern natural law thought that resemble in many respects these subdisciplinary concerns. This first requires moving beyond the traditional sociological treatment of natural law.
Chapter 2: Moving Beyond the Classical Sociological Dismissal of Natural Law: A More Detailed Examination of Natural Law

The Classical Sociological Critique of Natural Law

The classical sociological critique of natural law is one of the major bases for sociology's traditional rejection of human rights (see Sjoberg et al., 2001: 18-19; Turner, 1993: 489; 499; Woodiwiss, 2005: 128; 2003: 12-13). It underlies the "disgraced naturalism" associated with human rights in the eyes of social scientists (Somers and Roberts, 2008: 396-397), Somers and Roberts noting "an evident slippage between natural rights and human rights" and observing that "[m]ost social scientists are uncomfortable with the idea of anything social being called natural or universal" (Somers and Roberts, 2008: 388). Somers and Roberts encapsulate the major assumptions of the classical sociologists that continue to ground the dismissal of rights in sociology:

[M]ost sociologists, with more or less consciousness, have followed classical social science’s distancing from (and sometimes hilarious ridicule of [e.g., Bentham 1843]) the inherently value-laden (Weber), illusory (Marx), and philosophically speculative (Durkheim) nature of rights as moral entities. (Somers and Roberts, 2008: 386; parentheses in original)

Critics also suggest classical sociology’s dismissal of natural law was a formative element of sociology (see Chernilo and Fine, 2013: 192; Fine, 2013: 222-223;
Thornhill, 2013: 198-201), Fine describing it as “perhaps one of the core epistemic and normative convictions of sociology” (Fine, 2013: 222-223) while Thornhill observes a “founding self-construction of sociology as *averse to natural law*” (Thornhill, 2013: 213; emphasis in original) where natural law is conceived “as a realm of norms located hypostatically against social facts” (Thornhill, 2013: 201). He recalls criticisms of the notions of natural and universal rights in the work of Comte and Marx, as well as the critique of natural law in the works of Durkheim, Weber and Tonnies (Thornhill, 2013: 199-200).

Turner identifies two aspects of Durkheim’s thought that underpin the latter’s dismissal of universal rights, namely, his positivistic view of law and his separation of the concerns of sociology from those of philosophy, both of which serve to discourage normative analysis of law in sociology (Turner, 1993: 490-491), the latter a key concern for the sociology of human rights, according to Turner (1993; 1997). Durkheim’s and indeed Weber’s dismissal of universalistic natural rights is grounded in a commitment to the historicisation and description of norms (Hynes et al., 2010: 814; see also Turner, 2002: 596). Thornhill adds that the respective ideal-typical and scientific methods of Durkheim and Weber were “designed to eradicate all transcendental principles from sociological reconstruction” (Thornhill, 2013: 199). He argues Weber’s critique of natural law is “of great methodological importance” in the latter’s work (199).

Turner identifies a number of factors that ground Weber’s criticism of natural law. He points in particular to Weber’s value neutrality and fact/value distinction which, crucially for Turner, preclude the normative evaluation of law (Turner, 1997: 565).
As Morris points out, Weber’s value neutrality is “consistent with his rejection of natural rights” as it takes an “historical” view and it stresses the impossibility of evaluating conflicting “principles of right or good” (Morris, 2006b: 4; see also Turner, 2002: 596). Turner argues this has left sociology with an inability to participate in “the discussion of the legality of law” (Turner, 1997: 565). For Turner, the fact/value distinction represents a significant obstacle in relation to the recovery of natural law thought for the sociology of human rights (Turner, 1993: 489).

Turner also points to Weber’s sociology of law as an important factor in his dismissal of natural law and influential in relation to sociology’s dismissal of rights (Turner, 1993: 493). Weber’s historical account of the rationalisation of law, including a number of changes associated with the rise of legal positivism - “the decline of religious tradition”, the “secularisation of the normative foundations of law” and “the conflict between formal and substantive law” - is tied to his account of the demise of natural law (Turner, 1993: 493-494) which itself “has robbed the law of ‘a metaphysical dignity’” (494, quoting Weber).

Turner argues Weber therefore rejects natural law as a basis for law “and hence for rights” (Turner, 1993: 493-494; see also Thornhill, 2013: 201). According to the “legal-rational authority” model, ‘legal norms’ are considered to be legitimate when “issued by a recognised authority”, a position that further discourages normative analysis of law (Turner, 1997: 570; see also 2002: 598) and fosters “obedience” to authority (1993: 494). Turner argues Weber’s position thus implies that “in the absence of a moral framework like natural law, might is right” (Turner, 1993: 495);
“that any person or group that has the power to issue a command that descends effectively through a formal chain of leadership has legitimacy” (Turner, 2002: 599).

The hostility towards natural law in classical sociology is particularly observable in the work of Marx, whose critique of natural rights has been influential in sociology (Somers and Roberts, 2008: 396-397; Turner, 1993: 492), Turner arguing the Marxist critique of universal individual rights has in part served to “constrain the emergence of a sociology of human rights” (Turner, 1993: 493; see also Hynes et al., 2010: 814). A number of commentators point to the influence of Marx’ critique of natural rights as presented in the 1789 *French Declaration of the Rights of Man and of the Citizen* in his essay ‘On the Jewish Question’ (see Fine, 2013: 233-234; Hynes et al., 2010: 814; Thornhill, 2013: 199; Turner, 1993: 492), a piece that is primarily a response to Bruno Bauer’s argument that Jews ought to renounce their religion if they wish to be granted equal rights, an argument grounded in a stereotypical portrayal of Jews (see Fine, 2013: 233-235). In his essay Marx discusses the relevance of the ‘rights of man’ in relation to this issue (Carrabine, 2006: 194; Waldron, 1987: 120-121).

A key criticism of Marx’ is that individual rights are obfuscators of social inequality in capitalist society (Turner, 1993: 492-493; Hynes et al., 2010: 814). He points in particular to the right to property in this regard, a universal right effectively denied to those who do not have the means to realise it (see Benton, 2006: 27), and one that thus cements “class inequalities inherent in the structure of capitalist societies” (Hynes et al., 2010: 814; see also Benton, 2006: 27; Carrabine, 2006: 194; Morris,
For Marx the right to property is simply “the right of self-interest” (Marx, 1996 [1843]: 774). He similarly condemns the right of equality:

“All equality”…is only the equal right to liberty …, viz., that every man is equally viewed as a self-sufficient monad. (Marx, 1996 [1843]: 775)

The “so-called rights of man” in the *French Declaration* thus represent the rights of “man as bourgeois”, that is, the rights of “egoistic man” (775). Rights language simultaneously obfuscates and reinforces the *raison détér* of bourgeois society: “the whole society exists only to guarantee to each of its members the preservation of his person, his rights, and his property” (775). While ostensibly pertaining to a universal community of persons, they reinforce instead the self-interested individual (Carrabine, 2006: 194; Morris, 2006b: 6) in capitalist society. The subject of natural rights in the *French Declaration* is formally a member of an imagined community that bears little resemblance to the individual’s social reality. Rights for Marx are thus simply “specious legalisms” (Somers and Roberts, 2008: 396-397). Formal political rights, for example, relating to “freedom of expression and association” can be contrasted with the realities of workers who “are subject to the dictatorial authority of the employer” (Benton, 2006: 26; see also Turner, 1993: 492).

Somers and Roberts point out that Marx also dismisses the state of nature as an imaginary place “where the ethereally laden Rights of Man reside” as well as the “specious and false universalism” of the abstract individual therein who possesses natural rights (Somers and Roberts, 2008: 396-397). The state of nature, an ideal-
typical conceptualisation of social life outside the state in natural law thought, is discussed in more detail in a later section.

Sociologists of human rights argue the dismissal of natural rights in classical sociology can be traced back to the work of Bentham (see Woodiwiss, 2003: 12) whose “epistemic prejudices influenced Marx, Durkheim, and Weber” (Somers and Roberts, 2008: 396). Somers and Roberts observe Bentham produces a “deviously nimble rhetoric” in his characterisation of natural rights as “nonsense on stilts”, a phrase in which “the positivist antipathy to natural rights is fully expressed” (Somers and Roberts, 2008: 396; see also Carrabine, 2006: 193; Connolly, 2012: 1241; Lukes, 1993: 28). According to Bentham’s account, as Sjoberg and his co-authors point out, “the rights of man” are abstract fictions “anchored in a pre-social state of nature” (Sjoberg et al., 2001: 18) whose universal, transcendental character places them outside positive law, rendering them effectively unenforceable. Moreover, natural law is “detached and protected from the merely arbitrary laws of an actual polity” (Somers and Roberts, 2008: 411-412). Natural rights are therefore placed in a position above and potentially hostile to positive law, as Woodiwiss explains:

‘[U]pon stilts’ because, not only were such rights intellectual phantoms (‘nonsense’) in that they had never been legislated for, but also because they were dangerous, anarchical phantoms, in that they could be used to incite people to strike down that which actually had been legislated. (Woodiwiss, 2005: 49; parentheses in original)
Bentham’s argument thus marks a distinction between natural law and positive law, and the rights that arise from each:

Right, the substantive right, is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, ‘gorgons and chimaeras dire.’ And thus it is that from legal rights, the offspring of law, and friends of peace, come antilegal rights, the mortal enemies of law, the subverters of government, and the assassins of security. (Bentham, cited in Somers and Roberts, 2008: 396).

The treatment of natural law in classical sociology is reflected in the sociology of human rights, where a number of writers echo some of the major assumptions about natural law held by the early sociological thinkers (see Sjoberg et al., 2001: 18; Somers and Roberts, 2008: 387, 411, Stammers, 1995: 500-501; Woodiwiss, 2005: 49; 2012: 967). A number of contributors to the subfield also seek to highlight differences between the notions of natural rights and human rights, emphasising the sociological validity of the latter while dismissing the former (see, for example, Garrett, 1987: 21; López, 2011: 76; Sjoberg et al., 1995: 11; Somers and Roberts, 2008: 412; Woodiwiss, 2012: 967, 968) and warning against approaches to human rights that resemble the conceptualisation of rights in natural law thought (see Stammers, 1995: 491-492; Woodiwiss, 2005: xi-xii). These subdisciplinary
arguments in relation to natural rights and natural law are discussed in detail in Chapter 5.

_Challenging the Classical Sociological Critique of Natural Law_

However, a number of sociologists challenge the classical sociological critique of natural law. Perhaps the most comprehensive account of the methodological basis of classical sociology’s treatment of natural law can be found in the work of Thornhill, whose work is discussed in detail in Chapter 6. Thornhill argues sociology’s dismissal of natural law is the result of its “literalistic” interpretation of natural law (Thornhill, 2013: 200; emphasis in original), an interpretation that engages with natural law on its own terms, that is, on the latter’s own ahistorical, universalistic assumptions, sociology asserting its “disbelief” (200) in relation to the “literal claims” (210) of natural law. He suggests this treatment of natural law paradoxically ‘internalises’ natural law thinking (200) and therefore effectively “misunderstands natural law” (213).

It is therefore an approach Thornhill argues has left sociology with an inability to recognise and explore the ways in which natural law theory has both mirrored and impacted social structures and processes (200-201; emphasis in original). In broader terms, it has left sociology with an inability to explore “the social function of conceptual norms” (201). In short, the traditional literalistic approach precludes the sociological recovery of natural law.

A growing number of sociologists argue that a reassessment of sociology’s continued opposition to natural law is long overdue (see Chernilo, 2013a; 2013b; Fine, 2013; Wickham, 2014). Chernilo and Fine suggest while a rejection of natural
law was formative for social theory, key ideas unite the two branches of thought, including “[n]ormativity, historicity, diversity, universality” (Chernilo and Fine, 2013: 191-192; see also Chernilo, 2013b: 1-7). They argue these ideas are observable in the works of Comte and Marx, and also note that an “ambivalence” in relation to natural law can be seen “in the works of Tonnies, Durkheim and Weber” (Chernilo and Fine, 2013: 192-193; see also Turner, 2003: 273; Woodiwiss, 2001a: 123, 125). Chernilo and Fine contend that “a sociology worth its salt, one that transcends empirical description to address fundamental human concerns, cannot erase its debt to natural law” (Chernilo and Fine, 2013: 196).

Thornhill suggests traces of natural law thinking can be found in the early writing of Marx, including his essay ‘On the Jewish Question’, which he argues is interpretable as “a sociologically embodied theory of post-Enlightenment natural law” (Thornhill, 2013: 199). Fine suggests Marx harbours an implicit defence for certain rights in the face of capitalism (Fine, 2013: 233-235; see also Chernilo and Fine, 2013: 192) and that in his essay Marx “defended equal rights for Jews against opponents of Jewish emancipation” (233), a reading that contrasts with the typical portrayal of this work as a representation of Marx’ anti-rights position (233-235). Lukes also critiques in detail Marx’ treatment of rights (see Lukes, 1985: 64-66; 1993: 29). Fine notes Marx’ personal promotion of “rights movements” (233) and argues Marx sees “the right of all human beings to have rights” as a necessary precursor “to human self-emancipation” (234; emphasis in original; see also Benton, 2006: 26; Morris, 2006a: 246).
While acknowledging the dismissal of the idea of rights in the classical critique, a number of contributors to the subfield nevertheless utilise the sociological insights of the classical thinkers in their subdisciplinary work. Morris favours this approach; she argues sociologists ought to “return to the classics, and other works, for guidance as to how to pursue the sociological analysis of rights in practice” and suggests ways in which they might do so (Morris, 2006b: 2-7; see also 2006a: 245-246). Similarly, Woodiwiss observes that despite classical sociology’s critique of rights, it “contained … most of the elements necessary to create a sophisticated sociology of human rights” (Woodiwiss, 2011b: 123; see also 135-136). Indeed, many sociologists of human rights draw on the ideas of Durkheim in their work (see Baghai, 2012: 953; Elliott, 2007: 353; Galtung, 2011; Joas, 2008; Johnson, 2014: 550-551; Morris, 2012: 1128; Turner, 2006a: 140-141, 149), and some writers also utilise the ideas of Weber (see Connolly, 2012: 1237-1238; Morris, 2012: 1128-1130, 1138).

A Word on Kant

A number of sociologists of human rights who explore the relevance of natural law focus on Kantian natural law thought (see Chernilo, 2013a; Habermas, 2010; Fine, 2013; Woodiwiss, 2005). However, while the thesis does not seek to discount the possible relevance of Kantian natural law for the sociology of human rights, in order to avoid confusion it does not discuss Kantian natural law ideas as it instead focuses on the natural law theories of Grotius, Hobbes and Pufendorf, early modern thinkers whose significance, natural law scholars note, is often neglected in Kantian accounts of natural law thought.
The consequence of the rise of Kantianism … was that the old history of moral philosophy was soon forgotten, the importance of Grotius and Pufendorf was overlooked, and the resemblance between Hobbes and the other natural law writers was disregarded. In post-Kantian histories … Hobbes is treated as a relatively minor contributor to an English ‘empiricist’ school of philosophers of which the most illustrious member was Locke. (Tuck, 1989: 96; see also Saunders, 2002: 2192; Schneewind, 1998: 119).

Haakonsen points to the historical significance of Protestant natural law, much of the natural law that was produced in “Protestant Europe during the seventeenth and much of the eighteenth centuries” (Haakonsen, 1996: 15), noting the importance of the work of Grotius, Hobbes and Pufendorf as part of this tradition (26-46). He recalls the significance attached to Grotius amongst his contemporaries before his natural law theory was obscured by the work of Kant:

[I]t seemed to moral philosophers of these centuries, especially to the modern natural lawyers themselves, that something decisively new happened with Grotius. Protestant natural law was seen as a distinct school of moral philosophy, until the history of philosophy was redrawn by Kant and by others working in the light of his philosophy. (Haakonsen, 1996: 15).

Observers also note a continued lack of acknowledgement of the importance of these early modern thinkers in much contemporary scholarship (see Buckle, 1991: 53; Saunders, 2002: 2192; Schneewind, 1998: 119). This is reflected in the work of
sociologists of human rights; the thesis can identify only one sociologist to date who recovers early modern natural law for the sociology of human rights, namely, Bryan Turner, whose work in this regard is discussed in Chapter 7.

The post-Kantian misrepresentation of Grotius, Hobbes and Pufendorf is perhaps in part responsible for the lack of recognition among sociologists of human rights of the important social elements in the work of these early modern thinkers. A number of scholars of natural law describe the work of these thinkers as resembling “sociology” (see Saastamoinen, 1995: 20; Westerman, 1998: 210-211). Tuck, for example, notes “a substantial element of descriptive ethical sociology” in the work of “Grotius and his successors”, including that of Hobbes and Pufendorf (Tuck, 1992: 86-87). Martinich suggests “the most important element of Hobbes’s greatness is his distinctively modern theories of both the natural and social worlds” (Martinich, 1992: 10). Miczo portrays Hobbes as “the founder of modern social exchange theory” (Miczo, 2002: 207; see also 216-217), Dreitzel refers to “Hobbes’ social philosophy” (Dreitzel, 2003: 258) and Raphael, speaking of Hobbes, states “I think it is fair to call him the inventor of social science as that term has been understood in the modern world” (Raphael, 1977: 18; emphasis in original).

In relation to Pufendorf, Hochstrasser refers to “Pufendorf’s social thought” (Hochstrasser, 2000: 95) while Tully argues Pufendorf redrew the discipline of natural law as the study of “the social” (Tully, 1991: xxii) and renders natural law “a social theory” (Tully, 1991: xxiii; emphasis in original; see also Chappell, 1992: vi). Saastamoinen too refers to Pufendorf’s treatment of “natural law as a social institution” (Saastamoinen, 1995: 20) and Westerman argues “Pufendorf’s theory
can indeed be characterised as a mixture of social science and moral theory” (Westerman, 1998: 205). She argues Pufendorf employs “the idiom of a descriptive sociologist or historian” in his conceptualisation of the state of nature (210).

A Brief Overview of Natural Law

An overview of the development of a number of natural law concepts will help situate the work of these three thinkers historically and intellectually within broader natural law thought. A general account of this body of thought is difficult, given the great diversity amongst the many natural law theories produced over centuries (da Cunha, 2012: 48-49; Haakonssen, 2004: 92-93, 106). Hunter describes natural law “as an intellectual genre or language in which a wide variety of conflicting doctrines were formulated” (Hunter, 2011, 476) and warns natural law theories are “difficult to fathom and dangerous to navigate” (475). Despite the diverse approaches within this vast body of work, Hunter argues natural law is “generally understood in terms of norms of conduct” arising out of the individual’s “nature” that are therefore “‘foundational for ‘positive’ law and politics” (475). It is natural in the sense that it is “embedded” in individuals who are able to gain access to it by the use of their “reason” (476), often referred to in natural law theory as ‘right reason’, an idea examined below.

As it relates to proper conduct among humans, it is also “capable of issuing civil laws” (476), a term not to be confused with the modern understanding of ‘civil laws’ that are separate from ‘criminal laws’ but a more general term relating to positive laws issued by or within the civil state, as opposed to divine law, natural law and laws issued by religious authorities. The thesis therefore employs the terms ‘positive
law’, ‘civil law’, ‘positive civil law’ and ‘state law’ to indicate the above understanding of “civil laws” as conceptualised in natural law thought (although religious law is a form of positive law, the thesis employs the terms ‘church law’, ‘religious law’ or ‘positive church law’ to distinguish such law from positive civil law). As a law relating to proper conduct among humans, natural law, in some versions of natural law theory, can be utilised to judge the legitimacy of civil law (477). This general description of the social and political authority of natural law is one to which traditional forms of natural law theory adhere to a greater or lesser degree.

Hunter provides a helpful overview of the development of the concept of natural law. As “part of Europe’s pagan heritage” it found expression in “Stoic (Ciceronian) ethical philosophy” and provided a basis for “legal rights” in Roman law (475; parentheses in original). He points to ways in which this early pagan thought “combined with other conceptions of law in late-medieval Christian monastic and university contexts” during the thirteenth and following centuries to produce a range of diverse natural law doctrines that brought together theological, jurisprudential and philosophical disciplines, within which differing conceptions of law “as divine reason, civil command, moral imperative, biblical law, and natural ordering”, and differing conceptions of the individual “as rationally self-governing, naturally sociable, dangerously fractious, requiring a superior, and so on”, reflected not only diverse disciplinary concerns but the competing political and religious uses to which natural law was put (475-476; see also Haakonssen, 2004: 92-93), particularly during the political and religious troubles of the sixteenth and seventeenth centuries. One of those key uses is its role in justifying or condemning government given its authority
as a means to judge the legitimacy of civil law (478), a feature of natural law that is transformed in the work of Hobbes and Pufendorf.

**Scholastic Natural Law**

The Thomist version of natural law, originating in Thomas Aquinas’ formulation of “scholastic” natural law during the thirteenth century, is a major strand of natural law, the further development of scholasticism during the sixteenth century in turn inspiring anti-scholastic natural law theories (Hunter, 2011: 476-479), to which Grotius, Hobbes and Pufendorf are significant contributors (Hunter and Saunders, 2003: xii-xiii).

Scholasticism combines aspects of “Greek (Aristotelian and Platonic) metaphysics and Christian faith”, scholastic thought holding a ‘Christianised’ version of the Aristotelian individual as a *zoon politikon* or “political animal”; the scholastic individual is assumed to have an inherent “‘rational and sociable’ nature” (Hunter, 2011: 477; see also Hunter and Saunders, 2003: xii; Wickham, 2014: 141). Wickham refers to the Aristotelian “homo-duplex”, a term signifying the dual “higher reasoning” and “lower sensuous” aspects of the Aristotelian individual, pointing out it is the “higher reasoning” aspect of the individual that is converted into the notion of natural reason in the scholastic scheme (Wickham, 2014: 141). Aquinas also extends the Aristotelian idea of the ‘*polis*’ in which individuals are able to ‘perfect’ their sociable and rational nature: for Aquinas the civil state similarly functions as a space in which individuals are able to perfect their sociable and rational nature as Christian virtues. The key role of civil law, according to Thomist
natural law, is thus to allow individuals to attain Christian perfection pursuant to
natural law (Hunter, 2011: 477-478; see also Wickham, 2014: 141).

In scholastic thought, civil law is situated below both divine law and natural law. For Aquinas divine law is associated with divine reason, through which “God as the divine mind” creates all “the essences or ‘natures’ of all things” including the nature of the rational individual (Hunter, 2011: 477; see also 2007: 88; Martinish, 1992: 10). Individuals are equipped with innate ‘right reason’ that allows them to access natural law and therefore to judge whether or not certain actions conform to natural law (see Harvey, 2006: 39-40; Hunter and Saunders, 2003: xii), that is, whether certain actions are recognised to be “objectively right” (Hunter, 2011: 477; see also Wickham, 2014: 142). By the use of their right reason, they are able to gain access to a limited amount of divine reason and therefore gain an understanding of how God intends humans to live according to natural law (Hunter, 2011: 477; see also Westerman, 1998: 212).

Wickham explains that in the scholastic narrative “nature in fact supplies to humans so much reason that, were they to apply it in the manner in which nature intends, they would achieve a perfect society” (Wickham, 2014: 140). This scholastic understanding of the individual thus leads to an account of society as arising naturally out of human reason, or what Wickham calls “society as a natural-rational community of communities” (143).

Below divine and natural law, therefore, positive civil law is considered to be just only if it adheres to the precepts of natural law (Hunter, 2011: 476-478). Thus the close connection between natural reason, natural law, civil law, and the state in the
scholastic scheme leads to a view of society as a “perfect, reason-focused, natural society” as opposed to conceiving of society as an artificial creation or “achievement” (Wickham, 2014: 141-142; see also Saunders, 2002: 2185).

This doctrine was extended in the natural law theory of the “second scholasticism” where natural law became an important ideological tool in the context of “the splitting of the church into rival Catholic and Protestant confessions in the sixteenth century, and the associated rise of mutually hostile confessionalized states” (Hunter, 2011: 478). Major scholastic natural law theorist Francisco Suarez argued heretical Protestant rulers of states could be ‘dethroned’ by the pope and conceivably assassinated, a clear example of the ways in which scholastic natural law could be utilised “in the counter-Reformation battle against Protestant churches and states” (Hunter, 2011: 478; see also Hunter and Saunders, 2003: xii). This dangerous scholastic deployment of natural law is, as Hunter explains, “the context in which the anti-scholastic natural law constructions of the seventeenth century emerged” (Hunter, 2011: 479).

*Anti-Scholastic Natural Law*

The Protestant natural law theories that arose in response to these scholastic assertions, including those recovered in this thesis, sought to protect the autonomy of the positive law of the state and thus conceptualised a different relationship between morality and law, and provided a different conceptualisation of society. An emphasis on the role of the social rather than the divine in human affairs can be found in these early modern anti-scholastic theorisations:
In the dark shadows of the religious wars, Protestant thinkers of the
sixteenth and seventeenth centuries sought a natural law that would
defend the civil state against religious and moral delegitimation.
Hugo Grotius (1583-1645) thus viewed the laws derived from
sociability as social conventions rather than transcendent values,
while the English political philosopher Thomas Hobbes (1588-
1679) made social peace, not moral perfection, the goal of natural
law, such that the sovereign state became the final arbiter of
morality, not vice versa. Following Grotius and Hobbes, Pufendorf
too viewed natural law as a set of rules for cultivating the
sociability needed to preserve social peace. (Hunter and Saunders,
2003: xii-xiii)

The secularisation of natural law under these three authors and the increasing
importance given to the social in their schemes can therefore be seen as a response to
the intellectual, social, moral and political environment in which these authors were
living and writing, a period marked by religious violence and social and political
upheaval, conditions that greatly concerned each author and informed their
respective approaches to natural law (see Tully, 1991: xviii-xxi). Each of these
authors was writing around the time of a prolonged sectarian conflict in the
seventeenth century: the Thirty Years’ War, which began in 1618 and ended with
the signing of the Peace of Westphalia in 1648.

Grotius and Hobbes produced major natural law works during the Thirty Years’ War
and were concerned, according to Tully, with “how to establish political society and
obedience to it out of the circumstances of devastating war and insecurity” (Tully, 1991: xx-xxi). Grotius’ relevant work was produced both before and during the Thirty Years’ War, namely, De Jure Praedae or Commentary on the Law of Prize and Booty, not published in full until discovered in 1864, but whose chapter Mare Liberum or The Free Sea or The Freedom of the Seas was published in 1609, and his major work, De Iure Belli ac Pacis or The Rights of War and Peace, published in 1625. Hobbes’ major works, in which he sets out his natural law and political theory, namely, De Cive, the first edition published in 1642, and Leviathan, or the Matter, Forme, and Power of a Commonwealth, Ecclesiasticall and Civil, referred to hereafter as Leviathan, published in 1651, were written during the English Civil War (1641-1651) and in part during the Thirty Years’ War. The threat, and reality, of religious destabilisation of civil society during this period was a central consideration of Hobbes (Wickham, 2014: 141-144; 151), whose stated aim was to discover “what are the conditions of society, or of human peace; that is to say (changing the words only), what are the fundamental laws of nature” (Hobbes, cited in Saastamoinen, 1995: 52; parentheses in original; see also 13-14) given the human propensity for conflict (see also Curley, 1994: xlv-xlvi).

Pufendorf, as Saunders observes, was “living in the shadow of the Thirty Years War” (Saunders, 2002: 2173). He produced his major work some 25 years after the war in the form of his seven-volume De Jure Naturae et Gentium or Law of Nature and Nations in 1672, followed by a student abridgment, De Officio Hominis et Civis or On the Duty of Man and Citizen According to Natural Law in 1673 (see Pufendorf, 2003 [1691]: 15; see also Hunter, 2004: 671; Hunter and Saunders, 2003: xii), also known as The Whole Duty of Man, According to the Law of Nature (see
Hunter and Saunders, 2003: xvi). As Hunter and Saunders point out, Pufendorf, who had experienced the “horrors and fears” of the Thirty Years’ War “as a child, with killings in nearby villages and the family forced to flee its home briefly when he was seven”, was concerned with the question of how to achieve “social peace” which “remained a driving factor in Pufendorf’s lifelong concern with the governance of multiconfessional societies, and hence with the critical relation between state and church” (Hunter and Saunders, 2003: x-xi; see also Tully, 1991: xvii-xix). As Tully points out, Pufendorf is concerned with the question “how does one conduct oneself so as to become a useful member of such a society and polity” (Tully, 1991: xx-xxi; see also Saunders, 2002: 2192). This concern for social peace, how to achieve it, and the individual’s place within society, is shared by Hobbes and Grotius.

With these important questions driving their work, a central feature of the early modern natural law theories explored in this thesis, particularly those of Hobbes and Pufendorf, is their rejection of the scholastic idea of the ‘natural’ society and the idea of seeking Christian ‘perfection’ in such a society: not only does the notion of a natural society take social peace for granted, but competing notions of perfection can become the source of violent conflicts:

The religious wars had been pursued for a divine end: to gain one’s own citizenship in heaven by eradicating others’ heresy on earth. The new natural law would pursue peace in “this life,” a life to be led “in society with others,” for an end that was merely civil and nothing higher. (Saunders, 2002: 2174, quoting Pufendorf; see also Wickham, 2014: 141-144 in relation to Hobbes)
It is partly for the above reasons, therefore, that the collection of natural law theories that arose in opposition to scholasticism is variously labelled Protestant natural law (see Haakonsen, 1996: 15), anti-scholastic natural law (Hunter, 2011: 487, 490), and secular natural law (see Carr and Seidler, 1996: 358-359, n. 12; Hunter, 2011: 487; Vogel, 1999: 561). It is also for these reasons that questions around the social conditions of the natural rights-bearing individual become a major concern for these theorists.

**Realist and Voluntarist Natural Law Theories**

A further point of difference amongst natural law theories is that between realist and voluntarist accounts of natural law, a distinction relevant to the increasingly secular approaches of Grotius, Hobbes and Pufendorf and the increasing emphasis on the state, society and the individual within as achievements rather than as products of a natural moral order.

As Haakonsen points out, realist natural law thinkers take a “metaphysical” view of morality, that is, they treat “values as ontologically inherent in the natural world” (Haakonsen, 2004: 93-94), an assumption seen in the “Aristotelian and Thomistic concept of nature as a purposeful realm” (xvii). The Thomistic notion of the individual who has, by exercise of right reason, access to God’s intentions according to natural law, is conceived within a realist framework: ‘realist’ thinkers “assume a structure to be inherent in reality that is consonant with and, hence, accessible to reason, including human reason” (Haakonsen, 2004: 94). This approach was, as Saastamoinen points out, the prevailing approach to “moral philosophy” in the seventeenth century (Saastamoinen, 1995: 130; see also Haakonsen, 2004: 106).
Grotius retains the traditional realist notion that individuals are able to access natural law through their right reason; that is, he holds to a realist conception of natural law as pertaining to an “objective moral order” (Haakonssen, 2002: 34) to which individuals can gain access by the use of their reason. The key point that separates Grotius’ conception from that of scholastic natural law is that he treats the individual’s reason as a socially-based rather than divinely-based ability (Seidler, 1990: 17-18). Moreover, while he retains the idea that the individual is sociable, he also transforms this idea, “shedding the perfectionism of the older outlook” (Forde, 1998: 641) and providing a this-worldly rather than divine basis for the individual’s sociable nature, as detailed in Chapter 3.

Hobbes and Pufendorf, on the other hand, reject these realist notions relating to a transcendental moral order to which individuals gain access by the use of their reason, and instead develop voluntarist versions of natural law (Haakonssen, 2004: 95-96). Voluntarist natural law theories treat moral order as imposed from without, traditionally via “divine willing” (Haakonssen, 2004: 96), the term ‘voluntarism’ referring to the emphasis on ‘will’ rather than nature.

Hobbes and Pufendorf follow Grotius, however, in one crucial respect: just as Grotius secularises realist natural law, Hobbes and Pufendorf develop a secularised version of voluntarist natural law, emphasising not divine will but “the human will as the key explanatory factor in understanding the value schemes that make up humanity’s cultural world” (Haakonssen, 2004: 96; see also Tully, 1991: xvii). Hobbes and Pufendorf also severely curtail the idea of reason as a reliable source of proper conduct among humans. The state and its civil laws are thus not natural
outgrowths of natural law, itself accessible by reasonable individuals, but necessary structures established in order to secure social peace in an otherwise uncertain moral environment (Tully, 1991: xvii; Wickham, 2014: 141-144), as detailed in Chapter 4.

**The State of Nature in Natural Law Theory**

Hobbes’ and Pufendorf’s anti-scholasticism is further demonstrated in their respective approaches to the state of nature. As Seidler explains, the state of nature in early modern natural law operates “as an abstract, ideal description of the human condition” (Seidler, 1990: 49), ‘ideal’ in the sense that it operates effectively as an ‘ideal-typical’ depiction of the human condition in a state of nature (Wrong, 1994: 16), that is, a depiction of social life outside the confines of the state and the rule of law. Seidler sets out four distinct “versions” of the state of nature in use during the seventeenth century, one of which is the scholastic version, according to which the state of nature is “an ideal polis” where the naturally sociable and political individual is able to “realize his proper human function”, a framework in which the state or polis is treated as a natural consequence of the interactions of sociable individuals (Seidler, 1990: 28-29).

Seidler also identifies the Stoic and Christian conceptualisations of the state of nature as either “a pre-civil (natural) state of ‘utopian’ perfection” that predates the “devolution”, or a prelapsarian state that predates the Christian “fall”, a “perfection” that “provided a norm for determining the content of the natural law” (Seidler, 1990: 29), elements of which can be found in the scholastic conception, as seen above.

The Epicurean account, on the other hand, provides a relatively bleak depiction of the state of nature:
[H]umans were originally free, equal, solitary, and at odds with one another. Their pre-civil condition was marked by war, chaos, and general insecurity because effective right and law were taken to be positive or conventional only, rather than natural. And it was in order to escape this undesirable natural state that they eventually joined together and by agreement formed civil societies to ensure their own safety and welfare. (Seidler, 1990: 29)

While Seidler acknowledges obvious parallels between the Epicurean version and Hobbes’ conceptualisation of the state of nature are recognised by many scholars of natural law (29), he identifies some areas of divergence and treats Hobbes’ conceptualisation as a fourth distinct version of the state of nature. Pufendorf in turn draws on the Hobbesian and Epicurean notion of the “imperfect state” (Seidler, 1990: 33) in his depiction of the state of nature.

A Note on the Use of Gendered Language

A further indication of the period in which these natural law theories were produced is their employment of both sexist and racist language (see Tully, 1991: xiv, n.1; Ryan, 1996: 217-218), a point that is necessary to address before proceeding to examine this early modern work in more detail. The thesis attempts to avoid the reproduction of such language where possible. While it avoids the use of racist language, it is not always possible to avoid reproducing gendered language, as much of the secondary literature in relation to natural law theory continues to employ gendered language, using the term “man” in both its direct quotes and its commentary. This is complicated by the fact that the original natural law theorists
also employ “man” in some instances to refer to men and exclude women, as Tully points out when he explains his preference to continue to use gendered language (see Tully, 1991: xiv, n.1).

However, a number of scholars of natural law employ the term “individual” where the original early modern literature refers to “man” or “men”, a hopeful sign that in many instances when the early modern theorists use the word “man” they may not be referring to men exclusively. Haakonssen, for example, refers to Grotius’ conception of “humankind’s social nature” (Haakonssen, 1985: 249) and speaks of the “person”, the “individual” and “everyone” in his discussions of passages by Hobbes where the latter has employed gendered language in the original (Haakonssen, 1996: 32), although Haakonssen does also revert to the terms “man” and “men” in other places (see Haakonssen, 1996: 37, 39). Given this contradictory treatment of gendered language in the secondary literature, for the sake of clarity the thesis reproduces the use of gendered language when quoting directly from Grotius, Hobbes or Pufendorf but avoids the use of gendered terms elsewhere where possible, reproducing gendered terms as they are used in the secondary literature only where it is difficult to avoid. It is to the natural law theories of these three early modern thinkers that the thesis now turns.
Chapter 3: The Importance of the Social in Grotian Natural Law

*Grotian Natural Law Theory*

A number of key ideas in the theories of Grotius, Hobbes and Pufendorf make their work relevant to the sociology of human rights. Each respective author conceives of what makes peaceful social life possible among individuals, a conception that for each is linked to their treatment of individual rights. The importance of the social in their work is connected to the increasingly secular approaches they take; they each treat natural law as pertaining to this-worldly human relations, reducing natural law’s traditional connection to theology. This focus on the social first occurs within a realist framework with Grotius’ secular conception of right reason, sociability and natural rights.

*The Secularisation of Natural Law under Grotius*

Grotius’ secularisation of natural law is a repositioning of natural law widely understood as a “watershed in the history of ideas” (Crowe, 1999: 3) and recognised as such by his contemporaries (Haakonsen, 1985: 251). His *etiamsi daremus* statement – a Latin phrase that roughly translates as ‘it would be so, even if’ - in the Prolegomena to his *De Jure Belli ac Pacis*, published in 1625, is commonly cited as the key passage that encapsulates his secular approach to natural law (Zagorin, 2000: 28-29):

> And indeed, all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be
granted, that there is no God, or that he takes no Care of human Affairs. (Grotius, 2005 [1738]: 89; emphasis in original)

According to Grotius’ realist position, there exists “an objective moral order” in the world (Haakonssen, 2002: 34) within which “things are good or bad from their own nature” (Tuck, 1979: 68), and therefore the principles of natural law are immutable and would prevail regardless of God’s position as the original author of natural law; in other words, the divine authorship of natural law is irrelevant to its content.

However, Haakonssen points out that “the famous etiamsi daremus passage upon which the picture of Grotius as the great secularizer has often been built” finds its roots in the “scholastic tradition that goes back at least to the mid-fourteenth century” (Haakonssen, 1985: 248-249; see also Seidler, 1990: 17; Zagorin, 2000: 29) and is not, therefore, key to the secular shift in natural law theory under Grotius. Saastamoinen too argues although the etiamsi daremus passage inspired much contemporary debate, “Grotius’ view of the normative character of natural law was still rather conventional” (Saastamoinen, 1995: 17-18).

Scholastic natural law thought similarly conceives of a transcendental moral order within which certain actions are recognised to be “objectively right” (Hunter, 2011: 477). Individuals within the scholastic scheme are equipped with reason, the use of which allows them to access a limited amount of divine reason and therefore gain an understanding of how God intends humans to live according to natural law (Hunter, 2011: 477). Grotius retains the scholastic idea that by the use of their “Right Reason” individuals are able to gain an understanding of “the Moral Deformity or Moral Necessity ... in any Act” and consequently whether it conforms to the
principles of natural law (Grotius, 2005[1738]: 150-151; emphasis in original; see also Harvey, 2006: 39; Seidler, 1990: 17). However, despite Grotius’ retention of these scholastic elements in his work, he is nevertheless recognised as “the one who ‘broke the ice’ after the long winter of Aristotelianism” (Tuck, 1991a: 499; see also 1989: 92-93).

Seidler argues the turning point in early modern natural law under Grotius is attributable to the way in which he transforms the role of reason within this familiar realist framework (Seidler, 1990: 17). Grotius secularises the traditional concept of right reason by replacing God with the social: the exercise of right reason now entails a consideration of social action rather than access to divine intellection:

[T]he content as well as the obligatoriness of the natural law emerges from a rational consideration of actions required for individual men’s wants to be satisfied in a social context. So regarded, Grotius’ position is indeed … both secular and novel. (Seidler, 1990: 18)

It is because Grotius continues to work within a realist framework that his secular transformation of right reason is made possible. For Grotius, given that God “made the world such that it has a determinate character” (Buckle, 1991: 28), access to the divine mind is therefore not required in order to determine the law’s content. Grotius wrests natural law from its theological shackles, providing “an independent route to ethical knowledge which even an atheist could follow” (Tuck, 1993: 198; see also 188). He thus provides, in the context of “fundamental changes in politics, science and religion” during the early seventeenth century, and particularly in the
face of the collapse of religious consensus and the resultant rise of religious violence, “a conception of moral and political order that could be convincing to people lacking a common, harmonious vision of the good life” (Darwall, 2004: 112).

The Connection between Individual Rights and Social Relations

Besides the capacity to exercise right reason, the Grotian individual possesses two additional key characteristics: sociability and a drive for self-preservation. Taken together, these three qualities demonstrate the important connection between individual rights and social relations in Grotius’ scheme. Grotius’ social account of right reason is related to the importance he places on sociability:

At the center of Grotius’s idea of natural law is … the concept of humankind’s social nature. It is inherent in our nature or a law of our nature that to live humanly, we should live socially.

(Haakonssen, 1985: 249)

Sociability is thus the foundation of natural law in Grotius’ scheme (Barr, 1932: 135; Buckle, 1991: 19; Forde, 1998: 640; Harvey, 2006: 33; Salter, 1999: 208; Schneewind, 1990: 89; Tuck, 1979: 72), a conception that links sociability and right reason: “the dictates of the law of nature are discovered by examining what the essential trait of sociableness requires” (Buckle, 1991: 28; see also Hunter and Saunders, 2003: xii-xiii). Sociability is variously defined by Grotian scholars as the individual’s “natural tendency toward fellowship and cooperation” (Seidler, 1990: 47), “a universal desire for a social life” (Tuck, 1999: 94), “a desire for a social order, for being part of a culture” (Buckle, 1991: 19), an “instinct of sympathy for others that leads them to desire society and peaceful association” (Zagorin, 2000: 78).
“a spontaneous sympathy or fellow-feeling for others” (Seidler, 1990: 18), or simply “Grotius’ *appetitus societatis*” (Dufour, 1991: 568-569). Grotius himself describes the individual’s “impelling desire for society, that is, for the social life” (Grotius, cited in Shaver, 1999: 67).

Closely related to sociability is the inherent drive for self-preservation. Although prima facie conflicting traits, sociability and the drive for self-preservation are mutually reinforcing; given the individual’s “social nature, true self-interest requires just such rules as are compatible with the human desire and need for social interaction” (Seidler, 1990: 47). Sociability aids the self-preserving actions of Grotian individuals who rely on the support of others to mitigate their vulnerability:

> [T]he Author of Nature was pleased that every Man in particular should be weak of himself, and in Want of many Things necessary for living Commodiously, to the End we might more eagerly affect Society. (Grotius, cited in Tuck, 1992: 85; emphasis in original).

This compatible relationship between sociability and self-interest is maintained through the exercise of right reason (Haakonsen, 1996: 28), the latter acting as a tempering guide to our drive for self-preservation. Right reason enables passionate individuals to “recast” or “re-examine” their “initial instinctive principles” in the light of the social setting in which they occur (Buckle, 1991: 26), that is, with their “eyes open to the relevant circumstances, rather than from blind internal imperatives” (Buckle, 1991: 27-28).
Moreover, when right reason is applied as a guide to self-preserving actions so that our needs are “satisfied in a social context” (Seidler, 1990: 18), those self-preserving actions acquire the status of natural rights. In contrast to Hobbes’ position, as set out in the following chapter, that individuals possess a natural right to do or take whatever they will as a means to preserve themselves, for Grotius, self-preservation is merely a “prima naturae” or first instinct, and cannot be rendered a right unless it has “passed the test of right reason”, that is, once it is found, by the application of sound reason, to be a “rightful” self-preserving act (Haakonssen, 2002: 31-32; emphasis in original). For Grotius, a natural right, as Haakonssen explains, is “a type of action, that is, any action which is not injurious to others in such a way that social relations break down” and requires the exercise of “right reason or sound judgement of what is honestum, that is, what makes life with others possible” (Haakonssen, 1996: 27).

What is more, the maintenance of peaceable social relations is a key criterion by which Grotius distinguishes between what he calls perfect rights and imperfect rights. For Grotius, “perfect rights” are those that respect for which “is the minimal morality which is the foundation of social life” whilst “vaguer and more dispositional ... imperfect rights” are those that relate to that which is “beyond what is necessary to the very existence of social life” (Haakonssen, 1996: 27).

Haakonssen points out the exercise of right reason is itself conceived as a natural right of the Grotian individual. It is a “moral power to judge what we, meaning everyone, rightfully should have” (Haakonssen, 2002: 33) and forms the basis of moral obligation (Tuck, 1992: 77). For Haakonssen, this novel subjectivisation of
right is the critical moment in Grotius’ secularisation of natural law theory (Haakonssen, 2002: 33-34), a claim compatible with Seidler’s abovementioned position that the key secularising factor in Grotian natural law is his social account of right reason (see Seidler, 1990: 17). A common point in both claims is that Grotius locates in the individual a personal power to derive moral obligation, that is, “knowledge of obligatory moral law”, from empirical observation rather than from the divine mind (Tuck, 1992: 77; see also Haakonsen, 2002: 33-34; Harvey, 2006: 35; Schneewind, 1990: 89).

Grotius defines *ius*, or right, in three different ways, the first two of which emphasise its social dimensions. The first sense of *ius* is “a type of action”, as discussed above, that does not cause injury to either other individuals or to “social relations” (Haakonsen, 1996: 26); secondly “*ius* as a feature of persons” includes our “natural drives or instincts for self-preservation” in combination with our “natural inclination” to judge “what makes life with others possible” (Haakonsen, 1996: 27). These first two definitions relate to the tempering of self-preservation by the exercise of right reason while the third sense of right pertains to its relation to natural law:

> The honouring of rights, perfect and imperfect, is in itself good, and as a consequence we can consider such behaviour as being prescribed by the Author of our nature. Such prescription is *lex*, the third sense of *ius natural*. (Haakonsen, 1996: 29)

Thus while Grotius retains God’s role as the ultimate author of natural law, it becomes a distal role in Grotius’s scheme, while a consideration of the social circumstances of the individual becomes the crucial measure of natural law and
natural rights. It is these social elements in Grotius’ scheme that mark him out as the first of the secular natural law theorists:

Grotius’ position as the founder of the discipline of natural law … is due to the fact that he was the first who restricted natural law to the necessities of an ordered social life and made these an independent object of study. (Saastamoinen, 1995: 52)

Indeed, the connection between the maintenance of social life and respect for individual rights is fundamental in Grotian natural law theory, so much so that it borders on circularity: individuals use reason within a social context to ascertain what their natural rights are, and in turn, reciprocal respect for these socially identified natural rights is the foundation for social life. As Grotius states, “Sociability … is the Fountain of Right” (Grotius, 2005 [1738] 85-86; emphasis in original) while, as Haakonssen points out, “the non-infringement of the … rights of others” forms “the essential requirements of social life” (Haakonssen, 1985: 249).

Natural Society and Civil Society

There is a further point of difference between scholastic natural law and Grotian natural law that prefigures key aspects of Hobbesian and Pufendorfian natural law. As discussed in Chapter 2, scholastic natural law conceives of ‘natural’ society arising out of interactions between sociable and reasonable individuals (see Wickham, 2014: 141-142). While Grotius preserves major elements of this idea, holding that natural or “universal society” (Haakonssen, 1985: 244) arises among sociable and reasonable individuals, there is a fundamental difference between the Grotian and scholastic conceptions of the natural society:
According to Grotius this natural sense of society with all other men does not entail any obligation to help them, or to foster the kind of moral life which Aristotle envisaged … It merely entails an obligation to refrain from harming them. Only in organised states does something more emerge. (Tuck, 1999: 95; emphasis in original)

As noted earlier, individuals have an “impelling desire” to enter into a “social life” with others that is conducive to their self-preservation (Grotius, cited in Shaver, 1999: 67). To maintain social peace at a “rudimentary” level, Grotian individuals must not infringe the rights of others; they are obliged to do no harm to one another (Tuck, 1989: 21; see also Haakonssen, 1985: 249). As Tuck points out, for Grotius “the principal condition for a peaceful community is respect for one another’s rights” (Tuck, 1979: 73). Although social peace is therefore attainable in natural society, it cannot be developed beyond this basic level “without the assistance of civil authority” (Haakonssen, 1985: 244). Grotius defines civil authority as that power “which governs the State” and describes the state as “a compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit” (Grotius, 2005 [1738]: 162; emphasis in original).

For Grotius the positive civil laws that are established by the civil authority are additional to the dictates of natural law and require that individuals not only do no harm to others, but “contribute” to social peace, the protection of their fellow citizens “and that which is necessary to the whole” (Grotius, cited in Tuck, 1999: 95). In this way the civil authority “secures and extends the particular social
arrangements” that existed in natural society (Haakonssen, 1996: 34-35). Although, as Buckle notes, Grotius treats positive civil law as a “descendant of the law of nature” (Buckle, 1991: 21; see also Grotius, 2005[1738]: 93-94), he also carefully separates positive law and natural law (Barr, 1932: 133; Grunert, 2003: 95), a point to which the thesis returns in Chapter 5.

Grotian civil society therefore better protects individuals and secures lasting social peace, two crucial characteristics that are shared with Hobbesian and Pufendorfian versions of civil society, as detailed in the next chapter. Two fundamental natural rights relating to self-preservation, namely, the right of necessity and the right of resistance, are retained in Grotian civil society. The former demonstrates the continued importance of the natural right to self-preservation of the individual in civil society, while the right of resistance demonstrates not only the continued right of self-preservation but the more secure form of social peace that characterises civil society.

The right of necessity, as held by individuals in natural society, is the right to take what they need of others’ belongings in times of great need (Haakonssen, 1996: 28), a natural right that arises from the natural right of self-preservation (Salter, 1999: 211) and is therefore limited to “things which life requires, as food, clothing, and medicines” (Grotius, cited in Buckle, 1991: 48). It is an “original use-right” (Buckle, 1991: 45) in relation to the original “common property” that preceded the introduction of “private ownership” (Salter, 2005: 285; see also Haakonssen, 1996: 28; for a discussion of the emergence of private property in Grotius’ scheme, see Buckle, 1991: 38-45).
This original right is recovered in civil society when the individual is in a situation of “supreme necessity” (Grotius, cited in Salter, 1999: 211; see also Buckle, 1991: 46); the “prior natural common right of use” revives for the individual in such a situation (Salter, 2005: 301). It is a right that effectively trumps the private property rights of others (Haakonsen, 1996: 28; see also Tuck, 1979: 62). This is because for Grotius the right to property arises also from the right of self-preservation, that is, “the preservation of human beings in sophisticated societies” (Buckle, 1991: 45; see also Salter, 1999: 211). Property therefore has “a necessary limit” in that it cannot infringe others’ natural right to self-preservation (Buckle, 1991: 52; see also 47; Salter, 1999: 205; 2005: 301).

The right of necessity therefore does not contradict, but reinforce the original intention of the right to private property, that is, to ensure the preservation of the individual and to maintain “natural equity” among individuals (Buckle, 1991: 46). What is more, the individual who takes from others in order to survive in civil society is not considered to be breaking positive laws in relation to private property: “as a last resort and in extreme and unavoidable necessity, it is not a crime to take from the surpluses of an unwilling owner” (Salter, 2005: 285; see also 1999: 220). The right of necessity ensures that the rights of the needy to survive are not violated by any arrangements that might follow the right to private property (Buckle, 1991: 47).

In the case of the right of resistance as it is practised in natural society, Grotius states that violence that “is repugnant to Society, that is, which invades another’s Right”, is forbidden (Grotius, 2005 [1738]: 184; emphasis in original) and therefore the use of
violence in order to defend ourselves is permitted when our “our Lives, Limbs, and Liberties” are attacked (184-185; see also 240), which itself constitutes a right of resistance. This right is severely curtailed in civil society, however, “for if that promiscuous Right of Resistance should be allowed, there would be no longer a State, but a Multitude without Union… (Grotius, 2005 [1738]: 338-339; emphasis in original).

Grotius, like many natural law theorists, conceptualises a model social contract made among all individuals that establishes the sovereign state (Haakonssen, 1985: 245). Under this contract the people surrender their natural right of resistance to the sovereign. Haakonssen argues this entails merely the power of individuals to “punish others”; it is the “implementation” of this right that changes within civil society (246). Individuals no longer possess what Grotius calls above a “promiscuous” right of resistance (Grotius, 2005 [1738]: 338-339), that is, a “general” right of resistance; they only retain a “minimum” version of this right (Haakonssen, 1985: 246).

As Salter points out, individuals in Grotian civil society are allowed to defend themselves by the use of violence, which includes the right to resist the sovereign’s demands, only when their life is threatened and only “where the common good is not threatened” (Salter, 2005: 291). While Harvey notes the Grotian civil state secures a “juridical space within which the legitimate pursuit of rights can occur” (Harvey, 2006: 33; see also Haakonssen, 1985: 246), the key word here is “legitimate”; the right of resistance cannot be exercised where it would jeopardise social peace.
Grotius therefore depicts two types of society: pre-civil or natural society; and civil society, or society that is secured under the civil authority or state, as described above. The thesis employs the term ‘civil society’ in this narrow sense, noting that Hobbes and Pufendorf also conceptualise civil society as society bound by the state. The employment here of the term ‘civil society’ is not to be confused with its usage outside natural law theory, where its meaning differs considerably from that described above; this difference prompts Wickham to prefer the use of the term ‘society’ rather than ‘civil society’ in his discussion of Hobbes (see Wickham, 2014: 140). As detailed in the following chapter, in the work of Hobbes civil society is set against the state of nature, the latter a social world that Hobbes does not call ‘society’. While Grotius does not treat the state of nature as an “abstract analytical tool” (Westerman, 1998: 210) in the way that Hobbes and Pufendorf do, a number of scholars nevertheless refer to his treatment of pre-civil social life as the Grotian state of nature (Haakonssen, 1996: 34-35; Straumann, 2006: 329; Westerman, 1998: 210).

However, Grotius’ references to ‘society’ outside the state necessitates, to avoid confusion, the use of the term ‘civil society’ in order to distinguish these two forms of Grotian society. For the sake of continuity, therefore, the thesis continues to employ the term ‘civil society’ rather than ‘society’ in its discussion of the work of Hobbes and Pufendorf.

Harvey argues these elements in Grotius’ work in relation to the establishment of civil society anticipate Hobbes’ “artifactual turn” (Harvey, 2006: 33). However, in the work of Hobbes, the artifice of civil society does not extend and secure social peace among sociable and reasonable individuals, but is established in order to put
an end to the dangerous pre-civil state of nature. Pufendorf similarly treats civil authority not as an extension and enhancement of human nature, but as a necessary achievement in order to bring about lasting social peace. While the work of Grotius is significant for the ways in which he foregrounds the social in his conceptualisation of right reason and natural rights, he nevertheless retains major scholastic assumptions in relation to a natural moral order and natural society among individuals. Both Hobbes and Pufendorf challenge these essentialist ideas in relation to morality and society.
Chapter 4: The Importance of the Social in Hobbesian and Pufendorfian Natural Law

Introduction

While Grotius conceives of a sociable individual who has both a need and desire to form social relations, Hobbes (see esp. 1991 [1651]) rejects the notion of innate sociability. Although Hobbesian individuals remain dependent upon social cooperation, they have a propensity for conflict. Hobbes also rejects the Grotian idea of a static moral order accessible via right reason, replacing right reason with a minimal prudent reason incapable of generating moral obligation, and replacing the idea of an objective morality with the idea of morality as an entirely individualist and subjective notion. While Hobbes nevertheless acknowledges the importance of a stable moral order for social peace, he holds that such an order must be artificially created by humans. For Hobbes, the establishment of civil society bound by the sovereign state produces that moral order and transforms individuals into sociable members of civil society, thus producing a peaceful social environment in which the individual’s natural rights are secured.

Pufendorf (see esp. 2003 [1691]), like Hobbes, aims to demonstrate how individuals, who differ from one another and hold disparate beliefs, can live in conditions of social peace. He too rejects the idea of innate sociability, but allows for the development of sociability and a measure of reason in the state of nature, though not enough to secure lasting social peace. Pufendorf therefore, like Hobbes, conceives of the artificial creation of civil society through the establishment of the sovereign
state, the creation of a novel moral space in which social peace prevails and natural rights are secured. He expands on the idea of sociability as an artefact of civil society in his theorisation of the ongoing reproduction of morality via interactions between moral personae, a micro account of the creation of morality that adds to Hobbes’ predominantly macro account. It is an account that firmly weds individual rights to social relations: in civil society, rights attach to moral personae and are crucial elements in the performance of social roles.

Hobbes and Pufendorf, like Grotius, theorise an essentialist human condition, but they do not share Grotius’ optimism in relation to that human condition, particularly in relation to the possibilities for social peace and mutual respect for individual rights. While for Grotius, natural society arises out of interactions between sociable and reasonable individuals who recognise each other’s rights, Hobbes and Pufendorf provide a much bleaker account of the human condition, one in which the artificial creation of civil society is necessary in order to mitigate the destructive effects of that condition, including the destructive effects of the exercise of natural rights in the social world outside the confines of the state.

**Hobbesian Natural Law Theory**

*Subjective Morality in the Hobbesian State of Nature*

Unlike Grotius, for Hobbes, there is no natural moral order to which individuals might gain access in the state of nature (Haakonssen, 2002: 28). Hobbes instead conceives of “nature as a purely mechanistic system of forces lacking intrinsic normative significance” (Seidler, 1990: 19). Within this system the Hobbesian individual acts “on the basis of desires arising from the manner in which sense-
impressions give rise to pleasurable or painful movements of his bodily nerve-fibres” (Hunter, 2011: 480). Human action is thus reduced to individual acts of “willing” as a result of “attraction” or “repulsion” (Haakonssen, 2004: 98-99; see also Schneewind, 1998: 88, 84) or “forms of movement, either towards or away from things and beings” (Arblaster, 1984: 133; see also Raphael, 1977: 22-28), and normative concepts are closely wedded to these individual corporeal sensations and movements (Miczo, 2002: 209; Schneewind, 1998: 84-85; Skinner, 1996: 339).

Notions of the good are therefore purely subjective:

> Every man, for his own part, calleth that which pleaseth, and is delightful to himself, GOOD; and that EVIL which displeaseth him: insomuch that while every man differeth from other in constitution, they differ also one from another concerning the common distinction of good and evil. (Hobbes, cited in Tuck, 1989: 52-53; emphasis in original)

This subjective account of morality produces a morally relativist world in which “there is no reason to suppose that any two people will naturally desire or be averse to the same things” (Schneewind, 1998: 86). Hobbes therefore goes further than Grotius: he not only rejects the notion that individuals, by the use of their reason, are able to access the divine mind (Wickham, 2014: 143). He rejects the notion of right reason altogether and instead holds that reason amounts to “whatever reasoning the agent thinks right” (Schneewind, 1998: 89), a position starkly demonstrated in his treatment of natural rights.
**Hobbesian Natural Rights**

Hobbes’ conceptualisation of natural rights differs markedly from Grotius’, particularly his treatment of the fundamental natural right of self-preservation. Grotius treats self-preserving actions as natural rights only when they are consistent with right reason; he places social limits on the right to self-preservation. Like Grotius, Hobbes treats the drive for self-preservation as a key characteristic of the individual, indeed “the greatest human desire of all” (Kriegel, 1995: 40; see also Seidler, 1990: 19). However, for Hobbes any self-preserving actions, regardless of their social consequences, are performed “with right” (Hobbes, cited in Schlatter, 1973: 139) as “nothing can be unjust” in the state of nature given his subjective account of morality (Hobbes, cited in Raphael, 1977: 50; see also Zuckert, 2002: 193). Reason does not temper natural rights to within socially sustainable parameters. Instead individuals judge for themselves which actions best favour their preservation (Tuck, 1989: 63-64; 1991b: xvi-xvii; 1996: 189; see also Ewin, 1991: 37), as Hobbes states in the following passage from *Leviathan*:

> The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. (Hobbes, 1991[1651]: 91; emphasis in original)

This means that each individual has an “unlimited” natural right to do what they will in order to secure their self-preservation (Raphael, 1977: 30; see also Ryan, 1996:
Hobbes adding that this subjective interpretation of the natural right to self-preservation effectively produces “a Right to everything; even to one another's body” (Hobbes, 1991[1651]: 91; emphasis in original). The operation of this personal power leads to the bleak picture of the Hobbesian state of nature.

**Hobbes’ Treatment of Reason**

While Grotius’ secularised version of right reason retains the scholastic idea of a natural society among people, according to Hobbes’ subjective account of reason, individuals possess only a modicum of practical reason that enables them to preserve themselves and acquire a measure of sociability to that end (Wickham, 2014: 140), but not enough to create a ‘natural’ society among people in the sense meant by Grotius and certainly not enough to achieve conditions of lasting peace (143). As Wickham points out, Hobbes “warns his readers that if they allow too much of a role for reason, they will themselves be reasoning erroneously” (144).

Given the absence of right reason, and the subjective ways in which individuals conceive of ‘good’ and ‘evil’, competition frequently emerges amongst individuals regarding “rival accounts of perfection” (Wickham and Evers, 2012: n.p.) or disparate conceptions of “what is good” (Wickham, 2014: 143). As van Krieken points out, the Hobbesian state of nature is a place where there are “passionately held beliefs and opinions with no central authority to decide between them” (van Krieken, 2002: 259). The very notion that individuals are in possession of right reason is one such dangerous notion that does not found but rather jeopardises social peace:

For Hobbes, the idea of perfect nature at the centre of the scholastic account … is an overwhelming obstacle to peaceful, secure human
interaction, inasmuch as it fills each faction with the belief that they
alone are on the path to perfection. (Wickham, 2014: 142)

Moreover, individuals have a propensity to act on those visions of perfection, which
leads not to stable, peaceful social life but “a situation in which many rival political
communities … form around their disparate visions of the good life and seek to wipe
each other out” (143); Wickham adds Hobbesian individuals have a “capacity for
seemingly limitless violence” (145). Violence in the Hobbesian state of nature does
not only arise due to competing versions of perfection, however. It can arise merely
as a result of the uncertainty associated with the subjective interpretation of one’s
natural rights. Each Hobbesian individual, armed with a personal interpretation of
their natural right to self-preservation, suspects others of possible attack and is in
turn an object of suspicion (Raphael, 1977: 31), a situation that paradoxically
generates social conditions that effectively negate the individual’s natural rights
(Hüning, 2002: 143):

I see you walking peacefully …, whistling and swinging your club:
are you a danger to me? You may well think not: you have an
entirely pacific disposition. But I may think you are, and the
exercise of my natural right of self-preservation depends only on
my assessment of the situation. So if I attack you, I must be justified
in doing so. We have all the instability of a wholly relativist world
back again, despite our agreement that people are in general
justified in protecting themselves. The state of nature thus becomes
a state of war, savagery, and degradation... (Tuck, 1989: 59; emphasis in original)

There is thus in these morally relativist conditions in which individuals hold to rival notions of the good, and continually suspect one another, a constant threat of violence and frequent actual violence (Kavka, 1999: 2; see also Arblaster, 1984: 135; Condren, 2002: 68; Curley, 1994: xxi-xxii), even amongst mild individuals (Thornton, 2002: 618), and “considerations about survival … recommend ruthlessness” (Sorell, 1991: 96; see also Curley, 1994: xxiii-xxiv). This leads to the infamous ‘bellum omnium in omnes’ (Skinner, 1996: 320) or ‘war of all against all’ that characterises the Hobbesian state of nature, hence Hobbes’ familiar description of this social space as one in which life is “solitary, poore, nasty, brutish and short” (Hobbes, 1991[1651]: 89). Hobbes makes clear that the warring state of nature is not one of endless violent conflict, but of the constant threat of conflict as a result of this uncertainty in relation to others’ intentions:

[T]he nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE” (…). (Hobbes, cited in Martinich, 1992: 50; emphasis in original)

A further complicating factor in the state of nature is that all individuals are more or less equal when their “strength and intelligence” are considered in combination (Martinich, 1992: 49; see also Raphael, 1977: 31; Schneewind, 1998: 87), a natural equality that “leads each person to think that he has an equal chance against another” to achieve that which they desire (Martinich, 1992: 49; see also Saastamoinen, 2002:
This means that in the state of nature no single individual commands “irresistible power” (Halldenius, 2007: 699; see also Raphael, 1977: 31).

**The State of Nature as an Ideal Type**

The Hobbesian state of nature is, as Tricaud points out, “a representation that need not be assigned to any definite moment in historical or prehistoric times” (Tricaud, 1988: 110). It is to be understood instead, according to Wrong, as akin to a Weberian ideal type (Wrong, 1994: 16). Its primary purpose is to demonstrate the necessity of the sovereign state for the achievement of social peace by illustrating the human propensity for conflict in the pre-civil social world. It is a depiction of social life characterised by the absence of “sovereign rule” (Wickham: 2014: 147).

As Wickham points out, Hobbes holds to the Epicurean idea that individuals are “creatures whose passions need to be balanced by their wills” (Wickham, 2014: 151) in order for social peace to be established and preserved, but that individuals alone are incapable of mustering the discipline required to achieve this level of personal control (151) and instead “need to be restrained by the rule of a sovereign” (145) powerful enough to inspire sufficient fear in individuals to produce in them a willingness to act peaceably; in this way, “the passions will lead to actions which promote human life” (145). Moreover, the sovereign puts an end to the damaging moral relativism of the state of nature; only the establishment of a sovereign can put an end to the subjective interpretation of natural rights (Tuck, 1991b: xvii). Tuck notes the judgment of the sovereign in the form of civil laws creates a “moral consensus” (Tuck, 1989: 58) to which all individuals now adhere (see Ryan, 1988: 84):
The civil laws constitute the rules of what is *good* and *evil*, *just* and *unjust*, *honourable* and *dishonourable*, from which it follows that whatever the legislator commands is to be taken as *good*, and whatever he forbids is to be taken for *evil*. (Hobbes, cited in Skinner, 1996: 314; emphasis in original)

The positive civil laws of the sovereign thereby establish the moral order that Grotian individuals take for granted in natural society. For Hobbes, as Westerman observes, “society, justice and moral distinctions” are necessarily “artificial” rather than natural (Westerman, 1998: 182-183; see also Raphael, 2001: 50).

*Moral Order and the Ideal-Typical Social Contract*

This change is effected via the social contract, another concept in Hobbesian natural law theory that, according to Wrong, operates as an ideal type (Wrong, 1994: 16). The social contract depicts the birth of the sovereign state, or what Hobbes calls a “‘commonwealth’ or a *civitas* (‘city’ or ‘state’)”, taken simply to mean the people “under a regime of civil laws” (Tuck, 1989: 57; parentheses in original). Not to be treated as “a story about how states actually came into existence” (Ewin, 1991: 19), Hobbes’ depiction of the social contract merely illuminates certain characteristics of the sovereign state. Hobbes acknowledges that as an origin story, it diverges considerably from the conditions of formation of many states (Wrong, 1994: 16). As Ewin explains, the social contract is a model employed “to show that social life must have certain features the presence of which would be guaranteed if a contract *had* been the method of generation” (Ewin, 1991: 2; emphasis in original).
The social contract depicts an agreement among individuals in the state of nature to appoint a sovereign authority whereby “an individual or assembly” is rendered the “sovereign” who “immediately becomes a (singular) public ‘person’” (Wickham, 2014: 146). The social contract thus creates “an artificial person” that acts as the “representative” of the people (Skinner, 1996: 337). It also creates “the people” (Wickham, 2014: 146) where, prior to the social contract, there was no “pre-existing group commitment” (Halldenius, 2007: 704-705), that is, where there existed merely “a dissolute multitude” (Hobbes, cited in Wickham, 2014: 146). The individual is also transformed into the civil subject under the social contract (Raphael, 1977: 36), a point discussed in more detail below. As Halldenius points out, the social contract is “performative in the sense that words or acts convey new functions or new statuses on things or people who otherwise would not have that function or status” (Halldenius, 2007: 700; see also Haakonssen, 2004: 101).

Hobbes explains how the ‘multitude’ comes to enter into the social contract and thereby become ‘the people’. Individuals in the state of nature come to understand, using what little reason they have (Condren, 2002: 69-70; Wickham and Evers, 2012: n.p.), that only in conditions of social peace will their natural right to self-preservation be safeguarded (Arblaster, 1984: 134), so they covenant, “each individual with everyone else” (Skinner, 1996: 312; see also Raphael, 1977: 36), to lay down their subjective power of private judgment (Tuck, 1989: 64) in order to obtain this peace.

The social contract is a transformative process by which the “collective effect” of individual action arising out of immediate desires or aversions, mostly fear, acquires
social and moral significance (Haakonssen, 2004: 100). It is an action that engenders adherence to newly “constructed” norms (Halldenius, 2007: 698) without any prior aspiration on the part of individuals to achieve moral obligation, that is, as Haakonssen points out, without “assuming that obligation already is part of humanity’s moral culture” (Haakonssen, 2004: 99). Thus the newly formed moral consensus that results from the Hobbesian social contract has its origins in individual self-interest rather than in scholastic reason and sociability (Hunter, 2011: 493).

As Halldenius points out, it is crucial that each individual agree, or at least a “sufficient number”, and that all individuals know that this intention, that is, to appoint a sovereign, is commonly held among them (Halldenius, 2007: 703-4; see also Hayes, 2008: 464), as there is no guarantee that contracts will be honoured in the state of nature (Curley, 1998: 111; Raphael, 2001: 67; Sorell, 1991: 113-114; for a discussion about the logical possibilities of the Hobbesian social contract, see Gauthier, 1988) given the mutual suspicion and pre-emption that prevails there:

If no one but me seeks peace I will be destroyed. If it so happens that everyone actually does seek peace but I cannot know this or cannot trust it, I still need to be prepared for battle, which is costly and causes anxiety. If I can safely trust that I will not be attacked, then I have no reason to attack anyone else. But this requires someone with sufficient power to set up such a guarantee; it requires a sovereign. (Halldenius, 2007: 704)

As Hobbes states, “he which performeth first, does but betray himself to his enemy” (Hobbes, 1991: 96). Once the common agreement that constitutes the social contract
is reached, the problem of honouring contracts falls away, as the sovereign government now provides civil laws backed up with sufficient force to ensure that contracts are honoured (Raphael, 1977: 54; 2001: 67; Sorell, 1991: 117).

Hobbesian Civil Society

As Wickham points out, the establishment of the sovereign state creates what Hobbes calls “society” and at times “civil society”, that is, “a distinct domain of peaceful, secure human interaction” (Wickham, 2014: 140); he adds that Hobbes treats society as “a product of sovereignty” (147). In this sense, Hobbesian civil society is similar to Grotian civil society: it is as a society characterised by sustained social peace by reason of the presence of “civil authority” (Haakonssen, 1985: 244). Unlike Grotius, however, Hobbes rejects the idea that any form of society, whether natural or otherwise, can exist outside the sovereign state. Although the Hobbesian state of nature depicts a particular kind of social environment, that environment is not to be considered a society in any sense, as Hobbes rejects the notion that individuals possess enough reason to achieve ‘society’ other than through the establishment of a civil authority. As Hunter observes, for Hobbes, society is “a wholly artificial institution” (Hunter, 2011: 481; see also Halldenius).

Wickham argues Hobbesian civil society is an “achievement” secured in the face of dangerous competing notions of the good and is thus “something which can never be taken for granted, something which requires enormous effort, something which can be lost” (Wickham, 2014: 147; see also Curley, 1994: xlv-xlvi). The normative ideal that underlies the sovereign’s establishment of an artificial moral order via civil laws is therefore minimal: it is simply “the maintenance of peace and security”
The sovereign authority is able to tolerate people’s adherence to many disparate notions of the good, as long as those notions do not jeopardise this minimal normative ideal (150). This is an ideal Hobbes himself shares, a value that underpins his work (Wickham, 2014: 147, 151).

*The Creation of the Sociable Subject*

As noted earlier, the establishment of civil society renders the individual a “subject” (Raphael, 1977: 36) or “citizen” (Hunter, 2011: 493). In civil society the citizen develops a level of sociability akin to that which is naturally present in the scholastic and Grotian individual (Hunter, 2011: 481), a de-essentialised version of sociability according to which the individual is rendered ‘‘apt’ for society only by being socialized into decent conduct’’ (Ryan, 1996: 217; see also Miczo, 2002: 208), that is, through education (Saastamoinen, 1995: 80; Wickham, 2014: 143). Hobbesian individuals learn to temper their passions and preserve themselves within peaceable, sociable limits. Hunter describes Hobbes’ replacement of Aristotelian innate sociability with a version of sociability as an artefact of civil society as “Hobbes’s Copernican revolution in natural-law thought” (Hunter, 2011: 490).

This artificial transformation of the individual into the sociable citizen nevertheless relies on the continued self-interest that drives the individual (Halldenius, 2007: 704). As the individual continues to act on the basis of desires and aversions, the sovereign, by its capacity to inspire fear, is capable of procuring sociable conduct (Wickham, 2014: 145). Hobbes’ essentialist view of the self-regarding individual therefore provides the basis for his conception of the artificial sociable subject in
civil society, achieved through the creation of the “artificial” sovereign state (Hüning, 2002: 143; Ryan, 1996: 216; see also Halldenius, 2007: 698).

*The Laws of Nature*

The establishment of civil society is also made necessary by the impotence of natural law. For Hobbes, it is a fundamental law of nature to be “sociable”, to “seek peace” in order to secure one’s natural right to self-preservation (Hobbes, 1991: 106), and “if peace is not attainable”, to resort to doing what is necessary to preserve oneself (Schneewind, 1998:90). As Raphael points out, the latter precept to do what is necessary to survive in the absence of social peace is a ‘branch’ of the primary law to seek peace (Raphael, 1977: 53). The agreement by all to covenant to install a sovereign and so curtail their natural rights to within sociable limits constitutes for Hobbes the second law of nature:

> From this Fundamental Law of Nature, by which men are commanded to endeavour Peace, is derived this second Law; That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to *all* things; and be contented with so much liberty against other men, as he would allow other men against himself. For as long as every man holdeth this Right, of doing any thing he liketh; so long are all men in the condition of Warre. (Hobbes, cited in Johns, 2009: 566; emphasis in original)

In the above quote Hobbes makes clear that it is not the relinquishing of the individual’s natural rights to self-preservation but the relinquishing of the right to
“all things” to further that goal, that is, the individual’s subjective interpretation of the natural right to self-preservation, that constitutes the second law of nature. As Schneewind states, this means “I will come to want only as much as allows me to coexist with others who have a similarly limited set of desires” (Schneewind, 1998: 90). The third law deals with the keeping of covenants (Raphael, 1977: 56) which, as noted earlier, is only made possible under the protection of civil laws. Raphael points out the remainder of Hobbes’ laws of nature comprise “the usual rules of social morality: gratitude, mutual accommodation, forgiveness of injuries, treating everyone equally, and so on” (Raphael, 1977: 56).

However, as Palladini observes, “Hobbes emphasises … the incapacity of the laws of nature to guarantee the goal of human preservation” (Palladini, 2008: 49; see also Hüning, 2002: 144). That natural law is ineffective in this regard is evident in his subjective account of morality in the state of nature where the personal power to judge ultimately hampers the individual’s goal of self-preservation. As a voluntarist, law for Hobbes is “a rule commanded by a lawmaker we are obliged to obey” (Forster, 2003: 204; see also Goldsmith, 1996: 274). He also states that natural laws are merely “Conclusions, or Theorems” (Hobbes, 1991: 111); absent a lawgiver they contain no force and are thus incapable alone of commanding the peace necessary to secure natural rights (Palladini, 2008: 49). The combination of his voluntarist understanding of law and his statement that natural laws are mere ‘theorems’ demonstrates his secular position in relation to natural law:

[W]e should not, strictly speaking, think of Hobbes’ laws of nature as laws, unless we also think of them as divine commands. Unless
we are prepared to make that assumption, we should think of them as a kind of hypothetical imperative, advice about how to obtain your ends… (Curley, 1994: xxxi)

Natural law is thus reduced to a kind of statement of the human condition rather than law handed down by an authority. It effectively operates as a list of preferred actions relevant to certain social conditions; the law to seek peace is paramount, but best avoided in situations where there can be no guarantee that others will seek peace. In such conditions, the second branch of the first law allows the individual to do whatever conduces to one’s self-preservation, caution and belligerence becoming appropriate responses.

The only way to render the natural law law in the proper sense, that is, according to Hobbes’ voluntarist understanding of law, is to give it power as civil law, that is, “[o]nly when the natural law has become institutionalized, that is, has become the sovereign’s law” (Haakonsen, 1996: 35) or has been “collapsed into the sovereign’s law” (Condren, 2002: 68; see also Sorell, 1991: 117). Hobbesian natural law theory therefore speaks to the ultimate necessity of positive law. Indeed, the fundamental natural law to seek peace is only made reasonable under civil law.

What is more, as Westerman observes, since Hobbes’ natural laws operate as mere theorems, “they are not meant as standards by means of which one can evaluate or criticise positive law as such” (Westerman, 1998: 182). This is clear because, as mentioned above, Hobbes argues “where no law, no injustice” (Hobbes, cited in Raphael, 1977: 50); there is no justice that lies outside the sovereign’s law by which the sovereign’s law might be judged (Saastamoinen, 1995: 18), just as there is no
natural moral order outside the state. Hobbes thus secures in his natural law theory the autonomy of the civil law of the sovereign state.

*Natural Rights and the Sovereign’s Monopoly on the Use of Violence*

Positive law acts as law in the Hobbesian sense of the term, that is, it produces obligations, because it is enforceable. Hobbes explains how the civil laws come to be enforceable via his social contract ideal type. As noted above, individuals in the state of nature agree via the social contract to lay down their right of private judgment (Tuck, 1989: 64). Unlike Grotius, in whose scheme individuals transfer their natural right of resistance to the sovereign (see Haakonssen, 1985: 245-247), for Hobbes, the individuals in the state of nature do not transfer any natural rights to the sovereign. Indeed, they do not transfer anything to the sovereign (Skinner, 1996: 313, Sorell, 1991: 8, Tuck, 1979: 124-125), as the sovereign is not a party to the social contract:

> [T]he Right of bearing the Person of them all, is given to him they make Soveraigne, by Covenant onely of one to another, and not of him to any of them. (Hobbes, cited in Baumgold, 2004: 29; emphasis in original).

The multitude, through the social contract, appoints a sovereign. While individuals agree to lay down their right of private judgment, the sovereign, as an artificial person, simply retains its right of private judgment. In giving up their right of private judgment, individuals surrender their right to use violence to preserve themselves, an agreement that Dreitzel notes is “a condition of the possibility of society” (Dreitzel, 2003: 269). It is an act that in turn ensures the security of the
individual, as Kriegel observes: “the sovereign’s confiscation of all acts of war, his monopoly on the sword of justice, brings about individual security by means of the rule of law” (Kriegel, 1995: 40). Wrong again notes the similarities between Hobbes and Weber here:

*Leviathan* or the state comes into being, possessing, in Max Weber’s well-known formulation of nearly three centuries later, a monopoly over the legitimate use of physical force. (Wrong, 1994: 14-15)

This is why for Hobbes, the sovereign’s authority is necessarily absolute (Curley, 1994: viii, xxxvi; Raphael, 1977: 13, 20). In this way, as Kriegel points out, the Hobbesian sovereign state “pacifies society, guarantees individual security and makes the maintenance of life its chief aim” (Kriegel, 2002: 15). Hobbes makes clear it is only the subjective interpretation of one’s natural rights, and not the natural right to self-preservation itself, that is relinquished via the social contract; it is the former that is restored to the individual following the disbanding of the sovereign state:

[W]hen there is no further protection of subjects in their loyalty, then is the commonwealth DISSOLVED, and every man at liberty to protect himself by such courses as his own discretion shall suggest unto him. (Hobbes, cited in Skinner, 1972: 96; emphasis in original)
As Hobbes states, the “motive” for laying down the subjective interpretation of one’s natural rights “is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it” (Hobbes, 1991: 93). He adds “there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred” (Hobbes, 1991: 93), including the natural right to self-preservation, which he stresses is an “inalienable” right (Hobbes, cited in Kriegel, 2002: 22; see also Zagorin, 2000: 38). He refers to “the Right (he can never abandon) of defending his life, and means of living” (Hobbes, 1991: 96; parentheses in original) and that “can by no Covenant be relinquished” (Hobbes, 1991: 153). Indeed, Kriegel argues if individuals were to lay down their right to self-preservation via the social contract, this would amount to a “contradiction” of the contract (Kriegel, 1995: 40).

This is further made clear through Hobbes’ conception of the right of resistance to the otherwise absolutist state, a right that in many respects resembles Grotius’ conception. Given the sovereign is established to secure the natural right to self-preservation, sovereigns who no longer guarantee the protection of subjects or threaten their natural right to self-preservation are rightfully resisted (Hobbes, 1991[1651]: 153).

Carmichael notes a number of instances, as set out in Leviathan, where subjects can rightfully resist the Hobbesian sovereign, including those of “self-defence”, “non-incrimination”, the right to resist if one’s life or limb is threatened, and the right to take others’ property if one is destitute (which itself resembles Grotius’ right of necessity), all of which arise out of the “non-renounceable right of nature”, that is,
a list of instances that “are all equally permitted because they arise from the same right of preservation” (Carmichael, 1990: 4-6; parentheses in original; see also Curley, 1994: xxxviii; Raphael, 1977: 37; 60, Ryan, 1996: 240-241; Schneewind, 1998: 90; Tierney, 1997: 81). However, like Grotius’ version of the right of resistance, the exercise of this right in Hobbesian civil society is severely curtailed:

Once a sovereign is established to coordinate the exercise of these rights, no one has the right to defect unless they believe incontrovertibly that their preservation is endangered by sticking to the contract. (Tuck, 1989: 108; see also 1991b: xxi)

Nevertheless, Hobbes’ conception of the right of resistance demonstrates that the sovereign’s absolute authority cannot be employed in ways that will threaten “the legitimate exercise of subjects’ natural rights” (Carmichael, 1990: 12). The sovereign state’s purpose is tied to its secular origins: because the Hobbesian sovereign’s power is not granted by God, but by contract by the multitude to appoint a sovereign power, the purpose of that power originates in that contract, which is to provide security and protection to the people. Moreover, just as civil law subsumes and therefore secures the natural law to seek peace, so too does civil law secure the natural right of self-preservation by rendering self-preservation a “civil right” (Kriegel, 1995: 40; emphasis in original); “[t]he civil state confers reality on a right that remained virtual in the state of nature” (40).

The establishment of the sovereign state thus eliminates the social conditions that make natural rights destructive in the state of nature and instead creates an environment in which the natural rights of all are respected, an environment secured
by the presence of enforceable civil laws. This crucial connection between social conditions and the operation of rights is further elaborated in the work of Pufendorf, who points to ways in which rights attach to the sociable subject within civil society.

**Pufendorfian Natural Law Theory**

**Pufendorf’s State of Nature**

Like Hobbes, Pufendorf rejects the idea that the individual has an “innate social instinct” (Seidler, 1990: 20; see also Dufour, 1991: 569; Hont, 1987: 268; Westerman, 1998: 183), but he also rejects the Hobbesian depiction of the state of nature as an inevitable war of all against all (Hunter, 2011: 492), allowing for a limited form of sociability to develop in the state of nature. His treatment of sociability therefore lies somewhere between that of Grotius and Hobbes, Hochstrasser referring to Pufendorf’s “synthesis” of the two versions (Hochstrasser, 2000: 71). Before exploring Pufendorf’s treatment of sociability, it is necessary first to look at his version of the state of nature which, like Hobbes, he takes to be “the natural condition” of individuals “outside or prior to the establishment of states” (Tully, 1991: xxix).

Seidler notes Pufendorf, like Hobbes, treats the state of nature as a fictional model rather than “an historical actuality”, although Pufendorf does draw on “past history” in order to make an “empirically ‘real’” connection between the fictional depiction and “the actual state of civil society” (Seidler, 1990: 35). The purpose of Pufendorf’s concept is also very close to that of the Hobbesian ideal-type; its key role is to demonstrate the necessity for civil authority via its portrayal of pre-civil social life (Palladini, 2008: 50), Pufendorf treating the civil state as “a sort of
remedy” (Pufendorf, cited in Seidler, 1990: 37). Palladini observes that “all of the functions of the notion of the state of nature can be summarised in its being for civil society” (Palladini, 2008: 48; emphasis in original).

Also like Hobbes, as Seidler points out, Pufendorf rejects the traditional Christian and Stoic treatments of the state of nature as a place of “perfection”, criticising the emphasis upon perfection in these traditional accounts as unrealistic and unhelpful for today’s individual (Seidler, 1990: 29). He instead draws on the Hobbesian and Epicurean idea of the “imperfect” state of nature (33) inhabited by “imperfect individuals” (37), presenting, as Palladini notes, “an overall image of the state of nature as something entirely negative” (Palladini, 2008: 48; see also Salter, 2005: 298).

In keeping with his personal Lutheran faith, Pufendorf holds a postlapsarian view of the human condition as corrupt (Saastamoinen, 1995: 47). Although individuals possess “a congenital need for others”, they are also filled with “malice” (Dufour, 1991: 571); they are “self-interested, ambitious, weak, and prone to anger” (Seidler, 1990: 19) and are, like Hobbesian individuals, “passion-ridden” (Westerman, 1998: 188). Westerman observes that for Pufendorf, the individual is both “weaker than most animals” and “also more wicked than other animals” (Westerman, 1998: 185). Thus although Pufendorf rejects Hobbes’ extreme description of the war of all against all, this postlapsarian human condition nevertheless necessitates a readiness for war in the state of nature that, according to Hunter, places him closer to Hobbes than Grotius (Hunter, 2011: 492).
The Pufendorfian state of nature therefore resembles the Hobbesian version in many respects: it is an environment characterised by an “absence of security” in which “all are exposed to the threat of attack” and a place in which “conditions of suspicion and distrust outside households” preclude the development of a social environment that would foster and sustain “other-regarding social duties” (Tully, 1991: xxix). Pufendorf describes the state of nature as one of “war, fear, poverty, nastiness, solitude, barbarity, ignorance, [and] savagery” (Pufendorf, cited in Tully, 1991: xxix-xxx; parentheses in original), a list that resembles Hobbes’ well known description of the state of nature recalled earlier, as “solitary, poore, nasty, brutish and short” (Hobbes, 1991[1651]: 89).

For Pufendorf, however, there is not the same urgency attached to the creation of the state as there is for Hobbes, as a limited level of sociability develops among individuals in the state of nature in order to further their mutual needs; small-scale networks emerge including families and larger clans (Tully, 1991: xxix), as well as pockets of social exchange wherein individuals trade “knowledge, skills, and goods within and across historical boundaries”, mitigating the individual’s inability to supply many of these things in isolation (Seidler, 1990: 51). The Pufendorfian state of nature is thus “a state of relative sociability” (Dufour, 1991: 571; emphasis in original) compared to that of the warring Hobbesian version.

However, this limited social peace in the Pufendorfian state of nature is precarious. Ongoing external threats to these small social structures render them unsustainable (Saunders, 2002: 2184) and any “moral bonds” that attach to these groups cannot be sustained for long; they are inevitably weakened in the face of growing population,
the increasing complexity of social relations, “the artificial expansion of human needs” and the ever-present competing passions of individuals, necessitating the eventual creation of the state (Seidler, 1990: 51-52; see also Saastamoinen, 1995: 140).

Thus although Pufendorf allows for a modicum of sociability to develop in the imperfect individual in the state of nature, it is far from the amount that naturally resides in the Grotian individual and is only a simple, pre-civil version of the more complex form achieved in civil society where subjects are able to build secure and sustainable sociable relations. Like Hobbes, Pufendorf holds that the installation of the sovereign state for the sake of security creates a novel social space in which individuals are “progressively civilized and socialized” (Tully, 1991: xxxi; see also Seidler, 1990: 18). Pufendorf’s treatment of the sociable civil subject is related to his conceptualisation of the operation of sociability, reason and self-preservation in the state of nature.

*The ‘Natural’ Construction of Sociability*

As noted earlier, although for Pufendorf, individuals have “considerably more fellow-feeling than Hobbes had allowed” (Seidler, 1990: 19), he treats sociability as an “historical product” rather than an inbuilt trait of the individual (Hont, 1987: 268; see also Dufour, 1991: 569; Seidler, 1990: 20). This is not because he rejects an essentialist view of sociability outright, but because he holds that sociability is no longer a natural disposition of the individual in a postlapsarian world. As Saastamoinen points out, Pufendorf holds that natural law contains the same precepts as it did before the fall, but its “character” has changed in accordance with the
changed human condition to which it now relates (Saastamoinen, 1995: 47). His fundamental natural law resembles that of Hobbes:

> Everyman, so far as in him lies, should cultivate and preserve toward others a sociable attitude, which is peaceful and agreeable at all times to the nature and end of the human race. (Pufendorf, cited in Buckle, 1991: 73)

Before the fall, the natural law to be sociable effectively confirmed the natural human inclination to be sociable (Saastamoinen, 1995: 48). Natural law now no longer reflects individuals’ natural tendencies but asks them to curb their tendencies (Westerman, 1998: 212), urging them to be sociable in the face of their postlapsarian tendency to be wicked:

> [I]n the present condition natural law consists mainly of “negative precepts”, i.e. restrictive imperatives which demand of human beings to behave in a way which they are not otherwise inclined to do. (Saastamoinen, 1995: 48-49)

Pufendorf therefore holds what Hunter calls a “Hobbesian conception” of natural law as pertaining to a corrupt individual who is to seek peace in order to mitigate a “propensity for mutual predation” (Hunter, 2007: 89). Pufendorfian individuals need the society of others in order to mitigate their individual weakness and to protect themselves against the wickedness of others (Schneewind, 1998: 140; Seidler, 2002: 236). As Schneewind points out, given our wickedness and weakness, “it is a striking feature of our nature that it cannot be easy for us to live with one another.
Yet … we must” (Schneewind, 1998: 130). Pufendorf therefore conceives of a connection between self-preservation and sociability:

Man is an Animal extremely desirous of his own Preservation, of himself expos’d to many Wants, unable to secure his own Safety and Maintenance, without the Assistance of his Fellows and capable of returning the Kindness by the Furtherance of mutual Good … Now that such a Creature may be reserv’d and supported … it is necessary that he be social … This then will appear a fundamental Law of Nature, Every Man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of the human Race in general. (Pufendorf, cited in Hochstrasser, 2000: 62; emphasis in original)

Thus like Grotius, Pufendorf treats self-preservation and sociability as mutually reinforcing: the individual needs the company of others to mitigate “the fragility of human existence”, which necessitates the development of sociability (Buckle, 1991: 76). Although Pufendorf stresses “the primacy of self-love”, emphasising “its practical aspect of self-preservation” (Buckle, 1991: 76; see also Hochstrasser, 2000: 62), he states “Self-love and Sociableness ought by no means to be made opposites” (Pufendorf, cited in Hochstrasser, 2000: 63; emphasis in original) and treats the two instead as a “distinctive combination” (Hont, 1987: 267) that exerts a “powerful influence” upon social life (Saastamoinen, 1995: 87).
While, as noted above, he treats sociability as an “historical product”, he also conceives of its “natural” development in the state of nature (Hont, 1987: 268). As Hont points out, Pufendorf treats sociability simultaneously as a “social” invention and “natural”, a prima facie incongruous essentialist and ‘constructionist’ position that nevertheless makes sense in Pufendorf’s scheme:

Sociability was natural even though it was not given directly by nature. … The fact that something is not there in the beginning by nature should not be taken to mean that its later development is not natural. To deny the epithet of ‘natural’ to sociability simply because it was not innate, was like arguing that ‘Speech is by Nature actually born with no Man; therefore all Speech which is afterwards learnt is against the Design of Nature.’ However paradoxical it might seem, Pufendorf claimed, ‘natural’ sociability was a ‘social’ construct. (Hont, 1987: 268, quoting Pufendorf)

Seidler argues Pufendorf therefore holds a “developmental” understanding of sociability:

According to this view sociality is, like speech, a historical product of collective human development, arising naturally and spontaneously out of individuals’ self-interested dealings with one another in a context of relative scarcity, weakness, and consequent insecurity. (Seidler, 1990: 50)
Subsequent to its development, sociability eventually becomes “a non-instrumental virtue valued for its own sake” (Seidler, 1990: 50) although, for reasons described earlier, the opportunities for sociability to be practised and recognised as a virtue in the state of nature are limited.

The ‘Natural’ Construction of Reason

Pufendorf holds a similar view in relation to reason; it is not innate but develops naturally, concurrent with the development of language (Hochstrasser, 2000: 88), language itself an “arbitrary and historically relative creation” (Hochstrasser, 2000: 92). Hochstrasser argues the agreement among individuals in the state of nature to recognise “standard conventional meanings of words” has for Pufendorf a “dual sociological function” as it is both a prerequisite for the establishment of language and also represents “the first compact of society as such” (Hochstrasser, 2000: 92). The birth of language therefore also represents “the first instance of the operation of that principle of sociability which underpins all human relationships” (Hochstrasser, 2000: 92); the very existence of language demonstrates the presence of sociability in Pufendorf’s state of nature.

As Pufendorf treats reason as something that is developed alongside the development of language skills, he rejects the idea that individuals possess innate knowledge of natural law (Schneewind, 1998: 126-127; Westerman, 1998: 224). He argues the infant’s “mind is a *tabula rasa*” (Hochstrasser, 2000: 88) and that children are not fully capable, given their limited training, language skills and experience, of understanding natural law, as it is made up of concepts and propositions largely situated within language:
Every phrase consists of a noun and a verb, and combinations of them are formed through affirmation and negation. But new-born infants know neither nouns nor verbs, and much less do they know how to join them through affirmation or negation. And if anyone wishes to instill a particular kind of ideas in the minds of infants which may represent actions to be undertaken or shunned, he does not have recourse to sentences consisting of nouns and verbs. (Pufendorf, cited in Hochstrasser, 2000: 87)

Haakonsen suggests Pufendorf’s work in this regard leans towards what he calls “a social theory of the mind and of its language”, a claim he also makes in relation to Hobbes, whose social contract creates, via language, new social statuses (Haakonsen, 2004: 99). Haakonsen argues Pufendorf treats language as both a product of and basis for social life:

Pufendorf in particular felt the need to account for mental operations, including deliberations about action, as linguistic in nature, but the language that was required for such inner dialogue must derive from external dialogue, that is, from the social interaction between people. (Haakonsen, 2004: 99)

Individuals are thus eventually able to understand, through their developed reason and language skills, fundamental laws of nature (Buckle, 1991: 63; Dufour, 1991: 571; Hochstrasser, 2000: 90; Saastamoinen, 1995: 61) and very skilled individuals are able to access further natural laws after a “more exacting process of rational enquiry” (Buckle, 1991: 66). Pufendorf states that “the light of reason” not only tells
an individual that “it is right” to preserve oneself but also that “it is necessary so to modify” one’s actions in that regard in order to avoid being “unsociable with others” (Pufendorf, cited in Saastamoinen, 1995: 77-78).

At first glance Pufendorfian reason in this regard resembles the Grotian version of right reason which is similarly based in empirical observation; indeed, Schneewind points out “Pufendorf is an empiricist and thinks that we must be able to learn the laws of nature from evidence available in experience” (Schneewind, 1998: 126-127; see also Saastamoinen, 1995: 62). However, it is not because Pufendorfian individuals are sociable beings, but because they recognise that they are not, that they therefore realise that natural law obliges them to be sociable:

[T]he life of men without society is destined to be like the life of the beast, so the law of nature is principally founded upon the principle that social life among men is to be preserved. (Pufendorf, cited in Saastamoinen, 1995: 82)

Thus although Pufendorf, like Grotius, holds that natural law is “the Dictate of Right Reason” (Pufendorf, cited in Hochstrasser, 2000: 90), his version of ‘right reason’ is in many respects closer to Hobbes’ version of reason than it is to Grotius’. Like Hobbes, Pufendorf rejects the scholastic idea, reworked by Grotius, that right reason gives the individual access to a pre-existing “normative order” (Westerman, 1998: 224). Although postlapsarian individuals are eventually able to access natural law, they do not gain access to “a domain of objective values or imperatives” but rather encounter natural law as “rules deduced by prudential reason” and are unable to
“penetrate beyond the empirical and historical world” in which they reside (Hunter, 2004: 676).

Indeed, the individual’s capacity for right reason is so narrow that a number of natural law scholars argue Pufendorfian individuals possess only a measure of “prudential reason” (Hunter, 2004: 676) or “purely instrumental” reason (Buckle, 1991: 63; see also Westerman, 1998: 212, 215) despite their ability to ascertain fundamental laws of nature. Pufendorfian right reason is relatively ‘impotent’ (Buckle, 1991: 62); as Westerman points out, “the perception of natural facts does not produce ought-statements” for the Pufendorfian individual (Westerman, 1998: 193; see also Hunter, 2004: 676). Like Hobbesian individuals, Pufendorfian individuals cannot therefore rely on their reason. They cannot use their right reason as a guide to “evaluate prevailing laws and customs” or participate in public “moral discourse” (Saastamoinen, 1995: 134-135). Saastamoinen notes Pufendorfian individuals tend to internalise societal norms and “only a few adults” come to challenge those norms:

In practice, the tendency to follow the example of other members of one’s community is so powerful that only a few bother to think whether there is something wrong in the prevailing customs. … [W]hile there may always be exceptional individuals who reflect on the generally practiced customs and discover their possible disagreement with natural law, the majority adopts the prevailing views without the slightest hesitation. (Saastamoinen, 1995: 136; see also 173)
According to Saastamoinen, Pufendorf holds it is partly this tendency to adopt prevailing moral norms that leads to the common acceptance of the kinds of ideas represented by the *etiamsi daremus* claim that Grotius advances, that is, “the erroneous belief that there are acts which are morally good or wicked in themselves” and that the individual possesses an innate ability to gain knowledge of them (Saastamoinen, 1995: 136-7).

**Pufendorf’s Secularisation of Natural Law**

Besides his rather Hobbesian treatment of reason, Pufendorf also shares with Hobbes a voluntarist view of law as “the bidding of a superior”, that is, the will of a lawgiver (Pufendorf, cited in Buckle, 1991: 62) that creates obligations (Mautner, 1999: 175). However, his view of whether natural law can be considered to be law in this voluntarist sense differs from Hobbes’ view. As discussed earlier, Hobbes treats natural laws as mere “theorems” rather than laws *per se* (Hobbes, 1991: 111) and on that basis, demonstrates the relative impotence of natural law as compared with civil law. While Pufendorf similarly establishes the relative weakness of natural law, he does so via a slightly different route.

He first reinstates God as the deontic author of natural law (Seidler, 1990: 50). For Pufendorf, the fundamental law of nature to be sociable is a command handed down by God, a command that is undeniable given the individual’s weakness and propensity for conflict (Saastamoinen, 1995: 63, 82; see also Seidler, 1990: 23-24). Individuals recognise that sociability is a trait that natural law obliges them to cultivate (Dufour, 1991: 569), a deontological view consistent with traditional
voluntarist approaches to natural law (Saastamoinen, 1995: 79). Pufendorf makes clear his treatment of the fundamental natural law as an obligation:

And so the fundamental law of nature is that every man, so far as in him lies, should cultivate and conserve towards others peaceful sociality \([socialitas]\). And since he who obligates man to an end obligates him as well to the means without which the end cannot be attained, everything which necessarily makes for sociality is understood to be commanded by natural law, while all that disturbs or destroys it is understood to be forbidden. (Pufendorf, cited in Saastamoinen, 1995: 63; parentheses in original)

The role of God, however, is a severely diminished one in Pufendorfian natural law, “reduced to that of a merely punitive sovereign who could apply sanctions in an afterlife” (Hochstrasser, 2000: 71; see also Saunders, 2002: 2174). As Tully explains, while “the benevolent Christian God enforces duties through fear of his punishments”, such otherworldly punishments work to a degree only for those who believe (Tully, 1991: xxviii); they often produce only “mild stings of conscience” and are too remote to cause all individuals to feel obligated by natural law (Tully, 1991: xxix). Hunter points out that Pufendorf removes “the God of salvation” from natural law, replacing the former with “the God of natural religion (who remains but only as the object of a non-salvific honouring for civil purposes)” , a point discussed in more detail later (Hunter, 2007: 92, parentheses in original; see also Saastamoinen, 1995: 42-43). A key move Pufendorf makes in this regard is to draw a distinction between moral theology and natural law:
Natural law is confined within the orbit of this life, and so it forms man on the assumption that he is to lead this life in society with others. Moral theology, however, forms a Christian man, who, beyond his duty to pass this life in goodness, has an expectation of reward for piety in the life to come and who therefore has his citizenship in the heavens while here he lives merely as a pilgrim or stranger. (Pufendorf, cited in Saunders, 2002: 2174)

For Pufendorf, moral theology is “the study of how one should prepare for the Last Judgement while on earth” (Hochstrasser, 2000: 76). It relates to internal intentions and therefore “condemns actions which seem externally to be correct but which proceed from an impure heart” (Saastamoinen, 1995: 43), while natural law contains general principles relating to ways in which individuals lead “their earthly lives” (Hochstrasser, 2000: 76; see also Saastamoinen, 1995: 42, 44) and therefore deals with “external actions” only (Pufendorf, cited in Saastamoinen, 1995: 44; see also Saunders, 2002: 2189-2190).

Hochstrasser argues Pufendorf’s secularisation of natural law involves a distinction between three separate spheres of obligation pertaining to the individual: the obligations pertaining to all individuals derived “from the light of reason”, that is, those relating to the need to be sociable, which is the province of natural law; those arising from divine positive law, to which Christians are obligated, which is the province of moral theology; and the obligations of subjects in relation to positive law, that is, the law of the state (Hochstrasser, 2000: 106-107). In so doing, Pufendorf treats obligation to natural law as grounded in “the individual’s
perceptions of social realities” (63), strictly “a source outside divine will, while still complementing and not challenging the authority of God himself” (81).

Pufendorf thus marks out natural law’s temporal sphere, restricting it to a law pertaining to the necessity for the individual to “cultivate sociability for the sake of survival” (Hunter, 2004: 675) and treating “human sociability as the basis of natural law” (Hunter, 2007: 93; see also Buckle, 1991: 67; Hochstrasser 2000: 71). There is therefore in Pufendorf’s work a clear connection between his “de-theologizing” of natural law (Saunders, 2002: 2174) and the increased importance of the role of the social in his natural law:

God may retain the ultimate power to consign men to eternal life or eternal damnation, but in all matters of public dispute - the only areas relevant to daily life - He was by definition now marginal, since the sociability of men had been demonstrated to be the self-sufficient criterion by which any threat to the stability of that social life should be repulsed. (Hochstrasser, 2000: 107; see also Kirk, 1987: 82)

Pufendorf’s secularisation of natural law therefore - like the secularisation of natural law in the theories of Hobbes and Grotius, although via different routes - leads to an emphasis on the importance of the social in his scheme. His secularised version of natural law also leads to the necessity of positive law.
The Necessity of Positive Law

Like Hobbes, Pufendorf stresses the importance of law in relation to human affairs; he holds that “a society between men cannot be constituted nor maintained in a peaceful and stable condition without law” (Pufendorf, cited in Saastamoinen, 1995: 84). The great diversity of belief and standard of living amongst individuals as well as the postlapsarian human propensity for conflict, are two chief reasons why humans must live under law, without which “every man would be a lion, a wolf or a dog to his neighbour, or something worse than these” (Pufendorf, cited in Saastamoinen, 1995: 84). Given the weakened deontological status of natural law (see Tully, 1991: xxix), Pufendorf argues natural law alone cannot secure social peace:

But because ‘tis beyond the Power of any moral Bonds, utterly to suppress our natural Freedom of acting; and therefore such is either the Lightness, or the Wickedness of most Men’s Minds, that they despise these Grounds of Dominion, as feeble Reasons for Obedience; hence there ariseth a Necessity of adding some further Motive, which may work on our disorderly Lusts with a stronger Effect than the bare Sense of Decency and Honour ... Now there is nothing that could have such an Effect as this, but the Fear of some Evil to be inflicted upon our violating an Obligation, by some stronger Power, whose Interest it was that we should not have thus offended . . . For indeed Laws can hardly obtain their outward End and Effect, unless they are supported and arm’d with Strength, so as
to be able, upon Occasion, violently to force a Compliance.

(Pufendorf, cited in Hochstrasser, 2000: 105; emphasis in original)

Pufendorf thus effectively restricts his voluntarism in a similar fashion to Hobbes, a move that, according to Hochstrasser, reveals the ultimately “non-voluntarist epistemological foundations” of Pufendorf’s natural law theory (Hochstrasser, 2000: 105-106). For Pufendorf, only positive law with worldly sanctions, that is, “the voluntarism of the sovereign” rather than the voluntarism of an otherworldly lawgiver, can secure the behaviour necessary to sustain peaceful social life (Hochstrasser, 2000: 105). Like Hobbes, Pufendorf holds that given the relative impotence of natural law, “the effective remedy for suppressing evil desires, the remedy perfectly fitted to the nature of man, is found in states [civitates]” (Pufendorf, cited in Tully, 1991: xxix; parentheses in original).

Pufendorf, again like Hobbes, conceptualises the formation of the sovereign state and civil society through the model social contract, an agreement amongst individuals in the state of nature to establish the sovereign state (Dufour, 1991: 573-574) which involves, according to Dufour, “passing a decree wherein the people agree a type of government, be it monarchical, aristocratic, or democratic, that is to direct the state, and to which they will commit themselves” (Dufour, 1991: 573; see also 580-582; Hochstrasser, 2000: 102). Pufendorfian individuals, again like those in Hobbes’ scheme, are motivated by the “selfish” need to erect a more stable form of social existence (Westerman, 1998: 215) and their agreement produces a new social environment in which new moral statuses emerge (Dufour, 1991: 573-574), a point discussed in more detail below.
Once the sovereign is established via the social contract, Pufendorf is concerned, like Hobbes, to secure the autonomy of positive state law and thus secure the social peace that the state is established to protect. This is achieved through Pufendorf’s separation of moral theology and natural law. By restricting natural law to the “rules required to render man sociable in civil life” (Hunter, 2004: 677) rather than containing “a stairway to salvation” (Saunders, 2002: 2179; see also Buckle, 1991: 65), Pufendorf is able to “abolish in natural law all theological controversies” (Pufendorf, cited in Hochstrasser, 2000: 70). He thereby ensures natural law cannot be employed by theologians or church authorities to evaluate state law and so threaten social peace (Behme, 2002: 43; Hunter, 2004: 677):

What the orthodox were trying to do, in Pufendorf’s eyes, was to lay claim to a special vantage point outside of all human morality and society from which they could judge the latter. … [T]o claim a transcendent standpoint in relation to historical morality and society is nonsense, politically speaking, and very often dangerous nonsense, since by definition such a question sets itself above concern for the central point of moral and social living, namely peace. (Haakonsen, 2006: 261-262)

The careful separation of the theological and natural law spheres thus secures an autonomous space for the political sphere, free from “moral critique and clerical interference” (Behme, 2002: 43). This means Pufendorf’s natural law theory, like that of Hobbes, authorises “the civil sovereign to interpret natural law norms in accordance with the goal of social peace” (Hunter, 2007: 87; see also Hunter and
Saunders, 2003: xv; Saastamoinen, 2002: 200), although only in relation to ‘external’ aspects of religious worship that are independent of its ‘internal’ part”, consistent with the remit of natural law (Zurbuchen, 2002: xix). The sovereign has no power to enforce laws pertaining to ‘internal’ beliefs. Hunter calls this Pufendorf’s “desacralizing of civil authority” (Hunter, 2004: 671).

Pufendorf thereby allows for a reciprocally autonomous theological sphere where ‘truths’ relating to salvation are free from “the morality and politics of civil society” (Haakonssen, 2006: 261-262; see also Saunders, 2002: 2185, 2196). Pufendorf warns if either ecclesiastical or state sovereigns overstep their respective bounds, “great Abuses, Disturbances and Oppressions, both in Church and State” will follow (Pufendorf, cited in Zurbuchen, 2002: xv). He adds that individuals alone, for similar reasons, cannot act as moral judges of positive law (Saunders, 2002: 2191) as this too jeopardises social peace, Pufendorf arguing it “introduces the utmost confusion into human affairs” (Pufendorf, cited in Saunders, 2002: 2192).

*The Creation of the Sociable Subject*

His social contract delivers therefore an absolute and autonomous sovereign that resembles that of Hobbes. It also delivers, like Hobbes, a new moral space, civil society, a form of society that is thereafter reified and valued:

Society was originally established for selfish motives, but *once it was there*, it turned out that it generated other advantages as well. At that stage of human development, society is appreciated for its own sake. (Westerman, 1998: 215; emphasis in original)
In this new social environment individuals are able to cultivate a level of sociability that exceeds the limited, untrained form achievable in the state of nature. While Pufendorf treats sociability as ‘naturally’ developing in the state of nature, the sociability learned in civil society is “totally a product of education” (Saastamoinen, 1995: 82). This more sophisticated version of sociability involves attaining “an aptitude for acting right in that society” (Pufendorf, cited in Saastamoinen, 1995: 81). Like Hobbes, for Pufendorf, civil society produces the civil individual:

[T]his is perhaps the principal fruit produced by societies, namely that the recently born, in whom no actual understanding of these things has been implanted by nature, may, within societies, be fashioned into suitable members of the same. (Pufendorf, cited in Saastamoinen, 1995: 81).

Pufendorf holds that in order for the individual “to become a useful member of society” (Pufendorf, cited in Tully, 1991: xxvi), not only must they avoid injuring or violating the rights of others (Westerman, 1998: 191) but must do two additional things. As Tully points out, sociable subjects must recognise the “equal dignity” of other individuals “so that their highly sensitive and easily provoked self-esteem is not injured” and they must also “perform duties of benevolence” in order to foster mutual “trust” (Tully, 1991: xxvi-xxvii). In turn, individuals must also show they are thankful for being so treated (Westerman, 1998: 191).

Pufendorf expands greatly on Hobbes’ treatment of the artificial sociable subject via his theorisation of the operation of morality in civil society. Like Hobbes, Pufendorf rejects the realist assumption of a naturally occurring moral order and emphasises
instead the ‘constructed’ nature of morality. Morality, according to Pufendorf, is “only perceptible on the basis of norms that are imposed or added to nature” (Westerman, 1998: 198); it is “something external to human beings”, imposed via “external forces” (Saastamoinen, 1995: 173). However, Pufendorf, more than Hobbes, explores the creation of morality at the micro level in his work (Westerman, 1998: 209). He does this via his theory of entia moralia, or moral entities.

The Creation of Moral Personae

Pufendorf distinguishes between physical entities and moral entities, the former consisting of those whose movements occur “with no direction at all from perception or reflection” (Schneewind, 1998: 120) but rather from “inner principles of natural substances” (Behme, 2002: 44). They are the underlying “physical realities” upon which moral meaning is superimposed (Dufour, 1991: 564). Moral entities, on the other hand, do not exist independently (Westerman, 1998: 193) and are instead “superadded, at the will of intelligent entities, to things already existent and physically complete” (Pufendorf, cited in Schneewind, 1998: 120). Moral entities thus “owe their existence to imposition” (Westerman, 1998: 193) and “add norms and values to what otherwise would have been a purposeless world” (Westerman, 1998: 206). For Pufendorf there are a number of different kinds of moral entity, key among which are moral personae: the individual is a physical entity to which attaches moral personae, or moral social roles.

As Hunter points out, the most fundamental moral persona is that which attaches to the individual in the state of nature; it is the individual’s “natural condition”, that is, “the condition of a passion-driven creature who must cultivate sociability in order to
escape mutual predation”, a moral entity that is “a status imposed gratuitously by God” (Hunter, 2004: 676; Saunders, 2002: 2181; cf. Hochstrasser, 2000: 63). Besides this fundamental moral persona of the ‘natural’ individual in the state of nature, further moral personae are “superadded later” by individuals (Saunders, 2002: 2181-2182), who possess an “ability to construct functioning moral entities in just the way that God does” (Schneewind, 1998: 139; see also Westerman, 1998: 206). Pufendorf thus differs from Hobbes in two respects: unlike Hobbes, for whom there exists no morality prior to the will of the sovereign, Pufendorf allows for the presence of morality in the state of nature, as noted earlier in relation to the weak and unsustainable moral bonds that form in that social environment; and more importantly, Pufendorf holds that morality is not only imposed by the sovereign, whether divine or civil, but by individuals at a micro level.

Within civil society, moral personae operate as “specially constructed capacities” that enable the civil subject to “undertake specified actions in civil life” (Saunders, 2002: 2182). The civil subject, no longer holding the moral persona of the ‘natural’ individual, maintains a collection of moral personae pertaining to civil life:

According to Pufendorf, the whole social world in which we live can be regarded as the result of human imposition of moral entities. Man is conceived of as being able to play different roles in different situations and contexts, which are themselves the product of human imposition as well. In short, the whole social fabric is an artefact. (Westerman, 1998: 209)
For Pufendorf, a moral persona functions as a “‘mask’ that enables an actor to play his role” (Westerman, 1998: 206), including that of “husband” and “mayor”, for example (Schneewind, 1998: 120-121), Pufendorf holding an almost dramaturgical understanding of relations between individuals in civil society:

Time and again Pufendorf stresses that in different situations men can assume different roles. Pufendorf hastens, however, to add that ‘the imposition which produces real moral persons’ differs from the roles of actors in the theatre: whereas the latter serve no other purpose than to deceive the spectator, ‘real’ moral impositions should order man’s lives. (Westerman, 1998: 206, quoting Pufendorf)

Haakonssen observes the beginnings of this kind of conception of the civil subject in Hobbes’ social contract which, effected through language, transforms individuals who become “for the purposes of social intercourse, hidden behind the sociolinguistic mask of the ‘party member’ or the ‘subject’”, a notion that is expanded in Pufendorf’s theory of moral entities (Haakonssen, 2004: 101). The Pufendorfian individual chooses from a range of masks or personae that are available or appropriate in any given social context, and any number of these personae may operate alongside one another “provided they do not clash with each other” (Pufendorf, cited in Saunders, 2002: 2182). For Pufendorf, the ongoing production of moral knowledge takes place via interactions between the moral personae of different individuals:
[T]he central issue in practical knowledge, knowledge of what should be done, including moral knowledge, is not whether such knowledge can be formulated in propositions that are true in some absolute sense. The real interest is in knowing what sort of social persona you adopt - ‘become’ - by the signs you send to your fellows. In order to know what to do in the world, you have to know what the use of a uniform or a title or a form of words or the occupancy of a job or position tell others that you ‘are,’ socially speaking. (Haakonssen, 2004: 101; see also Hunter, 2004: 680).

Hochstrasser argues Pufendorf’s particular approach to morality where moral knowledge can be created and dispersed by individuals within the social world, that is, without the “will of a superior”, represents the “final form” of the transformation of natural law that began with Grotius (Hochstrasser, 2000: 85).

Pufendorf also identifies the “composite person” as a further form of moral entity, made up of a number of individuals who unite to act as one persona (Dufour, 1991: 565; see also Seidler, 2002: 238). Once constructed, composite persons are “autonomous” and assume a “distinct” existence from the individuals that constitute them, operating as “real” with “their own life and ends” (Dufour, 1991: 567; see also Westerman, 1998: 219). The sovereign state is the central composite moral entity in Pufendorf’s scheme, conceived as “a particular body, a person” (Dufour, 1991: 574; emphasis in original).

The two fundamental moral personae created by the social contract are the sovereign and subject, or citizen. Hunter makes the point that the “normativity” that grounds
their creation is an entirely internal, civil normativity; that is, it is based entirely “in the civil purposes for which they are instituted” (Hunter, 2004: 676; see also Saunders, 2002: 2184). This is why “moral knowledge” in civil society, as noted above (Haakonsen, 2004: 101), consists of knowledge of how one must ‘act’ in order to maintain social peace. The civil morality that guides and is reproduced by these moral personae cannot therefore be threatened by any external normative ideas.

Pufendorf’s work in relation to moral entities thus further reinforces his separation of the theological and civil spheres. By treating moral personae in civil society as created by individuals for the maintenance of social peace (see Hunter, 2004: 680), Pufendorf removes from clerical authorities the ability to claim transcendental knowledge of the individual’s “moral nature” or knowledge of any transcendent law as it applies to the individual (Saunders, 2002: 2183). The “offices” of “priest and sovereign” alike are grounded in the “purposes for which these persona have been instituted” (Hunter, 2007: 133; see also Hunter and Saunders, 2003: xvi; Saunders, 2002: 2183).

Moreover, Pufendorf’s treatment of the operation of rights in civil society further reinforces the separation of the theological and civil spheres. Different rights and duties are accorded to different personae in the one individual; this means that, as Saunders points out, “no status is morally so fundamental that its rights transcend the rights attaching to all other statuses” (Saunders, 2002: 2183). For Pufendorf, rights are essential elements of moral personae and enable interactions between individuals.
Pufendorf’s Treatment of Individual Rights

For Pufendorf, rights arise either directly via law, through agreements between individuals, or on occasion of the creation of moral entities, three routes that reflect the importance of both law and social peace in his scheme. Firstly, Pufendorfian rights are juridical; they arise either directly or indirectly from law, including both natural law and positive human law (Schneewind, 1987: 141), Pufendorf treating law as “logically and causally primary” and rights, including natural rights, as “derivative” (Haakonsen, 1996: 39; see also Seidler, 1990: 39), a move that sets apart his conceptualisation of rights from that of Grotius and Hobbes.

While Pufendorf treats natural law as obligatory law in the voluntarist sense, albeit a relatively weak form of law, Hobbes limits his voluntarist account of law to that of the civil sovereign and treats natural rights in the state of nature as prior to law. For Grotius too, natural rights are prior to law, Grotius treating them as innate subjective powers of the individual. Pufendorf’s treatment of rights as secondary to law is linked to his rejection of scholastic and Grotian realism:

The reason for Pufendorf’s obvious fear of considering rights as primary over law was that he saw such a position as a version of scholastic essentialism - the view that moral values were inherent in nature prior to God’s moral legislation. This was exactly the view that he vehemently criticized in Grotius (...). (Haakonsen, 1996: 41)

While Hobbes similarly rejects Grotian realism, he retains the idea of rights as primary but strips them of any objective moral worth. Pufendorf’s anti-realistic
position entails instead rejecting their primary status but retaining their moral value, a move in relation to which Westerman suggests Pufendorfian natural rights might more aptly be called “‘moral’ rights” (Westerman, 1998: 207). For Pufendorf, natural rights in the state of nature are not natural in the sense that they are inherent qualities of the human, but are natural insofar as they arise from natural law. Like moral entities, natural rights in the state of nature are attached to the individual from an external source, that is, through either God as the author of natural law, or by human agreement.

Rights that arise via agreement or “contractual and quasi-contractual arrangements” between individuals (Haakonssen, 1996: 40) are nevertheless ultimately grounded in natural law. As rights agreements are both a necessary feature of social life (Salter, 2005: 298) and “reflect the fundamental duties of sociableness” (Buckle, 1991: 83), they are therefore prescribed in natural law (Buckle, 1991: 81). Their naturalness, in other words, is connected to their social necessity: as Buckle points out, natural rights “are natural in just the sense that the law of nature is natural: that is, they are either necessary to peaceful social existence, or possess a rational utility to that end” (Buckle, 1991: 81).

In relation to the necessity of property agreements in the state of nature, for example, Pufendorf argues “natural law clearly advised that men should by convention introduce the assignment of such things to individuals, according as it might be of advantage to human society” (Pufendorf, cited in Buckle, 1991: 81). Rights agreements in relation to “land” are necessary for social peace (Hochstrasser, 2000: 103), as are agreements that ground the individual’s “rights to the products of his
own labour” (Hont, 1987: 273). Pufendorf therefore treats natural rights that arise by agreement as both “natural” and a “social creation” (Buckle, 1991: 81), a position that resembles his treatment of the human capacities of sociability, language and reason.

A further indication of the juridical foundation of rights arising via social agreement is the necessary pre-existence of a particular form of right, *libertas*, which itself arises from natural law (Haakonssen, 1996: 40). The possession of the natural right *libertas* enables the individual to enter into rights agreements, as Haakonssen demonstrates in his account of Pufendorf’s four types of *ius*:

Pufendorf uses *ius* in the sense of subjective rights to refer to four different categories …: power over one’s own actions, termed *libertas*; power over another person’s actions, termed *imperium*; power over one’s own things - property, termed *dominium*; and power over another person’s property, termed *servitus*. The three last are ‘adventitious’, that is, they are instituted by men through contractual and quasi-contractual arrangements, and they thus presuppose the first power. *Libertas* encompasses the absence of subjection in a human being’s command of his physical and moral personality - his life, actions, body, honour, and reputation. (Haakonssen, 1996: 40; emphasis in original)

Although socially created rights agreements are only indirectly grounded in natural law, for Pufendorf, the rights that arise as a result of these agreements in the state of nature are sturdier than those that arise directly from natural law; he describes the
latter as “indefinite” rights that are to be treated as “a right in the fullest sense only through mutual consent or agreement” (Buckle, 1991: 79). The indefinite nature of rights imposed directly via natural law reflects the minimal power of natural law and the remoteness of God as its enforcer in Pufendorf’s scheme. While natural law grants and also grounds natural rights, as law it is inadequate to the task of protecting those rights. As Buckle points out, rights have to be created by agreement “wherever there is no established sovereign, or where the sovereign’s edicts do not extend” (Buckle, 1991: 79).

Agreements made in the Pufendorfian state of nature, however, are always at risk of unravelling. For Pufendorf, rights are only truly secured when the author of the law that oversees them is an earthly rather than divine sovereign who has the power to “bring some grave evil upon the disobedient” (Pufendorf, cited in Schneewind, 1993: 66). Pufendorf’s treatment of natural rights in this sense resembles that of Hobbes who emphasises the crucial role of positive law in securing individual rights. Indeed, Saunders notes a key role for the Pufendorfian sovereign, like that of Hobbes, is “the natural law requirement to conserve life” (Saunders, 2002: 2184, n.40). Pufendorf emphasises the importance of the natural right to self-preservation, as demonstrated below in his treatment of the right of necessity.

*Perfect and Imperfect Rights*

Besides the categories of right discussed above, Pufendorf also distinguishes between perfect rights and imperfect rights and provides a largely social account of the broad differences between the two that resembles Grotius’ distinction:
Among the laws of nature there are some which must be observed if society is to exist at all, and there are others which conduce to “an improved existence”. Perfect rights and duties take their character from the first kind of law, the imperfect from the second. (Schneewind, 1987: 141, quoting Pufendorf)

Pufendorf treats perfect rights as “active, in the sense that the possessor can demand a thing or an action of another” while imperfect rights are “passive, meaning that the possessor can lawfully suffer, admit or receive something” (Salter, 2005: 299; see also Mautner, 1999: 168-170). This means “enforceability” and “precision” are features of perfect rights - the individual “can use force to protect these rights”, as in the case of “rights to our bodies” (Schneewind, 1998: 132-133; see also 1987: 141) - while imperfect rights are not specified in any laws or agreements and are not enforceable (Schneewind, 1998: 132-133).

Perfect and imperfect rights are thus further distinguished in relation to the actions they elicit from others, the former requiring specific actions relating to the specific right, while the latter refers generally to ‘humane’ action (Schneewind, 1987: 141). Imperfect rights illustrate the importance of compassion and reciprocity as components of civil sociability in Pufendorf’s scheme, Pufendorf stating that the individual who honours imperfect rights “possesses the means to bind others to him by his kindness” (Pufendorf, cited in Salter, 2005: 300). Voluntary duties associated with imperfect rights may involve acts of “respect, gratitude or generosity” and include the provision of “counsel, goods, or personal assistance” to the rights-bearer (Pufendorf, cited in Schneewind, 1987: 141). Thus while perfect rights are
necessary for the existence of society, the voluntary duties associated with imperfect rights foster “social solidarity” (Schneewind, 1987: 142).

Pufendorf’s emphasis on duties in relation to imperfect rights touches on the issue of correlativity, a matter Schneewind notes is the subject of some debate amongst Pufendorfian scholars (Schneewind, 1998: 134, n.26). Tuck, for example, identifies a “correlativity thesis” in Pufendorf’s work that he argues is tied to Pufendorf’s “attack on primary natural rights”, arguing for Pufendorf “any right requires a definite obligation on someone else” (Tuck, 1979: 158-159). However, a number of scholars argue a less straightforward relationship exists between Pufendorfian rights and duties (see Mautner, 1999 for a detailed critique of Tuck’s interpretation). Buckle, for example, argues “although the existence of a right typically corresponds to another’s obligation, this is not always the case” (Buckle, 1991: 80). He cites as an example the sovereign’s right to punish, in relation to which Pufendorf states that “sovereigns have a right to exact punishment, but the criminal is under no obligation to undergo it” (Pufendorf, cited in Buckle, 1991: 80, n.105; see also Mautner, 1999: 172).

Haakonssen too points to the relatively convoluted relationship between right and duty associated with the Pufendorfian natural right of *libertas* where “respecting the *libertas* of our neighbour” is a duty owed to God the “obligator” performed by an “obligee” while the “beneficiary” is the neighbour (Haakonssen, 1996: 40). Haakonssen also adds that “adventitious” rights that arise via agreement or contract allow a degree of deviation from close correlativity “since adventitious institutions may be made to include rights unsecured by obligations” (41). Moreover, as noted
earlier, merely voluntary duties follow passive rights (see Mautner, 1999: 170-171 for a discussion of obligation in relation to passive rights).

Similarly, the right of necessity in Pufendorf’s theory entails only voluntary duties on the part of property owners, a right that Hochstrasser argues provides evidence that “no genuine correlativity of rights and duties” can be attributed Pufendorf’s work (Hochstrasser, 2000: 104). The Pufendorfian right of necessity includes the right to take the food or property of another “by force or stealth” (Pufendorf, cited in Tierney, 1997: 82) when an individual is in dire need. Pufendorf emphasises “the humanitarian duties of property owners” and the importance of generosity as an element of sociability rather than a duty that follows directly from the right of necessity (Salter, 2005: 299; see also Hochstrasser, 2000: 104).

While Grotius holds that pursuant to the right of necessity, an individual may steal from the wealthy when required in order to survive, as long as the exercise of this right does not threaten social peace (Salter, 1999: 220; 2005: 285), Pufendorf imposes a number of specific restrictions on the exercise of the right. He argues the needy individual “must first make a formal demand of the owner” of the property required and if unsuccessful, may then “seek a court ruling” if access to the courts is available (Buckle, 1991: 115). Salter notes courts can compel “a person who refuses to meet his obligations of charity” to provide for the destitute individual and equally, where such access to courts is available, such individuals who take from the wealthy “without the consent of the owner or the authority of the court” are guilty of stealing (Salter, 2005: 294-295). Where no such positive laws exist, however, needy individuals who have explored all other options can take the property of the wealthy
in order to survive and are not culpable (Salter, 2005: 295; see also Buckle, 1991: 115).

Buckle argues Pufendorf’s right of necessity demonstrates both “the fundamental importance of self-preservation” and the maintenance of social peace in his scheme (Buckle, 1991: 113-116). Pufendorf states, for example, that one is not obligated to follow any law when obeying it will jeopardise one’s survival as “the casting away of love and care for oneself is classed among things which are impossible” (Pufendorf, cited in Buckle, 1991: 113). The individual must be allowed to steal if it is necessary for survival, but this right is limited to ensure that it does not disrupt social peace (Buckle, 1991: 108). Pufendorf adds that the right of necessity “cannot be taken for granted” (Buckle, 1991: 108); he holds, for example, that this right applies only to the individual who is in need “through no fault of his own”, thereby excluding “lazy scoundrels who have fallen upon want through idleness” (Pufendorf, cited in Buckle, 1991: 116).

Despite the above caveats in relation to correlativeity between rights and duties, it is clear Pufendorf holds that individual rights cannot be held in social isolation; they are always held “vis-a-vis other persons” (Seidler, 1990: 26). A right necessarily entails a “moral effect” in other people, that is, to respect that right or to simply “not hinder” the individual in relation to that right (Pufendorf, cited in Buckle, 1991: 79, n.99; see also Tuck, 1979: 160). Without that crucial social element, the individual does not possess a ‘right’ of action or ownership, for example, and instead merely possesses a “natural faculty” in relation to the action or object in question.
Rights and Social Personae

Pufendorf’s theory of moral entities most clearly demonstrates the connection between social relations and individual rights in his work. For Pufendorf, individual rights are integral to the functioning of social personae. Haakonssen notes the fundamental natural law that “we should live sociably” requires that individuals possess rights, including *libertas* and the adventitious rights described above, which enable them to “fulfil certain offices, *officia*”, that is, “the offices of life which encompass clusters of specific duties and rights” (Haakonssen, 1996: 41-42). *Officia* are specific forms of moral entity including those that operate in the state of nature and in civil society:

The basic offices of life fall into three categories, that of being a human being *tout court*; that of being a member of a family (as spouse, parent, child, sibling, master, servant); and that of being a member of a political society (as citizen, sovereign, any type of magistrate, or soldier). (Haakonssen, 1996: 42; parentheses in original)

Rights are not only necessary preconditions for the formation of social personae but are necessary for the performance of roles that attach to social personae and therefore the maintenance of sociable relations between individuals. As Seidler notes, “*adventitious states*”, that is, social personae that are “products of human
social interaction” and include “humanly assigned or chosen roles in life such as one’s political, economic, or ecclesiastical station”, always have “rights and obligations attending them” (Seidler, 1990: 33; emphasis in original). Dufour too identifies “status” or “state” as a particular form of moral entity that constitutes “the framework within which moral beings function”, a category that necessarily includes “any condition, in principle involving rights and duties, in which people are placed in order to carry out certain actions” (Dufour, 1991: 565; emphasis in original), examples of which include “marriage and citizenship” (567). Social personae entail rights and duties, both on the part of the entity and others in relation to that entity.

It may therefore be inadequate to speak merely of ‘individual’ rights in the case of the Pufendorfian individual, as the social individual is not only an individual to which the natural right of self-preservation attaches, for example, but the holder also of a number of social personae each with their own specific rights and duties attached; these latter rights might be said to occur at a sub-individual level. In any case, Pufendorf’s account of rights points to the necessarily social elements of the person. The rights that attach to the individual at this sub level are social in nature, as their existence arises out of the creation of social entities; they help give social meaning to the individual. In the work of Pufendorf, rights are not just juridical objects that secure the protection of the individual. They form part of the performative apparatus of the different personae of the individual.

Although the connection between social relations and individual rights in the natural law theories of Hobbes and Grotius is not as comprehensively elaborated as it is in the work of Pufendorf, it is clear that for each of the natural law theorists recovered
in this thesis, individual rights are an important element in their respective theorisations of the possibilities for social life and sustained social peace. Key ideas in these theories, including the connection between rights and social relations, and the necessity of civil society and positive law for sustained social peace among rights-bearing individuals, challenge a number of assumptions about natural law thought held by sociologists of human rights.
Chapter 5: The Treatment of Natural Law by Sociologists of Human Rights

Introduction

In a number of places within the sociological human rights literature, writers make passing references to natural law, including references to the importance of the work of Grotius, Hobbes or Pufendorf in the development of rights thought, but do not explore the relevance of these natural law theories for the subdiscipline. A handful of writers discuss the work of Hobbes in relation to the state but do not refer to his contribution to rights thought. Locke figures more prominently as an early modern natural law theorist within the subdiscipline. For the most part, however, sociologists of human rights dismiss natural law thought, leaving unchallenged the traditional sociological rejection of natural rights and treating natural law thought as incompatible with sociological approaches to rights.

A number of key assumptions underlie the dismissal of natural law by contributors to the subdiscipline, including the notion that in natural law theory natural rights are held above and against the state and positive law, rendering natural law theory inimical to positivism; that natural rights are bestowed upon the individual by God and are thus inescapably otherworldly; that natural rights attach to the abstract individual in the state of nature, seen as a presocial, non-empirical, hypothetical realm, the theorisation of which strips the individual of social identity and thus ignores the social embeddedness of the individual and the importance of social relations for the operation of individual rights; and that while natural rights are
conceived as attached to an abstract universal individual, are paradoxically selective in their application.

An emerging number of sociologists question these enduring sociological assumptions about natural law, and key ideas in the natural law theories of Grotius, Hobbes and Pufendorf also demonstrate the inadequacy of these assumptions. Both this emerging sociological work and the natural law thought recovered in this thesis support the assertion that sociologists of human rights can no longer rely on the familiar sociological critique of natural law as a basis for the dismissal of the relevance of natural law thought for the subdiscipline.

References to Natural Law within the Sociology of Human Rights

Incidental References to Natural Law and Natural Rights
A number of human rights sociologists point to the historical or intellectual significance of natural law within broader rights thought, some referring to possible links between contemporary human rights thought and natural law or natural rights ideas. In her discussion of feminist criticisms of liberal rights thought, for example, Nash observes that the liberal focus on the autonomous individual of human rights can be traced to European natural law (Nash, 2002: 422). She later states that while in practice human rights have traditionally been applied selectively, they are “universal in form since their inception in natural law” (Nash, 2007: 419). Save for these two passing comments, however, Nash does not explore the position of natural law within broader rights thought. Han too also hints at a connection between natural rights and human rights when he points to Zhao’s rejection of a Western
A number of writers also touch on the work of Grotius or Hobbes in their references to possible connections between human rights and natural law. Shafir and Brysk, for example, argue the concept of human rights “arises out of natural law philosophy during the European Enlightenment” (Shafir and Brysk, 2006: 276). They note the importance of the secularisation of natural law under Grotius and his “conceptualization of ‘natural rights’ as a contractual basis for social life that is not rooted in religious law”, a transformation of individual rights they argue came to influence the “universal” natural rights of “the French and American Revolutions” (276). However, they do not discuss further these historical links between natural rights and human rights, instead focusing on human rights in relation to citizenship rights, pointing to the discrete Greek origins of citizenship and consequent differences between citizenship rights and human rights (276-278).

Carrabine also points to the emergence of the idea of individual subjective rights in early modern natural law. He distinguishes early modern natural law from previous forms seen in the “legal codes of ancient Babylon, Greek city states and imperial Rome” pertaining to citizens only, as well as natural law theories of the Middle Ages that justified absolutist rule through a “Divine Right of Kings” (Carrabine, 2006: 192). Sjoberg and his co-authors, whose work is discussed in more detail in a later section, similarly assert that “ancient social orders, such as Greece and Rome, did not formulate a concept of rights” and instead locate the emergence of human rights in early modern Western Europe (Sjoberg et al., 2001: 17). Neither Carrabine nor
Sjoberg and his co-authors, however, explore further the significance of the emergence of subjective rights in natural law theory in the early modern period.

By contrast, Young and Quibell trace the modern concept of individual rights to ancient Greece, emphasising the role of Plato, whose “dualism” and “atomistic individualism” they argue influenced the development of rights thought including into the seventeenth century, a period that saw the growth of science and the work of Descartes, who linked Plato and early modern physics and whose “mechanistic approach” in turn influenced Hobbes’ ‘atomistic’, subjective individualism that rendered justice reliant entirely upon law, stripped of Greek or Christian ethics (Young and Quibell, 2000: 755-756). Young and Quibell also discuss the work of Locke and Rousseau, portraying them as further carriers of an atomistic view of human relations and pointing to ways in which their natural law theories resemble “Descartes’ physical laws” in relation to “physical action” (756). They argue Hobbes, Locke and Rousseau each emphasise the importance of law as “the ‘lynchpin’ of society” (756).

De Laubier briefly acknowledges the importance of the work of Grotius whose natural law theory predates a significant period “in Christian lands” when “human rights received their modern formulation” (de Laubier, 1985: 101). He considers the impact of a number of religious doctrines on the development of human rights and ultimately ties the rise of human rights to the ascendancy of secularisation in the eighteenth century (101). De Laubier identifies Grotius as a key figure among “the secularised jurists of the seventeenth and eighteenth centuries”, referring to the *etiamsi daremus* passage in *De Jure Belli ac Pacis* in which Grotius treats the
existence of God as irrelevant to the content of natural law (101). De Laubier, however, does not discuss the possible relevance of Grotius for the sociology of human rights.

Garrett similarly points to the importance of Grotius’ *etiamsi daremus* passage for the secularisation of natural law, noting Grotius’ commitment to a natural law stripped of “theological dogma” (Garrett, 1987: 16), and he also recognises the importance of Pufendorf in natural law thought (17). However, he ultimately dismisses the idea that natural law has played an important role in the emergence of human rights (Garrett, 1987), as discussed in more detail later. Save for the abovementioned brief references to the importance of the work of Grotius for the emergence of a secular form of individual right, Grotius’ contribution to rights thought goes largely unnoticed in the sociological human rights literature. Habermas, for example, as Chernilo points out, sees Hobbes as the first theorist of “modern” natural law, a body of work that includes Rousseau, Kant, Hegel and the Scottish Enlightenment (see Chernilo, 2013b: 18), a history that effectively ignores the work of Grotius as a crucial turning point in natural law theory during the early modern period.

*The Enduring Spectre of Locke*

The natural law theory of Locke, on the other hand, is noted for its contribution to rights thought by a number of human rights sociologists, who also point to the early modern period as a significant one in the development of rights ideas, but who ignore or downplay the importance of Grotius, Hobbes or Pufendorf, writers of
Locke’s era who, according to natural law scholars, are major contributors to natural law and natural rights thought (see Hunter, 2011; Tuck, 1989: 96).

Sjoberg and his co-authors, for example, point to the significance of the early modern period and single out Locke, who for them “looms large as a figure” in the development of the idea of individual rights, briefly discussing his ideas relating to natural rights in the state of nature (Sjoberg et al., 2001: 17). Somers similarly points to the importance of seventeenth century rights ideas, noting the particular importance of Locke in shaping general conceptions of natural rights as arising out of natural liberty (Somers, 1994: 74-75).

Woodiwiss, who argues “rights discourse” emerged during “seventeenth-century Europe” (Woodiwiss, 2005: 138-139), notes sociologists and rights scholars in general identify Locke as a major influence in the development of the notion of individual rights (36-38, 137). He identifies the Lockean notion of the “god-given, universal state of freedom” as linking, according to “western opinion”, natural rights and human rights (xii) and also notes Locke’s “celebrated retrojection of individualism and private property back to the ‘state of nature’” (35). Woodiwiss later expands on these ideas, arguing Lockean natural rights suited an emerging capitalist system (Woodiwiss, 2012: 970); he points to ways in which the invocation of Lockean natural rights served to naturalise ‘capitalist’ rights favouring “the owners of private property in the means of production” (970).

While Thornhill recognises the importance of Hobbes’ contractarian theory in relation to law, he too emphasises the influence of Locke in relation to the emergence of rights in the Enlightenment, the shift from law to rights for Thornhill
representing a “change of paradigm”, as it made the state’s legitimacy reliant on its recognition of the freedoms of its subjects who now possessed “rights, attaching to persons *qua* persons” (Thornhill, 2013: 209). By contrast, he downplays the Hobbesian state’s role in protecting natural rights (see Kriegel, 2002: 15-16; 1995: 40); although recognising that one of the founding principles of the Hobbesian state is the self-preservation of its subjects (Thornhill, 2013: 207), Thornhill does not acknowledge self-preservation is a natural right of the Hobbesian individual, leaving the reader with the impression that Locke is the original champion of rights vis-à-vis the state. Thornhill’s approach to Hobbes is discussed in more detail in Chapter 6.

Carrabine acknowledges the impact of both Hobbes and Locke, emphasising the significance of Locke as the author of nascent human rights ideas and comparing their work in relation to the state. He contrasts Hobbes’ absolutism with Locke’s theory of government in which the sovereign’s role is to protect natural rights and rule “by popular consent” (Carrabine, 2006: 192), overlooking, like Thornhill, the important connection between sovereignty and the protection of natural rights in the work of Hobbes.

While the above references to Locke tend to downplay or overlook the importance of other early modern natural law theorists for their contributions to the development of individual rights, Zaret, on the other hand, disregards the role of natural law in general, although he identifies the early modern period as significant for the emergence of “a nascent doctrine of human rights”, exploring its presence within a discourse of “popular politics” employed by seventeenth-century English political actors (Zaret, 2000: 43). His focus on human rights as they developed within public
discourse closely anchored to political events ignores the contemporaneous theorisation of natural rights in natural law theory, from which, as historian Skinner points out, the public political discourse of the period drew directly (see Skinner, 1972).

**The Portrayal of Hobbes as a Theorist of the State**

A small number of human rights sociologists make reference to Hobbes as theorist of the state yet disregard his natural rights theory, missing the ways in which Hobbes’ political theory is closely wedded to his natural rights theory, as seen above in the work of Carrabine (2006: 192) and Thornhill (2013: 207-209). Similarly, Levy and Sznaider, in a sociological exploration of the relationship between human rights and state sovereignty, treat Hobbes as an absolutist theorist of the state, noting the importance of his theory of sovereignty but neglecting his theorisation of natural rights (Levy and Sznaider, 2006). They make no mention of Hobbes as a natural law theorist and refer to natural law only once via a brief discussion of Turner in relation to the dismissal of natural law in sociology (663).

What is more, Levy and Sznaider invoke the famous Hobbesian image of the state to highlight the power of the human rights regime, suggesting that “[t]he transformation of humanitarian ideals into a regime of human rights can be considered as a Leviathan writ large” (665). They discuss the changing face of sovereignty, from the “absolutist states envisioned by Hobbes” to the effects of globalisation which they argue are transforming “the meaning of sovereignty” (664). One of these is the institutionalisation of “recognition of the body’s universality” in human rights law (664). For Levy and Sznaider, the rise of human rights norms
challenges the sovereign power of the original Hobbesian state (672), a position that overlooks the role of the Hobbesian state in securing mutual respect for individual rights.

Smith, who discusses connections between liberalism and human rights, also refers to Hobbes’ *Leviathan* when discussing the role of the social contract in relation to “liberal democratic” states (Smith, 2004: 416). However, when she considers the state’s “monopoly on the legitimate use of violence” as a crucial element of the state’s duty to protect its citizens (416), Smith does not recognise this as a central Hobbesian idea tied to his theorisation of natural rights. Da Silva too seeks to draw on Hobbes’ conception of the state, da Silva deriving his treatment of rights as “fictions” in part from Hobbes’ ideas in relation to the state as a “fiction” (da Silva, 2013: 469). Da Silva also challenges the traditional sociological dichotomy between natural rights and citizenship rights (459) but does not mention Hobbes’ work in relation to natural rights.

Although Turner argues his work can be seen as a “neo-Hobbesian theory of human rights”, he does not discuss Hobbes’ treatment of natural rights (Turner, 1997), a point that is discussed in detail in Chapter 7. It is important to note, however, that Turner recognises the importance of the social elements of Hobbes’ conceptualisation of the state, a recognition that is missing from the above approaches to Hobbes. He argues Hobbes’ portrayal of the state of nature and the role of the state in establishing a “social space” are closely aligned with Turner’s own idea of the necessity of a social canopy to mitigate human frailty (567).
Turner’s work in this respect is notable; Wickham argues that sociology in general fails to see the ways in which Hobbesian sovereignty secures “a distinct domain of peaceful, secure human interaction” (Wickham, 2014: 140). Van Krieken too calls attention to the traditional “simplistic” reading of Hobbes in sociology that fails to recognise the important social elements in his work (van Krieken, 2002: 259).

The Rejection of Natural Law by Sociologists of Human Rights

Distinguishing Between Natural Rights and Human Rights

While some of the above references to natural law note the importance of natural law ideas within broader rights thought, given the “ridicule” traditionally directed towards the idea of natural rights and natural law in sociology (Somers and Roberts, 2008: 396), a number of human rights sociologists are careful to distinguish between natural rights and human rights as separate concepts with discrete histories. Somers and Roberts, for example, argue “[h]uman rights and the human rights regime today are both theoretically and institutionally different creatures from the natural rights theory” (412). They refer to the institutionalisation of human rights, including civil and political rights as well as social and economic rights in the Universal Declaration of Human Rights, and assert that human rights differ from natural rights in a discursive, historical and legal sense (390). They argue in view of the substantial differences between natural and human rights, the two notions “should not be used interchangeably” (412) and argue a sociology of rights ought to be able to distinguish between different forms of right, including natural and human rights (406). They lament the current “evident slippage” between the different forms (388).
Woodiwiss contrasts a sociological approach to human rights to the treatment of rights within natural law. He argues a key task of the subdiscipline is to explore that which “can be learned by reflecting on the classical sociological texts on law”, that is, that “contrary to what is argued by the natural law tradition, rights are neither a gift from god nor for any other reason immanent within humanity” (Woodiwiss, 2012: 967). Woodiwiss treats human rights as legal and “discursive entities”, a position that allows sociologists to explore how rights come to apply to rights-bearers, and one that he contrasts with a natural rights position that treats rights as ‘inherent’ qualities of the individual (Woodiwiss, 2011b: 131).

López too points to a “growing body of sociological research that takes human rights seriously precisely by making them ordinary objects of empirical analysis” rather than “some sort of quasi-natural law phenomenon” and he endorses Woodiwiss’ examination of human rights as legal objects as well as Somers and Roberts’ approach to human rights (López, 2011: 75-76).

Although in a number of places Sjoberg and his co-authors briefly point to possible connections between natural rights and human rights, they ultimately emphasise differences between the two rights concepts. They identify the Nuremberg Trials and the creation of the United Nations Universal Declaration of Human Rights as historical events that determined the formulation of the contemporary concept of human rights (Sjoberg et al., 1995: 11), although Sjoberg in a later article refers to claims by “some scholars” that the Universal Declaration of Human Rights “has antecedents in the natural law doctrine” (Sjoberg, 1996: 279). As noted above,
Sjoberg and his co-authors also acknowledge the early modern origins of individual rights:

> It was during the 16th through the 18th centuries in Western Europe that a group of philosophers began to articulate just what it means to have rights. (Sjoberg et al., 2001: 17)

Sjoberg and his co-authors state, however, that it is their preference to “not dwell on” early modern philosophy in relation to human rights and turn instead to the two declarations of the American and French Revolutions, as well as the American Bill of Rights, asserting that it is the articulation of rights in these documents that “captures our sociological attention” (2001: 17). Although they note some writers point to natural law ideas that were utilised during this later period, particularly the concept of natural rights as formulated “during the French Revolution”, they argue human rights and natural rights are distinct concepts and ought to be treated as such by sociologists of human rights (Sjoberg et al., 1995: 11). They agree with traditional sociological criticisms of key natural rights ideas contained in the French and American rights documents, particularly in relation to the employment of the idea of the state of nature, but argue that such criticisms do not justify a wholesale rejection of rights thought in sociology (Sjoberg et al., 2001: 19).

Their ultimate position on natural law resembles Woodiwiss’ and López’ above; they argue the revival of natural law ideas is less helpful to sociologies of human rights than is the empirical study of contemporary rights practices. They point in particular to the probative value of the empirical study of what they call “extreme” violations of human rights such as “mass killings” which they argue “are far more
sociologically revealing as to how the moral order justifies social activities” than a consideration of the human condition according to natural law (26).

A more detailed assertion of differences between natural rights and human rights can be found in the work of Garrett, who, like Somers and Roberts, criticises the way in which the notion of natural rights “has been consistently confused with the human rights tradition” (Garrett, 1987: 21). He discusses the discrete development of natural law, including secular natural law, and acknowledges the significance of Grotius and Pufendorf, as noted earlier, within natural law thought (17).

Garrett locates the emergence of individual rights in two “preparatory stages” or revolutions in law: firstly, the “revolution in canon law” (15) which in turn led to the second stage, the revolution in secular law, which saw “the incorporation of the state as a legal entity with its own rationalized system of jurisprudence” (15), both revolutions effected by lawyers, the “status carriers” (14) of this transformation in western law, a Weberian notion referring to “discrete class-based groups responsible for introducing a particular set of ideas into the social matrix” (3). Garrett argues the lawyers associated with these two preparatory stages in law made heavy use of “Aristotelian natural law” (14), a tradition of natural law that Garrett argues had a profound influence on western society.

Drawing on the work of natural law scholar Richard Tuck, Garrett describes early theories of rights within the secular natural law tradition, a tradition separate from Aristotelian natural law. Garrett argues a major theorist of this tradition is Gerson who Garrett claims produced the first natural rights theory and provided a foundation for the “development of human rights” via a conception of rights as “consistent with,
but analytically separable from, natural law” (15-16). Garrett also places the work of Suarez in this secular natural law tradition (16), although it is noted here that Suarez, as a member of the Spanish Scholasticism, was working within an Aristotelian and theological framework (see Crowe, 1999: 14; Haakonssen, 1996: 16; Tuck, 1979: 54-55). Garrett does stress, however, the gradual nature of the secularisation of natural law under these theorists, and emphasises Suarez’ important contribution to the development of natural rights, particularly in relation to his theory of contract and the related idea of the individual’s ownership rights over one’s liberty and person (Garrett, 1987: 16). Scholars of natural law identify the further development of these Suarezian ideas in the work of Grotius (see Harvey, 2006: 35).

Garrett also includes in this tradition the work of Grotius, Pufendorf, Locke and Rousseau, observing that ‘natural law’ in this discourse was progressively de-emphasised until finally being rejected by Rousseau (Garrett, 1987: 16-21), who replaces “natural law as a basis for social order” with “a more graphically political, even sociological, portrayal of the foundations of society” (18). He also acknowledges Grotius’ importance among the secular theorists, pointing not only to Grotius’ *etiamsi daremus* passage, but also his emphasis on sociability and his rejection of the scholastic conception of natural law as “inferior” to divine law (16). Garrett discusses the further development of secular natural law in the work of Pufendorf in which natural rights are applied to individuals as well as “corporate persons” (17). He makes no mention of Hobbes, whose theory post-dates Grotius and is treated at length by Pufendorf, despite drawing heavily on Tuck’s history of natural law in *Natural Rights Theories* where Tuck devotes a chapter to Hobbes (see Tuck, 1979: 119-142).
Despite recognising the significance of secular natural law in relation to the development of the idea of individual rights, Garrett ultimately argues the impact of the former upon the notion of human rights has been “overrated” (Garrett, 1987: 21). For Garrett, the secular grounding of state legitimacy is instead the lasting legacy of natural law (13) and marks an important point of distinction between natural rights and human rights. He argues while the human rights tradition is “fearful” of political tyranny as a threat to the individual, the natural rights tradition is “committed to safeguarding governmental powers and fearful of religious intrusion into the political domain” (5).

Garrett’s argument in relation to the importance of the state in secular natural law counters the familiar sociological assumption that in natural law theory, natural rights are held against an oppressive state. While his work is therefore important for his acknowledgement of the importance of the state in secular natural law, by making this idea the basis of his distinction between the human rights and natural law traditions, Garrett fails to consider the relevance of this idea for the sociology of human rights (on the importance of the state in relation to human rights see Morris, 2010a: 1-7).

**Key Assumptions about Natural Law Held by Sociologists of Human Rights**

*The Sociological Assumption that Natural Law is Opposed to Positive Law*

A number of assumptions about natural law are associated with the rejection of natural law thought within the sociology of human rights. One of these is the familiar sociological assumption that natural law is opposed to positive law. Somers and Roberts argue a strict distinction between natural law and positive law in broader
sociology can be traced to Bentham’s critique of natural rights as “nonsense on stilts”, a phrase in which “the positivist antipathy to natural rights is fully expressed” (Somers and Roberts, 2008: 396).

Somers and Roberts adopt this distinction between natural law and positive law and use it to mark out significant differences between natural rights and human rights, arguing while natural rights theory “positioned itself in opposition to positive and institutionalized law”, human rights are established in positive law, including both in international and domestic legal codes (412). They suggest the strength of human rights norms derives partly from their legal status, noting much human rights practice and scholarship continues to recognise the significance of the Universal Declaration of Human Rights (412). For Somers and Roberts, while the extra-legal, normative nature of natural rights places them in opposition to law, the legal status of human rights reinforces their normative resonance for “activists and scholars throughout the world” (412).

Woodiwiss too recalls Bentham’s positivist dismissal of natural rights and draws on the traditional natural law/positive law opposition in order to outline the broad parameters within which a sociological account of human rights would most suitably be located, arguing “it should be immediately clear why a sociologist would side with the Legal Positivist camp” as sociology is better equipped to conceptualise human rights as legal constructs, whereas “natural law theory prefers to fill that space with divinations of one kind or another” (Woodiwiss, 2005: xi-xii). Woodiwiss argues a natural law approach to rights treats them as “intrinsic to human beings” and “prior to” law, while a positivist approach treats rights as “extrinsic to
individuals and groups in that they are created and attached to legal persons by external forces, notably by legislative acts or judicial decisions” (xi).

Chernilo and Fine provide a brief historical account of the emergence of the distinction between positive law and natural law in social theory from medieval Europe to the twentieth century, arguing that according to the distinction, natural law provides a “normative foundation of jurisprudence” while positive law is committed to “a more secular account of the foundations of legitimate state rule” (Chernilo and Fine, 2013: 192; see also Thornhill, 2013: 198), a distinction that Chernilo and Fine argue needs to be reconsidered, and one the thesis argues is at odds with the secularisation of natural law under Grotius, Hobbes and Pufendorf. Chernilo and Fine argue that given this enduring distinction within sociology, the discipline remains blind to the ways in which sociological thought incorporates natural law thinking, particularly in relation to universalistic thinking, as it similarly deals with the idea of “human nature (often implicit)” in its exploration of the “social” (Chernilo and Fine, 2013: 192; see also Chernilo, 2013b).

Fine adds that the traditional sociological distinction between natural law and positive law ignores ways in which the two are interlinked (Fine, 2013: 235-236). He asserts sociological positivism dismisses and yet relies on natural law ideas, and details ways in which the Kantian iteration of natural law was a formative influence on the development of critical theory (231). Fine’s recovery of natural law is outlined in Chapter 7.

Thornhill too argues that by continuing to assert a strict distinction between natural law and positive law, sociology fails to recognise ways in which natural law thought
has historically been employed to reinforce positive law. In his history of the sociological functions of natural law, Thornhill observes ways in which the positivisation of natural law directly informed the positivist expansion of state law in late medieval and early modern Europe (Thornhill, 2013: 202-209). He also notes the emergence of the idea that the positive law of the stately prince was held to follow from natural law (205-206). These instances demonstrate the vital role natural law played in the emergence of positive law (see 213). Natural law scholar Haakonssen similarly points out “natural law theories during the seventeenth and eighteenth centuries … increasingly became theories of state law” (Haakonssen, 1985: 247). He discusses the utilisation of natural law by “territorial princes” to secure their legitimacy of rule over territories during early state formation (2006: 256-257) and argues “the intricate relationship between the two systems or approaches to law continued to be of importance well into the nineteenth century” (257).

Thornhill asserts the sociological distinction between natural law and positive law is therefore “without sociological reality” (Thornhill, 2013: 202, parentheses in original). It is a distinction he argues follows classical sociology’s literalistic reading of natural law and can be seen as “an original blind spot in sociological method” (Thornhill, 2013: 200-201; emphasis in original) as it hinders sociology’s ability to explore the ways in which natural law has buttressed positive law at a functional level. Thornhill’s methodological position and historical study of natural law is explored in detail in the following chapter.
The Necessity of Positive Law in Secular Natural Law

Grotius, Hobbes and Pufendorf separate positive law and natural law, not in order to set them in opposition, but to demonstrate the necessity of the former as a means to secure the latter. The separation of natural law from other positive laws, including human and divine positive laws, is first achieved in the work of Grotius (Barr, 1932: 133; see also Schlatter, 1973: 127; Tuck, 1999: 99) and is recognised and built on by Pufendorf (Grunert, 2003: 95), who comments “in fact, there was no one before Hugo Grotius who accurately distinguished the laws of nature from positive law, and put them in proper order” (Pufendorf, cited in Tuck, 1992: 75). Grotius renders natural law a minimalist law so that it may apply to all humans regardless of their religious beliefs (Tuck, 1993: 188) and treats theological positive law as a law pertaining strictly to a “particular community” of believers (Tuck, 1999: 99).

For Grotius, positive human law similarly relates to “the common good of one body”, that is, a specific body of subjects within civil society, while natural law relates to “the common good” of “diverse individuals” within natural society (Grotius, cited in Brett, 2002: 46). Human positive law fills some gaps that his minimalist natural law leaves open. “In some cases”, Forde points out, positive law “may be said to tighten the moral laxity of the natural law” and “may decide questions left in suspense by natural law” (Forde, 1998: 643). Salter too notes that for Grotius, “moral duties can, if the circumstances require, be strengthened by the civil law” (Salter, 2005: 290, n. 28). This is because for Grotius “law fails of its outward effect unless it has a sanction behind it” (Grotius, cited in Harvey, 2006: 38). Grotius thus hints at natural law’s relative impotence and the need for human positive law to provide some certainty in human affairs, an idea that is amplified in
the work of Hobbes and Pufendorf, who stress the important role of positive law for the maintenance of peaceful society.

Hobbes strips natural law of its ability to operate as law *per se* by restricting his voluntarism to human positive law. He treats natural law as a kind of statement of the human condition containing “Conclusions, or Theorems” (Hobbes, 1991: 111) regarding actions conducive to self-preservation relevant to one’s social conditions. For Hobbes, it is unsafe for individuals to be sociable in a social space that is not bound by positive law; it is only when natural law is incorporated “into the sovereign’s law” (Condren, 2002: 68) that the fundamental natural law to seek peace is secured.

Pufendorf too demonstrates the inability of natural law to operate as law in a voluntarist sense and argues positive law is crucial to securing adherence to the fundamental natural law to seek peace. Pufendorf also secures the autonomy and authority of positive law via his separation of natural law and moral theology. By treating natural law as pertaining only to external actions and moral theology to inner beliefs, natural law is denuded of transcendental power and therefore cannot be utilised by religious authorities as a moral standard by which to judge positive law (Hunter, 2004: 677; Saunders, 2002: 2192).

As Saunders points out, after separating moral theology and natural law, both natural law and positive law pertain merely to “the same worldly end”, that is, “civil security to be achieved by pursuing socialitas” (Saunders, 2002: 2181; emphasis in original). Saunders argues Pufendorf’s work thus “continues to present a challenge to current ways of thinking about natural law as the higher moral standard against which
positive law and politics are gauged” (2179; see also Haakonssen, 2006: 261-262).

Hobbes similarly secures the autonomy of positive law:

Natural law itself is largely mediated by a sovereign authority; priestly claims to disclose or arbitrate as to its meaning are spurious and disruptive. … What mattered for Hobbes was not the existence of natural law - this seems never to have been an issue - but the uses to which it was put and by whom. (Condren, 2002: 66)

In the work of both Hobbes and Pufendorf, the autonomy of positive law therefore secures the individual’s adherence to the fundamental natural law to seek peace. It also secures mutual respect for individual rights; both Hobbes and Pufendorf demonstrate the effective futility of natural rights in the absence of positive law. Natural rights in the lawless conditions of the state of nature are ultimately destructive in Hobbes’ scheme (Hüning, 2002: 143) and in the case of Pufendorf, are indefinite unless secured by agreements which themselves are precarious in the absence of positive law (Buckle, 1991: 79). It is only by the institution of positive law that natural rights and corporeal safety can be protected.

Given Hobbes’ rejection of the notion of objective morality, his restricted voluntarism that pertains only to positive law, and his position that only positive law secures mutual respect for rights, it is tempting to perceive Hobbes’ account as closer to that of Bentham and legal positivism than to natural law. Goldsmith, for example, suggests Hobbes is effectively “a legal positivist” (Goldsmith, 1996: 275). Woodiwiss notes that according to Bentham’s legal positivist stance, “what counted
as law was only that which could be seen in the ‘black letters’ of the law” (Woodiwiss, 2005: 49) and he recalls Bentham’s definition of law:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power. (Bentham, cited in Woodiwiss, 2005: 49; emphasis in original)

Bentham’s definition of law resembles Hobbes’ definition as “a rule commanded by a lawmaker we are obliged to obey” (Forster, 2003: 204). However, while Hobbes celebrates positive law, he treats natural rights as primary features of the individual and treats natural law, albeit containing mere ‘theorems’, as a primary feature of the human condition, ideas that are incompatible with a strict positivist position. This combination of positions in Hobbes’ work, and indeed the relationship between positive law and natural law in the work of Grotius and Pufendorf, points to a more complex relationship between natural law and positive law than is portrayed in the familiar sociological interpretation of natural law as inimical to positive law.

While this traditional sociological interpretation applies to numerous natural law theories, including those utilised by religious authorities to depose ‘heretical’ princes (Hunter and Saunders, 2003: xii; Zuckert, 1994: 145), it is an assumption that does not apply to the natural law theories studied in this thesis. Indeed, the positions of Hobbes and Pufendorf are asserted in opposition to the theorisation of natural law as inimical to positive law (see Hunter, 2004, 2011). Natural law vis-à-vis positive law
has been theorised and utilised variously as a divine mandate to rule (see Thornhill, 2013: 205-206), a transcendental law that rulers must adhere to lest they be deposed (Hunter and Saunders, 2003: xii; Zuckert, 1994: 145; see also Hunter, 2011), and a minimalist or impotent secularised law that must be buttressed or secured by positive law (Haakonssen, 1996: 34-35), three different treatments that demonstrate the inadequacy of the sociological assumption that natural law is opposed to positive law.

The Sociological Assumption that Natural Rights are Anti-State

A further assumption in the sociological human rights literature closely related to the natural law/positive law opposition is the idea that the individual’s natural rights are held against the state and that natural law theory is generally ‘anti-state’ in its approach. Somers and Roberts, for example, argue that in natural law theory the individual has “the right to freedom from the tyranny of the political” (Somers and Roberts, 2008: 411-412). They argue the state is treated in natural law theory as a perpetual threat to the individual’s liberty while natural rights represent “freedom from state coercion” and the “antipolitical” state of nature from which natural rights originate is “alleged to protect against coercive state power” (387). They point to the “remarkable powers” of natural rights in natural law theory, where they are associated with a “high-minded normative superiority” and are “privileged in their ascribed right to trump Westphalian claims to sovereignty” (411).

Similarly, Benton, while recognising law as a securer of rights in natural rights theory, argues a key tenet of natural rights theory from the ‘seventeenth and eighteenth centuries’ is that “the harms from which individuals need to be protected,
or the obstacles in the way of their fulfilment of their life-plans, arise from the intentional acts of other individuals, or the sovereign power (usually thought of as a ‘super-subject’, or leviathan)” (Benton, 2006: 22, parentheses in original), an allusion to Hobbes that, instead of pointing to the Hobbesian state’s role in protecting natural rights, emphasises state power and state abuses of rights. Against the notion in natural rights thought that “citizens and the sovereign are disposed to abuse or obstruct one another in the exercise of their basic freedoms”, Benton envisages the possibility of “[a]lternative forms of social coexistence … in which there was no public power set over and against the citizens” (21-23).

Woodiwiss, on the other hand, does not argue natural rights are held against the state but that individuals are oppressed by the state through the sacralisation of certain “capitalist” civil rights as natural rights, particularly those relating to property (Woodiwiss, 2005: 9; see also 2012: 968). He therefore argues “‘natural’ rights … represent an assertion of state power rather than an antidote to it” and their conceptualisation in natural law “ultimately legitimised the ever increasing inequality produced by the emerging capitalism” (2005: 17-18). He argues this “sleight of hand” during the early modern period introduced a “hegemonic” western version of human rights that links “liberty” and “freedom” with “private property” (2012: 968). As noted earlier, Woodiwiss’ critique of the use of natural rights as a capitalist tool focuses on the utilisation of Lockean natural law to this end (970).

Woodiwiss’ argument follows the Marxist critique of natural rights according to which the state’s official protection of rights obfuscates its role as oppressor via rights that perpetuate social inequality. He recalls the elaboration within Marxian
literature of the relationship between rights and labour, according to which “the sacrifice of labour power” is connected to the operation of formal rights (Woodiwiss, 2005: 9-10). He also argues “classical theorists” including Durkheim and Weber recognised the links between “the rise of a rights-based legal discourse” and “the development of capitalism” (25). His argument that natural rights have been historically invoked by states as a tool of oppression can be contrasted with his more optimistic approach to human rights vis-à-vis the state: he argues that a sociological approach to human rights treats them as “a set of minimum, indeed minimal, standards of good behaviour drawn up by states to protect their citizens from abuse by the same states and certain other powerful parties” (Woodiwiss, 2012: 967).

As noted earlier, Garrett points out that in secular natural law theory the state is a protector of rights, and he suggests it is in human rights thought that the idea that individual rights are held against a potentially oppressive state is propagated (Garrett, 1987: 5). He emphasises the contribution secular natural law theory makes to the emergence of the notion of “the modern state” (Garrett, 1987: 13). Thornhill too, as noted above, points to ways in which natural law theories were invoked to support the development and expansion of state power in late medieval and early modern Europe (Thornhill, 2013) and the ways in which state legitimacy was partly grounded in its ability to ensure its citizens received ‘equal protection under the law’ through its recognition of their “subjective rights”, an idea, according to Thornhill, arising in Enlightenment thought that postdates the early modern period and is influenced by Lockean natural law (Thornhill: 2013: 209). The natural law theories of Grotius, Hobbes and Pufendorf also challenge the sociological assumption that natural rights are held against the state.
Secular Natural Law, Natural Rights and the State

As set out earlier in the thesis, Grotian individuals are naturally sociable and reasonable and are therefore able to achieve a modicum of social peace marked by mutual respect for individual rights, a peace that is secured and enhanced by the presence of “civil authority” (Haakonssen, 1985: 244; see also Tuck, 1999: 95). The Hobbesian state also secures mutual respect for “inalienable” natural rights (Hobbes, cited in Kriegel, 2002: 22); it establishes a space within which, as Seidler points out, the individual’s “self-preservation and self-enhancement are promised a reasonable and mutually compatible degree of satisfaction” (Seidler, 1990: 19; see also Kriegel, 2002: 15). The Pufendorfian state too secures individual rights; it provides the security and certainty that is required in order to render natural rights definite, as the social agreements that are established to secure rights in the state of nature are precarious (Buckle, 1991: 79).

The Anti-State State of Nature

Similarly, the state of nature in the natural law theories of Hobbes and Pufendorf is not a site of respite, a place that ‘protects’ the individual “against coercive state power”, as Somers and Roberts suggest (see Somers and Roberts, 2008: 387). While the state of nature is the depiction of a stateless existence, it is not ‘anti-state’ but “the antithesis of the political state”; as Dufour points out, “it shows the defects which make urgent the establishment of political society” (Dufour, 1991: 572). It is a device designed to demonstrate the necessity of the sovereign state for lasting social peace and individual safety (see Curley, 1994: xxii).
The Sociological Depiction of the Abstract Individual in the Presocial State of Nature

Closely related to the idea that the state of nature is ‘anti-state’ is the notion that natural law theory ignores the social embeddedness of the rights-bearing individual, a criticism that is generally made with reference to the state of nature, depicted as a presocial space occupied by atomistic individuals. Sjoberg and his co-authors, for example, describe the state of nature as a “pre-social (or fictional)” realm (Sjoberg et al., 2001: 26, parentheses in original) that exists “independently of the imposition of a social and cultural order” (17). They recall Bentham’s contention that the granting of rights necessarily occurs within “society” via “the state apparatus”, a conviction that grounds Bentham’s dismissal of natural rights as being “anchored in a pre-social state of nature” (18).

Somers and Roberts argue the classical sociological “ridicule” of the “ontology” of natural rights largely arose from the fact that it “located its origins outside of society” (Somers and Roberts, 2008: 396). They favour an approach to human rights that recognises the socially embedded rights-bearer, in opposition to the notion of the natural rights-bearing individual who is effectively “stripped metaphorically of all political and social attachments … in the perfect freedom of the state of nature” (411-412). O’Byrne similarly argues sociologists of human rights ought not to explore “philosophical questions concerning the pre-social origins or foundations of rights”, adding that ‘justifications’ of human rights “through recourse to ‘natural law’, in the tradition of Hobbes and Locke, have been heavily criticised for their abstraction” (O’Byrne, 2012: 831).
Bauman too refers to the “pre-social” Hobbesian individual residing in the state of nature (Bauman, 2003: 137), while Chernilo argues Hobbes depicts the state of nature as “an asocial condition of human existence” (Chernilo, 2013b: 102). Chernilo adds that Hobbes effects “a radical separation between the asocial state of nature and fully fledged social relations in the commonwealth” (107) and that it is only in civil society that “social life emerges” (117; see also 104, 106, 116).

Benton similarly argues natural rights thought of the seventeenth and eighteenth centuries contains several “underlying assumptions”, one of which is that “self-identity is a ‘given’ property of individuals independently of their social participation” and that through its conceptualisation of the state of nature, natural rights thought treats “personal identity” as an inherent feature of “individuals prior to social participation” (Benton, 2006: 21-23). Benton favours instead a sociological understanding of the individual that treats “personal identity … not as a ‘given’, but as an achievement” (23).

The Social State of Nature in Secular Natural Law

The natural law theories of Grotius, Hobbes and Pufendorf challenge the above accounts of the conceptualisation of the individual in natural law thought. Grotius places great importance on the social context in which people live and conceives of a natural ‘society’ among sociable and reasonable individuals (Haakonssen, 1985: 244; Shaver, 1999: 67). Pufendorf too conceives of a social state of nature in which people form “moral bonds” and trade their “knowledge, skills, and goods within and across historical boundaries” (Seidler, 1990: 51-52), Pufendorf allowing for a modicum of sociability in that social space (Dufour, 1991: 571; emphasis in
original). He treats the individual as the carrier of moral personae who interact with the moral personae of other individuals, a view of the individual’s personal identity as consisting of social roles that are imposed rather than inherent (see Haakonssen, 2004: 101).

The idea of a presocial individual identity is also at odds with Hobbes’ portrayal of the individual in the state of nature. As sociologist Robert van Krieken observes, “[l]ike any sociologist, Hobbes took it for granted that humans are made … rather than born” (van Krieken, 2002: 259; see also Wickham, 2014: 147). Van Krieken argues the enduring sociological understanding of the Hobbesian state of nature as a presocial realm stems from Parsons’ depiction of the Hobbesian state of nature in The Structure of Social Action (van Krieken, 2002: 258; see also Wickham, 2014: 149). He asserts that this “simplistic” sociological depiction of the Hobbesian state of nature reflects a sociological rather than natural law perspective; it is “a projection of its own concern to see ‘nature’ as opposed to society onto Hobbes’s much more specific concern with explaining and preventing civil war” (van Krieken, 2002: 259).

Van Krieken quotes Nisbet who refers to “the natural character of the individual - his precultural, presocial, and prepolitical character” in his interpretation of Hobbes (Nisbet, cited in van Krieken, 2002: 258-259; emphasis in original). Van Krieken notes too that although Wrong “very correctly” identifies the Hobbesian state of nature as an ideal-type, he ultimately adopts the “standard” sociological understanding of the state of nature as a notion in opposition to society (261) and inhabited by “asocial” individuals (Wrong, cited in van Krieken, 2002: 261).
According to van Krieken, the sociological interpretation of the state of nature as a “prepolitical” and “presocial” space is simply “wrong”; he argues “this is not how Hobbes understood ‘the state of nature’” (259). He instead observes, following Macpherson, that the Hobbesian state of nature is inhabited not by “psychological egoists” but “entirely socialized individuals” residing in a social realm characterised by “the absence of a central authority” (259; emphasis in original). The state of nature is inhabited by individuals who Macpherson argues are equipped with “socially acquired behaviour and desires” (Macpherson, cited in van Krieken, 2002: 259). Van Krieken points out it is not the actions of atomistic, belligerent individuals or “presocial, egoistic human nature” that makes the Hobbesian state of nature precarious, but “the effects of passionately held beliefs and opinions with no central authority to decide between them”, a morally relativist social world that is resolved by the establishment of the Hobbesian state, the latter effecting the achievement of ‘normative integration’ (van Krieken, 2002: 259).

As Halldenius points out, the Hobbesian state of nature is simply “a social situation where there is no sovereign” (Halldenius, 2007: 703). As a device that illustrates the uncertainties of social life outside the state, it would not function as intended if it discounted the social embeddedness of the individual. This is also the case in Pufendorf’s model. He asserts in the opening pages of his book On the Natural State of Men that his depiction of social life in the state of nature highlights key characteristics of the state (Pufendorf, 1990 [1678]: 109-111). As Seidler points out, the Pufendorfian state of nature “suggests by direct contrast what actual social and civil relations ought to be” (Seidler, 1990: 53). For Pufendorf, the state of nature is an uncertain, unstable social environment in which the social connections people
forge “are never as secure and reliable as those created by a common civil power” (Saastamoinen, 1995: 146). For both Hobbes and Pufendorf, the state of nature - and in the case of Grotius, his depiction of natural society - is not a presocial but a precivil space, a depiction of social life outside the state.

The Connection between Social Relations and Natural Rights

The thesis has also detailed the respective ways in which Grotius, Hobbes and Pufendorf conceive of a connection between natural rights and social relations in both the precivil and civil social spaces. While for Grotius, mutual respect for natural rights is an essential element of social peace in natural society (Haakonssen, 1985: 249), for Hobbes, peaceful social conditions are essential to secure mutual respect for natural rights. As noted earlier, for Hobbes, natural rights operate as destructive forces in the state of nature given the uncertain social conditions that prevail there, making necessary the creation of an artificial moral and legal order that in turn guarantees the social peace that makes respect for others’ natural rights conducive to one’s self-preservation (see Kriegel, 1995: 40; 2002: 15). For Pufendorf, in the state of nature individual rights are formed via social agreement but are effectively indefinite until secured by the sovereign’s laws (see Schneewind, 1993: 66). The great importance placed on the social conditions of the natural rights-bearing individual in these natural law theories demonstrates the inadequacy of the sociological assumption that natural law, particularly in its depiction of the state of nature, ignores the social embeddedness of the rights-bearing individual.
The Sociological Assumption that Natural Law and the State of Nature are Non-Empirical

A further criticism related to the assumption that natural law ignores the social is that natural law takes a non-empirical approach to rights, a claim that echoes Marx’ original dismissal of the fictional state of nature “in favour of that which is empirically real” (Somers and Roberts, 2008: 396-397). Somers and Roberts, for example, argue the state of nature is a mere “thought experiment on which natural rights theory rests its claims” and that natural law belongs to “an epistemological world where moral compasses are refined and protected, not one in which they are tested” (Somers and Roberts, 2008: 411-412). Woodiwiss too argues depictions of the state of nature in natural law, upon which liberal ideas of rights are built, are “fictitious understandings of the origins of human society” (Woodiwiss, 2005: 74).

Fine observes that sociology positions itself against the non-empirical, “metaphysical presuppositions of the natural law tradition” and celebrates the fact that it has “started afresh on a more worldly basis” (Fine, 2013: 222-223), a claim echoed by writers in relation to the sociology of human rights. López, for example, points to a “growing body of sociological research that takes human rights seriously precisely by making them ordinary objects of empirical analysis” compared with the treatment of individual rights as “some sort of quasi-natural law phenomenon” (López, 2011: 75-76). Sjoberg and his co-authors also favour the empirical study of contemporary rights practices over natural law approaches that rely on “a pre-social (or fictional) state of nature” (Sjoberg et al., 2001: 26).
Wrong’s identification of the Hobbesian state of nature as an ideal-type (Wrong, 1994: 16), however, points to the empirical basis by which Hobbes constructs his state of nature and is applicable also to the Pufendorfian state of nature and Grotian natural society. Their respective versions are indeed fictional but nevertheless based on observations and accounts of the ways in which individuals behave towards one another in organised society, a mixture of empiricism and modelling that warrants Wrong’s Weberian description. Seidler explains that to repudiate scepticism and relativism, Grotius develops an approach to natural law that relies on “empirical evidence” including the examination of “diverging moral, social, and political practices” that forms the basis for his “minimalist” account of natural law in natural society (Seidler, 1990: 47-48). Haakonssen too speaks of “[t]he sheer prominence of Grotius’s emphasis on the empirical methods of understanding natural law” (Haakonssen, 1985: 251), pointing out that Grotius’ methodological discussions in this regard have had a lasting impact:

Grotius’ speculations about the empirical methods to be used in investigating natural law and its implications … were to become enormously important in the debates about scientific methods right down to our own time. (Haakonssen, 1985: 250)

Seidler observes that Hobbes similarly employs an “explicitly empirical” method in order to “meet the sceptical challenge” and argues his empirical approach, which informs his depiction of the ideal-typical state of nature, “became a central feature of Hobbes’s methodology” (Seidler, 1990: 48). As Saastamoinen explains, Hobbes
observes “human features which have a tendency to create violent conflicts even within civil societies” and builds his picture of the state of nature from those observations (Saastamoinen, 1995: 144; see also Hayes, 2008: 463-464). Van Krieken quotes Macpherson in this regard, who argues Hobbes’ portrayal of the individual in the state of nature is “a deduction from the appetites and faculties … of civilized men” (Macpherson, cited in van Krieken, 2002: 259).

As an ideal type, the state of nature is not a depiction of any particular historical, pre-state period (Curley, 1994: xxi; Saastamoinen, 1995: 145; Tricaud, 1988: 110) and nor is the equally ideal-typical social contract that ends the state of nature; as Raphael states, “Hobbes is well aware that in practice states are unlikely to be set up by social contract” (Raphael, 1977: 38). Ryan points out that Hobbes builds his state of nature “without anxiety about its historical accuracy” and suggests that it is “more nearly the condition of civilized people deprived of stable government than anything else” (Ryan, 1996: 217-218). It is thus a model of social life outside the state, rather than chronologically before the state, one that Hobbes argues ought to be guarded against (see Wickham, 2014: 150-151).

Pufendorf also employs an empirical approach, developing his model of the state of nature “from an analysis of humankind in its present state, and not from speculation about origins or alleged essential purposes” (Dufour, 1991: 566). The Pufendorfian state of nature is not a depiction of an actual precivil historical period; Pufendorf draws on “past history” and his observations of civil life in order to present a model that is “empirically ‘real’” (Seidler, 1990: 35).
The important role of empiricism for each author at a methodological level is reflected in the importance each places on empiricism as a basis for human knowledge in their internal narratives. All three authors demonstrate the necessity of empirical knowledge in relation to natural law and natural rights: they each argue the individual must observe social action, rather than rely on theological teachings, in order to access natural law and understand how to exercise their individual rights. The Hobbesian individual relies on the recognition of their social environment in order to know whether to seek peace or war, pursuant to natural law (see Sorell, 1991: 96). The Grotian individual considers the social consequences of self-preserving actions before those actions can be identified as natural rights (Haakonsen, 1996: 27; 2002: 31-32).

For Pufendorf also, as Schneewind points out, “[f]inding out what things are conducive to the sociable attitude requires empirical investigation” (Schneewind, 1998: 130) and Pufendorf maintains that “the laws of nature must be knowable by us on the basis of evidence available in experience” (Schneewind, 1987: 131-132; see also Seidler, 1990: 21). Schneewind adds that both Grotius and Hobbes “hoped, with Pufendorf, that insisting on observable evidence to support moral claims would offer a way to damp down some of the fiercest outbursts of human unsociability” (Schneewind, 1998: 127).

The Sociological Assumption that Natural Rights are God-Given

A further assumption held by sociologists of human rights is that natural law theory ignores the social embeddedness of the rights-bearing individual by treating natural rights as “God-given” (Somers and Roberts, 2008: 396; see also Woodiwiss, 2005:
Howard distinguishes between human rights and natural rights on the basis that the latter, coterminous with “pre-modern Christian” natural rights, are granted by God (Howard, 1995: 12). She argues human rights are grounded in secular rather than theological notions of the good, a derivation that allows for the recognition of the importance of “social relations” in relation to individual rights (12-13). She argues the original God-given status of natural rights reinforces their “natural” status (12).

*The Diminished Role of God in Secular Natural Law*

The secularisation of natural law under Grotius, and further developed under Hobbes and Pufendorf, represents an important shift in natural law theory that is missing from critiques that treat natural rights as inevitably God-given. As Haakonssen states, “natural law theories during the seventeenth and eighteenth centuries lost more and more of their theological appearance” (Haakonssen, 1985: 247). This secularising move is connected to the importance of the social elements of these natural law theories; it opens up an important place for the social in the theoretical space previously occupied by God.

For Grotius, only those self-preserving actions that are socially sustainable are identified as natural rights (Haakonssen, 1996: 27). While Pufendorf treats natural rights in the state of nature as ‘superadded’ to the individual either via God through natural law, or via social agreement (Buckle, 1991: 81; Haakonssen, 1996: 40), the latter form are more reliable than the former, Pufendorf treating rights that are granted via natural law “indefinite” and to be treated as “a right in the fullest sense only through mutual consent or agreement” (Buckle, 1991: 79). While the
contention that natural rights are God-given applies to a number of natural law theories, it does not account for the diminished role of God and the multifaceted nature of the origins of natural rights in the secular natural law theories studied here.

*The Sociological Distinction between Nature and Humanity as a Basis for Rights*

A related assumption held by sociologists of human rights is that natural rights are grounded in ‘nature’. Somers and Roberts, for example, distinguish between human rights and natural rights on the basis that “[w]e have human rights simply because we are human” (Somers and Roberts, 2008: 390), human rights being founded on “humanity” as opposed to natural rights whose “source” is found “in God or nature” (389-390). They refer to the Universal Declaration of Human Rights which “turned simply to humanity as justification enough” for human rights, noting the reference to “the human family” in its Preamble (391).

Hajjar argues “we need a sociological definition of human rights”, one which must, among other things, eschew definitions “that ground arguments in abstractions like ‘nature’” (Hajjar, 2005: 207). Fine recalls the distinction between nature and humanity in the work of Arendt, arguing that her engagement with natural law involves the replacement of the idea of natural rights grounded in “nature” with the cosmopolitan idea that human rights are grounded in humanity (Fine, 2013: 226).

However, the attempt to draw a distinction between humanity as a basis for human rights and nature as a basis for natural rights is problematised by the interchangeability of the two bases in the sociological human rights literature. During a discussion of the 1995 women’s conference in Beijing, for example,
Sjoberg and his co-authors note “the women at Beijing reasoned not that there was some pre-social state of nature in which women were guaranteed rights, but, rather, that women’s rights inhere in their very condition of being human” (Sjoberg et al., 2001: 17). They also refer to the “human status” that grounds human rights, contrasting it with the “exclusionary” state of nature (21), but also adopt the term “nature” when theorising foundational characteristics of the human subject of human rights. They emphasise “the social and cultural nature of human nature” (33) that constitute the defining characteristic of the human, the “social mind” (Sjoberg, 1996: 281; Sjoberg et al., 2001: 31), and advocate theoretical approaches that seek a “sociological conception of the nature of human nature” (Sjoberg et al., 2001: 31).

Shafir and Brysk too identify both humanity and nature as grounding human rights. They suggest both that “human rights are rooted in the individual by virtue of his or her humanity” and that “human rights gain their poignancy by virtue of their universal, equal, and natural character” (Shafir and Brysk, 2006: 277). This transposition of terms also occurs in human rights instruments. Somers and Roberts, for example, state that the United Nations Universal Declaration of Human Rights “debuted the rhetoric of human rather than natural rights” (Somers and Roberts, 2008: 391), but they also observe that articles 3 to 12 employ a “language of natural rights” (391), and note that the “ontological premises” of the first article of the UDHR include the notions of natural equality and reason (391).

Stammers cautions that it is not easy to reject the ‘abstraction’ of natural rights while at the same time making a case for the universality of human rights, as the latter claim also relies on a level of abstraction (Stammers, 1999: 990-991). He argues that
to propose “that we have human rights ‘simply because we are human,’ is inherently unsatisfactory as a way of grounding human rights” (991). Brown too asserts that “some idea of natural law must underlie all genuinely universal approaches to human rights” (Brown, 1999: 107). These difficulties arising from the attempted distinction between the natural and the human resemble the difficulties associated with attempting to define in sociological terms the ‘human’ subject of human rights discussed in Chapter 1.

*The Sociological Assumption that Natural Rights are Selective in their Application*

It is further argued by a number of scholars that natural rights, while ostensibly pertaining to a universal individual, are selective in their application, while human rights pertain to all humans. Sjoberg and his co-authors, for example, draw attention to the “exclusionary” ontology of natural rights set against the “inclusive” grounds for human rights belonging to “human beings” who “possess a minimal set of rights simply because of their human status” (Sjoberg et al., 2001: 21). Shafir and Brysk similarly assert “[t]he rights proffered by natural law were contingent on the level of maturity, rationality, and enlightenment of various groups of individuals” (Shafir and Brysk, 2006: 278).

While Somers and Roberts, as noted earlier, argue natural rights pertain to a universal individual in the state of nature “stripped metaphorically of all political and social attachments” (Somers and Roberts, 2008: 411-412), they also argue natural rights thought provides a “a justification for distributing rights selectively” based on “natural differences” and that human rights, by contrast, are theoretically applicable to all regardless of “race, religion, nationality, property, gender, ethnicity, and sexual
orientation” (412). In a nutshell, Somers and Roberts appear to argue that natural rights ignore social embeddedness while human rights ignore social difference, and that natural rights are therefore selective, while human rights are inclusive.

Natural Rights and Natural Equality in Secular Natural Law

In the theories of Grotius, Hobbes and Pufendorf, however, natural rights are not selective, but applicable to all. Grotius provides a “minimalist” conception of natural law and of the individual (Seidler, 1990: 47-48) in order to refute contemporaneous sceptical arguments against natural law, providing a minimal theory of universal rights in the face of “the multiplicity of beliefs and practices around the world” (Tuck, 1989: 20-21). He argues social life is not sustainable without a universal right to self-preservation:

Grotius’s answer was … that everyone has a fundamental right to preserve themselves, and that wanton or unnecessary injury to another person is unjustifiable. No social life was possible if the members of a society denied either of these two propositions…

(Tuck, 1989: 21; emphasis in original)

Pufendorf also holds that natural rights are applicable to all, regardless of their social standing; as Seidler points out, Pufendorf stresses “every human being’s equal right and dignity, regardless of how rich or poor they might be” (Seidler, 1990: 52). He makes a clear connection between natural equality and natural rights, arguing natural equality exists amongst all individuals “in terms of their equal obligations and rights” according to natural law (Seidler, 1990: 50). Hobbes too regards all
individuals as equally possessing rights in the state of nature, the basis for the danger that prevails in that social environment. As Kriegel points out, the Hobbesian natural right to self-preservation is an “inalienable” natural right (Kriegel, 2002: 22) that constitutes “the greatest human desire of all” (Kriegel, 1995: 40).

In civil society basic rights continue to apply to all citizens, as demonstrated by the concepts of the rights of necessity and resistance, according to which, respectively, destitute individuals can rightfully steal from others (see Carmichael, 1990: 4-6; Salter, 2005: 284; Tierney, 1997: 82), and the individual whose life is threatened by the state can rightfully resist the state (see Hobbes, 1991 [1651]: 153; Mautner, 1999: 172; Salter, 2005: 291).

Certainly the assertion of the universal nature of natural rights in the theories of Grotius, Hobbes and Pufendorf does not address the valid claim that during the early modern period ‘rights’ may have been selectively applied in practice in terms of race, sex, class, mental capacity and so on. However, the same argument is applicable to the notion of human rights and cannot therefore stand as a point of distinction between the two rights conceptions. There is a longstanding feminist critique, for example, of the ways in which ostensibly universal human rights apply to a standard male individual (see Kollman and Waites, 2009: 8).

The attempts by sociologists of human rights to contrast between ‘inclusive’ human rights and ‘exclusive’ natural rights again points to the problem of abstraction in rights thought. The minimalism necessary to identify either the ‘human’ or ‘natural’ subject of individual rights requires recognising commonalities rather than particularities in order to make rights inclusive, a move that paradoxically leaves
either ‘natural’ or ‘human’ rights vulnerable to the charge of being exclusionary: a minimalist depiction of the individual becomes a standard version of the individual that acts to exclude those who do not fit the model. This is an ongoing problem for sociologists of human rights who attempt to define human rights (see Morris, 2006a: 240-244) and is not resolvable by resorting to comparisons between ‘inclusive’ human rights and ‘exclusive’ natural rights.

The thesis argues that a reconsideration of familiar sociological assumptions in relation to natural law ideas, particularly those that are echoed by sociologists of human rights as detailed above, is an important aspect of the recovery of natural law for the sociology of human rights. A further helpful exercise is to consider the recovery of natural law thought within broader sociology, to which the thesis now turns.
Chapter 6: The Recovery of Natural Law: Functional and Literalistic Approaches

This chapter explores the respective approaches of two sociologists, Thornhill (2013) and Wickham (2014), who each seek to recover natural law for sociology. While neither Thornhill nor Wickham are human rights sociologists, their work is germane to the recovery of natural law for the subdiscipline, as they each stress the sociological relevance of natural law and discuss ways in which sociology is best positioned to recover natural law.

Thornhill’s Recovery of Natural Law

A Functional Approach to Natural Law

As briefly discussed in Chapter 2, Thornhill argues sociology’s rejection of natural law thought is the result of its “literalistic” interpretation of natural law (Thornhill, 2013: 200; emphasis in original), that is, its engagement with the ‘literal’ claims of natural law, including the ahistorical, universalistic ideas therein. He observes sociology traditionally expresses its “disbelief” (200) in relation to these literal claims, attacking the credibility of natural law principles rather than exploring the social functions of natural law, a “simplistic” view (212) of natural law that paradoxically ‘accepts’ and ‘internalises’ “the theoretical self-conception” of natural law thinking (200) and therefore precludes a genuinely sociological approach to natural law (200-201, 213-214).

Thornhill argues the literalistic reaction to natural law in classical sociology is “insufficiently sociological” (200; emphasis in original) and suggests a “functional”
approach to natural law might help refocus the distorted lens through which sociology traditionally views natural law (213). A functional approach recovers natural law thought as a valid sociological object; it involves exploring ways in which natural law thought has historically been utilised in society, including ways in which it has mirrored and reinforced political and social structural changes (201). Thornhill argues that by employing a functional approach, sociologists can recover “the social status of natural law” (202) and can also potentially reveal “natural law reflection as a still vital formative resource in modern society” (213).

This focus on the social function of natural law in Thornhill’s methodological discussion is reflected in his case study where he sets out ways in which natural law and natural rights thought have contributed and responded to social and political changes in Europe from the medieval period to the late Enlightenment (202-214). His functional study directly challenges the sociological distinction between natural and positive law (212), as it details the ways in which natural law thought contributed to early state formation, the consolidation of state authority and the positivisation of state law, including the role of the notion of natural rights in strengthening state authority during the Enlightenment period (202-214).

Thornhill points to the importance of examining “theories of natural law” and “theoretical norms” in his promotion of a functional approach (200-201), that is, to the importance of recognising natural law as theory. By treating normative ideas in natural law as theoretical ‘objects’ (214), a functional approach is able to explore the sociological relevance of those normative claims rather than express a normative


scepticism in relation to them. In other words, a functional approach renders accessible the “principles” of natural law for sociological examination:

To comprehend natural law principles, sociological theory … must observe that the abstracted norms of theory, against which it has defined its methodological structure, are in fact, like all objects, mere intrinsic parts of that positive social and historical reality, which sociological inquiry more normally constructs as its own object. (Thornhill, 2013: 201-202)

Thornhill therefore does not encourage abandoning the examination of the literal concepts of natural law, but rather abandoning sociology’s “unreflectively literal” response to those concepts that precludes an understanding of the ways in which they have operated or functioned in the social world (201).

However, this chapter argues Thornhill’s emphasis on the functional operation of the literal claims in natural law risks diminishing the importance of the literal claims themselves in relation to the sociological recovery of natural law. This risk is illustrated in Thornhill’s functional study, particularly in his section dealing with medieval natural law where he refers to the utilisation of ‘natural law’ in a general sense and appears to treat natural law as a single, undifferentiated body of work, failing to identify any specific natural law theories that may have been the subject of his research and overlooking the specific literal claims in natural law theories that underpin the social transformations he examines (202-204).
In Thornhill’s discussion of the ways in which natural law thought enables the positivisation of church and state laws, for example, he talks about the “origins of modern natural law” in “the legal system of the papal church of high medieval Europe” and talks generally about the establishment of church law that drew on “the divine/natural law ordained by God” (202; emphasis in original), without clarifying the difference between the concepts of divine law and natural law. He also talks of the “infusion of divine/natural law” in the church, “the rise of natural law in the church” (202), “the rise of a divine/natural legal order in the church” (203), “legal systematization in the church, underpinned by concepts of divine/natural law” (203), “the universalist ideas of natural law” (204), “the use of natural law arguments” (204) and so on, all broad references to natural law without any indication as to which specific universalist ideas or natural law arguments he is referring to.

Elsewhere in his study, however, Thornhill offers brief descriptions of the natural law principles that underpin its functional operation. He states, for example, that “the ius-naturalism of the Gregorian church defined the worldly regime, next to the church, as an institution that assumed inner authority from natural law” (203), a clear reference to a specific natural law principle, although Thornhill does not identify the natural law paradigm, theory or author to which the principle belongs. Indeed, in his methodological discussion Thornhill appears in places to treat natural law as a body of thought whose source is located in ‘society’ rather than in the minds of specific authors. He argues, for example, “it is important to analyse natural law principles as constructs that societies have objectively generated for themselves” (213) and he adds “it is important to appreciate natural laws, and the deductive or normative principles supporting these, as socially generated facts” (213; emphasis in original).
These statements evoke an image of natural law as a general normative orientation that is reproduced within and by society.

Thornhill does, however, refer in a number of places in his study to specific authors and specific natural law ideas in their work. In his discussion of the reformation, for example, Thornhill notes Luther’s denunciation of the natural law idea that “a divinely prescribed legal order could be discerned in the world by human minds or replicated (however remotely) in acts of human legislation” (205; parentheses in original), although he does not identify the natural law theory or broader natural law paradigm to which the original idea belongs. He also refers to the ideas of Melanchthon who “devised a theory of natural law that defined the secular prince as the appointed custodian of natural law, possessing specific authority to translate divine law into positive edicts” and the functional effects this concept produced in relation to state authority including “[t]he great shift to the modern definition of state sovereignty as founded in the positive will of a prince” (205). He also briefly discusses natural rights ideas in the natural law thought of both Locke and Kant, and their functional effects (209-210).

In his discussion of the functional impacts of early modern natural law, however, Thornhill does examine in more detail a number of literal claims within natural law theories written during that period. He discusses the differing approaches to natural law taken by Hobbes and Leibniz and compares the functional implications of their ideas in turn (207-209). Thornhill notes that the theories of Hobbes and Leibniz were produced during a period in which “natural law arguments were harnessed to diametrically opposed and acutely controversialized political strategies” (206) and he
treats the respective approaches of Hobbes and Leibniz as representative of the two opposing sides in this debate. He ultimately argues the prima facie rival natural law theories of Leibniz and Hobbes served a similar functional role in strengthening state power and state law (206-207).

However, the chapter argues that Thornhill’s less than comprehensive account of the respective literal claims of these two natural law theorists compromises his functional account of their natural law theories. This point is reinforced below via a comparison of Thornhill’s account of Leibnizian and Hobbesian natural law with an account provided by natural law scholar Ian Hunter (2004), whose more detailed examination of the literal claims of the competing natural law theories in this early modern natural law debate produces a markedly different functional reading. Before looking in more detail at Thornhill’s functional study of natural law, it is first necessary to reconsider Thornhill’s distinction between literalistic and functional approaches to natural law.

A Descriptive Literalistic Approach to Natural Law

The chapter argues Thornhill’s distinction between a literalistic and functional approach can be buttressed by a further distinction between two major ways in which a literalistic reading of natural law can be undertaken. While the chapter agrees with Thornhill that sociology’s traditional literalistic treatment of natural law is “insufficiently sociological” (Thornhill, 2013: 200; emphasis in original), it also identifies an additional way of conducting a literalistic treatment of natural law that it argues is sufficiently sociological and indeed crucial to the recovery of natural law in sociology. As noted earlier, Thornhill suggests it is not necessary to abandon a
study of the literal claims of natural law altogether; that sociologists can describe or examine the literal claims of natural law rather than react to them in terms of “disbelief” (200). Although it is apparent that he works with such a distinction in mind, Thornhill does not clearly articulate a distinction between the traditional reaction to, and mere description of, the literal claims of natural law.

His insistence, therefore, that ‘literalistic’ readings of natural law be ‘renounced’ (213) tends to diminish wholesale the importance of the literal narratives of natural law. While he points to the importance of examining the “principles of natural law” in his methodological discussion (213), he effectively buries the description of the literal claims of natural law within a broader functional approach. This move carries with it the risk that sociologists who attempt to adopt his functional approach might try to keep a safe distance from the literal narratives of natural law that have inspired so much sociological ridicule, or else provide only brief accounts of them as part of a broader functional approach. As noted earlier, this is demonstrated in his functional study of natural law where the literal claims of natural law that underpin its functional operation are often overlooked, an approach that compromises his functional analysis. What is more, by treating the description of the literal claims of natural law as part of a functional approach, Thornhill’s distinction does not allow for sociological analyses of natural law theory that do not touch on the functions of natural law but merely seek to describe or analyse their internal literal concepts, a point discussed in more detail later.

The chapter therefore argues that a distinction be drawn between a reactive literalistic reading of natural law, that is, one that reacts to the literal claims of
natural law in terms of “disbelief” (200), and a descriptive literalistic reading, that is, a reading of the literal claims of natural law theories that does not concern itself with the ‘believability’ of those literal claims as statements of truth. A descriptive literalistic approach, for example, would not concern itself with the believability of a key literal claim of natural law theory that there is a natural law authored either directly or distally by a deity that applies to all individuals. Under this proposed additional distinction between reaction and description, Thornhill’s criticism of ‘literalistic’ approaches to natural law can be more accurately described as a criticism of reactive literalistic approaches to natural law.

While a reactive approach tends to treat natural law as ‘doctrine’, a descriptive approach begins to honour Thornhill’s assertion that natural law ought to be treated as ‘theory’ (see Thornhill, 2013: 200-201, 213-214). A descriptive literalistic approach ideally treats natural law theories with the same careful attention that other theories are afforded within sociology; it recognises natural law theories as written by identifiable authors and recognises the larger natural law paradigms to which specific natural law theories belong. It may involve exploring the interconnections between the various conceptual pieces of natural law’s literal narratives.

As a sociological approach, it may involve describing the ways in which natural law theorists, utilising the terminology of natural law, theorise sociologically relevant ideas including, for example, the operation of government and law and the ways in which they affect or effect social environments, the conditions for the creation and maintenance of social life and the individual’s place in society, or the connection between social relations and individual rights. The examination of early modern
natural law in Chapters 3 and 4 of this thesis can be regarded as an example of a
descriptive literalistic recovery of natural law theories.

What is more, a descriptive literalistic approach also recognises that the term ‘natural law theory’ does not refer to an undifferentiated body of work, but a collection of diverse and in places incompatible theories. Chernilo and Fine refer to this diversity when they state they are able to “differentiate between traditional and modern, conservative and radical, religious and secular forms of natural law” (Chernilo and Fine, 2013: 191). Like the term ‘sociological theory’, ‘natural law thought’ is a term that encompasses many varied perspectives.

The proposed distinction between a reactive and descriptive literalistic approach to natural law reinforces Thornhill’s distinction between a literalistic and functional approach, as it rescues the descriptive literalistic approach from its secondary status within the functional side of Thornhill’s divide. A descriptive literalistic approach cannot be subsumed under a functional approach to natural law because it is an approach that can be undertaken in isolation; that is, a sociological examination of natural law can occur strictly at the level of theory rather than as a precursor to exploring the external societal functions of natural law thought. A descriptive literalistic reading of natural law, for example, might provide merely an examination or analysis of a particular natural law theory, or might consider the possible relevance of natural law ideas for further sociological theorising. This chapter argues Wickham’s work, as detailed in a later section, can be seen as a descriptive literalistic account of natural law, as he does not explore the external functional
impact of Hobbesian natural law, but stresses Hobbes’ relevance in relation to sociological conceptions of society.

While it is possible to conduct a descriptive literalistic reading of natural law without referring to its functions, some overlap can also occur between the two methods, as Thornhill’s functional study demonstrates. As noted earlier, in places Thornhill provides brief descriptive literalistic accounts of some natural law ideas in support of his functional study of natural law. The overlap between the two methods is also evident in earlier chapters, where the thesis provided a mostly descriptive literalistic account of the natural law theories of Grotius, Hobbes and Pufendorf, while noting the social and political environments in which these theories were written and the functional impacts their authors intended, given these historical conditions.

This chapter argues that while a descriptive literalistic approach can be undertaken in isolation, an accurate functional account of natural law cannot be undertaken in isolation; the latter will always rely on a descriptive literalistic account of natural law. While sociology’s traditional response to natural law is criticised as being overly “simplistic” (Thornhill, 2013: 212), a functional approach that does not refer to the literal claims of natural law theories makes itself vulnerable to a similar criticism. The chapter demonstrates below that Thornhill’s functional recovery of natural law would be better supported by a more comprehensive account of the literal narratives of the natural law theories he studies.

*Thornhill’s Functional Recovery of Natural Law*

Thornhill begins his functional account by noting ways in which natural law has functioned to facilitate the consolidation of positive state law, drawing a direct link
between the utilisation of natural law by the late medieval church and the positivisation of state law during early state formation (Thornhill, 2013: 202-206; see also Hunter, 2007: 86-87). He observes that by drawing on the supra-legal status of natural law, the medieval church gradually established “clear legal principles” that were “consistent” and ‘reproducible’ across Europe (202-203). Positive church law established church power across territories that distinguished the church from local secular powers; this overarching law drew on, and in turn reinforced, a similarly transcendent natural law (203). Ecclesiastical “legal theorists” also began to treat positive state law as grounded in natural law and parallel to church law; the positivisation of natural law within the church thus contributed to the increased positivisation and legitimisation of state law (203).

Thornhill notes this legitimisation by church theorists of emerging state laws as grounded in natural law represented an attempt to “undermine the powers of the Holy Roman Emperor” (203), a practical aim that was an important factor in the increased positivisation of law via the invocation of natural law ideas (204). This move was matched by emerging states wishing to establish a distinct, autonomous realm of political and legal power (204-205); they patterned their own positivist developments after those of the church, instilling stable, reproducible, consistent and centralised laws in a “secular setting”, Thornhill noting this period saw the emergence of “the principle that law possessed an overarching origin, distinct from the will of any particular actor or institution entitled to enforce it” (204).

These conditions also eventually enabled secular or reformist states to invoke natural law in order to defy church authority by portraying their distinct authority as
legitimised by natural law (206). During the late reformation the laws of territorial princes were depicted “as enactments of the natural laws ordained by God” and the princes as therefore authorised to “exercise judicial power in both worldly and sacral disputes”, inaugurating the “modern definition of state sovereignty as founded on the will of a prince” (205). Thornhill notes the importance of the natural law of Hobbes in the early modern period following these developments during the late reformation (207-208).

Thornhill also looks at the functional role of natural law in the Enlightenment period during the eighteenth century, noting the importance of the work of Kant, who “defined rights as constitutive elements of human subjectivity” and the importation of this idea into American state constitution documents as well as the French Constitution and Declaration of the Rights of Man, key articulations of subjective natural rights during this period (209). He points to the enduring influence of Locke in late Enlightenment thought and notes a focus on subjective rights rather than law during this period in relation to the legitimacy of state power (209-210). He notes Locke provided “a more generalized and abstracted construction of basic rights” and replaced law with natural subjective rights as the means by which the state’s legitimacy is both established and determined (209; emphasis in original).

Thornhill argues while the late Enlightenment is perceived to be a period that saw a resurgence of “the metaphysical attitude” that was in turn criticised by an emergent positivist sociology (209-210), this familiar view does not capture the ways in which Enlightenment theories of natural rights played an important role in the establishment of the idea that the legitimacy of state authority and state law is
grounded in rights, an idea that in turn reinforced state power, now applicable “across all social spheres” during this period (211). Through this focus on the natural bearer of equal rights as the source of its own legitimacy, the state was able to “apply its power at a dramatically heightened level of abstraction, simplicity and iterability” (210) across socially diverse populations (210-213). In turn, the importance of natural rights theories was further reinforced during this period (212). Thornhill’s functional account, however, overlooks the portrayal of the role of the state in relation to subjective rights in early modern natural law theory, as noted in the previous chapter.

*Leibniz versus Voluntarism: The Value of a Comprehensive Descriptive Literalistic Reading*

Thornhill provides a more detailed account of literal claims in the natural law theories of the early modern period “between the Reformation and the early Enlightenment”, a period during which opposing forms of natural law were invoked to justify opposing “political strategies” broadly split between “absolutist” and “consensual or constitutional” perspectives, that is, natural law theories that placed power “solely in the hands of a prince”, and those that argued that “actors bearing political power were subject to natural legal constraints”, respectively (206). He notes the particular importance of a fierce debate during “the middle decades of the seventeenth century” (207) among natural law theorists, centred on a “dispute over whether actors bearing political power were subject to natural legal constraints derived from *fundamental laws*, or whether supreme powers of magistracy ought to be placed solely in the hands of a prince” (206; emphasis in original).
Thornhill explores in some detail the opposing contributions of Hobbes and Leibniz to this debate, pointing to differences between Hobbes’ contractarian theory and the “defiantly metaphysical” perspective of Leibniz, who rejects Hobbes’ voluntarism and instead insists that laws are established in accordance with “formal reason” (208; emphasis in original). This is a notion also known as ‘right reason’, as described earlier in the thesis, that is, the traditional natural law idea that the individual possesses an ability to access a small amount of divine intellection, enough to know how God intends humans to live or, as Thornhill puts it, “reason capable of assuming identity with God’s own rational essence” (208) and thus the ability to recognise natural law principles (see Hunter, 2011: 477).

Despite their deep opposition, however, Thornhill argues the natural law theories contributing to this debate during the seventeenth century played a similar functional role “at a more submerged sociological level” as they each reinforced the increasingly “autonomous” and centralised authority held by states over “rapidly enlarged social spaces” (207) and reflected the rising need for law to underpin this expanding state power:

[T]hey helped to consolidate the state as a newly evolved body of institutions, and they provided positive formulae for the functional distinction and positive self-construction of state power in European society. (Thornhill, 2013: 209)

Thornhill argues Leibniz’ support for a positive approach to law and state power can be found paradoxically in his critique of voluntarist natural law. According to Thornhill, Leibniz argues that since voluntarist natural law theorists do not provide
an adequate account of the “source” for law, they ultimately rely on a metaphysical account; voluntarist natural law in fact “presupposes a transcendent or voluntaristic source outside itself” and is therefore “unaccountably metaphysical”. Leibniz therefore argues, according to Thornhill, that voluntarist natural law theorists are “guilty of pursuing an insufficiently positivizing approach to law”. He adds Leibniz’ argument is that only law grounded in reason can be “consistently positivized”; that “only rational (natural) law can create positive law”. On this basis, according to Thornhill, Leibniz ultimately “mirrored the intentions of the voluntarists” as he sought to explore how law “might contribute to the abstraction of political power by maximizing the positive fluidity of the state’s decision-making functions” (208; emphasis and parentheses in original).

Hunter points out this is Leibniz’ “circularity” argument, one that Leibniz also employs against Pufendorf’s voluntarist position (Hunter, 2004: 672). However, Hunter provides a more detailed examination of Leibniz’ argument against the voluntarists and demonstrates that Leibniz’ appeal to reason as a basis for law does not act as an appeal to positivism but as a reassertion of his metaphysical position. In contrast to Thornhill’s position that these opposing theories generally served to buttress state power, Hunter points to important differences between the literal narratives of Leibnizian natural law and voluntarist natural law that underlie important functional differences between them in relation to state autonomy (685). Hunter examines Leibniz’ anti-voluntarist argument, as he applies it to Pufendorf, “that in the absence of a transcendent concept of justice, Pufendorf’s construction of obligation must fall into circularity and self-contradiction” (687), that is, that
voluntarism ultimately relies on a metaphysical explanation for law. Hunter quotes Leibniz in this regard in relation to Pufendorf’s voluntarism:

Perceptive though he was, the author fell into a contradiction for which I do not see how he could easily be excused. For he bases all legal obligation on the will of a superior, as appears from the passages I have cited. Yet, shortly afterwards, he then says that a superior must have not only power sufficient to oblige us to obey him, but also just cause for claiming a certain power over us (...). Therefore the justice of the cause precedes the establishment of the superior. If to discover the source of the law a superior must be identified, and if, on the other hand, the authority of the superior must be founded in causes drawn from the law, then we have fallen into the most blatant circularity ever. For from where will one learn if the reasons are just, if there is as yet no superior from whom, it is supposed, the law can emanate? (Leibniz, cited in Hunter, 2004: 687)

Rather than an argument in support of positivism and state power, or a reflection of the “intentions of the voluntarists” (see Thornhill, 2013: 208), Hunter argues Leibniz’ argument is a deliberate misreading of the voluntarist account of law and a reiteration of a metaphysical basis for law that, in functional terms, serves to weaken state power. This functional implication is evident throughout Leibniz’ work; for example, according to Hunter, Leibniz opposes Pufendorf’s attempt to “separate natural law from moral theology and thereby render civil authority independent of
transcendent morality” (Hunter, 2004: 685) and argues against the idea that “the judgments of theologians - confessional or philosophical” should be made “superfluous to civil ethics and authority”, Leibniz maintaining that civil authority must submit to such judgments (685). Thus while Hunter, like Thornhill, points to the functional import of the natural law debate of the period, his more detailed descriptive literalistic account of the arguments in this debate produces a markedly different account of the functional implications of their respective positions:

Leibniz’ demand that Pufendorf supply a higher grounding for civil obligation thus reflects not a debate within the history of moral philosophy - at least as this is usually understood - but the response of two profoundly different intellectual cultures to the political and religious exigencies of late seventeenth-century German Protestant states: a difference so great that Leibniz’ appeal to a transcendent moral philosophy could assume the form of a dangerous ideological weapon. (Hunter, 2004: 689)

Both Pufendorf and Hobbes seek to disable natural law as an ‘ideological weapon’, to borrow Hunter’s term, by pointing to the potentially dangerous consequences that follow from the metaphysical appeal to right reason as a basis for law, potential consequences that include the demolishing of state power and undoing of society (see Saastamoinen, 1995: 84; Saunders, 2002: 2192; van Krieken, 2002: 259). As Hunter points out, in Pufendorf’s voluntarist scheme the idea of justice is simply “determined by the end of civil peace and the commands of the superior who preserves it” (Hunter, 2004: 687), while Leibniz’ position, according to Hunter, is
that “the superior’s commands must be grounded in a transcendent idea of justice” (688), the latter idea representing for Hobbes and Pufendorf a threat to the peaceful society that is achieved via the establishment of the positive law of the state, as it “tempted metaphysicians to imagine a source of civil norms higher than the exchange of obedience for protection that institutes civil authority, thereby opening the latter to subversion” (688).

Pufendorf’s worldly explanation for the establishment of, and obligation to, positive law is inadequate for Leibniz, whose metaphysical position leaves no room for a positivist account of law:

He [Pufendorf] looks for this, not in the very nature of things or in the maxims of right reason that conform to it and emanate from the divine understanding, but - this is surprising and would appear contradictory - in the will of a superior. (Leibniz, cited in Hunter, 2004: 686-687; parentheses in original)

Both Pufendorf and Hobbes replace metaphysical, otherworldly explanations for civil obligation with a worldly explanation. The “just cause” that Leibniz criticises in his circularity argument above that grounds the individual’s obligation to law is simply the individual’s understanding that the sovereign power will maintain security and social peace, a peace that subjects recognise as unsustainable outside the sovereign state. It is, as Hunter argues, merely an “exchange of obedience for protection”, a “just cause” for obligation to law that Hunter notes Leibniz could not ‘grasp’ as he relies on “reason as the transcendent source of the norms rendering the
superior’s commands just” (687-688); he relies on a metaphysical understanding of reason:

[F]rom Pufendorf’s perspective, there is nothing circular in his construction of obligation, because he rejects the whole idea that morality should have ultimate foundation in a self-grounding universal reason. (Hunter, 2004: 689)

These ideas in the work of both Pufendorf and Hobbes reflect their respective views of the individual and their anti-metaphysical conception of reason. Hunter points out that for Pufendorf individuals have “just enough reason to know that sociability requires a superior” (Hunter, 2004: 694) and Wickham notes that for Hobbes humans have enough reason “to achieve a rudimentary level of self-preservation – but not nearly enough to produce society” (Wickham, 2014: 140). For Hobbes and Pufendorf, given the potential wickedness of individuals, to rely on a metaphysical explanation of the individual’s obligation to law is to practice dangerous thinking (see Haakonssen, 2006: 261-262; Wickham, 2014: 142). Moral order is achieved through social agreement rather than realised through the application of right reason, as Hunter points out in relation to Pufendorf:

[T]he institution of the superior via the civil pact is not the realization of man’s nature, or the expression of God’s, but represents instead the historical institution of a new moral persona whose commands establish the normative horizon of civil life. (Hunter, 2004: 694)
Hunter argues Leibniz’ appeal to right reason reflects his “neo-Platonic improvisation” of the “scholastic” approach to natural law, a point that challenges “the modern view of Leibniz as a progenitor of enlightenment rationalism” (683). As set out in Chapter 2, scholastic and anti-scholastic versions of natural law hold significantly different ideas about the individual’s position vis-à-vis natural law and therefore different ideas about the conditions for the emergence of society and state and, what is more, different functional implications in relation to those entities.

Thus while Thornhill downplays the functional differences between these two natural law approaches, suggesting that during this early modern natural law debate “the essential – or functionally subliminal – thrust of natural law theories was not quite as polarized as a surface-level analysis might suggest” (Thornhill, 2013: 206; emphasis in original) as they equally “attempted to envision the state as a repository of autonomous public power” (207), Hunter’s account details the ways in which Leibniz’ natural law scheme seeks to weaken state autonomy, in opposition to secular voluntarist natural law.

Hunter’s more detailed examination of the natural law claims of Leibniz thus invites a reconsideration of Thornhill’s argument that a functional account of these differing natural law theories reveals an underlying unity of effect. His work illustrates this chapter’s argument that an accurate functional account of natural law relies on an accurate descriptive literalistic reading of the particular natural law theories in question.
A Social View of the Individual in Early Modern Natural Law

Hunter’s detailed descriptive literalistic account of the natural law theories discussed above exposes an additional sociologically relevant idea in these theories besides their respective functional roles in relation to the state, one that is touched on throughout the thesis: it reveals the tug of war at that point in western intellectual history between a metaphysical view of the human condition and what might be called a social view of the human condition.

While Leibniz holds that individuals are connected to a transcendent moral order that is discoverable through right reason, and that they are obligated to the state by virtue of their natural obligations to that moral order, Hobbes and Pufendorf argue instead that the creation and maintenance of social peace requires something simpler than a reliance on metaphysics demands. It requires the creation of society through the establishment of a sovereign authority. For Hobbes and Pufendorf, it is not the natural human but the sociable human in society who respects the rights of others.

Wickham’s ‘Hobbesian Sociology’: A Descriptive Literalistic Approach

While not a human rights sociologist, Wickham’s treatment of Hobbes is also relevant to the recovery of natural law in the subdiscipline for two key reasons: he argues for a “distinctively Hobbesian sociology” and suggests that Hobbes might be treated “as a major contributor to sociology” (140); and his work can also be seen as an exemplary descriptive literalistic approach to natural law. His work serves as an example of the kind of literalistic recovery of natural law that Thornhill may approve
of but which the latter’s broad distinction between a functional and literalistic interpretation of natural law currently does not account for.

Although in his 2014 article Wickham notes in places some functional implications of key literal claims in Hobbesian natural law, he does not refer to the historical functional impact of Hobbesian natural law in the social world, nor does he refer to the particular social or political environment in which Hobbes was writing. What is more, he treats the literal claims of Hobbesian natural law as theoretical concepts and demonstrates their applicability as theoretical tools within sociology. His major concern is to demonstrate the relevance of Hobbesian natural law as theory, for theory, rather than to point to the functional resonance of Hobbesian natural law in the social world.

In his call for a “Hobbesian sociology” he promotes the utilisation of Hobbes’ particular conception of society (151). He also challenges, by reference to the literal claims of Hobbesian natural law, the traditional sociological conception of society and its traditional understanding of the role of norms in establishing society (142, 150). He does this by contrasting Hobbes’ conception of society with the competing scholastic natural law conception of society (141-148) and pointing to ways in which the traditional sociological treatment of society resembles the scholastic position that Hobbes opposes (142). Wickham argues sociology tends to embrace a modern version of scholasticism when it conceptualises society and remains closed to a Hobbesian approach (142, 148-150). Thus by pointing to major differences between the Hobbesian and scholastic accounts of society, Wickham is able to set out the parallel differences between his proposed Hobbesian sociology and the traditional
sociological approach to society. The chapter argues these features of Wickham’s recovery of Hobbesian natural law demonstrate the value of a descriptive literalistic approach.

The Absence of Hobbes in Sociology

Wickham notes a lack of interest in Hobbesian natural law theory in sociology that has led to a general ignorance of the sociological relevance of Hobbes and therefore “the failure of sociology to treat Hobbes as one of its own” (150). He observes the typical absence of Hobbes from “introductory textbooks” and notes that Hobbes is usually given only a superficial treatment when referred to in more in-depth sociology publications (148). Wickham briefly recalls a small number of sociologists who have looked at Hobbes but notes that their work in this regard has not inspired a broader effort within the discipline to explore the relevance of Hobbesian natural law theory. He refers to the work of Stephen Turner and Regis Factor, as well as that of Peter Baehr, who each identify Hobbesian influences in the work of Weber (148). Wickham also notes Bryan Turner’s recovery of Hobbes (148-149), arguing Bryan Turner “makes an admirable attempt to build a neo-Hobbesian element into his late twentieth-century account of human rights” (149).

Wickham also discusses the work of van Krieken (149-150), who calls attention to the importance of the social in Hobbes’ scheme, a crucial element van Krieken notes is missing from most sociological accounts (van Krieken, 2002: 259-260), a point with which Wickham agrees and seeks to ameliorate in his own work (150). As discussed in the previous chapter, van Krieken calls particular attention to the impact of Parsons’ treatment of Hobbes in this regard, noting sociology’s lack of knowledge
of the importance of the social in Hobbes’ scheme following Parsons’ treatment of his work (van Krieken, 2002: 259). Wickham also points to Parsons’ portrayal of the Hobbesian state of nature as a “pre-social state of nature”, a move he argues has Parsons “effectively wiping Hobbes from an entire discipline” (149; emphasis in original).

Wickham refers also to the lack of knowledge within sociology of the particular way in which Hobbes conceptualises society. He observes that although Tönnies, for example, finds a number of ideas in Hobbes’ work relevant for sociology, Tönnies fails to deal with the Hobbesian notion of society (148). Wickham suggests sociology’s disregard of Hobbes’ treatment of society may be due to the enduring assumption within sociology that Hobbes is a theorist of “individuals qua individuals” rather than “individuals within society” (150). Wickham points out while the individual is indeed a major concept in Hobbes’ work, his conceptualisation of the individual directly informs his treatment of society (140), an idea expanded on below.

Wickham argues Parsons is responsible for a further assumption about Hobbes that contributes to sociology’s traditional dismissal of Hobbesian natural law: Parsons treats Hobbes as a utilitarian, downplaying the crucial role of norms in Hobbes’ scheme, a move that enables Parsons to argue, according to Wickham, that “Hobbes cannot be treated seriously as a contributor to sociology because his work does not contain a normative component” (151) and to further argue that Hobbes’ inadequate treatment of norms might be remedied by a more rounded sociological approach, as Wickham points out:
Parsons seeks to establish that while Hobbes and his utilitarian followers are extremely helpful if one is seeking to understand only factual order, one will have to turn to sociology … if one wishes to learn how factual order and normative order combine to produce social life: ‘Thus a social order is always a factual order in so far as it is susceptible of scientific analysis but … it is one that cannot have stability without the effective functioning of certain normative elements’ (…). (Wickham, 2014: 149, quoting Parsons)

Wickham recalls van Krieken’s observation that most sociologists following Parsons continue to ignore the crucial normative elements of Hobbes’ scheme, and notes van Krieken calls for “a re-reading of Hobbes” in this regard (van Krieken, cited in Wickham, 2014: 150; see van Krieken, 2002: 259-260). Van Krieken points to Parsons’ portrayal of Hobbes in The Structure of Social Action where Parsons argues Hobbes eschews a normative solution to the state of nature (van Krieken, 2002: 260):

[T]he ‘normative’ solution to the problem of order which almost everyone from Parsons onwards has suggested is specific to sociology, having eluded Hobbes, (…) is actually present in Hobbes himself. (van Krieken, 2002: 260)

As noted in Chapter 4, it is the moral uncertainty of the state of nature that the Hobbesian state provides a solution to, as it imposes a moral order akin to the one that exists naturally in the Grotian world. As van Krieken points out, the Hobbesian state is the achievement of normative integration:
Rather than not having a sense of normative order, as Parsons accused him (...), Hobbes’s whole point was that it was precisely unregulated values and beliefs that would drive humans to civil war (...). (van Krieken, 2002: 259; emphasis in original)

A key feature of Hobbesian society is the minimal normative ideal that underscores its operation:

Hobbes’s account of society is normative in only one respect, a very important respect – its dedication to the fundamental importance of peace and security. (Wickham, 2014: 140; see also Bayatrizi, 2008: 26)

Wickham’s call for a Hobbesian sociology is in part an attempt to counter the continuing influence within sociology of Parsons’ treatment of Hobbes, particularly in relation to sociology’s neglect of the social and moral elements in Hobbes’ scheme.

Hobbes’ Rejection of the Scholastic Understanding of Society and the Individual

Wickham also draws attention to the important anti-scholastic elements of Hobbes’ account of the individual and society. For Hobbes, ‘society’ is an “achievement” secured in the face of dangerous competing notions of perfection, rather than a natural outgrowth of human reason and sociability (147), the latter ideas central to the scholastic account, as detailed in Chapter 2. Crucially, Hobbesian society is achieved by the installation of a sovereign via the social contract who is powerful
enough to inspire sufficient fear in individuals to produce in them a willingness to act peaceably rather than violently in order to secure their self-preservation (145-146). Wickham stresses the primacy of sovereignty for the establishment of society, arguing that Hobbes treats society “as a product of sovereignty” (144).

While the thesis has employed the term ‘civil society’ when referring to this notion of society bound by civil authority as conceptualised in the natural law theories of Grotius, Hobbes and Pufendorf, to avoid confusion, it follows in this section Wickham’s preference to use the term ‘society’ (140-141), as Wickham contrasts the Hobbesian account with the sociological understanding of ‘society’.

Sociology’s Scholastic Treatment of Society
Wickham argues sociology has traditionally ignored the Hobbesian conception of society as an achievement and instead leans towards a scholastic position that reinstates reason as a basis for society:

Traces of scholastic thinking are present (albeit only in their secular form, without direct reference to Aquinas) in the not uncommon modern sociological proposition that society is natural and based much more in reason than in rule. (Wickham, 2014: 142; parentheses in original)

In its dismissal of Hobbesian natural law, sociology has failed to grasp the important differences between the scholastic and Hobbesian approaches and has rendered itself blind to its own secular reflection of the scholastic account of the reasonable individual as “the source of solidarity” (142). Wickham points to the work of
Tönnies as an example of this oversight in sociological thought. He argues while Tönnies translates and builds on the work of Hobbes in *Gemeinschaft und Gesellschaft*, he misses the crucial difference between Hobbes’ account of the conditions for society and “the scholastic account of natural, reason-based, perfect society” (148). It can be argued that Thornhill’s interpretation of Hobbes set out above echoes this tendency in sociology, as it overlooks the differences between a reason-based account of the individual in natural law and the secular, anti-metaphysical conception employed by Hobbes (see Thornhill, 2013: 207-209).

**A Descriptive Literalistic Reading of Hobbesian Natural Law as the Basis for a Hobbesian Sociology**

Wickham argues therefore for the establishment of a “Hobbesian sociology”, a branch of sociology that takes seriously the Hobbesian conception of society as an ‘achievement’ rather than as an inevitable outcome of human interaction (151). It is a particular understanding of society that, in its rejection of the naturally reason-endowed individual, is arguably more sociological than the traditional sociological conception of society Wickham outlines.

Wickham’s work clearly illustrates the parameters of a *descriptive* literalistic approach as he argues for the applicability of Hobbes’ conception of society as a sociological theoretical tool without reacting to Hobbesian natural law as doctrine. While he acknowledges the theological and philosophical routes Hobbes takes to reach his account of the individual (144-146), which in turn underlies Hobbes’ account of society, Wickham does not consider the credibility or believability of those theological and philosophical ideas. Wickham does not call on sociologists to embrace, for example, the idea that God has some role to play in the human
condition, nor Hobbes’ Epicurean understanding of “the process of motion” that
governs human “bodies” (144), but instead explores ways in which Hobbes’ account
of external human action and the conditions for social peace, including Hobbes’
conception of society, are useful for sociology.

His treatment of Hobbes in this sense can be said to resemble the customary
treatment of Marx within sociology; while sociologists may note the importance of
Marx’ utopian ideas in his overall scheme, they are not generally obliged to
comment on the ‘believability’ of those ideas when they attempt to utilise and build
on his critique of capitalism. Sociologists may yet decide to treat Hobbesian
doctrine as they do Marxist doctrine: as an element within a broader theoretical
position that “has so much to say” to sociology, as Wickham argues of Hobbes
(151). Wickham’s work demonstrates that a descriptive literalistic approach is a
genuinely sociological approach to natural law.

An Expanded Distinction: Functional, Descriptive Literalistic and
Reactive Literalistic Approaches

The chapter therefore argues that a descriptive literalistic approach is an important
element of the recovery of natural law in sociology, both as an essential component
of any functional account of natural law, and as an approach on its own. It is
important to add, however, that while a central aim of this chapter has been to
reinstate the importance of the literal claims of natural law, it has not been an attempt
to render less important the functional recovery of natural law. Both functional and
descriptive literalistic approaches are important elements of the recovery of natural law in sociology, as demonstrated in the earlier discussion of Thornhill’s study.

Despite the existence of some overlap between the two approaches, the functional/literalistic divide remains analytically helpful. There are important differences between examining the concepts internal to natural law theory, and examining the impact of those ideas in the social world. The expansion of Thornhill’s distinction by the inclusion of a distinction between reaction and description on the literalistic side of Thornhill’s divide represents the acknowledgement of two analytically distinct and genuinely sociological approaches to natural law, while also acknowledging the enduring presence of the traditional sociological approach.

Moreover, this distinction between reaction and description is applicable within the sociology of human rights in a number of respects. It can be used, for example, to critique the traditional dismissal of the idea of human rights within broader sociology. This dismissal can be described as a reactive literalistic response to human rights that necessitates, to borrow Thornhill’s terms, stepping “outside the terrain of sociology” (see Thornhill, 2013: 213-214).

To continue to borrow from Thornhill, sociology’s continued expression of “disbelief” (see Thornhill, 2013: 200) in relation to the universalistic claims of human rights thought can be called “insufficiently sociological” (200; emphasis in original) and an approach that precludes a genuinely sociological account of human rights. It can be argued sociology’s reactive literalistic reading of human rights prevents its examination of the functions of human rights thought in contemporary
society and indeed prevents its examination of the concepts internal to human rights thought including the theorisation of the individual and the individual’s place in the social world.

The amended distinction is similarly relevant to the dismissal of the idea of natural rights within the sociology of human rights. As noted in the previous chapter, a number of sociologists of human rights reject natural law and natural rights on the basis of their unacceptably universalistic or otherworldly principles yet argue the notion of human rights can be treated as a sociological object (see, for example, Woodiwill, 2011b: 131; 2012: 967; López, 2011: 75-76). Such a view can be restated as a willingness to take a reactive literalistic approach to natural rights while allowing for a genuinely sociological approach to human rights.

A distinction between functional and literalistic approaches is also applicable to the work of a number of sociologists who explore the relevance of natural law for the sociology of human rights, the subject of the following chapter. Although none of the writers examined there describe their work in terms of Thornhill’s distinction, the thesis argues it is analytically helpful to consider their individual contributions in terms of whether they tend to take either a functional or literalistic approach to natural law.
Chapter 7: The Recovery of Natural Law by Sociologists of Human Rights

Given the classical sociological dismissal of natural law and natural rights thought, it is unsurprising only a handful of sociologists to date have argued sociology’s traditional opposition to natural law might be reassessed (see Chernilo, 2013b, Fine, 2013, Thornhill, 2013, Wickham, 2014). It is also unsurprising, given the discipline’s dismissal of human rights follows its traditional rejection of natural law (see Turner, 1993: 489, 499, Sjoberg et al., 2001: 18-19; Somers and Roberts, 2008: 396, Woodiwiss, 2003: 12; 2005: 128), that very few sociologists of human rights have attempted to recover natural law. The thesis can identify four contributions that fall into the latter category, one that can be described as a functional approach to natural law, and three that can be described as descriptive literalistic approaches.

A Functional Approach to Natural Law within the Sociology of Human Rights

Meyer (2000; 2007) and his co-authors (Meyer et al., 1997) provide an account of the function of natural law ideas in contemporary societies and in that sense, their work can be said to resemble the kind of functional account of natural law Thornhill advocates when he suggests sociologists are well positioned to “analyse natural law principles as constructs that societies have objectively generated for themselves” (Thornhill, 2014: 213). They do not recover any specific natural law theory, but instead describe ways in which universalistic natural law ideas are reproduced within what they call “world culture” (Meyer et al., 1997), a term referring to a set of global cultural norms to which states, peoples and individuals increasingly adhere (Meyer et
Meyer and his co-authors therefore treat natural law as a cultural phenomenon; it is a major component of the “cultural processes” that underlie these isomorphic shifts (Meyer et al., 1997: 145-146).

In contrast to the Weberian view of natural law being effectively defeated by the increasing rationalisation of law (see Turner, 1993: 493-494), for Meyer the expansion of natural law is enhanced by the rationalisation of law, and natural law ideas are becoming increasingly rationalised (Meyer et al., 1997: 169). A key concept within world culture is the idea of “a rationalized (scientific) analysis of nature as universal and lawful and thus suited to rational and purposive action” (Meyer, 2000: 237; parentheses in original), an understanding of nature that “forms the common frame within which social life is embedded” (Meyer et al., 1997: 168).

**The Human Rights-Bearing Actor of Contemporary Natural Law**

“Education” is a key means by which “a culture of high natural law” is promulgated (Meyer, 2007: 268-269). In institutions of higher education “universalized natural law pictures of the good individual in the good society in the good world” are learned, particularly in the “social sciences” (269). A central figure in this scheme is the individual who is “seen as endowed with enormous human rights and human capacities to manage action” (Meyer 2007: 269; see also 2000: 239), a conception that is reflected in the “striking” isomorphic expansion of human rights, including political, social and economic rights (Meyer, 2007: 264-265). Meyer provides as an example the “current efforts to extend rights to gays and lesbians” which he describes as “worldwide in character” (Meyer, 2000: 234).
Meyer links the ascension of the rights-bearing actor to the secularised form that natural law now takes: “sacralized human actors” have replaced “the high god” (Meyer, 2000: 237) of “Western Christendom” to which the origins of world culture can largely be traced, and “rights originally devolving from an active and interventionist god are now located in humans and their communities” (Meyer et al., 1997: 168). The idea of “salvation” is therefore similarly secularised:

[S]alvation lies in rationalized structures grounded in scientific and technical knowledge-states, schools, firms, voluntary associations, and the like. The new religious elites are the professionals, researchers, scientists, and intellectuals who write secularized and unconditionally universalistic versions of the salvation story, along with the managers, legislators, and policymakers who believe the story fervently and pursue it relentlessly. This belief is worldwide and structures the organization of social life almost everywhere. (Meyer et al., 1997: 174)

There are thus other carriers and producers of world culture besides those in education; “modern world society is, in a sense, dominated by its clergy” including “the sciences and professions”, “international associations”, “social movements” and “actors themselves” who each internalise and reproduce “globalized models” of the good person and good society (Meyer, 2000: 246). Meyer and his co-authors also identify the United Nations, the International Monetary Fund, the World Bank and non-governmental organisations as major carriers of world culture (Meyer et al., 1997: 163).
The carriers of world culture also provide functional explanations of the value and importance of these world models, explanations that operate effectively as “functional theories” (Meyer et al., 1997: 149). Within world culture “model social problems” are identified, where “failures” to adhere to world models such as “inefficient production methods or violations of rights” can be remedied pursuant to standard practices that are “widely known and ready for implementation” (Meyer et al., 1997: 151). Any modifications to the notion of the good society are also quickly adopted around the globe (Meyer, 2007: 263).

Despite the prevalence of functional explanations, Meyer and his co-authors observe what might be called dysfunctional outcomes associated with the adoption of world cultural norms. They note, for example, the adoption of curricula in schools in remote communities that have no bearing on the future lives of the children to which they are taught (Meyer et al., 1997: 149) and other “forms of ‘development’ that are functionally quite irrational” including “freeways leading nowhere” and the adoption of “unrealistic five-year plans” (Meyer et al., 1997: 156). It is noted here that these references by Meyer and his co-authors to “the functionalism of world culture” (Meyer et al., 1997: 149) are not to be confused with the ways in which their work resembles Thornhill’s ‘functional’ approach to natural law.

Meyer also points to “loose coupling”, that is, the ostensible or professed adherence to these norms by various actors alongside contradictory “actual practices on the ground” (Meyer, 2007: 264), including professed “commitments to egalitarian citizenship” on the part of states that run counter to discriminatory practices (Meyer et al., 1997: 154). Indeed, Meyer and his co-authors argue loose coupling is a
widespread phenomenon given the “highly idealized and internally inconsistent” nature of world society models, their irrelevance to local practices, and the relative ease of planning rather than implementing real changes (Meyer et al., 1997: 154). One such idealised notion is the assumption of “rational actorhood”, an idea that contradicts in many respects “actual human life and possibilities” (Meyer, 2000: 242).

Meyer and his co-authors also refer to the deliberate “rejection” of world culture by states and other actors including religious groups, nationalistic and fundamentalist movements, some of which nevertheless draw on world culture (Meyer et al., 1997: 161-162). Meyer observes, for example, that anti-globalisation social movements who protest against inequalities produced by globalisation are nevertheless global in nature and espouse the values of world culture, including “general principles of rights, progress, and welfare” (Meyer, 2007: 270). Despite the above examples, therefore, of protests against world culture and practices that contradict world culture, the isomorphic spread of world culture endures:

The classic sociological observation - usually attributed to Durkheim - is that collective norms (like progress and individual rights, in the modern scheme) impact the practices of both those who ostentatiously subscribe to them and those who don’t. (Meyer, 2007: 265; see also Meyer et al., 1997: 168)

*The Role of Natural Law in Stateless ‘World Society’*

Meyer and his co-authors argue the effectively stateless form of “world society” accounts for the mostly “cultural and associational” nature of the spread of “world
models” that increasingly influence social practices around the world (Meyer et al., 1997: 145). Given the absence of sovereign governance at the global level (Meyer, 2000: 236), world society is itself “held together by great principles of science and natural law” (Meyer, 2007: 269) and in the absence of an enforceable global law, “modern natural law” has become an alternative means of safeguarding human rights within the global social realm (2007: 267).

Non-governmental organisations hold states and other entities to account in this regard (Meyer et al., 1997: 164-165). Social movements appeal to global cultural norms in order to secure “desired actions” from states, powerful economic entities and other “sub-units of the world society” in relation to environmental, economic, and human rights issues (Meyer, 2000: 236). Natural law is invoked in response to natural and human-made global disasters, Meyer pointing to a “natural law globalized world” (2007: 267). Social movements perceive “an environment which should be regulated by universalistic natural law principles” as well as “human conditions that should be regulated in universalistic human rights terms” (Meyer, 2007: 270).

For Meyer and his co-authors, states are “culturally constructed and embedded” within the stateless social space that is world society (Meyer et al., 1997: 147). Global cultural norms impact the practices of states, including the idea of equality, “human rights”, “environmental policies”, the value of “mass schooling systems”, economic development norms, “standard definitions of disease and health care”, and so on (Meyer et al., 1997: 152-153). The state presents itself as a “rational and responsible actor” both domestically and on the world stage and adopts “basic goals
of collective and individual progress” (Meyer et al., 1997: 153; see also Meyer, 2007: 264). States also adhere to “standardized” styles of “sovereignty” that are held to be legitimate in world society (Meyer, 2000: 243; see also Meyer et al., 1997: 148). States that choose not to adopt world cultural norms are often challenged by local groups within the state, Meyer and his co-authors pointing to the embeddedness also of “local actors” in “world culture” (Meyer et al., 1997: 161).

Meyer and his co-authors also refer to “societies, organized as nation-states” (Meyer et al., 1997: 145-146) within the broader social space that is stateless world society, a conception of two distinct forms of social space that is somewhat similar to those conceptualised in the early modern natural law theories recovered in the thesis. It is similar in the sense that Meyer and his co-authors treat natural law as operating within a “stateless” social space they call “world society” (Meyer et al., 1997: 145, 162; Meyer, 2000: 236) and also conceive of multiple societies that are bound by sovereign states.

On the other hand, however, while for Hobbes and Pufendorf individuals leave the stateless social realm in order to safeguard their security, for Meyer and his co-authors the stateless social world continues to influence sovereign societies. Meyer and his co-authors point to the moral force of natural law in relation to the realisation of human rights in both social arenas, and in that sense their work differs considerably from that of Hobbes and Pufendorf, who argue that natural law - albeit not conceived as a set of cultural norms but a law relating to the human condition - is powerless to secure rights without the force of positive law issued by a sovereign authority.
However, while the approach of Meyer and his co-authors can be described as a functional approach to natural law as they point to the resonance of natural law ideas within society, it cannot be said to be a recovery of natural law theory, as it does not refer to the functional operation of any specific natural law theory but rather treats natural law as a general set of ideas that operates across and within social worlds. For this reason the work of Thornhill is perhaps a more promising functional account of the historical social significance of natural law theory that future functional accounts of natural law within the sociology of human rights might build on.

The Literalistic Recovery of Natural Law within the Sociology of Human Rights

Fine’s Descriptive Literalistic Recovery of Natural Law

As explained in Chapter 2, the thesis avoids discussion of Kantian natural law ideas as it recovers early modern natural law theories that were subsequently obscured in the work of Kant (see Haakonssen, 1996: 15; Tuck, 1989: 96). Although Fine recovers aspects of Kantian natural law, his work is instructive for a number of reasons: it demonstrates the value of a descriptive literalistic approach as it focuses on the relevance of theoretical concepts within natural law; he also recovers Kantian natural law through an exploration of critical theory’s treatment of Kant, specifically the work of Arendt and Adorno; and he explores the legacy of sociological positivism in relation to the recovery of natural law.

Fine argues Kantian natural law, particularly Kant’s conception of natural rights, was a formative influence on critical theory (Fine, 231). He observes that the exploration
of Kantian natural law ideas by Arendt and Adorno follows their respective
criticisms of the positivist dismissal of natural rights in the social sciences (223-224).

He recalls the familiar argument in Arendt’s work that “the social scientific ethos of
objectivity and detachment impedes sociology’s ability to confront the totalitarian
phenomena of the modern age” (223) and links this weakness in sociology to its
 wholesale dismissal of natural law (223, 234, 236).

Fine also recalls Arendt’s assessment of Burke’s criticism of the notion of the “rights
of man”, noting Arendt finds Burke’s preference for nationalist rights over those
pertaining to humanity to both reflect and reinforce harmful “ethnic nationalism”
(227-228). He points to Adorno’s similar reading of Hegel, arguing that Burke and
Hegel, for Arendt and Adorno respectively, “served as a negative reference point for
the consequences that derive from a merely negative rejection of natural right
philosophy” (228). Arendt’s discussion of Burke is connected to her critique of
totalitarianism: she contends that a facile positivist dismissal of natural rights theory
may reinforce totalitarian and nationalist conceptions of categories of person as more
or less worthy (227-228). Similarly, although Adorno criticises much of Kantian
natural law, he does not dismiss entirely the abstraction associated with the notion of
natural rights, as the notion of equality contained within that abstraction counters
both the logic of fascism and “fetishized forms of capitalist society” (227).

Fine adds that although both Arendt and Adorno find merit in the idea that rights
obfuscate actual inequalities, they nevertheless attempt “to overcome the contempt
and hatred for rights prevalent in the era of totalitarianism” that stems from this
criticism (227). He argues critical theory’s critique of rights represents a
“revaluation” of rights rather than a “devaluation” or “trashing” of rights (236; emphasis in original):

We can seek to understand the dismay and disgust people feel over the gulf between the rights bourgeois society espouses and the violence that lurks beneath its surface; but critical theory teaches us not to let dismay and disgust, however justified, morph into hostility to the idea of rights itself. (Fine, 2013: 236)

Fine recalls the Arendtian notion of the individual’s capacity for “reflective judgment” or “the ability of some human beings to tell right from wrong” in the face of powerful opposing norms (224). He identifies in the work of Adorno a similar position in relation to “freedom”; while Adorno acknowledges the historical variability of the concept of freedom, Fine also observes that Adorno recognises a form of freedom that attaches “to the individual prior to any social determination and prevails throughout all the changes freedom undergoes” (224). This enduring form of freedom is brought to light when individuals resist “oppressive power” (224). Both Arendt and Adorno thus conceive of nonconformist moral action on the part of the individual that is ‘presocial’ in the sense that it “may arise simply out of what it is to be a human being confronted by the suffering of other human beings” (224-225). As action that occurs outside of or despite prevailing norms, it is for both authors moral action that cannot be captured by positivist approaches (224-225).

Both Arendt and Adorno look to natural law and natural rights ideas in the work of Kant in order to explore this sense of a presocial morality (225). Fine observes that Kant’s natural law philosophy treats natural rights as “the expression of definite
relations between individuals” rather than as inherent features of the individual; rights comprise a “system” that is continually progressing and producing new and different forms of right (229). Fine alludes to the teleological aspects of both Kantian and Hegelian thought (229) and notes Arendt’s recognition of Hegel’s replacement of natural law ideas with a telos (231). He argues the work of Hegel provides a bridge between Arendt and Adorno’s critical theory, and the natural law ideas of Kant (231), as it helps strengthen the social meaning of rights (231). Fine explains that Hegel rejects the natural law tendency, present in the work of Kant, to treat certain rights as “absolute” and hence prior to others, and instead points to how rights form hierarchically via social relations (232-233).

Fine links Arendt’s “reflective judgment” and Adorno’s “moral behaviour” to the idea of human rights (226). He notes Arendt’s work in relation to the idea of the “original compact based on inalienable human rights” (225) as a guide to social and political action and her replacement of the idea of natural rights grounded in “nature” with the cosmopolitan idea that individual rights are grounded in humanity (226). Fine’s exploration of Kantian natural law ideas via the work of Arendt and Adorno, and the ways in which he builds on theoretical concepts in order to consider the social aspects of human rights, represents a promising descriptive literalistic exploration of the relevance of natural law for the sociology of human rights.

However, it is also clear that his work suffers somewhat due to his reliance on Kantian assumptions about early modern natural law that natural law scholars argue need to be interrogated, including Kant’s criticisms of Grotius, Hobbes and Pufendorf (see Haakonssen, 1996: 15; Tuck, 1989: 96). For example, Fine notes, but
does not challenge, Kant’s portrayal of Grotius and Pufendorf as “‘sorry comforters’ whose justifications of state sovereignty were incapable of providing for a lawful or peaceful community of nations” (Fine, 2013: 230). He also notes Hegel’s criticism of the strong Hobbesian state enjoying “supreme status over the rights of individuals” (232).


To reassert the relevance of Grotius, Hobbes and Pufendorf in relation to the above ideas, however, is not to dismiss the possible relevance of the work of Hegel or Kant for the sociology of human rights. Fine demonstrates the potential relevance of a number of Kantian natural law ideas, particularly in his discussion of the ways in which critical theorists draw on Kantian natural law in their critique of the sociological positivist dismissal of natural law (Fine, 2013: 231). Fine’s work demonstrates the value of employing a descriptive literalistic approach to natural law for the sociology of human rights: he explores a number of theoretical concepts within natural law in order to interrogate longstanding sociological assumptions in relation to rights.
Woodiwiss’ Treatment of Natural Law

Woodiwiss also explores the relevance of Kantian natural law for the sociology of human rights. His work demonstrates key differences between reactive and descriptive literalistic approaches to natural law; on the one hand, Woodiwiss dismisses natural law thought in general from a legal positivist standpoint, while on the other hand, he describes and builds on Kantian natural law concepts for his sociological theory of human rights.

As noted earlier in the thesis, Woodiwiss favours a legal positivist approach to human rights, arguing sociology is best equipped to treat human rights as legal and discursive constructs, and therefore dismisses natural law thought as it treats individual rights as “prior to law” (Woodiwiss, 2005: xi-xii). Woodiwiss further argues in order to attempt a social approach to human rights, sociologists “must somehow wean ourselves from the comforting contractarian myth that rights are part of our primordial inheritance” (Woodiwiss, 2005: 8). His positivist rejection of natural law echoes the traditional sociological dichotomisation of natural law and positive law.

However, while maintaining the above argument that natural law generally is incompatible with a sociological approach to rights, Woodiwiss nevertheless draws on key aspects of what he calls Kant’s “natural law ethics” in his sociological approach to human rights (2005: 11). Woodiwiss recalls the “balance” between reciprocity and autonomy that underlies the Kantian notion of cosmopolitanism:

[F]or Kant … reciprocity is the most basic condition of sociability, both nationally and internationally, and is therefore simultaneously
a prerequisite for individual autonomy and a constraint upon it (…).

(Woodiwiss, 2005: 13)

He argues this Kantian concept can be utilised as a standard against which to “judge any extant or proposed human rights regime” (13), suggesting “a properly cosmopolitan rights regime would show up the gaps and weaknesses in particular national regimes” (14). By measuring human rights outcomes against a standard cosmopolitan model, sociologists can point to possible ways in which these gaps can be overcome that are compatible with or translatable to the particular societies in which they might be implemented (Woodiwiss, 2005: 14). Woodiwiss points to one such gap at a general level within the contemporary global human rights regime when he observes “elements favouring autonomy far outweigh those favouring reciprocity both in terms of perceived significance and quantity” (13).

Woodiwiss’ promotion of a cosmopolitan model built on Kantian natural law ideas as a standard against which sociologists can measure extant laws or institutions pertaining to human rights thus counters the strict line he draws between legal positivism and natural law thought. The chapter argues these two opposing approaches in Woodiwiss’ work in relation to the compatibility of natural law for the sociology of human rights can be explained in terms of the two different methods by which he reads natural law. His reading of Kant can be described as a descriptive literalistic reading of natural law; he draws on theoretical concepts internal to Kantian natural law in order to build what can be called an ideal-typical model against which to empirically measure legal systems relating to human rights. Woodiwiss treats Kantian natural law concepts as valid theoretical objects of
sociological study. His separate argument in relation to the incompatibility of natural law in general, on the other hand, dismisses natural law as a valid object of sociological inquiry; it is a reactive literalistic reading of natural law as doctrine.

The chapter argues that if Woodiwiss were to treat all natural law theories as valid theoretical objects of study, he might find a number of natural law ideas of the early modern period as useful as those he recovers in the work of Kant. As noted in Chapter 1, for example, Woodiwiss on a number of occasions points to the enduring importance of the issue of enforceability of human rights laws and the relationship between the human rights-bearing individual and the state (see Woodiwiss, 2002: 149; 2003: 12; 2005: xiv; 2012: 967), issues that resemble key concerns of the natural law theorists studied in this thesis. Instead, Woodiwiss marks out Kantian natural law as an exception in the long history of natural law thought:

To my legally, but in no other sense, positivist mind, rights are simply ‘socially determined policy objectives’ (…), which means that their existence does not require justification so much as explanation. For this reason, Immanuel Kant’s natural law ethics might seem an inappropriate place for me to begin my substantive argument. However, Kant’s ideas are generally thought to have been or, at least, to have become, the basis for the range of ‘socially determined policy objectives’ specified in the UDHR. Thus, both because of their practical social significance and for rhetorical reasons, I have derived my sense of the importance of the balance between autonomy and reciprocity … from reconsidering Kant’s
concepts of ‘republicanism’ and ‘cosmopolitanism’. (Woodiwiss, 2005: 11)

For Woodiwiss, therefore, the continuing resonance of Kantian natural law within broader rights thought and practice lends Kantian natural law a legitimacy that other natural law theories do not enjoy. Again, this is not to dismiss the possible relevance of Kant, but to argue that to rely too heavily on Kant may be to overlook ways in which the ideas of other natural law theorists might be useful for contributors to the subfield.

*Turner’s Descriptive Literalistic Recovery of Natural Law*

One sociologist of human rights who points to the relevance of natural law thought that predates Kant is Bryan Turner, whose literalistic recovery of Hobbesian natural law is perhaps the most thorough examination of natural law for the sociology of human rights to date (see Turner, 1993; 1995; 1997; 2003; 2006b). Turner draws links between key concepts in his foundationalist theory of human rights and major ideas in Hobbesian natural law, arguing “[a]ny analysis of human rights raises questions central to the political philosophy of Thomas Hobbes” (Turner, 2006b: 1). Turner argues his sociological theory can be treated as ‘A Neo-Hobbesian Theory of Human Rights’, as the title to one of his articles asserts (1997; see also 1995).

As discussed in Chapter 1, Turner’s minimalist account of the human condition that grounds the universal applicability of human rights consists of the twin foundational concepts of biological frailty (Turner, 2003: 279-280) and social precariousness (Turner, 2006b: 28). The ongoing relationship between the biological and the social
is at the core of the Turnerian human condition: a social canopy in the form of social institutions is established in order to mitigate biological frailty or vulnerability, but the inherent precariousness of those institutions in turn impacts on human vulnerability, and so on (Turner, 1993: 501-3; 2013: 247-248). Turner observes that Hobbes’ account of the human condition reflects his own in many respects and argues “the frailty of human beings can be summed up in the Hobbesian phrase of ‘nasty, brutish and short’” (Turner, 1993: 504; see also 1995: 4; 2006b: 26), recalling Hobbes’ well-known depiction of the vulnerable human in the state of nature.

Turner describes his human rights theory as “a sociological version of traditional notions of natural or inalienable rights” (Turner, 1993: 489). However, he also adds that “natural law theory in its pristine form cannot be easily resurrected” within sociology (1993: 500), particularly in view of the traditional sociological treatment of natural law (1993: 489, 496). He is therefore reluctant to “go back to natural law theory” (1995: 4) and instead suggests his theory might be seen as a sociological “substitute” for natural law (1993: 500). The chapter argues Turner’s assertion that it is difficult to revive natural law in its original form in sociology might be interpreted as an unwillingness to treat natural law as doctrine, given the traditional reactive literalistic reading of natural law within sociology.

Indeed, Turner avoids treating natural law as doctrine in his work. In his detailed reading of Hobbes, for example, he does not express his belief or disbelief in relation to Hobbes’ Epicurean understanding of the role of motions or passions in the individual’s actions, or the idea of a universal natural law authored distally by God, but instead explores the ways in which Hobbes’ understanding of external human
action and the possibilities for social peace, including Hobbes’ theory of the state, mirror Turner’s own sociological theorisation of the possibilities for the protection of the frail individual. It can therefore be said that Turner employs a descriptive literalistic approach; he treats Hobbes’ work as theory, drawing on relevant Hobbesian ideas as a way to reinforce key concepts in his own human rights theory.

However, the chapter argues Turner overlooks major similarities between his theory of human rights and key ideas in Hobbesian natural law, similarities that, if Turner were to incorporate them, would strengthen his neo-Hobbesian position in relation to human rights. A number of these parallels between Turner and Hobbes that are missing from Turner’s account are associated with Hobbes’ treatment of rights.

Turner incorporates aspects of the familiar sociological interpretation of Hobbes in his work. He suggests, for example, that the “utilitarian” (2006: 32) and “individualistic assumptions” (26) associated with Hobbes’ contractarian theory are unhelpful, a statement that echoes Parsons’ treatment of natural law (see van Krieken, 2002: 259-260; Wickham, 2014: 149-151). He also argues Hobbes’ portrayal of not only a vulnerable, but “rational” and “antagonistic” individual (Turner, 1997: 567) conflicts with his own minimalist account of vulnerability or frailty (Turner, 1993: 503). While Turner accepts individuals have a capacity for rationality, he finds Hobbes’ focus on reason as a way to resolve “human nastiness” problematic (1993: 505-506) and he focuses instead on the individual’s “dependency” which fosters “sympathy” (2003: 278-279; Turner’s reliance on sympathy is discussed in more detail later). Turner references Parsons in his depiction of the self-interested, rational Hobbesian individual:
How can the frailty argument get round the problem of human nastiness? As we have seen, the Hobbesian solution (and generally all solutions which depend on some appeal to human rationality) is to suggest that rational actors will have an interest in security. The problems with this Hobbesian solution for sociology are well known (Parsons 1937). (Turner, 1993: 505-506, parentheses in original)

However, as noted earlier in the thesis, Hobbes severely restricts the role of reason as a driver of human action (see Wickham, 2014: 140-144). Turner later states he has “adopted the argument that human beings are rational” (Turner, 1997: 568) but retains his objection to the Hobbesian view in relation to aggression. However, as the chapter reiterates below in its discussion of the operation of natural rights in Hobbes’ scheme, the Hobbesian individual is not naturally aggressive but is instead obliged to become aggressive in certain social environments.

**Hobbesian Natural Rights and Turner’s Social Canopy**

A key feature of Hobbesian natural law theory Turner leaves unexplored is the connection between vulnerability and natural rights. Hobbesian natural rights effectively operate as destructive forces in the state of nature (see Tuck, 1989: 59) and are therefore ostensibly incompatible with a sociological theory that promotes human rights as an important social concept. In the Hobbesian state of nature individuals can subjectively interpret their natural right to self-preservation and can therefore rightly act in any way they see fit to safeguard their own survival, sometimes at the expense of others’ lives (Hobbes, 1991[1651]: 91). This means
that natural rights, as they operate in the state of nature, effectively intensify the vulnerability of individuals.

However, a more detailed reading of Hobbesian natural rights that takes into account not only their operation in the state of nature but their expression also in Hobbesian civil society reveals important parallels between Turner’s and Hobbes’ theories. Both inside and outside the state of nature, the Hobbesian natural right to self-preservation can be restated in Turnerian terms as the right to mitigate one’s frailty or vulnerability; the right to protect oneself. While it is prudent to seek war in the Hobbesian state of nature to protect oneself given the uncertain and dangerous social environment that persists there (see Schneewind, 1998:90; Sorell, 1991: 96), in Hobbesian civil society, aggression is no longer conducive to one’s self-preservation; the need to be ready to exercise violence to mitigate one’s vulnerability is removed (see Hunter, 2011: 481) and sociability instead becomes conducive to one’s self-preservation. Mutual respect for natural rights among individuals is protected by the law of the Hobbesian state, whose role is to secure social peace and individual security (see Kriegel, 2002: 15). The fundamental connection between vulnerability and natural rights in the Hobbesian individual is always played out within a social context.

Moreover, Hobbes’ contrasting depictions of the operation of natural rights in the state of nature and civil society point to the importance of the creation of a ‘social canopy’ in his scheme, to borrow Turner’s term, that is, to the importance of the establishment of a social environment marked by social peace and in which rights are safely exercised and no longer represent a threat to others. Indeed, although
Turner does not touch on Hobbesian natural rights, he nevertheless identifies elements in Hobbes’ contractarian theory in *Leviathan* that are comparable to his own theorisation of the establishment of a social canopy as a social response to vulnerability: in order for individuals to mitigate the extreme vulnerability they face in the “perpetual war” that characterises the state of nature, they establish the state via the social contract (Turner, 2003: 278-279; see also 1997: 567), a state that maintains a “social space” (1997: 567). Turner describes his twin concepts of frailty and social precariousness as “a version of Hobbesian responses to the state of nature in terms of the creation of political order through a contract” (1993: 503; see also 1997: 567; 2013: 248).

Turner also identifies inherent problems in the Hobbesian state that mirror his core idea of the inherent precariousness of the social canopy (2003: 278-279). For Turner, the Hobbesian state is “quintessentially precarious” (1993: 504). As Hobbesian states must be “sufficiently powerful to regulate social space”, they inevitably possess great power and “come unintentionally” to threaten the security of the citizens they are established to protect (1997: 567; see also 1993: 504). Turner points to the danger inherent in the Weberian state’s “monopoly of violence within a given territory” (1997: 567; see also 2003: 278-279) and notes that although the Hobbesian state is a “guarantor of social security” it is also “an instrument necessarily of violence” (1997: 567).

For Turner, therefore, the Hobbesian state reflects his major idea that universal ontological vulnerability necessitates the formation of social institutions which often eventually come to threaten the very frailty they are established to mitigate (Turner,
a notion he comes to describe as a “Hobbesian paradox” (2006b: 33). Turner ultimately finds the Hobbesian state too inherently precarious, too powerful, to consider it a reliable social canopy, arguing that Hobbes’ theory of the state “can be used to justify any type of power (patriarchal, monarchic, ecclesiastical and so forth)” (1993: 504; parentheses in original). He suggests instead that the perennial “Hobbesian problem of order” calls for a solution in the form of human rights (1995: 4).

However, a closer reading of Hobbes’ treatment of rights reveals that Hobbes provides a solution to the precariousness of the sovereign state in the form of rights. Hobbes states the natural right to self-preservation is an inalienable natural right of the individual (Hobbes, 1991[1651]: 91), and builds into his scheme a right of resistance to the state grounded in this inalienable natural right (Carmichael, 1990: 4-6). Hobbesian subjects can resist the sovereign state should it threaten their natural right to self-preservation, as to surrender the latter right would be to negate the state’s reason for existence; the Hobbesian state “takes the people’s welfare as its objective” (Kriegel, 1995: 41; see also Hobbes, 1991: 153). While the circumstances for resisting the state are extremely narrow – the right to resist comes only to those whose natural right to self-preservation is threatened by the state – the right of resistance nevertheless demonstrates the state’s commitment to the inalienable natural right to self-preservation (see Kriegel, 2002: 22). It is a right that effectively operates, however narrowly, as a check on the power of the state and therefore mitigates the inherent precariousness Turner identifies in the Hobbesian state.
Of course it could be argued that the narrow circumstances in which the right of resistance can be practised demonstrate that it is a less than reliable means to offer effective protection against state power. However, the chapter argues the Hobbesian right of resistance can be treated as a theoretical concept that is emblematic of similar, more expansive rights enjoyed by citizens of contemporary states. Wickham effects a similar transposition of the notion of Hobbesian state sovereignty into a contemporary context when he notes that the installation of the Hobbesian sovereign via the social contract is the installation of “an assembly which can, it is clear, 360 years after *Leviathan* was first published, grow so large as to stretch the term ‘assembly’ a long way” (Wickham, 2014: 146).

As noted above, while the free operation of natural rights in the state of nature amplifies the vulnerability of the Hobbesian individual, the Hobbesian state secures the natural rights of its citizens via positive law. It is only when natural rights are rendered positive rights under the state that the rights of all individuals are finally protected; as Kriegel points out, “these rights cannot be secured absent a certain type of state, namely, the sovereign state or the state under the rule of law” (Kriegel, 1995: 41).

Therefore, while Turner stops short of endorsing the Hobbesian state partly on the basis that vulnerable individuals require the protection of rights in the face of a dangerous state (Turner, 1995: 4), a closer reading of Hobbes reveals that individual rights that relate to ontological security are only truly realised under the protection of the state and its positive laws, whose major functions are to ensure social peace and to safeguard the security of its subjects (Kriegel, 2002: 15-16). As Bayatrizi points
out, the Hobbesian social contract is “founded on the moral and political commitment to refrain from killing and to value life as the highest good” (Bayatrizi, 2008: 26). An understanding of the important role of rights in Hobbes’ scheme therefore reveals strong links between the ideas of Hobbes and Turner: both thinkers recognise a minimalist human condition that necessitates the creation of a canopy that provides the social conditions in which the rights of all are protected.

One major difference, however, between their respective approaches is that Turner does not theorise rights as a universal inherent trait, a view he shares with most sociologists of human rights. Although human rights are part of the universal human condition according to Turner, in that they can form part of the social canopy that is a universal social response to frailty, they do not attach naturally to the individual as natural rights do for Hobbes (see Turner, 1997: 566-567), for whom natural rights are primary and inherent features of the individual.

However, despite this fundamental difference between the rights thought of Hobbes and Turner, their theories retain a similarity at this point, as demonstrated in the discussion above. Although Hobbes treats natural rights as attaching directly to the human in the state of nature, he renders them futile in this natural state in the ways described earlier. Only when individual rights become part of Hobbes’ artificial social canopy, that is, only when they are established via positive law, do they finally secure the safety of the individuals to which they naturally attach (Kriegel, 1995: 41; 2002: 22).
The Role of Normativity in Relation to Individual Rights

A more important difference between the rights thought of Turner and Hobbes is that Hobbes severely restricts the normative significance of natural rights in his scheme, in accordance with his subjective account of morality in the state of nature (see Haakonssen, 2002: 28; Tuck, 1989: 52-53). Hobbes’ understanding of the great importance people place on values informs his models of both the state of nature and civil society (see Wickham, 2014: 142-143; Wickham and Evers, 2012). Given the force of “passionately held beliefs and opinions” in the state of nature (van Krieken, 2002: 259), the establishment of social peace via the sovereign state is necessarily underscored by a minimal, civic normative principle relating to “peace and security” (Wickham, 2014: 140). For Hobbes, appeals to normative beliefs that transcend the state represent dangerous threats to the social peace secured by the state (van Krieken, 2002: 259-260; Wickham, 2014: 151).

The rights that are secured by the Hobbesian state are therefore grounded in the narrow normative purpose for which the state is established pursuant to the social contract. They do not derive from any transcendent normative principles, but from their codification in positive law, including the right of resistance to the sovereign.

Turner does not touch on these normative elements in Hobbes’ work. His appeal to human rights as a solution to state power may, by contrast, be described as an appeal to human rights as a transcendent normative ideal. As such, it represents a significant difference between his rights thought and that of Hobbes. His treatment of human rights as a normative ideal is demonstrated in his promotion of “human rights obligations” (2002: 47), or what he calls “cosmopolitan virtue”, an umbrella
term for a set of normative principles designed to foster a mutual recognition of and respect for human rights among individuals and peoples:

I want to suggest that the components of cosmopolitan virtue are as follows: irony both as a hermeneutic method in order to achieve emotional distance from our own culture and critical reflexivity with respect to other cultural values; skepticism towards easy solutions in terms of the grand narratives of modernization; care for other cultures, especially precarious aboriginal cultures, and hence acceptance of cultural hybridization; and an ecumenical commitment to dialogue with other traditions. (Turner, 2000: 120; see also 2001a: 150; 2002: 57-60)

Turner argues in a globalising world that has seen the emergence of social issues that transcend the state, the positive law of the state is ineffective as a means to secure rights; it “cannot adequately respond to the vulnerability of human beings” (Turner, 2001b: 207). He argues therefore that “our ontological security can only be safeguarded by a new set of values” in the absence of “global governance” (206).

Sympathy is also a major component of Turner’s scheme (Turner, 1993: 506; 1997: 568). For Turner, mutual respect for human rights is reliant upon the recognition of mutual frailty; the individual’s dependence on others generates a feeling of sympathy and recognition of the other as a worthy bearer of human rights:

Ultimately my argument has to assume that sympathy is also a consequence of, or a supplement to, human frailty. Human beings
will want their rights to be recognised because they see in the plight of others their own (possible) misery. (Turner, 1993: 506; parentheses in original; see also 1997: 568)

Turner is therefore optimistic about the possibilities for cosmopolitan virtue and sympathy among individuals. His work here can be said to resemble Grotius’ more than it resembles Hobbes’. Grotius holds that individuals are sociable and that they have, as Zagorin points out, an “instinct of sympathy for others that leads them to desire society and peaceful association” (Zagorin, 2000: 24), a trait described by Seidler as “a spontaneous sympathy or fellow-feeling for others” (Seidler, 1990: 18).

According to Hobbes, however, as Wickham notes, individuals are “‘born unapt for society’, they are ‘made fit for society not by nature, but by education’” (Wickham, 2014: 143, quoting Hobbes).

While for Hobbes it is a fundamental law of nature to become “sociable”, to “seek peace” (Hobbes, 1991: 106), the virtue of sympathy is a dangerous one to practise prior to the establishment of the state, as it renders the sympathiser more vulnerable to attack (see Tuck, 1989: 59; Halldenius, 2007: 704). It is only within Hobbesian civil society that sociability and indeed sympathy, rather than a readiness for war, are conducive to self-preservation. In the relative safety of Hobbesian civil society, sociability becomes a valuable social virtue. This change in the individual is achieved without recourse to transcendental normative principles or a reliance on sympathy as a natural response to vulnerability. For Hobbes, sociability, sympathy and mutual respect for individual rights cannot be secured via the value sphere, but
practically, that is, via the creation of a social canopy that oversees a social space characterised by peace and ontological security.

To be sure, Turner’s appeal to human rights as a normative ideal takes place within a contemporary context significantly different to the world in which Hobbes was writing. Sociologists of human rights, Turner among them, note that state legitimacy in a globalised world is increasingly dependent on the state’s willingness to adhere to “international human rights standards” both in its “domestic and foreign policy” (Turner, 2006b: 140; see also Beck and Levy, 2013: 13; Cohen, 1996: 182-183; Cole, 2005: 492; Levy and Sznaider 2006: 657; Ron et al., 2006: 23). However, Turner also acknowledges that “human rights without the support of a sovereign state … are merely abstract claims that cannot be enforced” (Turner, 2006b: 3). As noted in Chapter 1, regardless of the subdisciplinary optimism in relation to the growing resonance of human rights norms within global civil society, an enduring issue for the subfield is that the state remains the crucial enforcer of human rights (Morris, 2010a: 1-7).

One can also revisit Turner’s criticism of the “individualistic assumptions” in Hobbes’ work (Turner, 2006b: 26) in light of the above discussion. Turner contrasts Hobbesian individualism with his own emphasis on “intimacy and sociality in the midst of hardship” and “trust and solidarity in patterns of friendship” (Turner, 2003: 276-277; see also 2006b: 26). However, it is clear that Hobbes too emphasises the importance of sociality and places great importance on the establishment and maintenance of social peace. Hobbes’ treatment of the individual directly informs his conceptualisation of the importance of society (see Wickham, 2014: 140), just as
Turner’s focus on the frail individual demonstrates the importance of a social canopy in his scheme.

*The Sociable Pufendorfian Individual*

Turner instead points to the role of social virtues in Pufendorf’s natural law theory, contrasting the educated Pufendorfian individual with the aggressive Hobbesian individual, and placing Pufendorf in the company of Leibniz:

While in Thomas Hobbes’s world brutish individuals struggled for survival, Samuel Pufendorf and Gottfried Leibniz recognized that individuals had a right and an obligation to perfect themselves through education and that the state was to function as a moral guide to the individual. In his *On the Duty of Man and Citizen according to Natural Law*, Pufendorf, emphasizing the moral component of right as a social bond, warned the citizen … to conduct his or her life with dignity and scrupulousness (…).

(Turner, 2002: 598; see also 1997: 569-570)

However, as noted earlier, for Hobbes education is also the crucial means by which individuals become sociable citizens (see Saastamoinen, 1995: 80; Wickham, 2014: 143). Hochstrasser also speaks of “the remorseless scepticism Pufendorf directs towards the efficacy of natural amiability as an unsupported motive for social action” (Hochstrasser, 2000: 104). As detailed in the previous chapter, Hunter points to important differences between the metaphysical natural law espoused by Leibniz on the one hand, and the anti-metaphysical natural law of Pufendorf on the other (Hunter, 2004). Hunter observes that Pufendorf, like Hobbes, treats the creation of
civil society as the creation of a new moral space that cannot be threatened by any transcendental normative beliefs (Hunter, 2004: 685), while Leibniz argues, according to Hunter, that “the superior’s commands must be grounded in a transcendent idea of justice” (688).

Turner is correct, however, to point to the fundamental connection between rights and social relations in Pufendorf’s scheme. Pufendorf demonstrates that rights are a crucial element of the interactions between social personae that attach to individuals (Haakonssen, 1996: 41-42; Seidler, 1990: 33). Pufendorf also argues that given the uncertainty of the state of nature, natural rights are ultimately secured only via positive law in civil society (Schneewind, 1993: 66). What is more, Pufendorf, like Hobbes, links the vulnerability of the individual to the necessity of the artificial creation of social peace (Hochstrasser, 2000: 62; Schneewind, 1998: 129-130); Hochstrasser points out that Pufendorfian individuals “accept the institutions of civil life” for this reason (Hochstrasser, 2000: 95). This chapter argues that a recognition of these Pufendorfian ideas together with the important parallels between Turner’s work and that of Hobbes as detailed above, would further strengthen Turner’s recovery of natural law for his sociological theory of human rights.

*Turner’s Recovery of Maritain*

Besides pointing to the ways in which seventeenth century natural law concepts mirror his own theory of human rights, Turner also highlights the connection between natural law and human rights in the work of Jacques Maritain, a twentieth century philosopher who helped draft the Declaration of Human Rights and who Turner suggests is “one of the leading Thomist scholars of human rights” (Turner,
2013: 241). Turner draws on the ideas of Maritain in his critique of the work of Alasdair MacIntyre, who Turner argues neglects the notion of human rights and of law, “both positive and natural”, despite MacIntyre drawing heavily on scholastic doctrine in his philosophical and sociological work (241-242).

According to Turner, the scholastic thinker Maritain emphasises reason in his development of the notion of “integral humanism”, a concept that emphasises the reliance of democracy on natural law ideas (250) and as such establishes a “bridge between Christianity and secular politics” (250). Maritain’s integral humanism envisions “a vital Christianity grounded in a proper appreciation of natural law and expressed in human rights as the modern vehicle of natural rights”, a connection that, particularly in relation to human rights, Turner suggests could be integrated into MacIntyre’s work (250). Maritain is, Turner argues, “central to the growth of human rights and the reassessment of natural law” (2013: 250) and his work “ensured that both Christianity and natural law remained relevant to the emergence of human rights” (252).

While Turner attempts to draw connections between natural law and human rights via Maritain for his sociological theory of human rights, the chapter argues that Turner’s recovery of Maritain’s work, with its emphasis upon reason as an important element in human life, ought to be kept separate from his recovery of Hobbes and Pufendorf, who reject reason as a basis for peaceful social life, and who treat human society not as arising out of some innate ability to get along, but as arising out of the social creation of a social canopy. It is by highlighting these important parallels, in addition to those outlined earlier, between Turner’s foundationalist theory and early
modern natural law, that the chapter argues his work best operates as a sociological ‘substitute’ for natural law theory (see Turner, 1993: 499).

What is clear is that the above discussions of the literalistic approaches of Turner, Fine and Woodiwiss demonstrate that when the subdiscipline allows natural law theory to become recognisable as an analysable body of rights thought, it becomes possible to explore sociologically significant theoretical concepts therein. The thesis now turns to its concluding chapter, where it points to a number of ways in which the early modern natural law theories recovered here are relevant to the sociology of human rights.
Chapter 8: Conclusion: The Relevance of Natural Law for the Sociology of Human Rights

This concluding chapter revisits the key subdisciplinary themes and issues outlined in Chapter 1, pointing to ways in which natural law ideas discussed throughout the thesis are relevant to those key issues. It also suggests ways in which a number of concepts within natural law theory can be utilised in future research by sociologists of human rights. These arguments relating to the relevance of natural law for both theory and research within the subdiscipline necessarily rely on the treatment of natural law as theory rather than doctrine, underscoring a major methodological position of the thesis in relation to the validity of a descriptive literalistic approach to natural law. The chapter demonstrates ways in which major ideas in the natural law theories recovered here are relevant to the exploration of the fundamental social dimensions of human rights.

The Importance of the State for Human Rights: Making Arendt’s Paradox Social via Natural Law Theory

The first subdisciplinary issue revisited here is that relating to the enduring significance of the state in relation to the realisation or protection of human rights. According to Morris, this is a key issue for the sociology of human rights (Morris, 2010a: 1-7), a claim reflected in the numbers of contributors to the subfield who refer to the importance of the state for the protection of human rights (see, for example, Grigolo, 2010: 909; Hajjar, 2005: 207, 209; Koenig, 2008: 100; Koo and Ramirez, 2009: 1324, 1343; Koopmans, 2012: 23-29; Lechte and Newman, 2012: 523; Morris, 2006b: 10, 145; Nash, 2006: 195-196; Smith, 2004: 416-417; Soysal,

To briefly recount, according to Arendt, the paradoxical position of the human rights bearer is that “supposedly inalienable” human rights become unattainable at the very point at which the individual is rendered a human (Arendt, cited in Bauman, 2002: 284; see also Gregg, 2010b: 632), that is, a “bare” human (see Morris, 2010a: 3), a description referring to stateless individuals, those who are “no longer citizens of any sovereign state” (Arendt, cited in Bauman, 2002: 284; see also Buckel and Wissel, 2010: 46; Turner, 2006b: 3). The category ‘stateless’ includes, Lechte and Newman argue, both “de jure statelessness” a term pertaining to “those who have no formal legal status and who do not belong to any nation-state” and “de facto stateless people” who include “refugees, asylum seekers and internally displaced persons” (Lechte and Newman, 2012: 534, n. 6; see also Morris, 2010a: 3).

Despite the many subdisciplinary references to the importance of the state for the realisation of human rights, Chapter 1 also noted that a number of contributors to the subdiscipline argue human rights norms, practices and so on often operate at a level beyond the state (Ertürk and Purkayastha, 2012: 153-154; O’Donnell, 2007: 251; Turner, 1993: 497-498; Woodiwiss, 2003: 12-13), and much subdisciplinary research focuses on the operation of human rights norms or practices that occur at a global or extra-national level (see Basok, 2009: 183, 186; Elliott, 2007: 353; Cole,

In view of these extranational social possibilities, a number of thinkers argue the traditional sociological treatment of society as an area bound by the state (see Hynes et al., 2010: 812; Kunz, 2013: 387-388; O’Byrne, 2012: 832-833; Sjoberg, 1996: 279-280; Sjoberg et al., 1995: 13; Turner, 1990: 343), an approach to society that Beck and Levy call “methodological nationalism” (Beck and Levy, 2013: 4; see also Nash, 2006: 194, 202; Turner, 2013: 240), is an inadequate model for the sociology of human rights (see, for example, Nash, 2006: 194; Sjoberg et al., 1995: 13; Turner, 1993: 497-498; cf. Woodiwiss, 2003: 12) and that sociologists are well positioned to study human rights as they operate in a global social setting (see Turner, 1990: 344-356; 2006a: 139, 141-142).

The thesis argues that notwithstanding this subdisciplinary optimism in relation to the operation of human rights at an extra-national level, the continued reference
within the sociological human rights literature to the importance of the state vis-à-vis human rights points to ways in which methodological nationalism, or at least a modified form of methodological nationalism, represents not an obstacle to the sociological study of human rights, but a disciplinary strength upon which the subfield can draw. A particular form of methodological nationalism that builds on ideas from both the abovementioned subdisciplinary work relating to Arendt’s paradox, and the natural law theories of Hobbes and Pufendorf, allows for the articulation of the fundamental social dimensions of human rights.

The Importance of Sovereignty

One crucial element common to both Arendt’s paradox and the natural law theories of Hobbes and Pufendorf is their emphasis on the civil rather than national elements of the state that secures rights. As Jean Cohen points out, Arendt carefully distinguishes between the notions of nation-state and civil state. She treats the nation-state as a danger to the individual; it is a place within which “minorities will find themselves excluded from full or equal citizenship and hence denied human rights” as the practice of defining citizens in terms of ethnicity or “some natural set of characteristics” creates internal outsiders who are not accorded equal status as citizens (J. Cohen, 1996: 170).

According to Cohen, Arendt argues the emphasis on racial identity over territory in the treaties relating to Eastern European states that followed the First World War led to “the construction of the national minority as a permanent institution” (J. Cohen, 1996: 166-167). The civil state, on the other hand, that is, the state that “bases membership on civic, legal principles” (170) and “territoriality” (180), is the only
guarantor of human rights (170). The stateless human of Arendt’s paradox, as Lechte and Newman point out, is the individual “who has lost every trace of a civil identity” (Lechte and Newman, 2012: 525; emphasis added). As Chapter 4 demonstrated, Hobbes and Pufendorf similarly treat the state as a civil sovereign authority whose citizens are civilly rather than ethnically defined, and it is the civil state that secures the individual’s right to self-preservation, that is, the “right that is both natural and civil”, as Kriegel points out in relation to Hobbes (Kriegel, 1995: 40).

However, Cohen argues Arendt’s faith in the civil state to secure the human rights of its citizens ignores the ways in which civil states, like nation-states, can define citizenship in exclusive terms, and ignores the instances where nation-states have successfully secured rights (J. Cohen, 1996: 165-168). She further observes that nationality in many nation-states is not based on race and ethnicity (J. Cohen, 1996: 170). While Hobbes and Pufendorf, like Arendt, identify a civil authority, the central characteristic of the ideal-typical Hobbesian and Pufendorfian state that secures social peace and ontological safety is its sovereignty.

As discussed in Chapter 6, Wickham draws attention to the importance of sovereignty as the crucial feature of the Hobbesian state and promotes what he calls a “Hobbesian sociology” that treats society as “a product of sovereignty” (Wickham 2014: 141). Chapters 3 and 4 demonstrated that while Grotius maintains society naturally forms among sociable and reasonable individuals, both Hobbes and Pufendorf hold that society is not possible outside the sovereign state; the sovereign state secures that social space they call society, or civil society. The
conceptualisations of civil society in the work of Hobbes and Pufendorf, like those of the state, operate effectively as ideal types. They each depict civil society as a social space characterised by social peace and ontological security. This concluding chapter will follow Wickham’s preference and refer to this space as ‘society’ (see Wickham, 2014: 140) in order to avoid confusing this narrow Hobbesian and Pufendorfian conception with the idea of ‘civil society’ as it is employed in the sociological human rights literature, as discussed elsewhere in the chapter.

Sovereignty and Enforceable Law

The chapter therefore proposes a modified form of methodological nationalism that treats society as coterminous with an ideal-typical sovereign state, rather than a nation-state or civil state. Sovereignty entails, for the voluntarist theorists Hobbes and Pufendorf, the presence of a sovereign lawgiver who produces positive laws that are enforceable, that is, laws made enforceable by reason of the sovereign’s monopoly on the means of violence, a monopoly that secures social peace and renders private violence between individuals unlawful (Kriegel, 1995: 40), ideas that resemble Weber’s treatment of the state (Wrong 1994: 14-15; see also Turner, 2002: 598).

Sociologists of human rights note that an important characteristic of legitimate sovereignty is that the violence that is utilisable by the state is not arbitrary violence, but legally regulated violence; violence practised under the rule of law (Turner, 2006b: 139-140; Woodiwiss, 2003: 15; 2005: xiv), a point that Kriegel makes in relation to the Hobbesian state when she describes it as a “state under the rule of law” (Kriegel, 1995: 41).

These subdisciplinary references to the weakness of international human rights laws and the possibilities for global governance speak to the necessity of sovereignty to ensure the enforceability of laws. Arendt refers to the importance of sovereignty in this regard, as Turner points out when he states that for Arendt, “[h]uman rights that cannot be enforced by a sovereign authority are simply abstractions” (Turner, 2009: 71). Bauman illustrates the connection between sovereignty and enforceable law in Arendt’s paradox in the following passage quoted in Chapter I that is worth repeating here:

On the earth sliced into estate properties of sovereign states, the homeless are without rights, and they suffer not because they are
not equal before the law - but because there is no law that applies to
them and to which they could refer in their complaints against the
rough deal they have been accorded or whose protection they could
claim. (Bauman, 2002: 285)

The Stateless Social World outside Society
The chapter argues Bauman’s depiction of the plight of the stateless individual in
Arendt’s paradox points to an important distinction between society and the social
world of the stateless individual, a distinction that Hobbes and Pufendorf draw in
their contrasting depictions of society and the state of nature. As demonstrated in
Chapter 4, for Hobbes and Pufendorf, the state of nature is simply a social space that
is not bound by a sovereign authority. Like society, the state of nature operates
effectively as an ideal type. It is a portrayal of social life outside the state that is
designed to demonstrate the importance of the sovereign state for the establishment
of society characterised by social peace and ontological security.

While Arendt argues stateless individuals have lost ‘the right to have rights’ (see
individuals possess natural rights in the state of nature. Despite this difference,
however, in both the Hobbesian and Pufendorfian states of nature, the natural right to
self-preservation is effectively rendered futile as it is not protected. Hobbes depicts a
dangerous social world in which the unfettered use of natural rights leads to a
perpetual ‘war of all against all’, that is, the constant threat of, and frequent
occurrence of, violence (see Martinich, 1992: 50; Skinner, 1996: 320), while
Pufendorf depicts a precarious social space where any social bonds between people
or agreements in relation to rights are temporary and uncertain (see Dufour, 1991: 571; Seidler, 1990: 51; Tully, 1991: xxix).

Hobbes and Pufendorf place great importance not only on the differing social conditions but also the differing social conduct of the stateless individual and the citizen. The state of nature is a social space in which it is necessary to be willing to practise violence at times in order to survive, contrasted with society in which it is conducive to one’s self-preservation to be sociable and respect the individual rights of others. In society the individual is rendered a sociable subject fit for society, Pufendorf arguing that the sociable citizen is “the principal fruit produced by societies” (Pufendorf, cited in Saastamoinen, 1995: 81). The sociable citizen respects the individual rights of others. Pufendorf expands on the idea of the connection between rights and social relations by treating rights as attaching to moral personae and integral to the interactions that take place between those personae (see Dufour, 1991: 565; Seidler, 1990: 33).

Hobbes and Pufendorf also contrast the kinds of law that operate in these two differing social spaces. In the state of nature, natural law does not operate as law per se; Hobbes treats natural law as a collection of mere “theorems” rather than enforceable laws (Hobbes, 1991: 111), and for Pufendorf, the sanctions associated with natural law are so remote as to render it something other than law in a voluntarist sense (see Saunders, 2002: 2174; Tully, 1991: xxviii-xxix). Their depictions of social life in these two contrasting settings each speak to the necessity of positive law issuing from a sovereign lawgiver whose sanctions have coercive force. For Hobbes and Pufendorf, therefore, sovereignty provides enforceable
positive laws that protect individual rights, the social conditions in which rights are respected, and the sociable citizens who demonstrate that mutual respect for individual rights.

Both Arendt’s paradox, as described by sociologists of human rights, and the Hobbesian and Pufendorfian states of nature, are each designed to demonstrate that the greatest threat to the security of the person is statelessness. They each contrast precarious conditions in which arbitrariness reigns, with the relatively safe conditions that are experienced inside the state, the only space in which one’s rights will be secured, and the only space in which, according to Hobbes and Pufendorf, society can be achieved.

An Alternative Form of Methodological Nationalism
As noted in Chapter 1, a number of contributors to the subfield argue that to focus on the legal or juridical dimensions of human rights is to downplay the sociological importance of human rights or to grant too much power to the discipline of law in relation to the study of human rights (see Claeys, 2012: 853; Deflem and Chicoine, 2011: 104; Hagan and Levi, 2007: 378). As the work of Hobbes and Pufendorf demonstrates, however, to assert that law and sovereignty are crucial to securing rights is to highlight the very social dimensions of human rights, as the presence of a sovereign lawgiver allows for the creation of society, that social space in which the sociable, human rights respecting citizen emerges.

The chapter therefore argues that rather than rejecting methodological nationalism as a hindrance to the sociological study of human rights, treating society as a social space bound by the sovereign state, as Wickham proposes in his “Hobbesian
sociology” (2014), allows for the exploration of connections between the achievement of society and the realisation of human rights. Drawing on the work of Hobbes and Pufendorf in the ways described above thus allows sociologists to point to the fundamental social dimensions of human rights. It allows sociologists to point to differences between society and that social space that sits outside society, that is, that social space in which the human rights bearer, according to Arendt’s paradox, becomes the mere human.

The chapter therefore proposes that a revised form of methodological nationalism for the sociology of human rights can utilise three ideal types: the sovereign state, society, and the stateless social, drawing on the depictions of these ideas in the natural law theories of Hobbes and Pufendorf in order to amplify the social elements of Arendt’s paradox. The chapter proposes a number of ways in which these ideal types might be employed in future subdisciplinary research.

Future researchers might explore, for example, the extent to which empirical versions of these spaces reflect their ideal-typical form. Is the stateless social, for example, a space in which the human rights of stateless individuals are not realisable or not protected? Empirical versions of the stateless social may include immigration detention camps, refugee camps, tent communities of stateless people established alongside state borders, vessels carrying asylum seekers in the Pacific Ocean or Mediterranean Sea, to name a few examples.

Future researchers might explore the extent to which social spaces outside society resemble the Hobbesian or Pufendorfian state of nature. Certainly Pufendorf allows for the presence of communities and of rights agreements among individuals in the
stateless social world. Future sociologists might investigate to what extent tent cities that are established in refugee camps, for example, become places where social bonds or social arrangements come to offer a degree of individual protection.

Future researchers might also explore the differences between communities outside the state that feature enforceable law, including indigenous or traditional communities, and the kind of society that is bound by the sovereign state. They might also study the extent to which strong social ties in traditional communities render the idea of human rights irrelevant. As noted in Chapter 1, Verschraegen points out that for Luhmann, human rights are a feature of modern societies, established to protect the individual in an environment of ever greater functional differentiation, as opposed to traditional communities where individuals enjoy the protection that attaches to more definite social roles and stronger social ties (Verschraegen, 2002).

Future researchers might also interrogate the idea of a “stateless” global social world (Meyer et al., 1997: 162), “global civil society” (Turner, 2006b: 96), or “world society” (Meyer, 2000: 236; Meyer et al., 1997) in which human rights norms are celebrated. To what extent can those who reside in the stateless social participate in global ‘civil society’? Is the individual’s access to global ‘civil society’ restricted in particular detention camps, for example? To what extent is access to global ‘civil society’ dependent on membership of or residence within a state? Nash, for example, argues that cosmopolitan communities are forged “within public space formed and maintained by states” (Nash, 2007: 420).
Future researchers might also explore the extent to which international human rights law in stateless social spaces resembles natural law, that is, the extent to which the former operates merely as a set of theorems or a body of law whose sanctions are so remote as to render it something other than law *per se*. Chapter 1 noted that much sociological research points to ways in which state actions contradict purported commitments to international human rights instruments and treaties (see S. Cohen, 1996), a number of researchers identifying this practice as “decoupling” (Clark, 2010; Cole, 2005, 2009; Hafner-Burton and Tsutsui, 2005; Hafner-Burton et al., 2008). These instances demonstrate the ways in which international laws continue to act merely as “aspirations” (Turner, 2013: 250) rather than laws in relation to state actors. They also demonstrate the enduring problematic nature of the reliance on the state as a means to secure international human rights law:

Human rights abuse is characteristically a product of state tyranny, dictatorship, and state failure as illustrated by civil war and anarchy. Again, a viable state acts as an important guarantor of rights. (Turner, 2006b: 4)

The weakness of international human rights law is illustrated by the continued violation of human rights by state actors to whom international law pertains, and on whose sovereignty the enforcement of international human rights law relies. As Turner points out, Arendt holds that “human rights can generally only be enforced through a system of states that promise not to violate human rights and also to enforce them” (Turner, 2009: 71). A number of scholars note that many human rights violations, both within the public and private spheres, are carried out within
and by states (see Buckel and Wissel, 2010: 42; Budz, 2009: 21; Hosie and Lamb, 2013: 193; Joas, 2008: 171; Lechte and Newman, 2012: 530; Morris, 2009a: 217; Turner, 2006b: 33; Woodiwiss, 2003: 3-4). Future researchers might explore the extent to which such instances can be seen as the result of the ‘rule of law’, a defining characteristic of the ideal typical sovereign state, being undermined in various ways. Woodiwiss, for example, points to the ways in which state actors have ignored “the writ of habeas corpus, in the context of the current, so-called War on Terrorism” (Woodiwiss, 2003: 3-4; see also McRobbie, 2006: 80-82).

Violations of human rights within society may be associated with arbitrary state power, the presence of laws that permit violations to take place, inadequate enforcement of protective laws, inadequate policing, unequal access to legal and community services, and so on. Future researchers might explore the extent to which the state’s monopoly on violence, which is intended to take violence out of the hands of individuals, fails in particular instances, particularly within private spaces. To what extent does the prevalence of domestic violence, for example, challenge the ideal-typical depiction of society as a relatively safe social space bound by the state? Human rights violations associated with social inequalities in relation to sex, gender, sexuality, race, class and so on might also be measured against the ideal typical state that secures the rights of all citizens.

Future researchers might also explore the extent to which the importance placed on the idea of nation in relation to membership of the state may be associated with state practices in relation to human rights. Future sociologists might explore, for example, the extent to which the idea of nation or ethnicity informs the state’s treatment of
stateless people, for example, those seeking asylum. Nash argues that more research is needed to examine “how ‘the national’ might contribute to, block, or otherwise be implicated in struggles over the cosmopolitan meaning of human rights” (see Nash, 2006: 208; see also Morris, 2009a; Turner, 2002; 2006b: 64).

Description versus Advocacy and the Difficulty of Appealing to Human Rights Norms

The above discussion in relation to the importance of the state and the achievement of society for the protection of individual rights relates to a further key subdisciplinary issue relating to the normative dimensions of human rights. As discussed in Chapter 1, the distinction between description and advocacy of human rights, a distinction relating to sociologists’ views in relation to the role of normativity within the subdiscipline, is a major “tension” within the sociology of human rights (Frezzo, 2011a: 204).

A number of thinkers within the subdiscipline advocate or promote human rights, including human rights values, norms, principles, and so on (see Frezzo, 2011a: 210; Stones, 2006: 150; Turner, 1997: 566, 569), some writers doing so with a view to effecting social change (see Abji, 2013: 326; Blau and Moncada, 2007a: 366; Connolly, 2012: 1242; O’Donnell, 2007; Garrett, 2005: 85-89; Gregg, 2010a; Sjoberg et al., 2001: 12; Turner, 2001b: 206-207; Woodiwiss, 2003: 15; 2005: xvi; 2012: 970). A number of scholars, including Blau and Moncada, defend the adoption of “explicitly normative” positions within the subdiscipline or argue that the sociology of human rights ought to be able to engage in normative debate in

While commentators observe a degree of overlap between the two approaches, noting that advocacy usually relies on a degree of description or analysis (Frezzo, 2011a: 208-209; O’Byrne, 2012: 840), a number of thinkers conduct what can be called strictly descriptive work, including the analysis or description of human rights practices, and avoid or explicitly argue against the advocacy of human rights values, norms or principles, either as a tool to be used within the subdiscipline or as a means to effect social change (see Brint, 2005: 49, 60-62; Deflem and Chicoine, 2011: 109-113; Hajjar, 2005: 209).

As demonstrated throughout the thesis, the natural law theories studied here, particularly those of Hobbes and Pufendorf, engage with ideas that bear some resemblance to the above subdisciplinary debate in relation to normativity, particularly the notion that the promotion of certain values is an effective means by which to effect social change, including in relation to social peace and ontological security. Grotius, whose views differ from Hobbes and Pufendorf in this regard, conceives of a natural moral order that is knowable by sociable and reasonable individuals. He holds that ‘natural society’ forms among individuals and that mutual respect for individual rights is a key feature of natural society (see Haakonsen, 1985: 249; Tuck, 1989: 21; 1999: 95).

Hobbes and Pufendorf, on the other hand, hold that no such natural moral order exists, that people are not naturally sociable and reasonable, and that, as van Krieken
points out in relation to Hobbes, people hold diverse and “passionately held beliefs and opinions” that are frequently a source of conflict (van Krieken, 2002: 259). For Hobbes and Pufendorf, therefore, one cannot rely on the invocation of beliefs or values as a basis to establish society among people and mutual respect for individual rights therein. They each hold that the very fact that values and beliefs are an important influence in the lives of individuals calls for pragmatic rather than normative means by which to establish society and ontological safety, in the ways outlined earlier. Both Hobbes and Pufendorf focus on external action rather than internal belief as the basis for social change.

Central among these pragmatic measures is the establishment of the state and enforceable law, the importance of which is also referred to in the work of sociologists, as noted above. While a number of sociologists point to the resonance of human rights norms in global ‘civil society’, many scholars also observe that human rights are not guaranteed at a global social level given the weakness of international human rights laws in the absence of a sovereign authority to enforce those laws. Taken together, the chapter argues that these two subdisciplinary observations speak not only to the necessity of enforceable law in relation to protection of human rights, but also to the inadequacy of norms in this regard.

*An Artificial Moral Order*

For both Hobbes and Pufendorf, not only do pragmatic rather than normative measures secure the protection of individuals, those pragmatic measures also produce normative effects. A minimal moral order is created when the people instil a sovereign authority (see Tuck, 1989: 58), a transformation that does not rely on any
prior normative commitment on the part of the people (see Haakonsen, 2004: 99-100). For both Hobbes and Pufendorf, mutual fear inspires individuals to come together to instil a sovereign authority. The state is therefore founded on the practical need to secure social peace and the safety of the individual. These two necessities thereafter form the minimal normative order that grounds society, and it becomes the state’s duty to uphold these two ideals. As Wickham points out in relation to Hobbes, citizens may continue to hold diverse beliefs, so long as those beliefs are secondary to, and do not threaten, the minimal normative ideals of social peace and ontological security (Wickham, 2014: 150).

Crucially for Hobbes and Pufendorf, the moral order that is achieved by the establishment of the state is a “civil morality” (Hunter, 2004: 697), that is, it is bound to, or internal to, that new social and moral space. The ideals of social peace and individual safety are not treated as transcendental values, and the rights that are secured by the state are not treated as higher moral ideals. Importantly, therefore, the rights-bearing individual is not sacralised, as to do so would be to appeal to transcendental values that could potentially come to threaten social peace (see Wickham, 2014: 150). The practical establishment of the sovereign authority is therefore important not only in relation to the enforcement of rights, but in relation to the production of the normative conditions in which social peace and individual security are safeguarded.

The Advocacy of Human Rights as Transcendent Norms

The chapter therefore argues a lesson that can be gleaned from the theories of Hobbes and Pufendorf is that given the great diversity of belief among people, the
promotion of human rights norms or principles as transcendental values may represent wishful thinking, and that ultimately human rights norms cannot be relied on as a basis for the protection of human rights. Pragmatic measures ultimately secure the safety of individuals, measures that in turn produce the kinds of social and normative changes that make possible mutual respect for human rights. In the work of Hobbes and Pufendorf, the civil individual, rather than the objectively good or moral individual, is the key supporter of individual rights.

The chapter further argues that to treat human rights as transcendental norms that lie beyond the state, that is, as values residing within a universal or transcendental realm of morality or justice, is to take a position that resembles the scholastic, metaphysical and realist positions outlined throughout this thesis that Hobbes and Pufendorf are strongly opposed to in view of the diversity of belief among people. To appeal to a transcendental sense of ‘good’ in order to effect social change is to perhaps assume the inherence of something akin to ‘right reason’ or to assume that the individual has a capacity to access or understand a universal moral order, which represents for Hobbes and Pufendorf a particularly dangerous prospect (Saastamoinen, 1995: 136-137; Wickham, 2014: 142-143).

Indeed, to point to the good of human rights as a normative ideal is not without its dangers; a number of sociologists point to ways in which human rights principles can be utilised to reinforce inequalities and ignore inequalities, as well as counter inequalities (Connell, 1995: 26-27; see also Ammaturo, 2014: 182, 190; Burawoy, 2005: 158; Hilhorst and Jansen, 2012: 898, 902; Rowland, 1995: 24). This is not to contest the social resonance of human rights norms at micro, meso and macro levels,
as referred to in much subdisciplinary work (see Hilhorst and Jansen, 2012: 892; Hynes et al., 2012a: 788; Meyer, 2000; 2007; Meyer et al., 1997). Indeed, in the work of Hobbes and Pufendorf, once society is established, the need to value the ontological security of all individuals as a normative ideal is crucial to the maintenance of social peace. It is merely to point to possible unintended consequences associated with the advocacy of transcendental norms as a means to secure human rights.

Cole, observing the dual power of enforceable law and human rights norms, suggests that a combination of Hobbes and Durkheim is needed to secure human rights; “that both swords and socialization” respectively are important in relation to the enforcement of human rights laws, a combination that is demonstrated in his empirical research into state actions in relation to rights treaties (Cole, 2012b: 552; see also Woodiwiss, 2005: xv). While Hobbes and Pufendorf similarly place great importance on education and socialisation, the transformation of the individual into the sociable citizen in their schemes occurs after the abovementioned practical measures are put in place. The chapter argues that Cole’s research supports the notion that law in the voluntarist sense, that is, law enforced by the presence of sovereignty, is crucial to securing human rights.

Again, future sociologists might explore the extent to which empirical instances differ from the above conceptualisations in natural law theory, as a way to supplement the substantial extant research that looks at the operation of human rights norms within and across societies (see Cole, 2012a; 2012b; Elliott, 2007: 349, 359; Meyer et al., 1997; Shor, 2008; cf. Basok, 2009: 186-187). Future researchers might
explore the possible combinations, connections and disconnections between normative and pragmatic measures to secure human rights.

Foundationalism, Constructionism and Natural Law Theory

The contention that the protection of human rights relies on pragmatic measures relates to a further key subdisciplinary issue discussed in Chapter 1, that is, the distinction between foundationalist and constructionist approaches to human rights. Chapter 1 argued a strict distinction between these two approaches does not account for the constructionist treatment of human rights within foundationalist approaches (see Turner, 1997: 565-566). With the exception of Feuer, who conceives of ‘natural rights’ as innate features of the human (Feuer, 2002 [1961]), sociological foundationalist theorists treat human rights as constructs; they identify universal features of the human or human condition that warrant the universal application of human rights (see Sjoberg, 1996; Turner, 1993; 1995).

Foundationalist theorists therefore provide what can be described as an ostensibly essentialist account of the human alongside a constructionist account of human rights. Turner, for example, identifies the universal vulnerable individual and conceives of the creation of a social canopy consisting in part of human rights as a way to protect the vulnerable individual (see Turner, 1993; 1995). Chapter 1 argued that given the constructionist elements present in foundationalist approaches, the foundationalist/constructionist distinction can be replaced by a distinction between foundationalist and non-foundationalist approaches.
In the schemes of Hobbes and Pufendorf can be found a similar connection between essentialism and constructionism, or what might more accurately be called a connection between the essentialist and artificial elements of their narratives. The ‘pragmatic measures’ discussed earlier, that is, the creation of the state, enforceable law and society, are artificial measures that rely on an essentialist understanding of the human to which they apply. Hobbes and Pufendorf each argue that individuals are weak or vulnerable, concerned with their own preservation, and willing to practice violence in order to ensure their preservation. They also hold that individuals are passionate and cannot muster the self-control necessary to maintain social peace and mutual respect (see Wickham, 2014: 145 in relation to Hobbes). Individuals, essentially conceptualised, therefore rely on the creation of society, an artificially created social space in which social peace and mutual respect can be maintained.

While their essentialism stretches much further than that of most foundationalist sociological approaches to human rights, as Hobbes holds that natural rights are inherent, primary features of the human (see Schlatter, 1973: 139; Tuck, 1989: 63-64), and Pufendorf holds that natural rights arise out of natural law (Haakonssen, 1996: 39; Schneewind, 1987: 141; see also Seidler, 1990: 39), it is the artificial elements in their schemes in relation to the creation of the state, society and positive law that secure these otherwise natural individual rights. It is the artificial elements in their schemes that transform the otherwise bleak human condition.

Thus in a number of ways, Hobbes and Pufendorf contrast the natural with the artificial in order to point to the necessity of the latter. Natural rights in the state of
nature are futile or uncertain for Hobbes and Pufendorf respectively; the only way to secure natural rights is to render them artificial via positive law. Natural law is for Hobbes and Pufendorf ineffective as law; only humanly created positive law acts as law per se. Society too is a necessarily artificial rather than naturally occurring phenomenon; they each argue against the notion that ‘natural society’ arises among people or that peaceful social life can be maintained outside artificially created society. Hobbes and Pufendorf also point to the importance of an artificial moral order and argue against the metaphysical notion that there is a naturally occurring moral order. They also contrast the sociable citizen with the natural individual of the state of nature.

*The Universal and Constructed Human Subject of Human Rights and Natural Law Theory*

Chapter 1 argued that an identifiable difference between foundationalist and non-foundationalist approaches to human rights is their respective approaches to the human subject of human rights rather than to human rights, the latter treated as constructs in almost all subdisciplinary accounts. While foundationalists treat the human as a universal category whose condition renders human rights relevant, non-foundationalists tend to avoid definitional discussion of the human (see O’Donnell, 2007: 260) by either treating human rights as pertaining not to a human subject but to specific social or moral standards of conduct (Barbalet, 1995: 37; O’Byrne, 2012: 839), by historicising the category ‘human’ or ‘humanity’ (see Hynes et al., 2010: 815-816; Joas, 2008: 174; Johnson, 2014: 549; Morris, 2006a: 240-244), or by extending the category of ‘human rights bearer’ to additional social actors besides the human individual (see Woodiwiss, 2005: xi).
However, as further noted in Chapter 1, the ostensibly essentialist accounts of the human in foundationalist approaches contain a degree of constructionism, as they point to the ways in which social conditions shape the universal human (see Sjoberg, 1996; Turner, 1997: 565), a further element in foundationalist approaches that challenges the strict distinction between foundationalism and constructionism.

The work of Hobbes and Pufendorf also demonstrates the compatibility of an essentialist and constructionist view of the human. Their conceptions of the natural human point to the necessity of the development of the artificial human, that is, the sociable citizen; their ‘constructionist’ views of the individual are not possible without an underlying essentialist view of the human.

The chapter argues that, as the work of sociological foundationalist thinkers and of Hobbes and Pufendorf demonstrates, it is not necessary to abandon a foundationalist approach to the human, whether conceived as ‘weak’ and ‘wicked’ (Schneewind, 1998: 130; Westerman, 1998: 185), ‘vulnerable’ (Turner, 1993), or possessing a ‘social mind’ (see Sjoberg, 1996: 281; Sjoberg et al., 2001: 31), in order to hold a constructionist view of the human rights-bearing human. This combination can also be seen in Arendt’s paradox. According to the paradox, it is the citizen who is the bearer of human rights, the person who has a “civil identity” (Lechte and Newman, 2012: 525), and who reverts to mere human status outside the state (see Bauman, 2002: 284; see also Gregg, 2010b: 632; Morris, 2010a: 3), an idea that both combines, and relies on a distinction between, the universal and artificial human, and an idea that is, this chapter argues, central to the sociology of human rights.
A Descriptive Literalistic Recovery of Natural Law

The above arguments in this chapter in relation to the relevance of natural law ideas for the sociology of human rights rely on a descriptive literalistic treatment of natural law, as conceived in Chapter 6, which necessitates abandoning the traditional sociological approach to natural law that Thornhill identifies (Thornhill, 2013: 200). In other words, the above arguments necessitate abandoning what Chapter 6 described as a reactive literalistic treatment of natural law as doctrine rather than theory.

To treat natural law as doctrine is to engage with natural law in terms of belief, Thornhill arguing that sociology traditionally asserts its “disbelief” in relation to natural law (200) and therefore dismisses wholesale natural law theory, a treatment of natural law that Thornhill describes as “simplistic” (212). Treating natural law as theory, on the other hand, as this thesis has done, enables a consideration of the theoretical conceptions therein in relation to the possibilities for society among individuals and the social importance of individual rights.

Moreover, as argued in Chapter 6, broader sociology’s dismissal of the notion of human rights can be said to resemble the traditional sociological dismissal of natural law. It is an approach that echoes Bentham’s rejection of natural rights as “nonsense on stilts” (see Somers and Roberts, 2008: 396). Sociology abandons its purported adherence to description when it refuses to treat human rights norms and practices as valid sociological objects of study. Following Thornhill’s assessment of sociology’s treatment of natural law, the thesis argues that to dismiss human rights as fictions or
nonsense precludes the study of human rights theory, and precludes the study of the operation of human rights norms or principles in the social world.

**In Conclusion: The Social Import of Human Rights**

The discussions of natural law in this concluding chapter together point to what is perhaps the central way in which the natural law theories recovered here are relevant to the sociology of human rights: these theories speak to the social import of individual rights. As noted in Chapter 1, a key enduring issue for the sociology of human rights is the desire to highlight the social import of human rights, that is, to make human rights social (see O'Byrne, 2012: 831). Sociologists attempt to redress the lack of recognition of the social significance of human rights both within sociology and in broader rights thought (see O’Byrne, 2012; Sjoberg et al., 2001: 18-19; Somers and Roberts, 2008: 390-391; Turner, 1993; 1995; 2002; 2013). This thesis is presented as a contribution to that central subdisciplinary project. It points to the ways in which the social import of individual rights has long been theorised within rights thought, as demonstrated in the early modern natural law theories recovered here.

While Grotius defines natural rights in social terms and identifies mutual respect for individual rights as a fundamental feature of natural society, it is the natural law theories of Hobbes and Pufendorf in particular that point to the crucial social dimensions of individual rights. In the work of both Hobbes and Pufendorf one finds the idea that society, conceived as an ideal-type, is the social space wherein rights are realised and protected, and the space within which the rights-bearing and rights-respecting sociable citizen emerges. This idea, which articulates the social
dimensions of Arendt’s paradox, points to the social core of human rights and the human rights bearer.

In the ways outlined earlier in this chapter and throughout the thesis, the early modern natural law theories recovered here can make a significant contribution to the sociological theorisation and examination of human rights.
References


