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*Absolute Democracy
or Indefeasible Right:
Hobbes Versus Locke*

FRANCIS EDWARD DEVINE

A PERVASIVE TENSION EXISTS within the American political tradition between democracy (the rule of the majority of citizens, restricted only by minimal standards of competence) and liberalism (the insistence that certain basic human freedoms are beyond abridgement). On the one hand, the claim of the majority to have its will carries great weight; on the other, the protest that certain rights, or liberties, are beyond the rightful purview of the majority's will is equally strongly asserted. Attempted reconciliation of the two arguments based on the claim that the liberties asserted are merely the conditions of democracy, may be pragmatically attractive, but merely obscures the fact that the majority's claim to rule as it wills is, in fact, abridged.¹ This tension exhibits itself at all degrees of reflectiveness within the tradition.

¹ Both 'democracy' and 'liberalism' have at various times been used to mean all things to all people. By 'democracy' I intend here only the generic meaning, rule by popular majority. Ranney and Kendall have observed that majority rule is an essential characteristic of all views of political democracy, and that even those who oppose absolute majority rule as a definition of political democracy accept it outside of areas of individual freedom. [Austin Ranney and Willmoore Kendall, "Democracy: Confusion and Agreement," *The Western Political Quarterly*, IV (September, 1951), 439.] By 'liberalism' I intend the Lockean tradition of individual freedoms which writers as diverse as David Braybrook, the Dolbeares, Louis Hartz, and Leo Strauss seem to agree is the common root of both American liberalism and conservatism. [David Braybrook, *Three Tests for Democracy* (New York: Random House, 1968), Chap. II. Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, Inc., 1955), Chap. I. Kenneth M. Dolbeare and Patricia Dolbeare, *American Ide-*

A recent poll graphically demonstrates the tension within public opinion. Only three of the ten liberties protected by the Bill of Rights received strong popular support. Majorities favored limiting five others.² Judicial review, in itself, is postulated on the possibility of overriding democratically elected legislatures in the interest of indefeasible rights. The Supreme Court has, moreover, even overruled the result of a popular initiative concurred in by about two-thirds of a state's voters, geographically distributed. In doing so, it employed the liberal argument that "One's right to life, liberty and property. . . and other fundamental rights may not be submitted to vote: they depend on the outcome of no election." "No plebiscite can legalize an unjust discrimination."³ Political scientists develop this basic division in the American political tradition in the debate between the proponents of judicial restraint and those of judicial activism. To the former group, judicial policy making is a "Platonic graft on the democratic process—a group of wise men insulated from the people have the task of injecting truth serum into the body politic, of acting as an institutional chaperon to ensure that the sovereign population and its elected representatives do not act unwisely."⁴ To the latter group, certain liberties are so important to human beings that their infringement cannot be countenanced.⁵ Hence the Constitution and especially the Bill of Rights

ologies (Chicago: Markham Publishing Co., 1971), pp. 50, 80-81, 209-210. Leo Strauss, *Liberalism Ancient and Modern* (New York: Basic Books, Inc., 1968), p. vii.]

As Hans Kelsen points out, the principle of democracy—the unrestricted power of the people—is not identical with, and is even partially antagonistic to, the principle of liberalism—the restriction of governmental power. [Hans Kelsen, "Foundations of Democracy," *Ethics*, LXVI (October, 1955), 3-4.] Liberal freedom is both separable from democracy and not necessarily incompatible with autocracy. [Douglas W. Rae, "Political Democracy as a Property of Political Institutions," *APSR*, LXV (March, 1971), 111, f.n. 1.]

² Columbia Broadcasting System, *60 Minutes*, II, xvi (April 14, 1970), pp. 16-20 (Transcript).

³ *Lucas v. Colorado General Assembly*, 377 U. S. 713 (1964), 736, and f.n. 29.

⁴ John P. Roche, *Courts and Rights* (New York: Random House, 1966), pp. 121-122.

⁵ Loren P. Beth, "Civil Liberties and the American Supreme Court," *Political Studies*, VI (June, 1948), 137. Hugo L. Black, "The Bill of Rights," *New York University Law Review*, XXXV (April, 1960), 879-881. Fred Rodell, "Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment," *Georgetown Law Journal*, XLVII (Spring, 1959), 486.

place these beyond the reach of the majority.⁶ On the one side, at each level, are the proponents of absolute democracy, on the other, those of infeasible rights. If the majority were to rule, rights viewed as fundamental in the American tradition would be, at least at times, abolished. One must choose between two elements of the American tradition, democracy or liberalism. There is no guarantee that the democratic decision will coincide with the liberal one.

Where, then, does this bifurcation of the American political tradition arise? The answer lies at its source, in the political philosophy of John Locke. A perusal of the major American documents of the pre-Revolutionary, Revolutionary, and immediate post-Revolutionary periods betrays the Lockean origins of both the tradition of consent, or representation, and that of inviolable liberties.⁷ Samuel Adams's "A Statement of the Rights of the Colonist" of 1772,⁸ the "Declaration of Independence" and the Pennsylvania Constitution of 1790—to pick examples that could be multiplied indefinitely—refer both to government by consent, and inviolable rights. What is it then in the Lockean-American tradition that serves as a basis for argument for some and leaves many more uncomfortable when rights override majority rule?

An indication of where the answer lies is given by the fact that Locke's political philosophy is based, with modifications—important modifications—upon the fundamental concepts of Thomas Hobbes.⁹

⁶ Loren P. Beth, "The Case for Judicial Protection of Civil Liberties," *The Journal of Politics*, XVII (February, 1955), 108, 109. Beth, "Civil Liberties," p. 138. Charles L. Black, Jr., *The People and the Court* (New York: Macmillan Co., 1960), pp. 103-104, 108-109. Hugo Black, "Bill of Rights," pp. 865, 867, 874-875, 879-880. Rodell, "Judicial Activists," p. 486.

⁷ See Hartz, *Liberal Tradition*, Chaps. I, II. Lee Cameron McDonald, *Western Political Theory* (New York: Harcourt, Brace & World, Inc., 1968), p. 326. Carl L. Becker, *The Declaration of Independence* (New York: Vintage Books, 1959), pp. 72-79.

⁸ Which explicitly cites Locke.

⁹ That this initial statement is justified seems to be admitted by even such a staunch opponent of attempts to link Locke with Hobbes as Richard Ashcraft. [See Richard Ashcraft, "Hobbes's Natural Man," *The Journal of Politics* XXXIII (November, 1971), 1111-1114.] As well as Leo Strauss's "Locke's Doctrine of Natural Law," *APSR* LII (June, 1958), 449 and C. B. Macpherson's *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), pp. 1-2, 3 which stress such a connection, the link in the basic concepts

Hobbes, in turn, provides the basis for an excellent defense of absolute democracy on modern principles.¹⁰ This is not to assert the implausibility that Hobbes is by preference a democrat; clearly he favors monarchy.¹¹ However, Hobbes is above all an absolutist.

of the two philosophers is noted in one form or another in Ernst Cassirer, *The Philosophy of the Enlightenment*, (Boston: Beacon Press, 1961), pp. 19-20, 59; Dante Germino, *Modern Western Political Thought* (Chicago: Rand McNally & Co., 1972), pp. 90, 116; Wilfrid Harrison, *Conflict and Compromise* (New York: The Free Press, 1965), p. 69; and C. E. Vaughn, *Studies in the History of Political Philosophy* (New York: Russell & Russell, 1960), I, 132.

¹⁰ This is noted, though not developed by Howard Dean [Howard E. Dean, *Judicial Review and Democracy* (New York: Random House, 1967), p. 48.]

Herbert McClosky, on the contrary uses 'Hobbesian' and 'democratic' as antithetical terms. His argument is that consent cannot be withdrawn in Hobbes, but the possibility of the withdrawal of consent is essential to democracy. [Herbert McClosky, "The Fallacy of Absolute Majority Rule," *The Journal of Politics*, XI (November, 1949), 644.] This merely demonstrates that Hobbes's sovereign, when democratic, is absolutely democratic. If consent could be withdrawn from a democratic sovereign, it would not be an absolute democratic sovereign.

McClosky's use of the term 'Hobbesian' in opposition to 'democratic' stems from his denial of the logical possibility of absolute majority rule. An absolute majority, McClosky argues, could dispose of the rules that have given it its absolute power in the first place; hence it is a self-contradictory concept. If by this McClosky merely means that the abdication of an element of absolute power destroys sovereignty, Hobbes would wholeheartedly agree; although he would deny that this involves any conceptual self-contradiction. [Thomas Hobbes, *Leviathan*, II, xviii; p. 168 (Molesworth).] But this is not all—probably not even primarily—what McClosky means.

The reason McClosky opposes 'Hobbesian' to 'democratic' can be pushed one step further. The legitimate power of a majority to rule in a democracy comes, says McClosky, from the need to establish a procedure to approximate closely the will of the community. [McClosky, p. 642.] Assuming that a representative assembly is being referred to here, Hobbes would insist that its function is to establish, not approximate, a will for the community. [See Francis Edward Devine, "Hobbes: The Theoretical Basis of Political Compromise," *Polity*, V (Fall, 1972), 64.] The reason that Hobbes can be viewed as the defender of absolute democracy, and yet McClosky oppose 'Hobbesian' to 'democratic,' is precisely that Hobbes's concept of legitimate authority requires absolute sovereignty, while McClosky's precludes it.

¹¹ Thomas Hobbes, *Leviathan*, II, xix; pp. 173-177. Page references for Hobbes's works are to the Molesworth edition, except, as noted below, in the case of the *Dialogue between a Philosopher and a Student of the Common Laws of England* where the critical edition by Joseph Cropsey is used.

Whatever the form of government, it must be absolute.¹² And democracy—however inexpedient it may be when compared to monarchy—is a legitimate form of government.¹³ Thus Hobbes's defense of the absolute sovereignty of a democracy constitutes an archetypical modern defense of absolute democracy.

The reason for the tension between democracy and liberalism in contemporary American politics can be understood through grasping: the Hobbesian defense of absolute democracy; the modifications made in Hobbes's position by Locke; and why Hobbes's view is sometimes—though not always—more appealing to the contemporary mind than Locke's. Once the reason for the tension is understood, the advocacy of rights, on much the same grounds that constitutes the defense of majority rule, emerges.

Laws, according to Hobbes are the commands and prohibitions of whoever has the sovereign power.¹⁴ No law made by a sovereign can be unjust.¹⁵ No law can abridge the legislative power of the sovereign.¹⁶ A crime is anything for which a penalty is ordained by the law. And the law's definition of criminality depends upon the opinion or interest of those who have the sovereign authority. The law may make anything—even things good in themselves—sins.¹⁷ No one may rightfully resist or even dispute what the sovereign does.¹⁸ Subjects should study the laws. But they should do so only to obey them, not to dispute them.¹⁹ The sovereign is absolute; the subject is without recourse.

A democratic sovereign differs from a monarchical one only in the absence of a union between a natural person and the political authority. Democratic sovereigns must command by a plurality of the commands of individuals. The individual commands taken alone have no effect.²⁰ In the decision of a democratic assembly, the ma-

¹² Hobbes, *Leviathan*, II, xviii; pp. 167, 168-169, xix; pp. 171, 173, 174. Thomas Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: The University of Chicago Press, 1971), 38; p. 74.

¹³ Hobbes, *Leviathan*, II, xix; pp. 171, 173-174, 177.

¹⁴ Hobbes, *Dialogue*, 30; p. 69. Hobbes, *Leviathan*, II xxvi; p. 251.

¹⁵ Hobbes, *Dialogue*, 30-32; pp. 69-71. Hobbes, *Leviathan*, II, xxx; p. 335.

¹⁶ Hobbes, *Dialogue*, 76; p. 94.

¹⁷ *Ibid.*, 46-47; pp. 78-79.

¹⁸ *Ibid.*, 39; p. 74.

¹⁹ *Ibid.*, 2; p. 54, 190; p. 158.

²⁰ *Ibid.*, 197; p. 162. Hobbes, *De Cive*, II, vii, 7; pp. 98-99.

majority casts individual votes sufficient to offset those of each member of the minority, and still has votes remaining uncontradicted to be the will of the assembly.²¹ In fact, the "deliberations" of an assembly closely parallel those of an individual as Hobbes describes them. In both cases, appetites and aversions towards some object alternate until some final appetite or aversion constitutes a will.²² With a democratic sovereign, the process, which would be internal in a monarch, is external. A democratic sovereign, once it has willed, is as absolute as any other.²³

Do no bounds, then, exist to the legislation of Hobbes's sovereign? He is blunt that sovereigns are not subject to any human law.²⁴ But what about other—perhaps higher—standards? At various times Hobbes considers several: justice, equity, goodness, the law of nature, and the law of God. Each he effectively rejects, ultimately on the same grounds. The reasonableness of a law is not the reason for obeying it.²⁵ Conversely, therefore, the unreasonableness of the law cannot constitute a good reason for not obeying it. Upon this principle rests the Hobbesian defense of absolute democracy.

Hobbes outwardly appears to concede a great deal to reason. Nothing can be law that is against reason. Reason is the law of life, the law of human nature. Common law is nothing but reason; law is the true philosophy.²⁶ The problem is that though the law itself may be as rational as mathematics, those propounding it err more.²⁷

²¹ Hobbes, *Leviathan*, I, xvi; p. 151.

²² *Ibid.*, I, vi; pp. 47-49.

²³ Theodore Lowi's statement, "Democracy is indeed a form of absolutism, but ours was fairly well contrived to be an absolutist government under the strong control of consent-building prior to taking authoritative action in law," seems remarkably similar. [Theodore J. Lowi, *The End of Liberalism* (New York: W. W. Norton & Co., Inc., 1969), p. 293.] The similarity grows when one learns that laws are appropriately the result of bargaining on the rules governing the society—at least to the extent of demanding that the authority state some rule. [*Ibid.*, p. 147.] Laws deliberately set some goals and values above others. [*Ibid.*, p. 126.] Until this is done, considerations of justice are irrelevant. Only when an actor has made a deliberate, conscious attempt to derive his action from a general rule governing a class of acts, can considerations of justice be made, though the rule may be criticized as good or bad on the personal level. [*Ibid.*, p. 290.]

²⁴ Hobbes, *Dialogue*, 192; p. 159.

²⁵ *Ibid.*, 3-5; pp. 54-55. 41; p. 75.

²⁶ *Ibid.*, 2-3; p. 54. 9; p. 58.

²⁷ *Ibid.*, 1; p. 53.

And even mathematics provides no certainty of the correctness of a conclusion; neither consensus nor expertise guarantees correctness.²⁸ Everyone is subject to error. So even the wise and diligent will differ.²⁹ Many individuals are able judges of reasonableness. If reasonableness were the basis of law, they could both make and abrogate law for themselves. This would be to say that they are not bound by the law, not subject to its penalty.³⁰ If reason were the basis of law, certainty of punishment for its violation would be destroyed.

Ironically, Hobbes says certainty of punishment rests on the difference between individual reasons. Once this difference is accepted as a given, the authority to define punishments—to make laws—can be given to anyone. When such a recipient's reason has defined punishment, right reason has done so. Once the reason of the authorized person—or group—is publicized, everyone can know what actions are against the law of reason. The possessor of the authority to define punishments, whether an individual or an assembly, is the sovereign.³¹ The only universal reason in any nation is the sovereign's.³² The authority of the sovereign's reason is to all other reasons like trumps in cards, analogizes Hobbes. The common law is one with the law of reason when both refer to the sovereign's reason. But authority, not wisdom, makes laws.³³

Why should anyone authorize another to define right reason for him? Because—Hobbes continues his analogy with card playing—in matters of government, when nothing else is turned up, clubs are trumps.³⁴ The hope of peace among individuals rests in a common sovereign power able to punish them. Otherwise—like nations—they will attack each other whenever it appears advantageous.³⁵ Attack will seem advantageous whenever they have cause to fear another.³⁶ The one exception would be if the feared could give

²⁸ Hobbes, *Leviathan*, I, v; pp. 30-31.

²⁹ Hobbes, *Dialogue*, 127; p. 124.

³⁰ *Ibid.*, 26; p. 67. 41; p. 75. 157-158; p. 140. Hobbes, *Leviathan*, II, xxvii; pp. 283-284.

³¹ Hobbes, *Dialogue*, 158; pp. 140-141. Hobbes, *Leviathan*, II, xxvi; pp. 256-257.

³² Hobbes, *Dialogue*, 26-27; p. 67.

³³ *Ibid.*, 4-5; p. 55. 16-17; p. 62.

³⁴ *Ibid.*, 158; p. 140.

³⁵ *Ibid.*, 7-8; p. 57.

³⁶ *Ibid.*, 192; p. 159. Hobbes, *Leviathan*, I, xiii; pp. 111-112.

sufficient guarantee that he would not attack. This, however, Hobbes brands "utterly impossible."³⁷ To avoid this state of war, each assents to the sovereign, and to the law defined by the sovereign as right reason.³⁸ Anyone who fails to assent remains in the state of war, at his peril.³⁹ Thus Hobbes insists that the subjects are the authors of all the judgments of the sovereign.⁴⁰ By the social contract everyone submits his will and judgment to that of the sovereign; one gives up his right to self-government and instead authorizes the actions of the sovereign.⁴¹ Individual reason must be sacrificed to authority for the sake of preservation.

With this denial of the objective rationality of law, coincides the removal of any standard by which the content of the law can be criticized. One type of claim to restrict the sovereign is, thus eliminated. Not only can no law made by a sovereign be unjust, the definition of law cannot include the notion of justice, because there is no justice or injustice before the law is made. Laws precede justice, and law-makers, sovereigns, precede laws.⁴² Justice is giving everyone his own. But without law everyone has the right to everything—even the bodies of others. This results in war. So some distribution must be decided upon to tell each what is his own, and—more to the point—what is another's. This distribution is justice. It is accomplished by means of law—law living and armed.⁴³ Differences among private individuals about what constitutes justice is an important reason why a sovereign who makes laws and punishes offenses is necessary.⁴⁴ Ownership, upon which depends the meaning of justice, depends in turn upon the laws. Laws are the products of the sovereign's reason. Any attempt to criticize the sovereign's justice is unfounded because his reason is accepted as right reason. Justice, therefore, can never serve as a restriction upon the sovereign's authority.

Hobbes concedes that iniquity—which he reduces to inequity—may be found in the law. And Hobbes, on the surface, admits a

³⁷ Hobbes, *Dialogue*, 192; p. 159.

³⁸ *Ibid.*, 67; p. 89. 190; p. 158.

³⁹ Hobbes, *Leviathan*, II, xviii; pp. 162-163.

⁴⁰ *Ibid.*, p. 163. See Devine, "Hobbes" pp. 60-63.

⁴¹ Hobbes, *Leviathan*, II, xvii; pp. 157-158.

⁴² Hobbes, *Dialogue*, 29-31; pp. 69-70. 35-36; pp. 72-73.

⁴³ *Ibid.*, 9-11; pp. 58-59. 36-37; pp. 72-73.

⁴⁴ Hobbes, *Leviathan*, II, xxvi; p. 253.

sovereign is bound by the law of equity. However, iniquity—or inequity—is nothing more than obedience to the law of reason.⁴⁵ Equity is not the reason that corrects the law, because then all reasons would become pretexts for disobedience.⁴⁶ No one can amend the law except the one who makes it. Hence, Hobbes insists that equity does not amend the law, but only erroneous judgments of what the law is.⁴⁷ Since the sovereign determines right reason for the society, equity cannot serve as a basis to restrict the authority of the sovereign.

Neither can the more contemporary meaning of iniquity, wickedness, serve as a standard for criticizing law and thereby restricting the sovereign. Hobbes, it is true, speaks of good laws, as distinguished from just laws—a redundant term. A good law is needful, for the good of the people, and perspicuous. However, what is for the good of the sovereign is needful, and for the good of the people. Significantly, Hobbes does not oppose to a good law a bad or evil law.⁴⁸ Evil is simply a name for the object of an individual's aversion outside of society and the sovereign's in society.⁴⁹ In fact, disputes about good and evil—i.e., about what is desirable—are the cause of the conflict that makes a sovereign necessary.⁵⁰ Since the sovereign defines evil, no claim based on it can be used to criticize his law, or restrict his authority. On the contrary, the law is the rule of good and evil for the society.⁵¹ Through hearing some things referred to in odious terms, the vulgar come to think of them as evil in themselves. To believe criminal acts evil in themselves is, precisely, a vulgar error.⁵²

Hobbes also eliminates restrictions on the sovereign based on the law of nature. The laws of nature, he argues, are not properly laws at all. They are conclusions or theorems—conclusions or theorems about what conduces to self-preservation.⁵³ In fact, Hobbes calls

⁴⁵ Hobbes, *Dialogue*, 31-32; p. 70.

⁴⁶ *Ibid.*, 3; pp. 54-55.

⁴⁷ *Ibid.*, 86-87; p. 101.

⁴⁸ Hobbes, *Leviathan*, II, xxx; pp. 335-336.

⁴⁹ *Ibid.*, I, vi; p. 41. I, xv; p. 146. For a discussion of various objections to this assertion see Devine, "Hobbes," p. 63, f.n. 31.

⁵⁰ Hobbes, *Leviathan*, I, xv; p. 146. II, xvii; pp. 156-157.

⁵¹ *Ibid.*, II, xviii; p. 165. II, xxix; pp. 310-311.

⁵² Hobbes, *Dialogue*, 46-48; p. 78-79. Hobbes, *Leviathan*, I, xi; p. 91. I, xiii; p. 114.

⁵³ Hobbes, *Leviathan*, I, xvi; p. 147.

the same set of theorems the law of reason.⁵⁴ Again, since the sovereign decides all controversies and makes all interpretations concerning natural law—or since his reason is the standard of right reason—appeals to natural law cannot be used to restrict the authority of the sovereign. Natural law is reduced to civil law.⁵⁵

⁵⁴ Hobbes, *Dialogue*, 9-10; p. 58.

⁵⁵ Hobbes, *Leviathan*, II, xviii; pp. 165-166. II, xxvi; pp. 253-254, 262-263. For a response to the Warrender/Taylor, deontological objection to this interpretation of Hobbes on natural law, see Devine, "Hobbes," pp. 67-68, f.n. 60. See also Harvey C. Mansfield, Jr. "Hobbes and the Science of Indirect Government," *APSR* LXV (March, 1971), 103, f.n.21.

Two attempts to modify the deontological position should be noted here. Both are less plausible than the original Warrender/Taylor version.

Stanley Moore's attempt to 'secularize' the deontological position sets up and simultaneously demolishes a straw man. [Stanley Moore, "Hobbes on Obligation, Moral and Political," Part I *Journal of the History of Philosophy*, IX (January, 1971). Part II, *Ibid.*, X (January, 1972).] According to Moore, Hobbes's moral theory rests on two disguised moral axioms, rule egotism and equal treatment.

Moore concedes that Hobbes argues for his 'rule egotism' as merely prudential in the *Leviathan* but brands the argument inadequate. Rule egotism derived from prudence would be a circular argument. Therefore, he concludes, it must be an axiom of Hobbes's moral theory (Moore, I, 48, 50-51). Moore's circle is more evident than Hobbes's. Converting Hobbes's prudential laws of nature into rule egotism—with its implication of moral duty—Moore's argument runs: Hobbes advances a theory of moral duty; his argument for a theory of prudence is inadequate to support a theory of moral duty; therefore, Hobbes must be introducing the axioms of a theory of moral duty in disguise, in order to have a theory of moral duty.

The second disguised axiom Moore finds underlying Hobbes's moral theory is the principle of equal treatment. Moore judges Hobbes's argument for this as a matter of prudence inadequate because of the possibility of unequal power to harm. [Moore, I, 53-55.] Hobbes himself answers this objection. Such inequalities to harm as do exist are inadequate to preserve their possessor from violent death. [Hobbes, *Leviathan*, I, xiii; pp. 110-111.] So to suppose that the principle of equal treatment is a disguised axiom of a moral theory is unnecessary after all.

Moore's conclusion is that given the theory of moral duties which Hobbes has—supposedly—constructed, the duties of men conflict with the duties of citizens in a commonwealth by acquisition. [Moore, I, 46.] The fear of all cannot be equated with the fear of one. And the fear of all is assumed in Hobbes's analysis of moral obligation. The fear of one may produce coercion but not obligation. [Moore, II, 36.] Either Hobbes is very confused about the place of fear in his philosophy, or he did not intend to produce the kind of theory of moral obligation Moore attributes to him.

The other attempt to modify the deontological interpretation of Hobbes is

Finally, Hobbes nominally concedes that the sovereign is subject to both the unwritten and written laws of God. However, the unwritten law of God is the law of reason and identical with equity. His objection recurs, "Would you have every Man to every other Man alledge for Law his own particular Reason?" The only universal reason agreed upon by any nation is the reason of the sovereign.⁵⁶ As for the written law of God, the sovereign both decides what God has said, and authorizes the preaching of religious doctrines.⁵⁷

Thus, by his insistence that reason is subjective and can only be made to function as other than subjective through the stipulation of a sovereign's reason as valid, Hobbes removes any standard for criticizing the content of laws of the sovereign. With no standard by which the sovereign's laws can be criticized for content they seem absolute, beyond challenge.

But perhaps there are grounds for challenging the validity of a sovereign's laws other than a standard by which their content can be criticized. Hobbes has stressed a modern meaning of the peculiarly ambiguous word 'right.' Right he explains is distinct from law. A law is an obligation; a right is a liberty.⁵⁸ If there are rights that can stand against laws, then the sovereign may be restricted in the scope of his authority to legislate, regardless of the merits of the content of his legislation.

Hobbes starts from an assumption of absolute individual rights. By natural right everyone is free to do anything he thinks fit for his preservation. The problem with the resulting absolute right of all is that everyone's right to anything—even life—is insecure. Ab-

made in Frederick A. Olafson's, "Thomas Hobbes and the Modern Theory of Natural Law," *Journal of the History of Philosophy*, IV (January, 1966). This differs from the standard version of the position only in that it concedes that the natural law produces no substantive moral guidance. Natural laws—though matters of duty not prudence—are merely procedural. A sovereign is necessary to give them substantive content. [Olafson, pp. 20-22.] That such councils as: seek peace; be content with as much liberty as others; perform covenants; pardon offenses, etc., are not substantive is difficult to see. True, they deal with actions, and any action may be viewed as a procedure, but so do most—if not all—councils. The deontological position gains little from this distinction without a difference.

⁵⁶ Hobbes, *Dialogue*, 26-27; p. 67.

⁵⁷ *Ibid.*, 160; p. 141. Hobbes, *Leviathan*, III, xxxiii; p. 366.

⁵⁸ Hobbes, *Dialogue*, 37; p. 73. Hobbes, *Leviathan*, I, xiv; p. 117.

solute rights mean all things are common. Community of things causes "Incroachment, Envy, Slaughter, and continual war." Hence comes Hobbes's rule of reason to seek peace. The means to peace is justice—as Hobbes defines it. The law necessary to achieve justice involves the enthronment of the sovereign's reason as definitive. So, for Hobbes, individuals, starting from absolute rights, end absolutely subject to their sovereign. The sovereign cannot be compelled to anything by the subjects.⁵⁹ The sovereign has all rights; all laws are in his power. "No Man may presume to dispute of what he does, much less to resist him."⁶⁰

Hobbes comments individually on many of the rights that might be advanced against the claim of the sovereign to absolute rule. He reduces any right to security of property against one's sovereign to mere reluctance to have one's wishes crossed. But such a wish as this is untenable. To have security of property against the world, one must pay the bill to his sovereign. The sovereign judges the bill.⁶¹ However, the sovereign's claim on the property of the subjects is not merely this pragmatic one. Only because of the sovereign does anyone possess any property in a way that deprives everyone else of an equal right to it. No individual, then, can claim any property except on title from the sovereign. To deny the sovereign anything necessary to sustain his sovereignty destroys the very proprietorship it pretends to protect.⁶² And, of course, the sovereign's reason determines what is necessary, not the subject's. This leads Hobbes to a twofold classification of property. First, since the sovereign makes the laws distributing property—i.e., establishing justice—his proprietorship is absolute. It excludes the rights of all other members of the society. Second, since the subjects hold their property from the distribution of the sovereign, their proprietorship excludes the rights of other subjects, but not of the sovereign.⁶³

True, the justification for a sovereign's invading property is qualified by the common good, but it is the common good as judged by the sovereign, not by the subject. The result is that subjects have no claim for security of property against their sovereign.

If anything, Hobbes is more forceful about the absence of a sub-

⁵⁹ Hobbes, *Dialogue*, 28; p. 68.

⁶⁰ *Ibid.*, 39; p. 74.

⁶¹ *Ibid.*, 24; pp. 65-66.

⁶² *Ibid.*, 36-37; p. 73.

⁶³ *Ibid.*, 9-10; p. 58. 199-200; p. 163.

ject's right to liberty against his sovereign. One's right is defined as the liberty left him by the law to do anything which the law does not forbid, and to avoid anything which the law does not command.⁶⁴ The liberty of subjects, therefore, consists in only those actions which the sovereign has omitted to regulate.⁶⁵ Liberty thus exists only in the absence of law. The law of the sovereign can abridge any liberty. Hence, a right to any liberty, or to liberty in general, can never be advanced as a restraint on the sovereign.

Even in the realm of opinion Hobbes's sovereign is absolute. The sovereign, of course, decides what accords with right reason. He is, therefore, the judge of what opinion and doctrines are compatible with peace.⁶⁶ However, no area of opinion is unrelated to the peace.⁶⁷ On this ground the sovereign both authorizes the teaching or publication of opinions, and defines heresy. An erroneous opinion is just that, unless it is against a law; then it becomes a heresy, and is punishable by the sovereign.⁶⁸ Hobbes's discussion of treason illustrates that, for him, a purely mental process can be criminal, while acknowledging that it must be expressed in words to provide the evidence to prosecute it.⁶⁹ He stresses, though, the distinction between the crime itself and the evidence of it. There are no rights against the sovereign in the realm of opinion.

Only with regard to the right to life is there ever any concession by Hobbes to the rights of subjects. And even here the concession is formulated so as to maintain intact the absolute right of the sovereign. The main argument given, Hobbes notes, against the absolute right of the sovereign to make laws according to his own reason is the fear of the subjects that "he may take away from us, not only our Lands, Goods, and Liberties, but our Lives also if he will." Hobbes concedes that this is true; he may indeed. His response is not to contradict the conclusion, but to brand the fear as needless in practice. A sovereign may, but will not, attack the lives of the subjects; to do so is unprofitable. Sovereigns love their own

⁶⁴ *Ibid.*, 37; p. 73.

⁶⁵ Hobbes, *Leviathan*, II, xxi; pp. 198-199.

⁶⁶ *Ibid.*, II, xviii; pp. 164-165.

⁶⁷ Hobbes, *De Cive*, VI, xi, f.n.; pp. 78-79.

⁶⁸ Hobbes, *Dialogue*, 124; p. 122. 131-133; pp. 126-127. 140; p. 131. 159-160; p. 141. Hobbes *Leviathan*, II, xviii; pp. 164-165.

⁶⁹ Hobbes, *Dialogue*, 96-100; pp. 107-109.

power; it depends on their subjects.⁷⁰ However no liberty, or right, of the subject abolishes or limits the sovereign's power of life and death.⁷¹

Without renouncing the sovereign's absolute right of life and death, Hobbes concedes three cases involving life and death where a subject may rightly disobey his sovereign, and one more where he may rightly resist him. A subject has the liberty to disobey a sovereign's command to directly or indirectly kill or wound himself, to confess a crime when interrogated by the sovereign, or to kill another.⁷² This last right gives Hobbes the most discomfort, for he explicitly notes that the sovereign may punish such a refusal with death. Indeed he may have changed his mind about conceding this right altogether.⁷³ The one case where one may actively resist the sovereign is when—justly or not—one is sentenced to death.⁷⁴ The common form of each of these rights has two sides: the absolute right of life and death of the sovereign is retained intact, but a counter-right is conceded to the subject. The absolute authority of the sovereign is never limited. One may in these few cases disobey or resist, but never can a claim be made that sovereigns have exceeded their authority. Such rights as the subjects have do not limit the sovereign; they merely create a conflict of rights. In essence, they are a return to the state of war.

Ultimately, Hobbes's denial of rights that restrict the authority of the sovereign may be traced to the denial of the objectivity—or at least objective knowability—of reason. The property right cannot stand against the sovereign because in the absence of rational knowledge of what constitutes just distribution, the sovereign's opinion prevails. The right to liberty cannot stand against the sovereign because the decision of what liberties are to be abridged is—in the absence of any rational standard—the sovereign's. That the right to opinion cannot stand against the sovereign is little more than to rephrase the position that the sovereign's reason is, by stipulation, right reason. The right to life does not abridge the sovereign's claim to be the absolute judge of life and death because the sovereign

⁷⁰ *Ibid.*, 41-42; p. 76.

⁷¹ Hobbes, *Leviathan*, II, xxi, pp. 199-201.

⁷² *Ibid.*, II, xxi; pp. 204-205.

⁷³ Hobbes, *Dialogue*, 201; p. 164.

⁷⁴ Hobbes, *Leviathan*, II, xxi; pp. 205-206.

possesses the power to define punishments in the absence of any other standard of right reason.⁷⁵

So Hobbes's sovereign is absolute. No standard exists by which the content of its law can be criticized. No rights exist by which the scope of its authority can be claimed to be restricted. If the sovereign is democratic, it makes its decision by plurality (as it does if it is aristocratic). In spite of its manner of decision making, a democratic sovereign is as absolute as any other. The voice of the people need not be the voice of God to be absolute. With Hobbes's argument, that the voice of the people is the voice of the sovereign is enough. Hobbes has provided the modern case for absolute democracy: a denial of any rational standard to judge the content of law, and a denial—based on the same uncertainty of reason—of rights that might limit the scope of authority of the sovereign people to make laws.

Nevertheless Hobbes's concession to the rights of subjects, small, carefully constructed, and reluctantly given as it is, indicates remotely how Locke, using the same modern concepts can argue for rights which restrain the authority of the sovereign.

Locke's basic concept of law does not differ significantly from Hobbes's. The right to make laws and punish their violation is the essence of political power.⁷⁶ Private judgment that a law is bad does not take away one's obligation to the law.⁷⁷ Locke curtly responds to one who had argued that persecuting laws of the French king were not real laws, "You were best to say so on the other side of the water. It is sure the punishments were punishments, and the dragooning was dragooning." Locke breaks with Hobbes, however,

⁷⁵ Hobbes's concession to subjects' rights rests on what he takes to be a psychological fact, that everyone aims at his own preservation. This aim he asserts is natural and necessary. He even suggests that suicide is a sign of insanity. [Hobbes, *Dialogue*, 113; pp. 116-117.] The conflict between the rights of sovereign and subject, thus rests on a fact about human nature being asserted as objectively knowable by reason. Such an assertion contradicts not only Hobbes's general view on the certainty of rational knowledge, but the nominalism by which he denies that there are natures. [Hobbes, *Leviathan*, I, iv; p. 21.] For more extensive development of this point see Devine, "Hobbes", p. 66.

⁷⁶ John Locke, *The Second Treatise of Civil Government*, I, 3; p. 339. XV, 171; p. 441. John Locke, *A Letter Concerning Toleration*, p. 23. Page references for Locke are to *The Works of John Locke*, (London, 1823) except, as noted, for *An Essay Concerning Human Understanding*.

⁷⁷ Locke, *A Letter*, p. 43.

by going on to insist that the fact that they are laws does not excuse them.⁷⁸ Why does it not; does Locke admit some standard governing the content of law that Hobbes denies?

Locke agrees with Hobbes that reasonableness does not make law.⁷⁹ If law is to depend on right reason, the magistrate must be made the judge of what is right reason.⁸⁰ This for Locke is no more than to authorize him to legislate his own opinion, producing the—for Locke—absurd consequence that truth varies with country.⁸¹ Individuals may judge truth for themselves but they have no authority to do so for others.⁸² This equality of opinion depends, not on the claim of any opinion to truth, but on the fact that no one can avoid being governed by his own present judgment of the truth.⁸³ Arguments about such matters of opinion may convince people of false positions as well as of true.⁸⁴ The individual of common discretion who might be supposed to sort out true from false opinion is, himself, not identifiable.⁸⁵ Law is far from depending on reason. A law is a necessary precondition for understanding duty; a law in turn cannot be supposed without a lawmaker and punishment.⁸⁶ Consequently, philosophers cannot create obligation. They are not lawmakers; their views have no authority.⁸⁷ In the state of nature there is no established known law, received by all as a standard of right and wrong.⁸⁸ In countries where the breach of a rule is not punished, it is no law.⁸⁹

⁷⁸ John Locke, *A Third Letter for Toleration*, p. 530.

⁷⁹ Locke, *Second Treatise*, VI, 54; pp. 368-369. John Locke, *A Second Letter Concerning Toleration*, pp. 82, 112-113. Locke, *Third Letter*, pp. 206-207, 214, 218.

⁸⁰ Locke, *Third Letter*, p. 428.

⁸¹ Locke, *Second Letter*, pp. 89, 90, 100. John Locke, *A Fourth Letter for Toleration*, pp. 560-562, 568.

⁸² Locke, *Third Letter*, pp. 174, 175, 419, 420.

⁸³ Locke, *Third Letter*, p. 334.

⁸⁴ *Ibid.*, pp. 375-376.

⁸⁵ Locke, *Second Letter*, pp. 105-106. Locke, *Third Letter*, p. 271.

⁸⁶ John Locke, *An Essay Concerning Human Understanding*, I, ii, 12; vol. I, p. 76. Volume and page reference for *Human Understanding* are to the critical edition ed. Alexander Campbell Fraser, (New York: Dover Publications, Inc., 1959).

⁸⁷ John Locke, *The Reasonableness of Christianity as Delivered in the Scriptures*, p. 141.

⁸⁸ Locke, *Second Treatise*, IX, 124; p. 412. XI, 136; p. 419.

⁸⁹ Locke, *Human Understanding*, I, ii, 12; I, 76.

Locke even takes a tentative step in the direction of giving his lawmaker control over the process of moral reasoning which might serve as a legal standard. The lawmaker, he indicates, establishes the essences of moral species, or categories, by defining moral names.⁹⁰ This ability of Locke's lawmaker to control the content of the complex idea referred to by a moral name would, if maintained, give him potential power over moral reasoning comparable with Hobbes's sovereign. Moral knowledge, Locke insists, can be as certain as mathematics. The reason for this degree of certainty is that, like mathematics, moral reasoning is divorced from considerations of substances. Moral propositions simply relate complex ideas which have no substantive referent in reality.⁹¹ These complex ideas are made up of simple ideas which can be associated, or disassociated, at will.⁹² Once a complex moral idea is formulated, a name is attached to it. Moral propositions can be reasoned upon exactly, precisely because they depend on only the proper linking of such ideas.⁹³ Since moral ideas are composed of simple ideas which are not linked by foundation on a substance in reality, one is at liberty in associating simple ideas into a complex moral idea.⁹⁴ Thus moral ideas may differ between individuals even if the same name is attached to them.⁹⁵ Hence the ability of a lawmaker to establish the essence of a moral species by defining its name.⁹⁶ With control over the establishment of moral species Locke's lawmaker seems to approach a position to control moral reasoning.

However, Locke qualifies his optimism over the likelihood of the success of this quasi-mathematical moral reasoning. With this qualification, his lawmaker loses his advantage in moral discourse. Because of the complexity of a moral idea, the mind cannot easily retain the precise combination of simple ideas which constitute it. This introduces an element of uncertainty into considerations of the correspondences, agreements, and disagreements of moral ideas. Special uncertainty arises when a moral proposition must be judged

⁹⁰ *Ibid.*, IV, iv, 10; II, 235.

⁹¹ *Ibid.*, III, xi, 16; II, 156-157. IV, iii, 18; II, 208-209. IV, iv, 7; II, 232. IV, xii, 8; II, 347.

⁹² *Ibid.*, IV, iv, 5; II, 230-231. IV, iv, 9; II, 234.

⁹³ *Ibid.*, III, xi, 16-17; II, 156-158. IV, iii, 18; II, 208-209.

⁹⁴ *Ibid.*, IV, iv, 5; II, 230-231. IV, iv, 9; II, 234. IV, iv, 12; II, 236-237. IV, v, 8; II, 248-249.

⁹⁵ *Ibid.*, IV, iii, 19; II, 209.

⁹⁶ *Ibid.*, IV, iv, 10; II, 235.

by a long deduction where several complex ideas must mediate the demonstration of agreement between the ideas in question.⁹⁷ This element of uncertainty introduces the possibility of partisanship which prevents truth and falsity from having a fair play.⁹⁸

The lack of certainty in moral discussion spreads. Whatever is presumed true without a perception of its certain agreement or disagreement is judgment, or opinion, not knowledge.⁹⁹ The highest assurance of an opinion does not constitute knowledge.¹⁰⁰ The teachings of philosophers Locke terms opinions; they may be accepted or rejected not only on principle, but even as interest, passion, or humor dictate.¹⁰¹ One must be guided by his own judgment.¹⁰² Individuals, therefore, may judge truth for themselves, but not for others.¹⁰³ Most hold their views on the basis of judgment not knowledge. And they are strongly motivated by the implication that they have been ignorant or foolish if they renounce their previous opinion upon the presentation of an argument they cannot answer.¹⁰⁴ Arguments, after all, can convince one of a falsity. Moreover, each individual is the judge of what constitutes sufficient

⁹⁷ *Ibid.*, IV, iii, 19; II, 210. Locke, *Reasonableness of Christianity*, p. 139.

⁹⁸ Locke, *Human Understanding*, IV, iii, 20; II, 211.

John Yolton notes that Locke never did write a deductive moral treatise and puzzles over why. [John W. Yolton, *Locke and the Compass of Human Understanding* (Cambridge: Cambridge University Press, 1970), pp. 169-170.] Locke's failure to do so in the light of his ultimate pessimism about the possibility of success is not puzzling. Sterling Lamprecht points out, moreover, that such a deductive morality would not explain obligation, and implies that Locke senses its inadequacy. [Sterling Power Lamprecht, *The Moral and Political Philosophy of John Locke* (New York: Russell & Russell, Inc., 1962), pp. 78-80, 85.]

John Dunn correctly observes Locke's epistemological relativity, but fails to see the extent to which this leads him into skepticism on matters of opinion. He, moreover,—strangely—fails to see that the same individualist epistemology is of very direct political relevance for Hobbes, and hence the similarity of Locke to Hobbes. [John Dunn, "The Politics of John Locke in England and America," in *John Locke, Problems and Perspectives*, ed. John W. Yolton, (Cambridge: Cambridge University Press, 1969), p. 56.]

⁹⁹ Locke, *Human Understanding*, IV, ii, 14; II, 185. IV, xiv, 4; II, 362. John Locke, *Elements of Natural Philosophy*, XII; p. 330.

¹⁰⁰ Locke, *Third Letter*, pp. 144-145. Locke, *Fourth Letter*, p. 558.

¹⁰¹ Locke, *Reasonableness of Christianity*, p. 141.

¹⁰² Locke, *Third Letter*, p. 334.

¹⁰³ *Ibid.*, p. 174. Locke, *A Letter*, pp. 41-42.

¹⁰⁴ Locke, *Human Understanding*, IV, xvi, 4; II, 371-372.

evidence for his judgment.¹⁰⁵ In fact, on this ground, Locke—in a fashion not very different from Hobbes—calls into question the certainty of even mathematical demonstration.¹⁰⁶ Thus reasoned argument on the moral content of law is reduced, for Locke, to opinion and disappears as a standard for judging law.

As with Hobbes, the unreliability of reason as a legal standard leads Locke to turn to authority based on consent for the establishment of law. In the state of nature, the individual has the right to judge offenses for himself and punish them. He punishes them as he “in his opinion” judges they deserve.¹⁰⁷ This punishment extends even to the life of supposed criminals.¹⁰⁸ Moreover, the threat of force against oneself establishes the right of war—the right to kill the threatening assailant.¹⁰⁹ Thus a difference of opinion of fact or guilt creates a situation paralleled to Hobbes’s state of war, complete even to the right of preemptive attack. The state of nature is indeed, as Locke sees it, an “ill condition.” The inconveniences—as he, with classic understatement, terms them—of being exposed to the irregular and uncertain exercise of the right each person has to punish offenses as he sees fit leads—as in Hobbes—to a transfer of this inconvenient right.¹¹⁰ The individual no longer judges what is fit for his preservation and what accords with his right to punish

¹⁰⁵ Locke, *Third Letter*, pp. 297, 299, 400, 402.

For these reasons Selinger’s picture of a group of men, more rational than average, distinguishing true interpretations of natural law from false and then trying to persuade others is untenable. [M. Selinger, “Locke’s Natural Law and the Foundations of Politics,” *Journal of the History of Ideas*, XXXIV (July, 1963), 343, 352.] The same problem exists for Yolton’s reasonable men who save the state of nature from being one of war. [John W. Yolton, “Locke on the Law of Nature,” *The Philosophical Review*, LXVII (October, 1958), 495.]

¹⁰⁶ Locke, *Third Letter*, pp. 425, 537.

¹⁰⁷ Locke, *Second Treatise*, VII, 87; pp. 387-388. IX, 128; p. 413.

¹⁰⁸ *Ibid.*, XV, 172; p. 442.

¹⁰⁹ *Ibid.*, III, 16-19; pp. 347-349.

Hence Ashcraft’s stress on declared war, as opposed to mistakes of judgment, is without pertinence. [Richard Ashcraft, “Locke’s State of Nature,” *APSR*, XLII, 2, (September, 1968), 904.] Arguments for the breakdown of Locke’s state of nature into a state of war have been given by authors as divergent as Leo Strauss [*Natural Right and History*, (Chicago: The University of Chicago Press, 1963), pp. 224-225,] and C. B. Macpherson, [*Political Theory*, pp. 240-241.]

¹¹⁰ Locke, *Second Treatise*, III, 21; p. 350. VII, 87; p. 388. VII, 90; p. 390.

in pursuit of it.¹¹¹ The society now establishes by law what is necessary for preservation, judges offenses against its laws, and executes punishment.¹¹² As in any voluntary society, the making of laws belongs to the society or those authorized by it.¹¹³ The remedy to attack by other citizens is now the law.¹¹⁴

The converse of this view of the transfer of authority is that a magistrate needs a commission or grant of authority to do even what is useful.¹¹⁵ Authorization is necessary for any use of force.¹¹⁶ The power of society becomes identical with the authority of those appointed to use it.¹¹⁷ The validity of laws for Locke—as for Hobbes—comes to rest, not on reason, but on consent.¹¹⁸ Unlike Hobbes, however, Locke's consent is not a blanket consent to whatever the lawmaker pronounces. There are limitations to the lawmaker's power. But how are these justified in the face of Hobbes's claim that anything short of absolute sovereignty is no sovereignty?

In the same way that Hobbes had done, Locke eliminates the traditional standards by which the content of law could be judged when he divorces law from reason.¹¹⁹ An obvious possible standard by which the content of law could be judged—one which Hobbes considered and rejected—is virtue, and especially justice. Virtue, for Locke, is the product of law, rather than its standard. However, the law which defines virtue is not civil law, but the law of opinion. Virtue is whatever contributes to one's reputation in a given country. The measure of virtue is the praise, or approbation attached to actions by the tacit consent of the society. What is virtue in one country is not in another. Thus, "Virtue is everywhere, that which is thought praiseworthy; and nothing else but that which has the

¹¹¹ *Ibid.*, VII, 88, pp. 388-389. IX, 129-130; pp. 413-414.

¹¹² *Ibid.*, VII, 87; 388. XIX, 212; p. 405.

¹¹³ Locke, *A Letter*, pp. 13-14.

¹¹⁴ *Ibid.*, pp. 42-43.

¹¹⁵ Locke, *Second Letter*, pp. 80, 82, 112-113, 117-118, 122.

¹¹⁶ Locke, *Third Letter*, pp. 206-207, 212, 214, 217-218, 224, 225, 303-304.

¹¹⁷ *Ibid.*, pp. 217-218.

¹¹⁸ Locke, *Second Treatise*, VIII, 95-99; pp. 394-396. VIII, 106; p. 400. VIII, 116-122; pp. 407-411. XVI, 192; p. 453.

¹¹⁹ Stewart Edward recognizes that this is true for Hobbes and seems to imply that what is true of Hobbes in such matters is true of Locke. However, he does not apply his specific conclusions about Hobbes's position to Locke. [Stewart Edward, "Political Philosophy Belimed, The Case of Locke," *Political Studies*, XVII (September, 1969), 277, 278, 281.]

allowance of public esteem is called virtue.¹²⁰ The reason for similarity in the judgments of various societies about virtue is that in general the same things benefit society in various places. Hence the same things are praised out of self-interest.¹²¹ Virtues smooth social relations, preserve both individual and national wealth, and so are praised.¹²² Far from being a standard of law, virtue is the consensus of opinion of precisely those who have the authority to make law. Its enforcement is by non-legal means.¹²³

Justice is the virtue of dealing with property. Where there is no property, there is no justice.¹²⁴ Moreover, justice depends on a developed understanding of the nature of property.¹²⁵ Thus since—unlike with Hobbes—property is possible in the state of nature, justice also seems possible. The problem is that everyone is judge for himself of what is just.¹²⁶ In the absence of a rational standard of justice, one person's justice is another's act of war. The laws of the community are precisely what makes justice meaningful by declaring and regulating the possession of property, once the "inconvenience" of each individual's doing so for himself is rectified.¹²⁷ Property laws can be tyrannical but not unjust.

Another possible standard for evaluating the content of law is simply good or evil. However, Locke follows Hobbes in defining good and evil subjectively. Good is what is apt to produce pleasure, evil pain.¹²⁸ Locke explicitly draws out the full subjectivist and relativist implications of this definition. Not all real goods or apparent goods move every individual's desire. One is moved only by what he takes to be part of his happiness—happiness being merely

¹²⁰ Locke, *Human Understanding*, II, xxviii, 10; I, 476-477.

¹²¹ *Ibid.*, I, ii, 6; I, 70. II, xxviii, 11; I, 478.

¹²² John Locke, *Some Considerations of the Consequences of the Lowering of Interest*, pp. 20, 72-73. John Locke, *Some Thoughts Concerning Education*, 135; p. 128.

¹²³ Locke, *Human Understanding*, II, xxviii, 10; I, 477. II, xxviii, 12; I, 479.

Though the magistrate has the authority to enforce virtue to, and only to, the extent necessary for the preservation of society. [Locke, *A Letter*, p. 45.]

¹²⁴ Locke, *Human Understanding*, IV, iii, 18; II, 208.

¹²⁵ Locke, *Concerning Education*, 110; p. 101.

¹²⁶ Consider, for example, the problem of what is necessary for preservation, or even more, the problem of reparation. [Locke, *Second Treatise*, IX, 128; p. 413. II, 10; p. 343.]

¹²⁷ Locke, *Second Treatise*, V, 45; p. 364. XI, 138; p. 421. XIX, 222; p. 469.

¹²⁸ Locke, *Human Understanding*, II, xx, 2; I, 303. II, xxi, 43; I, 340.

the utmost in pleasure.¹²⁹ Though one has a duty to examine, view, and judge the good or evil of what he proposes to do, when he has done so there is no fault in acting as he sees good.¹³⁰ Hence the same thing is not good to every individual. They neither place their happiness in the same thing, nor choose the same means to it. There is no one summum bonum. Pleasantness depends not on the thing itself, but on the taste of the individual. Since a great variety exists in tastes, that which gives the greatest pleasure will vary. So the greatest good varies with the individual.¹³¹ Locke does at one point attempt to justify the punishment of those who because of too hasty a choice impose a wrong measure of good and evil.¹³² However, no opinion can be known to be subject to punishment for ill consideration by Locke's standards.¹³³ The individual must be the judge of the sufficiency of the evidence for his opinion.¹³⁴ Only one who pretends to judge of right reason can punish deviations from it, which, therefore, no one has the right to do.¹³⁵ Far from law being subject to evaluations of good and evil, "moral" good and evil—as opposed to good and evil simply—is the conformity or disagreement of our actions with some law, whereby good or evil is drawn on us from the will and power of a lawmaker. The good or evil attending our observance or breach of such a decree of the lawmaker is simply the reward or punishment, the pleasure or pain, involved.¹³⁶

¹²⁹ *Ibid.*, II, xxi, 43-45; I, 340-342.

¹³⁰ *Ibid.*, II, xxi, 48; I, 345. II, xxi, 53; I, 349.

¹³¹ *Ibid.*, II, xxi, 55-56; 350-351.

Interestingly, this is exactly the moral situation Locks describes as following from the denial of natural law in his early and unpublished *Essays on the Law of Nature* [ed. M. von Leyden (Oxford: Oxford University Press, 1958), pp. 119-121] where he is widely thought to be defending natural law.

A. P. Brogan attempts to use Locke's definition of good and evil to present him as a Utilitarian. [A. P. Brogan, "John Locke and Utilitarianism," *Ethics*, LXIX (January, 1959).] However, he notes, himself, that Locke is unable to develop a Utilitarian position. [p. 82.] And he senses the incompatibility between Locke's natural rights and a Utilitarian public happiness. [p. 83.] What he does not recognize is that, unlike a Utilitarian, Locke denies that social usefulness creates authority. [Locke, *Second Letter*, pp. 80, 82, 112-113, 117-118, 121-122.]

¹³² Locke, *Human Understanding*, II, xxi, 57; I, 353.

¹³³ Locke, *Second Letter*, pp. 74-75, 78, 89, 128. Locke, *Third Letter*, pp. 299, 400, 402, 408.

¹³⁴ Locke, *Third Letter*, pp. 400, 402, 537.

¹³⁵ Locke, *Second Letter*, p. 89. Locke, *Third Letter*, pp. 174, 175, 428.

¹³⁶ Locke, *Human Understanding*, II, xxvii, 5; I, 474.

Thus law determines moral good or evil as lawmakers manipulate pleasure and pain.

Natural law is particularly significant as a possible standard for evaluating the content of law in Locke, in view of the fact that he is often considered a natural law philosopher.¹³⁷ This view of Locke's position is bolstered by his frequent references to natural law. However, both logical and concrete difficulties stand in the way of natural law being a norm for the content of law in Locke. The logical difficulties focus on two points: the sense in which natural law is law, and the sense in which natural law is and can be known to be natural.

Law, for Locke, must be known, and must be enforced by rewards and punishments. He denies that any rule which is not punished *in this life* can be a law. By this standard the law of nature, insofar as it is conceived of as enforced by God can be no law.¹³⁸ God has the power to enforce natural law by infinite rewards and punishments, but they are in *another life*.¹³⁹ So Locke turns to other executors. Like any law, the law of nature, Locke reasons, would be in vain if it had no executive. In the state of nature no one has superiority or jurisdiction to be such an executive. Therefore, everyone must be the executive for the law of nature in the state of nature. This, however, does not end the problem. In the first place, this general enforcement of the natural law is a right, not a duty.¹⁴⁰ Thus the status of natural law as law depends upon some one choosing to exercise his right. If no one chooses to exercise his right to enforce some aspect of the natural law, that aspect is no law. But to enforce a law, one must know it. The natural law is the law of reason; it obliges by reason.¹⁴¹ Children, for example, are not subject to natural law. Since they are not rational, the natural law has

¹³⁷ A classic statement of the view that Locke held a traditional version of natural law, and that natural rights are merely the counterparts of the duties imposed by natural law is presented in Raymond Polin, *La Politique Morale de John Locke*, (Paris: Presses Universitaires de France, 1960), pp. 95-128, 210-211; 252-254.

¹³⁸ Locke, *Human Understanding*, I, ii, 12; I, 76. II, xxviii, 6; I, 474-475.

¹³⁹ *Ibid.*, II, xxviii, 8; I, 475.

Many writers, stressing the extremity of God's sanctions fail to note their irrelevance to Locke's definition because they are not of this life. [e.g., Lamprecht, *Moral and Political Philosophy*, p. 91.]

¹⁴⁰ Locke, *Second Treatise*, II, 7; pp. 341-342.

¹⁴¹ *Ibid.*, II, 6; p. 341. VI, 57-60; pp. 369-372.

not, Locke insists, been promulgated to them.¹⁴² The general difficulty is that naturally and unalterably most men are ignorant. Leaders as well as the "following herd" find much ethical meditation not to their purpose. Hence unassisted reason has failed men in its great and proper business of morality; the natural law has not been deduced from clear unquestioned principles.¹⁴³ So Locke resorts to presumptions. One is "*presumed* to know" the natural law when he "might be *supposed* capable" to know it.¹⁴⁴ This basis in supposition proves inadequate for the enforcement of natural law. The upshot is that Locke concludes that there is no "established settled known law allowed by common consent to be the standard of right and wrong." The law of nature is not acknowledged by individuals through a combination of ignorance and self interest. It therefore "serves not, as it ought, to determine the rights—of those that live under it, especially where everyone is judge, interpreter, and executioner of it—and that in his own case."¹⁴⁵ The law of nature is, by Locke's definition of law, no law.¹⁴⁶

Not only is the law of nature not law, only in the most tenuous sense is it natural. Nature, in both the sense of human nature and of cosmic nature, is unknowable according to Locke.¹⁴⁷ "Man"—

¹⁴² *Ibid.*, VI, 57; pp. 369-370.

¹⁴³ Locke, *Human Understanding*, IV, xx, 2-3; II, 443-444. Locke, *Reasonableness of Christianity*, p. 140.

¹⁴⁴ Locke, *Second Treatise*, VI, 59-60; pp. 371-372. XV, 170; p. 440 (my italics).

Ashcraft [Locke's State of Nature," p. 908.] italicizes the "capable." One more profitably italicizes the "presumed" and "supposed."

¹⁴⁵ Locke, *Second Treatise*, IX, 124; p. 412. XI, 136; p. 419.

¹⁴⁶ Cf. a parallel—though not identical—means to the same end, the removal of natural law as a standard for positive law in Cesare Beccaria, *On Crimes and Punishments*, "Preface to the Reader." Natural justice is immutable, because it concerns immutable things; political justice is only the relation between an act and the changing condition of society. The former is the concern of the theologian, the latter of the statesman. Once these disparate things are confused, correct reasoning in political matters is impossible. The object of one cannot prejudice the object of the other. The extent to which political virtue should yield to natural virtue may be apparent to all. But the extent, upon reflection, is nil.

¹⁴⁷ Even in Locke's *Essays on the Law of Nature*, where he is frequently interpreted to be defending natural law, he establishes its existence by conceding its knowability. The first reason given for the existence of the law of nature is that it obtains everywhere. [p. 113.] However, most people do not

like the name for any substance—means merely conformity to an abstract complex idea.¹⁴⁸ The real essence of such a substance is unknowable.¹⁴⁹ The nominal essence is simply the abstract idea.¹⁵⁰ One is at liberty, moreover, in forming the nominal essence out of simple ideas.¹⁵¹ Because real essences differ from nominal ones, we do not know the boundaries of species. Therefore we cannot have certainty of such propositions as—to use Locke's own example—all men are rational.¹⁵² Hence Locke insists that the only reason that moral propositions are capable of demonstration is because they do not involve knowledge of substances such as man; they need conform to no external archetype.¹⁵³ Nature, in the sense of human nature, cannot, and does not, provide any moral information.¹⁵⁴ Similarly cosmic nature is beyond human understanding. The knowledge of principles, properties, and operations of things will never be certain.¹⁵⁵ The nature of any other substance is an un-

know it. The most rational and perceptive should, therefore, be consulted. But they not only do not agree what it is, they contend fiercely about it. Such contention, Locke ventures, proves it exists, since they must be fighting about something. [p. 115.]

¹⁴⁸ Locke, *Human Understanding*, III, iii, 12; II, 22-23.

¹⁴⁹ *Ibid.*, III, iii, 15-17; II, 26-28.

¹⁵⁰ *Ibid.*, III, iii, 12-13; II, 22-24.

¹⁵¹ *Ibid.*, III, iii, 14; II, 24-25. III, vi, 27; II, 77-78, III, vi, 31; II, 82.

¹⁵² *Ibid.*, IV, vi, 4; II, 253-254.

¹⁵³ *Ibid.*, III, xi, 17; II, 157-158.

¹⁵⁴ Hans Aarsleff totally ignores Locke's denial of the possibility of knowing the nature of substances including man. [Hans Aarsleff, "The State of Nature and the Nature of Man," in *John Locke*, ed. Yolton, p. 100.] He asserts as a fundamental belief of Locke, for example, that man is by nature rational. This precise proposition Locke chooses as an example of one "that is impossible with any certainty to affirm." [Locke, *Human Understanding*, IV, vi, 4; II, 253.] Yolton recognizes Locke's denial of the possibility of knowing the nature of man, but insists that Locke had a set of "beliefs" about man's nature adequate for his subsequent account of morality. One of which, incidentally, is human rationality. [Yolton, *Locke*, p. 170.] This may be accepted, provided "beliefs" is taken in Locke's sense as pertaining to opinion, in contrast to knowledge, with all that implies for the absence of any claim to authority for the view held.

Interestingly, von Leyden, who understands Locke's natural law as pertaining to human nature rather than cosmic nature, notes that Locke could not wholeheartedly believe the doctrine of natural law, in part because of his philosophy of language. [W. von Leyden, "John Locke and Natural Law," *Philosophy*, XXXI, (January, 1956), 23, 26.]

¹⁵⁵ Locke, *Concerning Education*, 190; p. 182. 193; pp. 185-186.

knowable as the nature of man.¹⁵⁶ As for the state of nature, it must be either a real state or a mental construct. Insofar as it might be thought to have been a real state, it must be defended historically, and therefore, can never be more than a matter of opinion.¹⁵⁷ The most that can be claimed for any such matters of opinion is probability, which, interestingly, is all that Locke explicitly claims for the state of nature.¹⁵⁸ Insofar as it might be thought merely a self-constructed complex idea, while one may have certain knowledge of what follows from it, one can never know that this knowledge relates to reality, much less nature.¹⁵⁹

Logically, natural law cannot serve as a standard of law for Locke because it is neither natural nor law. Locke, for all his references to natural law does not view it as an effective legal norm.

Concretely, what, then, is the content of Locke's references to natural law? Locke is, in fact, remarkably reluctant to talk about any duties arising from the natural law. He considers it beside his present purposes to discuss its particulars while considering the state of nature.¹⁶⁰ The most he will concede to it as guidance for a magistrate is a general command to do good.¹⁶¹ A total of only four apparent duties are advanced by Locke as coming from the natural law: self-preservation, not to kill or injure another, to preserve offspring, not to destroy an object of potential property except for something nobler than its mere existence. Each of these, how-

¹⁵⁶ Locke, *Human Understanding*, IV, iv, 3-5; II, 228-231. IV, vi, 4; II, 253-254.

Lamprecht suggests that Locke holds a law of nature based on objective reality with ideas reflecting the real connections in things. [*Moral and Political Philosophy*, pp. 80-82.] As against the evidence presented here for the impossibility of this, Lamprecht himself admits that such a view of Locke's law of nature is difficult to prove, and that "the evidence is not definite and tangible but comes from the general atmosphere and tone of the *Treatises of Government*." [*Ibid.*, p. 82.]

On the unknowability of substances in Locke, see Margaret J. Osler, "John Locke and the Changing Ideal of Scientific Knowledge," *Journal of the History of Ideas*, XXXI, (January, 1970), 12-13.

¹⁵⁷ Locke, *Third Letter*, p. 144. Locke, *Human Understanding*, IV, xii, 10; II, 349-350.

¹⁵⁸ Locke, *Third Letter*, pp. 144-145. Locke, *Fourth Letter*, p. 558. Locke, *Second Treatise*, VIII, 112; p. 405.

¹⁵⁹ Locke, *Human Understanding*, IV, iv, 5; II, 230-231.

¹⁶⁰ Locke, *Second Treatise*, II, 12; p. 344.

¹⁶¹ Locke, *Third Letter*, pp. 213, 495.

ever, turns out to be the mere reflection of a right. The duty of self-preservation is the reflection of the right to life. One whose life is justly made miserable can cause it to be taken.¹⁶² The duty not to kill another is a reflection of his right to life.¹⁶³ The duty to preserve offspring is a reflection of their right to life.¹⁶⁴ Once this is no longer relevant the duty ceases.¹⁶⁵ The duty not to destroy a potential article of property is a reflection of the right to that property by others.¹⁶⁶ The natural worth of things is not fixed, but relative to fitness for the needs or conveniences of human life.¹⁶⁷ Since there is no duty without law, and no law without enforcement, these apparent duties of natural law amount to nothing more than the right of the potentially injured party to defend his claim to life or property. Natural law, for Locke, produces no duties more binding, nor binding in any other way, than the forceful compulsion of another. This force is transferred to the lawmaker in society. Hence, natural law can never serve to judge the content of law, once the judgment of the appropriate use of force is the lawmaker's.¹⁶⁸

Occasionally, however, Locke seems to ground these apparent duties on the law of God, rather than on the rights of others.¹⁶⁹ This represents the final standard by which the content of law could be judged. This standard raises the same questions as the law of nature as to whether it is punished in this world, and how it is

¹⁶² Locke, *Second Treatise*, IV, 23; p. 351-352.

Willmoore Kendall uses this passage on suicide to prove that preservation is a duty, while parenthetically noting that those who have forfeited their right to life may cause it to be taken. [Willmoore Kendall, *John Locke, and the Doctrine of Majority Rule*, (Urbana: University of Illinois Press, 1965), p. 77.] In fact, this very possibility of causing one's life to be taken proves it ultimately a right not a duty. One may forfeit and/or choose not to exercise a right. But one failure to meet a duty—the one that made the individual subject to death—would hardly justify another such failure—failure to preserve oneself.

¹⁶³ Locke, *Second Treatise*, II, 8; p. 342. II, 11; p. 344.

¹⁶⁴ *Ibid.*, VII, 78; p. 383. VII, 84; p. 386. Locke, *Third Letter*, pp. 207-208.

¹⁶⁵ Locke, *Third Letter*, pp. 209-210.

¹⁶⁶ Locke, *Second Treatise*, IV, 36-38; pp. 358-360.

¹⁶⁷ Locke, *Lowering of Interest*, p. 42.

¹⁶⁸ For support of the primacy of rights over duty in Locke see Richard H. Cox, *Locke on War and Peace* (Oxford: Oxford University Press, 1966), pp. 82-85, 168.

¹⁶⁹ Locke, *Second Treatise*, II, 6; p. 341.

known.¹⁷⁰ It is not punished in this world.¹⁷¹ Most individuals seldom consider the penalties that attend the breach of God's law, and of those who do, most hope for future reconciliation.¹⁷² Thus on the grounds of punishment, the law of God fails to be law; without law there is no duty.¹⁷³

Knowledge of the law of God is either by the light of nature or by revelation.¹⁷⁴ The problems with the first possibility are identical without those of natural law. As for knowledge through revelation, Locke says that even if the opinions contained in a book such as the Scripture are true, to be enforced they need an interpreter whose interpretation is accepted as authoritative. A judge must be agreed upon to determine what doctrines are contained in a book before they can be enforced.¹⁷⁵ In such matters of opinion the judge depends on consent for authority.¹⁷⁶ So the laws of God as contained in revelation cannot be enforced against those who disobey them, except to the extent of removing them from the body which has consented to the interpretation.¹⁷⁷ The revealed law of God is, therefore, not law and hence creates no duty. It cannot be used as a standard to judge laws. In fact, if anyone were the judge of the content of Scripture, the most likely candidate would be the sovereign. Locke rejects this possibility because truth would then vary with place.¹⁷⁸ The closeness of this view to Hobbes as to what follows from any attempt to grant authority to the law of God is apparent.

Like Hobbes, then, and for similar reasons, Locke rejects the various traditional standards by which the content of law could be judged. The reason why he insists that the fact that something is embodied in law does not justify it thus becomes crucial. The answer lies in his assertion that there are some rights which the lawmaker has no authority to abridge.

Locke postulates an original, and natural, human condition of

¹⁷⁰ Locke, *Human Understanding*, I, ii, 12; I, 76.

¹⁷¹ *Ibid.*, II, xxviii, 8; I, 475.

¹⁷² *Ibid.*, II, xxviii, 12; I, 479.

¹⁷³ *Ibid.*, I, ii, 12; I, 76.

¹⁷⁴ *Ibid.*, II, xxviii, 8; I, 475.

¹⁷⁵ Locke, *Third Letter*, p. 260.

¹⁷⁶ Locke, *A Letter*, pp. 13-14.

¹⁷⁷ *Ibid.*, p. 18.

¹⁷⁸ Locke, *Second Letter*, p. 89. Locke, *Third Letter*, pp. 178-180. Locke, *Fourth Letter*, pp. 555-557, 560-562, 568.

perfect freedom and equality.¹⁷⁹ He, however, carefully defines the nature of both the freedom and equality. Natural liberty consists in being free from any superior power on earth, and not being under the will or legislative authority of another. It is the ability to order actions without depending upon the will or permission of anyone. The equality consists in the equality of power and jurisdiction which arises from this freedom. Individuals are equal because there is no subordination or subjection.¹⁸⁰ Thus the natural freedom and equality of humanity rests precisely on the denial that any standard exists by which one individual could order another. Freedom and equality are natural because of the default of any natural standard by which individuals could be judged unequal. Locke does not fail to consider—he even admits—that individuals may be unequal in virtue, mental ability, or merit. What he denies is that these inequalities have any bearing on jurisdiction or dominion. In the absence of any standard by which moral claims can be demonstrated to create authority, such claims to inequality have no bearing on natural freedom and equality.¹⁸¹

Because individuals have perfect freedom and equality, they have a right to preserve their life, liberty, and property, and to judge and punish offenses against their right.¹⁸² Hence arise the inconveniences of the state of nature, and the transfer of the authority to legislate, judge, and punish to the society. Only by such a social contract does the state of nature end.¹⁸³ Because individuals are free and equal, their consent is necessary to the formation of society.¹⁸⁴ In any such society where the joining is free and spontaneous, the law making belongs to the society itself or to those authorized by it.¹⁸⁵ This view gives Locke a democratic bias absent in Hobbes. The majority must rule, at least until it conveys authority.¹⁸⁶ It always retains supreme power over its authorized legislature and executive.¹⁸⁷ It owes obedience only to the public will of

¹⁷⁹ Locke, *Second Treatise*, II, 4; pp. 339-340.

¹⁸⁰ *Ibid.*, II, 4; pp. 339-340. IV, 22; p. 351.

¹⁸¹ *Ibid.*, VI, 54; pp. 368-369.

¹⁸² *Ibid.*, VII, 87; pp. 387-388.

¹⁸³ *Ibid.*, II, 14; p. 346.

¹⁸⁴ *Ibid.*, VIII, 95; p. 394. VIII, 106; p. 400. VIII, 219-221; pp. 409-410.

¹⁸⁵ Locke, *A Letter*, pp. 13-14.

¹⁸⁶ Locke, *Second Treatise*, VIII, 96; p. 395. VIII, 98-99; pp. 395-396. X, 132; pp. 415-416. XIX, 212; p. 465.

¹⁸⁷ *Ibid.*, XIII, 149; pp. 426-427. XIV, 168; p. 439.

the society.¹⁸⁸ And preferably it will authorize as a legislature a temporary assembly; a legislature of one man or a permanent group is dangerous, though possibly necessary in some cases.¹⁸⁹

More crucial than the break with Hobbes over preferred forms of legislatures, however, is Locke's insistence on two points. The legislative power is limited by its purpose, the protection of rights.¹⁹⁰ And the magistrate needs commission or authorization to do anything—even what is admittedly useful.¹⁹¹ The power of society is merely the authority of those appointed to use that power.¹⁹² The people have given up only the power necessary for the ends of society.¹⁹³ Now the purpose or end of society is simply protection from injury by others.¹⁹⁴ Injury is limited to those matters of right: life, liberty, and property. Thus legislatures legislate and magistrates act to secure these by penalties which are directed against those of the offender.¹⁹⁵ Any sin not prejudicial to another's rights, or contrary to the peace of society, is beyond the scope of the magistrate.¹⁹⁶ Liberties, or rights, in society are abridged only by what has been entrusted to the legislature.¹⁹⁷ Any exercise of power beyond what is authorized constitutes tyranny.¹⁹⁸ This is as true of a democratic law maker and magistrate as of any other form.¹⁹⁹ Action by the legislature or magistrate contrary to the purposes for which the government was instituted—that is action against the right to life, liberty, or property of the people—dissolves the government. The people return to the state of nature, and may take any steps they judge necessary.²⁰⁰

¹⁸⁸ *Ibid.*, XIII, 151; p. 428.

¹⁸⁹ *Ibid.*, XI, 138; p. 421. XII, 143; p. 424.

¹⁹⁰ Locke, *Second Letter*, p. 117. Locke, *Third Letter*, pp. 212, 214. Locke, *Second Treatise*, VII, 87; pp. 87-88.

¹⁹¹ Locke, *Second Letter*, pp. 80, 82, 112-113, 121-122. *Third Letter*, pp. 218, 224.

¹⁹² Locke, *Third Letter*, pp. 217-218.

¹⁹³ Locke, *Second Treatise*, VIII, 99; p. 396. IX, 131; pp. 414-415.

¹⁹⁴ Locke, *Third Letter*, pp. 212, 214.

¹⁹⁵ Locke, *A Letter*, pp. 9-10, 40, 42-43. Locke, *Second Treatise*, IX, 131; pp. 414-415, XV, 171; p. 441. XIX, 220; p. 468.

¹⁹⁶ Locke, *A Letter*, pp. 36-37, 45.

¹⁹⁷ Locke, *Second Treatise*, XI, 137; pp. 420-421.

¹⁹⁸ *Ibid.*, XVIII, 199; p. 457. XVIII, 202; p. 459. XVIII, 206; p. 461. XIX, 212; p. 465.

¹⁹⁹ *Ibid.*, XVIII, 201; p. 458.

²⁰⁰ *Ibid.*, XIX, 219-220; pp. 468-469.

Locke has sometimes been understood to hold that since the people are the judges of when such a violation of rights occurs, the majority always defines rights.²⁰¹ This does not follow. Locke carefully distinguishes between a law that is judged bad by the conscience of a private person, and a law that is outside the scope of the magistrate's authority, as defined by the purposes of the state. In the first case disobedience is appropriate, but an obligation to accept punishment exists. In the second, no obligation results from the law. Every individual is judge for himself whether the magistrate has deprived him of his rights, and, thereby entered a state of war with him. His only recourse is to force. The injured individual must judge for himself when to resort to such an appeal to heaven against the magistrate who is likely to be stronger. Although the doubtfulness of the outcome does not settle the question of right, it introduces a prudential consideration that discourages frequent recourse to arms. Particular injustices, or scattered oppressions will not move most people to take such a step. Only a general mischief, or evident design for one, will move the greater part of the people, and thus promise a likelihood of a successful appeal to heaven. The "greater part" of the people in the prudential calculation of the probability of success of such an appeal can not be equated with a majority—a term Locke is not reluctant to use where appropriate.²⁰²

The defense of absolute democracy in Hobbes, and the defense of indefeasible rights in Locke are quite parallel—to a point. Both depend on the denial that there is an objective standard by which the content, or substance—as differentiated from the legitimate scope—of law can be judged. This reduces law to a matter of authority created by consent. The crucial difference is over what is consented to, and hence over the scope of the authority created. In Hobbes's view, the sovereign is consented to, with absolute authority to define reason and good. In Locke, the legislature is as

²⁰¹ Bernard Wishy ["Locke and the Spirit of '76," *Political Science Quarterly*, LXIII, 418.] uses Locke's statement that the people are the judges of violations by the government of its trust to say that, hence, the majority always defines rights. Therefore there can be no appeal from the majority. Willmoore Kendall [*John Locke*, p. 112.] uses Locke's *Second Treatise* VII, 95 to also make Locke an absolute democrat. What he does not note is that a little further in the same work Locke explains that this majoritarianism needs last for only one act, the establishment of a legislative power. [X, 132; pp. 415-416.]

²⁰² Locke, *Second Treatise*, XIV, 168; pp. 438-439. XIX, 230, 241-242; pp. 474-475, 484. Locke, *A Letter*, pp. 43-45.

absolute *within the scope of its authority* as in Hobbes; there is no standard by which the content, the substance, of its will can be criticized. However, the scope of its authority is limited; it is created for limited purposes. It cannot legitimately go beyond the limited purposes for which it is created. Both absolute democracy and indefeasible rights, then rest in their modern form, on the same denial. They rest on the same primacy of consent. They differ—differ critically—only on what is consented to, and hence on what is legitimate. Thus much of the foundation for the absolute democratic position is latent in the argument for indefeasible rights.

Why, though, is the position of the absolute democrat frequently more appealing? Given a democratic sovereign, there would be no disagreement between Hobbes and Locke that the majority of the people should rule. In the American political culture based on this Lockean tradition rooted in Hobbes, there is no substantial disagreement on that point. If anything, the hypothetical, "Given a democratic sovereign," has merely been removed. The point at issue both presently and between Hobbes and Locke, under democratic assumptions, is whether the majority should rule *in all things*. The reason Locke denied this is something generally called "natural rights." This term conjures up—in part because of Locke's own complex use of "nature"—visions of natural law standing behind these rights providing the sanction for them.²⁰³ But precisely because of the triumph of the Lockean-Hobbesian tradition, an argument for limitation of popular sovereignty apparently based on natural law has become implausible. Thus the proponents of limitation on popular sovereignty find themselves—when pushed beyond constitutional defenses—embarrassed by the lack of grounds, persuasive within the prevailing tradition, upon which to base their argument. Hence comes the frequently greater plausibility of the argument for absolute democracy, which can rest itself candidly on the prevailing tradition. Ballots, it has become a truism, are a civilized substitute for bullets.

This reduction of the Lockean tradition of indefeasible rights to that of absolute majority rule is not accidental, because essentially

²⁰³ This view of natural rights as linked with natural law is by no means merely a popular image. It is, for example, explicitly defended by Jacques Maritain. [Joseph W. Evans and Leo R. Ward, eds., *The Social and Political Philosophy of Jacques Maritain*, (Garden City, N.Y.: Doubleday & Co., Inc., Image Books, 1965), Chap. 3-4, esp. pp. 49-51.]

the Lockean position minus the notion of limitations coincides with a Hobbesian argument for absolute democracy. However, this argumentative disadvantage of proponents of limitations on the majority is not inevitable. In fact, it rests on a misunderstanding of Locke's argument. Locke's "natural rights" depend, as much as Hobbes's absolute democracy, on the denial of natural law and associated standards; they are "natural" only by default. He, as much as Hobbes, is responsible for the popular unpersuasiveness of appeals to such standards. He may be even more responsible, since he presents his denial in a form that is both less brutal, and promising of greater rewards. Nevertheless, so long as his defense of limitation of popular sovereignty by indefeasible rights is widely linked with "some kind of natural law," those who argue for absolute democracy will frequently be more persuasive to the contemporary mind. Should the proponents of indefeasible rights cease basing their arguments on impossible, according to Locke, appeals to such standards, they will find themselves in as strong a position as Hobbesian proponents of absolute majority rule—for, indeed, their arguments should properly come from identical premises. They should differ only on the issue of the limit on the rightful scope of consent to be governed.

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