NATURAL RIGHTS LEGAL THEORY

Emmanuel Q. Fernando

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ABSTRACT

Natural Rights Legal Theory is among the most prevalent legal theories today, given that most legal systems contain a Bill of Rights whose provisions must not be violated for a law to be valid. Actually, it is a variant of Classical Natural Law Legal Theory. Given that there are significant differences between the two, and that the former is cohesive and unified as well as important and influential in its own right, Natural Rights Theory merits separate treatment. It can be distinguished from the other Classical Natural Law theories in terms of three aspects, context, emphasis and basis.

The main characteristics of Natural Rights Theory are what it shares with other Classical Natural Law theories, first that there is a necessary or conceptual connection between law and morality and second that the moral order is part of the natural order. Its distinguishing features, there being five, are best expressed by the Declaration of Independence of the United States of America. These five features are the existence of self-evident truths, the adherence to natural equality, the existence of natural rights, the derivation of power from the consent of the governed, and the limitations on the powers of government.

Each of these five features will be thoroughly discussed in turn from the perspectives of Hobbes and Locke. Although Hobbes is not, strictly speaking, a Natural Rights theorist, he is studied in juxtaposition to Locke, because Locke's ideas can be fully understood only against the background of Hobbes' ideas. It is Locke who best represents Natural Rights Legal Theory.

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From the exposition of the five features of Natural Rights Legal Theory, two possible definitions, strong and weak, of valid positive law can be derived. Then both Philippine and American jurisprudence are analyzed to determine to what extent these two legal systems subscribe to these definitions of valid positive law. Finally criticisms, both unique to Natural Rights Legal Theory and common to Natural Rights and Classical Natural Law Theories, will be made.

I. INTRODUCTION

Natural Rights Legal Theory is actually a variant of Classical Natural Law Legal Theory, and in fact Natural Rights Theory is otherwise known as Modern Natural Law Theory. As such it satisfies the two essential characteristics of Classical Theory, that there is a necessary or conceptual connection between positive law and morality, and that the moral order is part of the natural order. However, given that there are significant differences between the two of them, and the former is cohesive and unified as well as important and influential in its own right (as will be shown hereafter), Natural Rights Theory merits separate treatment.

The two legal theories can be distinguished from each other in three substantial ways, in terms of emphasis, context and basis.

With respect to a shift in emphasis, Classical Natural Law Theory is universe-centered, while Natural Rights Theory is individual-oriented. This means that the focus of the former is on the general order of the universe and the interconnectedness of the things or objects in that universe. It only secondarily considers man's unique place, by virtue of his human nature and his separateness as a person, in that universe. The latter, on the other hand, focuses directly and immediately on man, the individual, and on his separateness as a person. Thus, it owes its intellectual roots to the Cynic-Stoic branch of Classical Natural Law Theory. Although the Cynic-Stoic tradition subscribed to some sort of interconnected universal order governed by reason, it also equally emphasized the equality and brotherhood of all men, thus, similarly focusing on the individual and laying the groundwork for treating him as an individual with a separate importance.

There is a second debt to the Cynic-Stoic tradition, which also accounts for the distinction between Classical Natural Law Legal Theory and Natural Rights Theory: the context. The Cynics and Stoics talked about human nature, not necessarily within the context of society. After all, man is free and equal anywhere, wherever he may be. Natural Rights Theory extended this idea and applied it to the context of the state of nature. Hence, it talks about a natural law in that state prior to the establishment of society or government, where, incidentally, men have rights by nature. On the other hand, Classical Natural Law Theory, and I am referring to the Aristotelian-Thomist tradition, refers to the Natural Law within the context of society, for man is a social or political being and he who lives outside society is either a man (god) or a beast. Hence, the shift in context from society to the state of nature.

This shift in emphasis and context leads to a third difference: the basis. Although both subscribe to the existence of Natural Law in both the descriptive and prescriptive senses (thus, satisfying the second essential characteristic of Classical Natural Law Legal Theory), Natural Rights Theory is a right-based natural law theory, while Classical Natural Law Theory is duty-based. In other words, the basis of rights theory is the rights of the individual in the state of nature, from which obligations or duties can be derived. Classical Natural Law Theory, on the other hand, is a theory about duties. Further elaboration might help in understanding this distinction.

Classical Natural Law Theory provides the traditional way of viewing the world or reality. Given the general order of the universe, there exists a natural law that prescribes a set of duties which men ought morally to obey or comply with. Hence "duty" is the primary moral concept. Man's rights are situated within that general order, and are ultimately based on his duties. For Natural Rights Theory, on the other end, the primary moral concept is that of "right". Men naturally have rights. Rights exist in human beings by nature. Rights, thus, are primary and duty derivative. Duties are derived from the existence of these natural rights. In particular, because all men have rights, each man has the duty to respect the other's rights.

Natural Rights Theory presents a unified and cohesive jurisprudential theory. It can be defined with sufficient precision to distinguish it from other theories of law, and from other natural law theories, classical or otherwise. Moreover, it is extremely important and influential. For example, it provided the principles with which the American and French revolutions were fought. In fact, it is the underlying philosophy behind the American Law. Now, it enjoys almost

universal acceptance, although no longer in the original state but mixed with novel or radical (some would say incompatible) ideas, due to the approval by the United Nations General Assembly of the following documents: The Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights and The International Covenant on Civil and Political Rights, which await complete ratification by the member states. Indeed I consider Natural Rights Theory to be a highly influential, if not the dominant, legal theory among lawyers in the Philippines today. This is so, because, as in the United States, our very own fundamental law, the Constitution, contains and prominently stresses the Bill of Rights.

The version of Natural Rights Theory to be discussed in this series of lectures is that of Locke's, suitably contrasted with the ideas of Hobbes. This is a historically appropriate approach, since Natural Rights Theory, as the legal theory which succeeds classical natural law theories, emerged as some sort of a distinct and complete theory during their (Locke's and Hobbes') time. Indeed Locke's ideas provided the impetus behind both the American and French revolutions, and Locke himself is considered among the fathers of Natural Rights Philosophy.[1] There may be a problem with doctrinal accuracy, however. As implied in the previous paragraph, the original ideas of Locke have developed in ways which he did not anticipate and perhaps would not have agreed with. In response to this, a distinction can be made between Natural Rights Legal Theory, which is a theory about law, and Natural Rights Political Philosophy, otherwise known as liberalism. It is only the latter which has substantially changed. Natural Rights Theory as a theory about law essentially remains the same. Hence, the study of Natural Rights Theory in terms of Locke is not only historically appropriate but also doctrinally accurate.

II. THE MAIN CHARACTERISTICS AND DISTINGUISHING FEATURES OF NATURAL RIGHTS LEGAL THEORY

The two main or essential characteristics of Natural Rights Theory, of course, are those which it shares with Classical Natural Law Theory. Since a thorough exposition of these two characteristics has been provided in the previous lecture on Classical Natural Law Legal Theory that need no longer be further discussed. Instead I will focus on those features of Natural Rights Theory which make it a distinct kind of classical natural law theory.

The distinguishing features of Natural Rights Theory is undeniably best expressed or captured by The Declaration of Independence by the United States of America, providing:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any form of Government becomes destructive of those ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Five basic distinguishing features can be gleaned from the above excerpt: (i) the existence of self-evident truths; (ii) the adherence to natural equality; (iii) the existence of natural rights; (iv) the derivation of power from the consent of the governed; and (v) the limitations on the powers of government.

The first four features will be discussed in this half of this two-part article on Natural Rights Legal Theory. The fifth awaits treatment in the second part, together with a proposed definition of positive law in accordance with Natural Rights Theory as exemplified in American and Philippine jurisprudence, and a criticism of the theory as a whole.

III. THE FIRST THREE FEATURES: ON SELF-EVIDENT TRUTHS

A. The Existence of Self-Evident Truths

"We hold these truths to be self-evident"

This feature merely demonstrates that Natural Rights Theory is indeed a variant of Classical Natural Law Theory. There are, however, two differences between them: (1) in the kind of self-evident truths held and (2) in the specification of these self-evident truths.

As to the first distinction, the kind of self-evident truths to which Classical Natural Law Theory adheres, concerns, as already mentioned, duties,

while Natural Rights Theory is a theory about rights. As to the specification, the former theory is often content to let these self-evident truths remain in the abstract, while Natural Rights Theory specifies, to a much greater unanimity, concreteness and detail than the former does, the content of these self-evident truths. For example, the Bill of Rights as found in various Constitutions is a specification of such natural rights. So are the United Nations Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, The European Convention for the Protection of Human Rights and Fundamental Freedoms, to name but a few. There is no corresponding specification of the truths of Classical Natural Law Theory which commands as much agreement.

B. The Adherence to Natural Equality

"that all men are created equal"

This is the first of the self-evident truths mentioned in the Declaration of Independence. The idea traces its roots to the Stoic conception of the universal brotherhood of men and the essential equality of all men insofar as each is endowed by their Creator with reason. Man's natural equality, therefore, is his upon birth, and it need not depend on his wealth, status in society, role, station in life or other accidental attributes. It is his by virtue of his being a man, as a creature endowed with reason, that he is equal to every other man.

Natural Rights theorists, in developing this idea, made use of the context of a state of nature. The state of nature is man's original state, the state prior to society or government. Man's equality therefore derives from that natural state, and inequality is introduced only when man leaves the state of nature and heads into the state of society and government.

A problem may exist when considering the nature of equality man is supposed to enjoy in the state of nature. For there are various senses of "equality". There is factual equality, which includes equality of ability, condition and resources; normative or ideal equality; equality of opportunity; equality before the law; abstract equality; and outcome equality, to name but a few.

Stephen Douglas provided an answer to this problem, in the celebrated debates with Abraham Lincoln for Senator of Illinois in 1858. In these debates, Mr. Douglas took 'equality' to mean some sort of factual equality. Hence, he interpreted the pronouncement on equality as found in the Declaration of

Independence to apply only to white Europeans in America, and not to Negroes, Indians or immigrants from Asia who cannot be considered their equals.

This is likewise the sense in which Hobbes meant it, although he did not assert it in terms of some sort of inherent superiority of one race over another, contending on the contrary that all men are created equal. He based this factual equality on the evidence of physical and mental ability, thus,

> Nature hath made men so equal in the faculties of the body, and mind; as that, though there be found one man sometimes manifestly stronger in body, or of quicker mind than another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.[1]

He then elaborated on the physical equality of man,

> For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger as himself.[2]

Further, Hobbes justified equality also as to mental ability, in the following words,

> And as to the faculties of the mind, setting aside the arts grounded upon words, and especially that skill of proceeding upon general, and infallible rules, called science; which very few have, but in few things; as being not a native faculty, born with us; nor attained, as prudence, while we look after somewhat else, I find yet a greater equality amongst men, than that of strength. For prudence, is but experience; which equal time, equally bestows on all men, in those things they equally apply themselves unto. That which may make such equality incredible, is but a vain conceit of one's own wisdom, which almost all men think they have in a greater degree, than the vulgar; that is, than all men but themselves, and a few others, whom by fame, or for concurring with themselves, they approve. For such is the nature of men, that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned; yet they will hardly believe there be many so wise as themselves; for they see their own wit at hand, and

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[1] THOMAS HOBBES, LEVIATHAN 98 (Michael Oakeshott, ed., 1962).
[2] *Id.*

> other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is ordinarily no greater sign of the equal distribution of any thing, than that every man is contented with his share.[3]

But if factual equality is meant by the phrase "all men are created equal", surely Douglas is closer to the truth than Hobbes is, although not in the racial terms Douglas meant it. Each man is unique or individually different from every other man. And there are sufficient individual differences, so that men are indeed unequal not only in resources, but also in ability. There is a great disparity of wealth, for example, among men. Moreover, there are those who are stronger, wiser, greedier, braver, more industrious, more ambitious, more determined than others, so that the difference in ability will often lead to a further difference in resources. Things do not always even out. Douglas was only pointing to the factual evidence in claiming the intellectual superiority of the white race as against other races. He should not have concluded, however, that the white race is inherently superior, only better off.

In the same debate, Lincoln had a ready reply to Douglas.

> I think the authors of that notable instrument (The Declaration of Independence) intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say that all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal – equal with 'certain unalienable rights, among which are life, liberty and the pursuit of happiness.' This they said, and this they meant. They did not mean to assert the obvious untruth that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.[4]

In response to Douglas' specific reference to Negroes, Lincoln continued,

> Certainly the negro is not our equal in color -- perhaps not in many other respects; still, in the right to put into his mouth the bread that his

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[3] *Id.*

[4] Abraham Lincoln, *Speech at Springfield, Illinois* (July 17, 1858), in CREATED EQUAL 357 (Paul M. Angle, ed., 1958).

> own hands have earned, he is the equal of every other man, white or black. In pointing out that more has been given you, you can not be justified in taking away the little that has been given him. All I ask for the negro is that if you do not like him, let him alone. If God gave him little, that little let him enjoy.[5]

"Equality" in the Declaration of Independence means therefore some sort of abstract normative equality, not factual equality. It is equality in the sense that all men equally have rights which ought to be respected by other men.

Actually, Locke combined both senses of equality. He claimed that in the state of nature, man is equal in the sense that man, being "promiscuously born to the same advantages of nature and use of the same faculties", is therefore in a state "wherein all the power and jurisdiction is reciprocal, no man having more than another". This appears to be merely a factual description of the state of nature. But he used it also in a normative sense, by concluding from the fact of man's natural equality that man "should also be equal one amongst another without subordination or subjection." This is not surprising since Locke, being a Natural Law theorist, was guilty of arguing from the natural or factual to the normative. This is nothing but the 'is-ought' fallacy which naturalists are prone to committing, thus providing further proof that Natural Rights Theory is but a variant of Classical Natural Law Theory.

Hence, Natural Rights Theory combines both senses. Man is factually equal in the state of nature. From this, the moral principle that man ought to be treated equally in the sense that he has equal rights which ought to be individually respected, follows. The full quotation of Locke reads as follows:

> A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.[6]

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[5] *Id.* at 82.

[6] JOHN LOCKE, *An Essay Concerning the True, Original, Extent and End of Civil Government*, in SOCIAL CONTRACT 4 (1947).

C. The Existence of Natural Rights

"that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness."

In the state of nature, moreover, man enjoys natural rights. This is both a factual and moral truth. The derivation of the moral truth from the factual truth involves a fairly straightforward argument. The premises of the argument are the suppositions regarding human nature in the state of nature. From these premises, natural rights are derived. Moreover, some of these rights are "unalienable". Before I proceed however with the derivation of natural rights and a discussion of their inalienability, the concept of "right" must first be examined.

1. The concept of right

There are many kinds of rights. There are moral as contrasted with legal rights. Legal rights are established by reference to law and are upheld or protected by legal institutions. Moral rights, on the other hand, are established by reference to morality. They are not necessarily recognized or protected by law. However, they may provide the justification for legal rights, in that, ideally, a legal right is based on a moral right. Natural rights are a particular kind of moral right, the moral basis of which is found in the nature of man. It is said that a man by virtue of being a man is entitled to certain rights. These rights his upon birth, in recognition of his humanity. These are his natural rights.

These various kinds of rights are said to have a shared, common or defining characteristic, which fixes their meaning. This defining characteristic is claimed to be in terms of the correlativity between right and duty, elegantly explained and popularized by Wesley Hohfeld in his book "Fundamental Legal Conceptions,"

> Recognizing as we must, the very broad and indiscriminate use of the term 'right,' what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative word 'duty,' for it is certain that even those who use the word and the conception 'right' in the broadest

> possible way are accustomed to thinking of 'duty' as the invariable correlative.[7]

This means that for every right, there exists a duty on the part of somebody else to respect that right. When a right is invaded, a duty is violated.

The meaning of right can be further examined by means of a contrast between right and "liberty", which Hohfeld referred to as "privilege". Liberty is differentiated from right in that although in both cases one may do whatever he has a right or liberty to, there is no corresponding duty (only a 'no-right') on the part of a third person in the case of liberty.

> A "liberty" considered as a legal relation . . . must mean, if it has any definite content at all, precisely the same thing as privilege; . . . It is equally clear, as already indicated, that such a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered as such, on its merits. The only correlative logically implied by the privileges or liberties in question are the 'no-rights' of "third parties." It would therefore be a non sequitur to conclude from the mere existence of such liberties that 'third parties' are under a duty not to interfere, etc. . . .[8]

Hence, a right is both a liberty to do something as well as a claim against someone entailing a duty on the latter's part not to interfere with that liberty.

The difference between right and liberty may best be illustrated by means of an example. A student wants to park in a certain slot in a parking lot. He certainly has the liberty to do so. But that liberty is not a right. No duty exists on the part of third persons to allow him exclusive use of that slot. If another student, in other words, chooses to park in that slot, he likewise has the liberty to do so. The situation is altered when the slot in question is actually reserved for the Faculty, suitably indicated by some sort of sign. In that case, the members of the Faculty have a right to that slot with respect to the non-faculty. In other words, students and other non-faculty persons have a duty to respect the right of a faculty

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[7] WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 38 (Walter Wheeler Cook, ed., 3rd ed. 1964).

[8] *Id.* at 42-43 (emphasis supplied).

member to park in that slot. But with respect to other faculty members, the said faculty member only has a liberty to park in that slot.

2. Hobbes discussion of natural rights

a. The derivation of natural rights

Hobbes did not actually derive natural rights. This is because he is neither a Classical Natural Law nor a Natural Rights theorist in the true sense (which is not immediately evident because Hobbes continually used the terms "the nature of man", "the law of nature", and "the right of nature"; and he appeared to confuse, just as Classical Natural Law theorists did, the "is" with the "ought", or fact with value). However, the conclusion he derived from his description of human nature and natural law is not an objective but a subjective morality. Hence, he did not subscribe to the Natural Law quite in the same way as the classical theorists do, and in fact ought to be contrasted against them. Indeed, ultimately for Hobbes, there is no such thing as a prescriptive natural law, only conventional law or positive law. Similarly, his concept of right is ultimately that there are no natural rights but only conventional rights. This will be adequately explained later.

If Hobbes is neither a Classical Natural Law theorist nor a Natural Rights theorist, why is he studied along with them? The answer is simple. Hobbes provided an approach which Locke adopted and from which Locke was able to derive the cardinal theory of natural rights. Admittedly, different conclusions were arrived at by means of a similarity in approach. However, that merely underscores the importance of studying Hobbes. For Locke's ideas cannot be completely understood if not shown in juxtaposition with those of Hobbes.

The approach Hobbes took was in terms of the context of the state of nature. In that state, it is natural for man to desire as well as to seek to satisfy his desires. It is also natural for man to enjoy liberty. Hobbes defined liberty simply as the absence of external impediments.

> Liberty what. By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments: which impediments may oft take away part of a man's power to do what he

> would; but cannot hinder him from using the power left him, according to his judgment, and reason shall dictate to him.[9]

This definition of 'liberty' is similar to that of Sir Isaiah Berlin[10] with an important difference. From Berlin's perspective, Hobbes' definition is too narrow. It includes all kinds of external impediments as limitations on liberty, even those due to natural causes. As a result, limitations which are due to natural causes are considered to be deprivations of or restrictions on human liberty. For example, an individual, unable to leave his home due to a raging typhoon, is, according to this definition, restricted in his liberty to move about. Berlin, on the other hand, insisted upon a difference between impediments due to natural and those due to human causes. It is only with respect to the latter where it can rightfully be maintained that one's liberty, or "political liberty" as he termed it, has been deprived or restricted. "Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings."[11] Hence, being rendered unable to leave the house due to a natural calamity like a typhoon, which in no way is attributable to the "deliberate interference of other human beings", is not an instance of a deprivation, lack or restriction of liberty or freedom.

On the other hand, Hobbes' definition can also be construed as being too wide. He considered even inanimate and irrational creatures as likewise capable of enjoying liberty.

> Liberty what. LIBERTY, OR FREEDOM, signifieth properly, the absence of opposition; by opposition, I mean external impediments of motion; and may be applied no less to irrational, and inanimate creatures, than to rational. For whatsoever is so tied, or environed, as it cannot move but within a certain space, which space is determined by the opposition of some external body, we say it hath not liberty to go further. And so of all living creatures, whilst they are imprisoned, or restrained, with walls or chains; and of the water whilst it is kept in by banks, or vessels, that otherwise would spread itself into a larger space,

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[9] HOBBES, *supra* note 1, at 103.

[10] Sir Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERALISM AND ITS CRITICS (Michael Sandel, ed., 1984).

[11] *Id.* at 16.

> we use to say, they are not at liberty, to move in such a manner, as without those external impediments they would. . . .[12]

Hobbes also contrasted liberty and power,

> But when the impediment of motion, is in the constitution of the thing itself, we use not to say; it wants the liberty; but the power to move; as when a stone lieth still, or a man is fastened to his bed by sickness.[13]

According to this explanation, an individual born lame does not lack the liberty, but merely the power to walk.

This is exactly the same point made by Berlin in his exposition of the distinction between liberty and ability,

> I am normally said to be free to the degree to which no man or body interferes with my liberty. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. . . .[14]

Thus, if we confine ourselves to the liberty of rational creatures, there is only one fundamental difference between Hobbes and Berlin in their explications of liberty, and it is with respect to their account of external impediments. Whereas Hobbes included all kinds of external impediments to human action as a limitation on liberty, Berlin maintained that a distinction can be made between external impediments due to natural and those due to human causes. An individual who has been restricted in his movement or actions by external impediments arising from natural causes does not lack or has not been deprived of liberty; he is merely prevented by external circumstances from doing or accomplishing what he desires. Only external impediments due to human agency or human causes can rightfully be considered to restrict or deprive one of liberty.

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[12] HOBBES, *supra* note 1, at 159 (emphasis supplied).

[13] *Id.*

[14] Berlin, *supra* note 10, at 15-16 (emphasis supplied).

On the other hand, both philosophers agree as to the relation of internal impediments, like blindness or lameness, to liberty. Such an impediment merely indicates a lack or deficiency of power, in Hobbes' terminology, or a lack or deficiency of ability, in Berlin's, and not a lack or deficiency of liberty.

The lack or deficiency in power or ability that is distinguished from lack or deficiency in liberty, is similar to lack or deficiency in resources. A poor man, for example, does not lack the liberty to travel; he merely lacks the resources in order to realize his liberty to travel. But isn't this ultimately equivalent or tantamount to lack of liberty, as some Marxists argue? For isn't travel, in both cases, beyond realization? Of what use or value then is liberty to a poor man or a man without resources?

In this regard, Joseph Stalin significantly queried: "What can be the 'personal freedom' of an unemployed person who goes hungry and finds no use for his toil?" Anatole France, on the other hand, made a point about the equal limitation on the liberty of both the rich and the poor when he sarcastically remarked: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A related point can be made about equal liberty from the converse perspective: "The law, in its majestic equality, allows the poor as well as the rich to sleep in a mansion, to give alms to beggars, and to eat caviar."

The point is well-taken, but a confusion is made. Berlin and probably Hobbes too are only attempting to clarify or elucidate the meaning of liberty, and not make a point as to its worth or value. As such, both philosophers would in all likelihood not deny that liberty, under the situation of poverty, is, to the poor and starving man, in many instances worthless; and that there needs a minimum wealth or means for liberty properly or fully to be enjoyed or appreciated. But that is neither here nor there in the elucidation of the meaning of the concept. For in defining 'liberty', Berlin and Hobbes are not trying to point out how valuable or worthwhile it is, but only to come to an understanding of its meaning.

And the meaning of liberty, as exemplified by our use of the concept, is such that it is so connected with human agency that a deprivation of it can be said to exist only if it is due to human causes. That, for example, underlies our use of the concepts 'economic freedom' or 'economic slavery', as Berlin rightly points out,

> . . . This is brought out by the use of such modern expressions as "economic freedom" and its counterpart "economic slavery". It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world, recourse to the law courts – he is as little free to have it as he would be if it were forbidden him by law. If my poverty were a kind of disease, which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom, least of all political freedom. It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness. If my lack of material means is due to my lack of mental or physical capacity, then I begin to speak of being deprived of freedom (and not simply about poverty) only if I accept the theory. If, in addition, I believe that I am being kept in want by a specific arrangement which I consider unjust or unfair, I speak of economic slavery or oppression. "The nature of things does not madden us, only ill will does", said Rousseau. The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.[15]

Hence, ordinary language makes a distinction between a limitation of liberty and a limitation of ability. It is true that in some instances, e.g., the case of a poor man, they lead to the same consequential effects. But it does not follow that they mean the same. A limitation on liberty, as it is ordinarily understood, is a result of the action of other human beings; while a limitation on ability or power is not. And, incidentally, neither does it follow that liberty is not valuable in its own right, that it is meaningless without the wealth or resources to realize it.

With the concept of 'liberty' suitably clarified, we are now ready to consider Hobbes' definition of a free man, as one who is not hindered from doing what he wills or desires. "And according to this proper and generally received meaning of the word, a FREEMAN, is he, that in those things, which by his

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[15] *Id.* at 16.

strength and wit he is able to do, is not hindered to do what he has a will to."[16] Given his selfish nature, what he has a will to do is the satisfaction of his desires.

Hobbes next defined a law of nature and distinguished it from natural right.

> A law of nature what. Difference of right and law. A LAW OF NATURE, *lex naturalis*, is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that by which he thinketh it may best be preserved. For though they that speak of this subject, use to confound *jus*, and *lex*, right and law: yet they ought to be distinguished; because RIGHT consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent.[17]

By means of the factual description of human nature that man is selfish and free in the state of nature, Hobbes arrived at a normative conclusion. Thus he was just as guilty as Classical Natural Law theorists are, of confusing the 'is' with the 'ought'. He concluded that man has the natural right to enjoy his liberty in a way that will allow him to satisfy his desires,

> Right of nature what. THE RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.[18]

He further specified the extent of such a right, given that the state of nature, as will be thoroughly explained in the next subsection, is a state of war,

> And because the condition of man, . . . , is a condition of war of every one against every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in

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[16] HOBBES, *supra* note 1 (emphasis supplied).
[17] *Id.* at 103.
[18] *Id.*

> such a condition, every man has a right to every thing; even to another's body.[19]

Hence, man's natural right to liberty is practically unlimited, given that "every man has a right to every thing; even to another's body." In another passage, he asserted that "there is nothing to which every man had not right by nature."[20] Man has liberty, therefore, to do whatever he likes, which includes violating the other person's liberty. Hence, his version of natural rights is not really one of rights. In a situation where every one has maximum rights to liberty, in effect no one has any duties. No one, in particular, has a duty to respect another person's rights.

To illustrate further, an individual's rights are restricted by the rights of another person. For example, my right to swing my arm ends where my neighbor's chin begins. Without such restriction, there can be no rights, just power relations. Hence, too much liberty for the wolf means death for the sheep. In giving everyone maximum liberty, in effect no one has rights.

b. The inalienability of natural rights

Both Locke and Hobbes asserted that some rights are not inalienable. This means that man can part with these rights if he finds it prudent to do so, or indeed if he is so inclined to. In fact, Hobbes considered this to be a law of nature, his second: "that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself 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."[21]

Since, as shown above, man may "lay down this right to all things", and be "contented only with so much liberty against other men as he would allow himself", it follows that Hobbes maintained that virtually all rights may be alienated. This differentiated him from Locke who asserted the inalienability of many rights. This is furthermore made manifest by his claim that man, by a covenant, surrendered his right to govern himself to a sovereign. "I authorize and give up my right of governing myself, to this man, or to this assembly of men, on

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[19] *Id.*

[20] *Id.* at 104.

[21] *Id.*

this condition, that thou give up thy right to him, and authorize all his actions in like manner."[22]

The right to govern oneself is an all-inclusive right, which affects practically all areas of human life. Hence, the subjects by means of a covenant practically surrender all their liberties. The subjects must submit their wills to him "in those things which concern the common peace and safety",[23] which, as will be shown later, extends to and may regulate even man's thoughts. For Hobbes believed that the sovereign cannot secure the peace, safety and protection of all in common otherwise. Thus, the sovereign had the power "to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of peace and security, by prevention of discord at home, and hostility from abroad; and, when peace and security are lost, for the recovery of the same."[24]

But there exist some rights which cannot be alienated.

> Not all rights are alienable. Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some good to himself. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any good to himself. The same may be said of wounds, and chains, and imprisonment; both because there is no benefit consequent to such patience; as there is to the patience of suffering another to be wounded, or imprisoned: as also because a man cannot tell, when he seeth men proceed against him by violence, whether they intend his death or not. And lastly the motive, and end for which this renouncing, and transferring of right is introduced, is nothing else but the security of a man's person, in his life, and in the means of so preserving life, as not to be weary of it. And therefore if a man by words, or other signs, seem to despoil himself of the end, for which those signs were intended; he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted.[25]

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[22] *Id.* at 132.
[23] *Id.*
[24] *Id.* at 137.
[25] *Id.* at 105.

Thus the right which cannot be transferred, being inalienable, is the right to protect oneself, or the right to self-preservation. "(I)t is manifest, that every subject has liberty in all those things, the right whereof cannot by covenant be transferred. I have shown before . . . that covenants not to defend a man's own body, are void."[26] Therefore, "(i)f the sovereign command a man, though justly condemned, to kill, wound, or maim himself; or not to resist those who assault him; or to abstain from the use of food, air, medicine or any other thing without which he cannot live; yet hath that man the liberty to disobey."[27]

3. Locke's discussion of natural rights

a. The derivation of natural rights

In contrast with Hobbes, Locke actually derived natural rights from man's condition in the state of nature. This state of nature consists in both a state of perfect freedom and of equality (Locke's notion of equality has already been discussed in the previous subsection II-B). As to liberty, this is what Locke has to say,

> (W)e must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.[28]

It is immediately evident that Locke's idea of liberty or freedom in the state of nature is contrary to Hobbes'. To Locke, man's freedom is limited "within the bounds of the law of nature", whereas to Hobbes it is virtually unlimited. In other words, his notion of rights had correlative duties, since, unlike Hobbes, the force and scope of rights were not unlimited, governed as they were by the law of nature, which obliges everyone. Locke, thus, elaborated,

> But though this be a state of liberty, yet it is not a state of licence: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature

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[26] *Id.* at 164.

[27] *Id.*

[28] LOCKE, *supra* note 6.

> to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions . . . .[29]

Hence, man's liberty is limited by the law of nature. This law of nature, in turn, did not generate other obligations apart from the duty not "to harm another in his life, health, liberty or possessions", or, in other words, the duty to respect other people's equal rights to life, liberty and property. This is in essence equivalent to the famous libertarian doctrine, known as the harm principle, lucidly enunciated nearly two centuries hence by John Stuart Mill,

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[30]

The interpretation that man's liberty is limited only by other people's rights to be secure in their life, health, liberty or possessions and that man's rights are limited by other people's equal rights is further supported by Locke's assertion that "all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind."[31]

The derivation of natural rights is therefore complete. Man has rights in the state of nature owing to the natural conditions of human liberty and equality in that state as governed by the law of nature. In other words, from these factual conditions in the state of nature, the normative conclusion that man has the right to be free and to be secure "in his life, health, liberty or possessions" followed. Moreover, this is a genuine right, entailing duties on the part of third persons, since all men may be restrained from invading (these) rights" or since "no one ought to harm another in his life, health, liberty or possessions." Hence, the force and scope of man's rights are limited, and limited only by other people's equal rights in accordance with the harm principle.

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[29] *Id.* at 5.

[30] John Stuart Mill, *On Liberty*, *in* J.S. MILL ON LIBERTY IN FOCUS 30 (John Gray and G.W. Smith eds., 1991).

[31] LOCKE, *supra* note 6, at 6.

Could Locke, being a devout Christian and, thus, believing in some sort of natural law in accordance with Christian doctrine, have meant by the law of nature a limitation on rights broader than the harm principle? If this were so, man's liberty in the state of nature is limited by obligations other than the duty to respect other people's rights. This appears to be the effect of introducing the concept of God in his discussion of rights.

> (F)or men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Everyone, as he is bound to preserve himself, and not to quit his station wilfully, so by the like of reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb or goods of another man.[32]

However the Christian interpretation was refuted by that very same quotation, in its very last sentence. Even if the source of the law of nature is God, clearly Locke intended, by the last sentence, to confine the obligations that derive from the law of nature which act as a limitation on rights, only to those obligations which "tends to the preservation of life, the liberty, health, limb or goods of another man."

If my interpretation of Lockean natural rights theory is incorrect, it is in any case undisputed that Natural Rights theory has developed in the manner that I suggested, that man's rights are limited only by other people's equal rights. This is presupposed, for example, by the doctrine introduced around that period and made popular centuries hence by the great philosopher and sociologist Herbert Spencer. This is the belief that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man. In other words, "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others",[33] which was encapsulated and

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[32] *Id.* at 5-6.

[33] JOHN RAWLS, A THEORY OF JUSTICE 60, 250 (1972).

immortalized by Rawls in his classic "A Theory of Justice," by crowning it as his first principle of justice.

b. The inalienability of natural rights

The rights to life, liberty and property are not the only rights in the state of nature. There is also the right to punish in the event of a violation of right or transgressions of the natural law, "(T)he execution of the state of nature is, in that state, put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation."[34]

Otherwise the law of nature would not be effective, "For the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders."[35]

There is, moreover, the right to reparation as well as the right to assist those injured in seeking reparation,

> (H)e who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it: and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender as much as may make satisfaction for the harm he has suffered.[36]

In other words, to Locke man possesses, apart from the rights to "life, liberty and property", the rights to executive power in the state of nature.

In terms of alienability, it is only right to property or estate and the rights to executive power which are alienable, while the rights to life and liberty (in terms of a right against slavery) are not. This freedom from absolute, arbitrary power, is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together,

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[34] LOCKE, *supra* note 6, at 6.

[35] *Id.*

[36] *Id.* at 8.

> For a man, not having the power of his own life, cannot, by compact or his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life, cannot give another power over it.[37]

The above passage takes care of the inalienability of the rights to life and liberty (which encompasses the right, under the Declaration of Independence, to the pursuit of happiness). The right to property is alienable; however, it is not alienated when man covenants himself to be bound with other men under a government to escape the state of nature. The rights to executive power, on the other hand, are surrendered or transferred to government by the original covenant, and as such are alienable. More of these points will be discussed in the next subsection.

III. THE FOURTH FEATURE: THE DERIVATION OF POWER FROM THE CONSENT OF THE GOVERNED

A. The Manner of Derivation

"Governments are instituted among Men,
deriving their just powers from the consent of the governed."

This fourth feature of Natural Rights Theory was substantiated by both Locke and Hobbes in terms of the idea of a social contract. According to them, the consent of the governed to subject themselves to a particular authority is manifested by means of a covenant or pact, otherwise known as the social contract. The context of a state of nature was likewise utilized. From the factual conditions existing in the state of nature, they showed how men were led to forge a covenant through which government is created and its authority justified by means of the consent of the governed.

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[37] *Id.* at 15.

1. Hobbes' version of the social contract

In the previous Section, I made a sketchy description of the factual conditions obtaining in Hobbes' version of the state of nature. In that state, man is selfish by nature, is roughly equal to others in terms of physical and mental ability, and enjoys unlimited liberty. From these facts, the general condition of the state of nature, that it is in a state of war, was deduced. The state of war, in turn, provided man the prudential reasons to forge an agreement or a social contract.

Hobbes prudential argument justifying the creation of a social contract thus consisted of two steps: the state of nature is a state of war; and the state of war leads man to forge an agreement or a social contract to be bound under an authority. There is a need also to discuss a third aspect, the manner in which man manifests his consent to be bound.

a. The state of nature is a state of war.

Man, according to Hobbes, is selfish by nature. He is motivated by his appetites, desires, fears and self-interest, seeking pleasure and avoiding pain. Moreover, whatever he desires is called good and whatever he hates evil, "but whatsoever is the object of any man's appetite or desire, that is it which he for his part calleth good; and the object of his hate and aversion, evil; and of his contempt vile and inconsiderable."[38]

Hobbes thus introduced a subjective notion of "good", which once again clearly dissociated him from Classical Natural Law legal theorists, who subscribed to an objective good,

> For these words of good, evil, and contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of the object themselves; but from the person of the man, where there is no commonwealth; or, in a commonwealth, from the person that representeth it; or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof.[39]

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[38] HOBBES, *supra* note 1 at 48.

[39] *Id.* at 48-49.

Happiness furthermore consisted in man fulfilling all his desires, so that man, given that he continually desires or is never satisfied, cannot rest content with the satisfaction of a particular desire in the form of Aristotle's or Aquinas' final good or end, a view which clearly dissociated him once more from Classical Natural law theorists,

(T)he felicity of this life, consisteth not in the repose of a mind satisfied. For there is no such *finis ultimus, utmost aim, nor summum bonum*, greatest good as is spoken of in the books of the old moral philosophers. Nor can a man any more live, whose desires are at an end, than he, whose senses and imagination are at a stand. Felicity is a continual progress of the desire, from one object to another; the attaining of the former, being still but the way to the latter. The cause whereof is, that the object of man's desire, is not to enjoy once only, and for one instant of time, but to assure for ever, the way of his future desire. And therefore the voluntary actions, and inclinations of all men, tend, not only to the procuring, but also to the assuring of a contented life".[40]

Moreover, he distinguished between different kinds of desire, which may be reduced to and based ultimately on the primary desire for power,

> The passions that most of all cause the difference of wit, are principally, the more or less desire of power, of riches, of knowledge, and of honour. All which may be reduced to the first, that is, desire for power. For riches, knowledge, and honour are but several sorts of power.[41]

The ultimacy of the desire for power was shown by virtue of the fact that it guaranteed the satisfaction of other desires,

> So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power, that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.[42]

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[40] *Id.* at 80.
[41] *Id.* at 62.
[42] *Id.* at 40.

Apart from man's selfish desire for power, the natural condition of man in the state of nature is also that of equality of ability (already discussed in the previous section). From this equality, he concluded a fourth natural condition, equality of hope, "from this equality of ability ariseth equality of hope in the attaining of our ends."[43]

These factual conditions concerning man's selfish nature, rough equality with each other and unlimited liberty then leads to an intolerable situation in the state of nature.

> . . . And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavour to destroy, or subdue one another. And from hence it comes to pass, that where an invader hath no more to fear, than another man's single power; if one plant, sow, build or possess a convenient seat, others may probably come prepared with forces united, to dispossess, and deprive him, not only of the fruit of his labour, but also of his life, or liberty. And the invader again is in the like danger of another.[44]

Hobbes explained in greater detail human nature with respect to its generating the intolerable situation in the state of nature mentioned above, "so that in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory."[45]

He then illustrated how these three aspects of human nature cause quarrels.

> The first, maketh men invade for gain; the second, for safety; and the third, for reputation. The first use violence, to make themselves masters of other men's persons, wives, children, and cattle; the second, to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their person or by reflection in their kindred, their friends, their nation, their profession, or their name.[46]

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[43] *Id.* at 98.
[44] *Id.* at 98-99.
[45] *Id.* at 99.
[46] *Id.* at 99-100.

Finally, the intolerable situation man found himself in, in the state of nature is that of a state of war. "Whereby it is manifest, that during the time that men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man."[47]

This state of war he then describes in shocking detail,

> The incommodities of such a war. Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.[48]

b. The state of war leads man to forge an agreement or social contract to be bound under an authority.

Given that the state of nature is a state of war, three descriptive laws of nature can be derived. The first concerns the fact that man endeavors to seek peace,

> Naturally every man has a right to every thing. The fundamental law of nature. And because the condition of man, . . . , is a condition of war of every one against every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to every thing; even to one another's body. And therefore, as long as this natural right of every man to every thing endureth, there can be no security to any man, how strong or wise soever he be, of living out the time, which nature ordinarily alloweth men to live. And consequently it is a precept, or general rule of reason, that every man, ought to endeavour peace, as far

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[47] *Id.* at 100.

[48] *Id.*

> as he has hope of obtaining it; and when he cannot obtain it; that he may seek, and use, all helps, and advantages of war. The first branch of which rule, containeth the first, and fundamental law of nature; which is, to seek peace, and follow it. The second, the sum of the right of nature; which is, by all means we can, to defend ourselves.[49]

The second law of nature (previously discussed) concerns man's willingness, in the event that others are also willing, to yield or give up, either by renouncing or transferring, virtually all of his rights for the sake of peace,

> 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 far-forth, as for peace, and defence of himself 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.[50]

This mutual transferring of right is called a contract, otherwise known as a pact or a covenant. Finally, there is the third law of nature, concerning the obligation of contracts known in Latin as *pacta sunt servanda*,

> The third law of nature, justice. From that law of nature, by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind, there followeth a third; which is this, that men perform their covenants made; without which, convenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war.[51]

What is the assurance that each man will perform his part of the covenant? Hobbes anticipated this question. He answered it in terms of a conventional theory of morality (to which a conventional theory of rights corresponds), as distinguished from an objective theory, which again clearly separated him from Classical Natural Law theorists. He in effect said that there is no justice without an authority that can compel the observance of justice, and that, therefore, justice is merely what the authorities say it is. It is fear of this authority that compels men to stick by the agreement.

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[49] *Id.* at 103-104 (emphasis supplied).

[50] *Id.* at 104 (emphasis supplied).

[51] *Id.* at 113 (emphasis supplied).

> Justice and propriety begin with the constitution of commonwealth. But because covenants of mutual trust, where there is a fear of not performance on either part, . . . , are invalid, though the original of justice be the making of covenants; yet injustice actually there can be none, till the cause of such fear be taken away; which while men are in the natural condition of war, cannot be done. Therefore before the names of just, and unjust can have place, there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their covenant; and to make good that propriety, which by mutual contract men acquire, in recompense of the universal right they abandon: and such power there is none before the erection of a commonwealth. And this is also to be gathered out of the ordinary definition of justice in the Schools: for they say that justice is the constant will of giving to every man his own. And therefore where there is no own, that is no propriety, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no propriety; all men having right to all things: therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice, consisteth in keeping of valid covenants: but the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them: and then it is also that propriety begins.[52]

Hence, the derivation is complete. The prudential considerations which motivate men to forge an agreement or a covenant by which they are willing to subject themselves to an authority have been established.

> The end of commonwealth, particular security. The final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war, which is necessarily consequent, as hath been shown (chapter 13), to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature set down in the fourteenth and fifteenth chapters.[53]

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[52] *Id.* at 113-114 (emphasis supplied).

[53] *Id.* at 129 (emphasis supplied).

In detail, the prudential argument can be summarized as follows. Man in the state of nature is in a state of war. He is desirous of peace. This is the first law of nature. Since he enjoys unlimited liberty in the state of nature and since practically all his rights are alienable, he is willing to yield virtually all of his rights so long as others do the same, in order to secure that peace. This is the second law. Finally, he can be reassured that men will perform their covenants made so long as each transfers his rights to a common power which will enforce that covenant. That is the third law. For sure, Hobbes mentioned sixteen other laws of nature, but these three are sufficient for the derivation.

Hobbes, thus, gave purely prudential considerations for the institution of sovereignty. When Locke is discussed, it will be shown that he introduced, apart from prudential grounds, moral reasons for the justification of authority.

c. The manifestation of the consent to be bound

Hobbes detailed two ways in which consent may be manifested in a contract for it to be binding: either express or by inference,

> Signs of contract express. Promise. Signs of contract are either express, or by inference. Express, are words spoken with understanding of what they signify: and such words are either of the time present, or past; as, I give, I grant, I have given, I have granted, I will that this be yours: or of the future; as, I will give, I will grant: which words of the future are called PROMISE.
>
> Signs of contract by inference. Signs by inference, are sometimes the consequence of words; sometimes the consequence of silence; sometimes the consequence of actions; sometimes the consequence of forbearing an action: and generally a sign by inference, of any contract, is whatsoever sufficiently argues the will of the contractor.[54]

Obviously, only a minority in society actually gave express consent to be bound by the will of the sovereign. Hence, the importance of consent by inference. Hobbes did not adequately discuss how the latter type of consent can be manifested so as to constitute a justification for authority. Locke was a bit more elaborate on that point.

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[54] *Id.* (emphasis supplied).

2. Locke's version of the social contract

The state of nature, according to Locke, is not as bleak as Hobbes depicted it. It is merely one of inconvenience, albeit great inconvenience, and not one of war. As a result, his justification for the social contract is due to a slightly different motivation.

a. The state of nature is a state of great inconvenience.

The reason why the state of nature, according to Locke, is not one of a state of war, is not because he maintained a grossly disparate view of human nature from Hobbes. For sure, he did not view man as quite so selfish or egoistic. He made constant reference to the laws of nature, and by implication man's obligation to observe that law. On the other hand, he did not introduce an ingredient of selflessness or altruism in his depiction of human nature, like the motive of sympathy, as Hume did. So it is fair to assume that Locke's man is likewise self-interested, although perhaps not quite to the extent that Hobbes depicted man to be. The difference between them lies in the fact that whereas Hobbes viewed man as having limited prudence, Locke viewed man as having a more rational or enlightened self-interest.

The state of nature, thus, for Locke, is not one of war. He first detailed the conditions when there can be a state of war in the state of nature. This refers to a situation which originates when a man attempts to get another man into his absolute power,

> And hence it is that he who attempts to get another man into his absolute power does thereby put himself into a state of war with him; it being to be understood as a declaration of a design upon his life. For I have reason to conclude that he who would get me into his power without my consent would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for nobody can desire to have me in his absolute power unless it be to compel me by force to that which is against the right of my freedom -- i.e. make me a slave. To be free from such force is the only security of my preservation, and reason bids me look on him as an enemy to my preservation who would take away that freedom which is the fence to it; so that he who makes an attempt to enslave me thereby puts himself in a state of war with me. He that in a state of nature would take away the freedom that belongs to any one in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation

> of all the rest; as he that in the state of society would take away the freedom belonging to those of that society or commonwealth must be supposed to design to take away from them everything else, and so be looked on as in a state of war.[55]

Hence, any person who is an object of such an attempt, even if the aggressor is interested only in his property or liberty, his life not being threatened, is justified in treating the situation as a state of war, and in defending himself accordingly,

> This makes it lawful for a man to kill a thief who has not in the least hurt him, nor declared any design upon his life, any farther than by the use of force, so to get him in his power as to take away his money, or what he pleases, from him; because using force, where he has no right to get me into his power, let his pretence be what it will, I have no reason to suppose that he who would take away my liberty would not, when he had me in his power, take away everything else. And therefore it is lawful for me to treat him as one who has put himself into a state of war with me – i.e., kill him if I can; for to that hazard does he justly expose himself whoever introduces a state of war, and is aggressor in it.[56]

Locke is now able to distinguish between a state of nature and a state of war,

> And here we have the plain difference between the state of nature and the state of war, which however some men have confounded, are as far distant as a state of peace, goodwill, mutual assistance, and preservation; and a state of enmity, malice, violence and mutual destruction are one from another. Men living together according to reason without a common superior on earth, with authority to judge between them, are properly in the state of nature. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and 'tis the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow subject....[57]

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[55] LOCKE, *supra* note 6, at 12.

[56] *Id.* at 12-13.

[57] *Id.* at 13.

The import of the above passage is clear. The normal condition in the state of nature is "a state of peace, goodwill, mutual assistance, and preservation", which may degenerate into a state of war only in certain instances, to wit, when one "attempts to get another man into his absolute power" or when "force or a declared design of force upon the person of another" has occurred. The difference therefore between Hobbes and Locke is that the former believed the normal condition to be a state of war, while the latter considered that state to be the exception. What led Locke to believe that the state of nature normally is "a state of peace, goodwill, mutual assistance, and preservation" then?

One answer, of course, is in terms of what has been suggested above, that man, being God's servant on earth, is a being who naturally respects and conforms to the Natural Law, which is nothing but an expression of God's will. This seems to be in conformity both with Locke's Christian beliefs and with the following passage,

> (F)or men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not into competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb or goods of another.[58]

There is an alternative answer, however, and it is equally compelling. It is in terms of an enlightened prudence, which indeed can be gleaned from the last sentence of the very same passage which supported the first answer. It is but rational for an individual, "when his own preservation is not in competition" with the rest of mankind, "to preserve the rest of mankind" and not to "take away or impair the life, or what ends to the preservation of the life, the liberty, health, limb or goods of another." That course of action is ultimately to his self-interest. For it is contrary to his interest to make enemies of other people and create a state of

[58] *Id.* at 5-6.

war between them and him. More positively, he may need the cooperation or help of other people, and why should he then offend or harm them?

Granting Hobbes own premises, therefore, about human nature, that man essentially is selfish, a different conclusion with respect to the state of nature is arrived at by Locke. The state of war is not the normal condition in the state of nature. Rather, the state of nature is normally that of "peace, goodwill, mutual assistance, and preservation". But there exists great inconveniences, and that occurs when a state of war exists between certain individuals, a situation which inevitably occurs between a few, and not the majority of, individuals in society.

For assuming a wrong has been committed or a right violated, what recourse does the wronged individual have to rectify the wrong? He has to do it, if not by himself, then with the assistance of others; for in the state of nature, apart from the rights to life, liberty, and property, man has, as earlier mentioned, the right to punish,

> And that all men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree, as may hinder its violation. For the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in a state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, everyone must needs have a right to do.[59]

Apart from the right to punish, man also has, as previously cited, the right of reparation, and others have a right to assist him in seeking reparation,

> Besides the crime of which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature and to be a noxious creature, there is commonly injury done, and some person or other, some other man receives damage by his transgression; in which case he who hath received any damage, has, besides the right of

[59] *Id.* at 6.

> punishment common to him with other men, a particular right to seek reparation from him that has done it: and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered.[60]

There are, thus, "in the state of nature . . . many things wanting," which lead to great inconvenience. These are the lack of an established and settled known law, the lack of a known and indifferent judge, and the lack of a power to back and support the sentence when right.

> First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases. Secondly, In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For everyone in that state being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases; as well as negligence and unconcernedness, to make them too remiss in other men's. Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended, will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.[61]

This condition, Locke depicted as one of great inconvenience, by means of such descriptions as: "(the) inconveniences of the state of nature . . . must certainly be great where men may be judges in their own case";[62] or "all the great inconveniences to be found in the state of nature".[63]

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[60] *Id.* at 7-8.
[61] *Id.* at 73-74.
[62] *Id.* at 10.
[63] *Id.* at 74.

b. The state of great inconvenience leads man to forge an agreement or social contract to be bound under an authority.

The derivation of this next step is fairly straightforward. The constitution of government is the remedy for the great inconveniences found in the state of nature.

> To this strange doctrine, viz., That 'in the state of nature everyone has the executive power' of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and, on the other side, that ill-nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow; and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great where men may be judges in their own case; since 'tis easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it . . .[64]

Hence, like Hobbes, men will agree to yield certain of their rights, in particular their right to punish, and to transfer such right to an authority or government so as to escape the great inconveniences to be found in the state of nature.

> Thus, mankind, notwithstanding all the great inconveniences to be found in the state of nature, being but in an ill condition while they remain in it, are quickly driven into society. Hence it comes to pass, that we seldom find any number of men live any time together in this state. The inconveniences that they are in exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. 'Tis this makes them so willingly give up every one his single power of punishing to be exercised by such alone as shall be appointed to it amongst them, and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we

[64] *Id.* at 9-10.

> have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.[65]

The prudential argument of Locke justifying the authority of government is now complete. But his consent theory was not just prudential in character. It also provided a moral justification of authority, in that no authority can ever by justified without the consent of every single one of its subjects, unless, in other words, each subject willingly consents to be bound by that authority. A covenant is binding only to those who have consented,

> Men being, as has been said, by nature all free, equal, and independent, and no one can be put out of his estate and subjected to the political power of another without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have the right to act and conclude the rest.[66]

Locke, therefore, provided not just a prudential but a moral justification for the authority of government. It is the latter type of justification which is of importance today, since nearly every existing government claims to derive its power from the consent of the governed.

c. The manifestation of the consent to be governed

The only question remaining concerns how each man's consent is actually manifested, or what constitutes sufficient consent for an individual to be bound under a government,

> Every man being, as has been showed, naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent, it is to be considered what shall be understood to be a

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[65] *Id.* at 74.

[66] *Id.* at 56.

> sufficient declaration of a man's consent to make him subject to the laws of government.[67]

Like Hobbes, Locke maintained that this consent may be manifested in two ways, expressly and tacitly, which mirrors Hobbes' express consent and consent by inference. While there is no doubt concerning what constitutes express consent and that such consent perfectly binds, this is not so with respect to tacit consent,

> There is a common distinction of an express and tacit consent, which will concern our present case. No body doubts but an express consent of any man, entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds, i.e., how far anyone shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all.[68]

Locke answers by stating that either "possession or enjoyment of any part of the dominions of government" constitutes tacit consent,

> And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent, and is as far forth obliged to the obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of land to him and his heirs forever, or by a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as the very being of anyone within the territories of government.[69]

If Locke's answer is so, surely it is unsatisfactory. It would render any foreign visitor to any country to have tacitly manifested his consent to be bound by the laws of that country and to owe allegiance to it, no matter how unjust the law or despotic the government. Clearly, the foreigner has not expressed any consent to be bound by that government.

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[67] *Id.* at 70.
[68] *Id.* at 70-71.
[69] *Id.* at 71.

Locke anticipated this objection and made a distinction between an obligation to obey the law and owing allegiance to government, due to being a subject or member of that state.

> But submitting to the laws of any country, living quietly, and enjoying privileges and protection under them, makes not a man a member of that society; this is only a local protection and homage due to and from all those who, not being in a state of war, come within the territories belonging to any government, to all parts whereof the force of its laws extends. But this no more makes a man a member of that society, a perpetual subject of that commonwealth, than it would make a man a subject to another in whose family he found it convenient to abide for some time, though, whilst he continued in it, he were obliged to comply with the laws and submit to the government he found there. And thus we see that foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration as far forth as any denizen, yet do not thereby come to be subjects or members of that commonwealth. Nothing can make any man so but his actually entering into it by positive engagement and express promise and compact. This is that which I think, concerning the beginning of political societies, and that consent which makes anyone a member of that commonwealth.[70]

Locke, therefore, had different criteria for obligation and for allegiance to the state. Tacit consent is sufficient for any individual to have an obligation to obey the laws of the state. On the other hand, express consent is required for an individual to be a member or subject of that state, from whence the duty of allegiance arises. If so, problems still exist. With respect to obligation, the above argument about the foreign visitor still holds. Merely visiting the country does not amount to a tacit consent to obey unjust laws. As to allegiance, only a minority have expressly consented to be bound by government. Are we willing to conclude that most individuals living in a state do not have the duty of allegiance?

No one is doubting that consent gives rise to the duties of obligation and obedience to the state. The problem still remains as to when and how this consent is manifested, given that most people living in a country do not expressly manifest their consent. This question is of fundamental importance given the prevalence of consent theory as a justification for the authority of government. As mentioned

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[70] *Id.* at 72-73.

earlier, it is standard fare for any existing government to claim to derive its authority from the consent of its people. Without an adequate analysis of the standards which constitute consent, therefore, any government can claim to have met these standards without actually enjoying the people's consent. On the other hand, a government may actually enjoy the consent of its governed, and yet are in no position to establish its authority.

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