

# TOWARD A THEORY OF EMPIRICAL NATURAL RIGHTS\*

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## I. INTRODUCTION

With the publication of *Anarchy, State, and Utopia* in 1974, Robert Nozick breathed new life into the natural rights tradition of political philosophy. By opening his book with the statement “Individuals have rights, and there are things no person or group may do to them (without violating their rights),”<sup>1</sup> Nozick stimulated two distinct lines of philosophical investigation: a future-oriented inquiry into the implications that the existence of fundamental individual rights holds for morally acceptable public policy, and a backward-looking inquiry into the sources of and foundations for these rights. In this essay, I propose to pursue the latter line of inquiry.

To this end, I will begin with a brief overview of natural rights political philosophy in Section II. Because Nozick explicitly adopts John Locke’s conception of natural rights as his own, I will first survey both Locke’s and Nozick’s rights-based arguments for limited government. I will then suggest that although both arguments are quite powerful, their persuasive force can be no greater than that of the underlying arguments for the existence of the natural rights upon which they rest. I will conclude Section II by suggesting that neither Locke nor Nozick has supplied an adequate version of the necessary underlying arguments.

Rather than attempting to supply this lack myself, I will offer in Section III an alternative conception of natural rights as rights that naturally evolve in the state of nature. I will then argue that these “empirical natural rights” form a good approximation of the negative rights to life, liberty, and property on which both Locke and Nozick rest their arguments and that such rights are normatively well grounded. I will conclude by suggesting that empirical natural rights can serve as an alternative grounding for rights-based arguments for limited government that would be more persuasive to those not already committed to a classical liberal position than the traditional conception of natural rights advanced by Locke and Nozick.

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<sup>1</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), ix. (Hereinafter, *ASU*. Future references to this work will be identified by page number in parentheses in the text.)

## II. THE NATURAL RIGHTS TRADITION

### A. Locke and Nozick

Natural rights political philosophy derives both the justification for and the limitations upon political authority from the natural rights of individual human beings. "Natural rights" are the pre-political rights individuals possess in the absence of established political authority, that is, in the state of nature. A natural rights-based argument for limited government has several familiar and easily identifiable features. It begins by identifying the rights individuals possess in the state of nature. It proceeds by presenting a list of the inconveniences inherent in life in that state and by arguing that to escape these inconveniences, individuals delegate some of the power derived from their natural rights to the exclusive use of a civil government. It then identifies the powers so delegated to conclude that a government that exercises these powers *and only these powers* is morally justified. Different versions of this argument can be generated by different lists of natural rights, different conceptions of the state of nature, different methods of delegation, and different lists of delegated powers.

In *Anarchy, State, and Utopia*, Robert Nozick advanced an argument for a severely limited form of government, his minimal state, that explicitly mirrored several of the features of John Locke's version of natural rights theory. Accordingly, it will be worthwhile to conduct a brief review of Locke's theory and to highlight its similarities to (and differences from) Nozick's. Doing so will also explain why both theories share the characteristic of being enormously influential to some and wholly unpersuasive to others.

Let us begin with a consideration of what Locke meant by the state of nature. This can best be done by contrasting Locke's account with the perhaps more familiar account of the state of nature given by Thomas Hobbes. Hobbes believed that human nature was such that in the absence of "a common power to keep them all in awe," human beings would behave so as to create a state of war "of every man against every man" in which "men live without other security than what their own strength and their own invention shall furnish them."<sup>2</sup> Hobbes's state of nature, therefore, was a world in which the utter want of personal security meant that there could be no industry, commerce, art, or learning—a world in which life was necessarily "solitary, poor, nasty, brutish, and short."<sup>3</sup> For Hobbes, the state of nature consisted not merely in the absence of an organized central authority, but in the absence of any mechanism of social control: the absence not merely of *government*, but of *governance*.

This is not Locke's conception of the state of nature. Political philosopher A. John Simmons argues persuasively that Locke's state of nature

<sup>2</sup> Thomas Hobbes, *Leviathan* (1651), ed. Herbert Schneider (Indianapolis, IN: Bobbs-Merrill, 1958), 106–7.

<sup>3</sup> *Ibid.*, 107.

was not intended as an empirical description of human behavior, but as the specification of a normative condition: “the condition of men living together without *legitimate* government.”<sup>4</sup> If this is the case, then the state of nature implies neither the absence of civil government, since one may be subject to an illegitimate one, nor the absence of governance, since human beings may make whatever interpersonal agreements or private arrangements they wish (within the law of nature) to provide for their personal security and comfort. And since Locke makes it clear that “men may make [promises and compacts] one with another, and yet still be in the state of nature,”<sup>5</sup> even if his state of nature is regarded as an empirical condition, it would be one that is consistent with a high degree of cooperative behavior.

The distinction between Hobbes’s conception of the state of nature and Locke’s is reflected in the different rights they ascribe to human beings in that condition. Hobbes’s war of all against all is an entirely lawless state. Under such conditions, the only right of any relevance, and hence the only natural right human beings possess, is the right of self-preservation.<sup>6</sup> In contrast, Locke’s state of nature, although it lacks a normatively binding human law, is not lawless. It is governed by the law of nature, which obligates human beings to act for the preservation of mankind: hence, no one may “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another” (STG §6). Thus, the law of nature entails the existence of natural rights to life, liberty, and property: life, because the preservation of mankind requires individuals not to take their own or others’ lives; liberty, because “all men are by nature equal,” and hence possess the “equal right . . . to [their] natural freedom, without being subjected to the will or authority of any other man” (STG §54); and property, because “every man has a property in his own person” that entitles him to “[t]he labour of his body, and the work of his hands,” such that whatever “he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property” (STG §27). In Locke’s state of nature, human beings are invested with a panoply of rights.

Although human beings are obviously much better off in Locke’s state of nature than in Hobbes’s, their ability to enjoy the exercise of their

<sup>4</sup> A. John Simmons, “Locke’s State of Nature,” *Political Theory* 17, no. 3 (1989): 451.

<sup>5</sup> John Locke, *Second Treatise of Government* (1690), ed. C. B. Macpherson (Indianapolis, IN: Hackett Publishing, 1980), §14. (Hereinafter, STG. Future references to this work will be identified by section number in parentheses in the text.)

<sup>6</sup> See Thomas Hobbes, *Leviathan* (1651), ed. Herbert Schneider (Indianapolis, IN: Bobbs-Merrill, 1958), 109.

The RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man has 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 judgement and reason, he shall conceive to be the aptest means thereunto.

natural rights is still far from secure. This is due to the absence of “an established, settled, known law” to serve as “the common measure to decide all controversies between [men]” (STG §124), “a known and indifferent judge, with authority to determine all differences according to the established law” (STG §125), and any organized “power to back and support the sentence when right, and to give it due execution” (STG §126). It is to escape these inconveniences and thereby secure the “mutual preservation of their lives, liberties and estates” (STG §123) that human beings delegate some of the power they derive from their natural rights to a civil government.

The method of delegation, for Locke, is clearly consent,<sup>7</sup> although the difficult question of what constitutes consent will not be addressed here. The amount of power delegated is that which is necessary to alleviate the inconveniences of the state of nature and to secure individuals’ lives, liberties, and estates. This requires each individual to relinquish all of his right to punish those who transgress the law of nature (STG §130) and that portion of his right “to do whatsoever he thinks fit for the preservation of himself, and others within the permission of the law of nature” (STG §128) that is required for the preservation of civil society.

The consensual delegation of these powers establishes both the legitimate authority of civil government and the limits of that authority. The delegation of the right to punish gives the civil government the exclusive power to redress actions that violate the law of nature, that is, actions that “take away, or impair the life, . . . liberty, health, limb, or goods of another” (STG §6). The government is thus empowered to establish positive criminal laws in support of the law of nature and is vested with the exclusive authority to adjudicate and apply criminal punishment. The delegation of a portion of the right to liberty gives the civil government the power to establish general regulatory laws designed to achieve the common good. But because no individual possesses a right to act in contravention of the law of nature, no such power can be delegated to the government; hence, the government has no power to make any law, criminal or otherwise, that is contrary to the injunction to preserve mankind. Thus, the power of civil government, “in the utmost bounds of it, is limited to the public good of society” (STG §135). Further, because the delegation of power is consensual and “no rational creature can be supposed to change his condition with an intention to be worse,” the government is obligated to use its delegated power “to secure everyone’s property, by providing against those three defects above mentioned” (STG §131). Thus, civil government

is bound to govern by established *standing laws*, promulgated and known to the people, . . . by *indifferent* and upright *judges*, who are to

<sup>7</sup> “Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent” (STG §95).

decide controversies by those laws; and to employ the force of the community at home, *only in the execution of such laws*, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other *end*, but the *peace, safety, and public good* of the people. (STG §131)

Turning now to Nozick's argument for the state, we find that it is virtually identical to Locke's with regard to its conception of the state of nature and the list of rights individuals possess therein. With regard to the state of nature, Nozick is seeking a conception that constitutes "the best anarchic situation one reasonably could hope for" because "if one could show that the state would be superior to even this most favored situation of anarchy, . . . it would justify the state" (ASU, 5). Nozick believes that Locke's conception, in which individuals who are free from legitimate political authority are both bound to behave morally and able to cooperate on the basis of contractual agreements and communal arrangements, meets this criterion. Accordingly, he explicitly adopts Locke's conception of the state of nature as one in which only government, not governance, is lacking (ASU, 9-10).

Further, although Nozick never explicitly identifies the rights individuals possess in the state of nature,<sup>8</sup> we may safely assume that the set of rights that Nozick ascribes to such individuals is either coextensive with or encompasses Locke's natural rights. In adopting Locke's conception of the state of nature, Nozick specifically cites Locke's characterization of it as being governed by the law of nature that requires "that 'no one ought to harm another in his life, health, liberty, or possessions'" (ASU, 10, citing STG §6). This, along with the substance of Nozick's extended discussion, strongly suggests that he believes that individuals in the state of nature possess the same substantive rights to life, liberty, and property for which Locke argues. If Nozick's list of rights differs from Locke's at all, it is by including an additional procedural right not to be punished for violating others' rights unless one's guilt has been established by a reliable and fair process.<sup>9</sup>

Nozick's argument begins to depart from Locke's when it comes to the method by which individuals delegate their power to the state and the specific powers that are delegated. Like Locke, Nozick recognizes that individuals' rights are not secure in the state of nature. Unlike Locke, however, he does not argue that individuals ever directly consent to the

<sup>8</sup> With the possible exception of the right to punish, Nozick deals with rights exclusively on the generic level. It is worth noting that Locke, too, fails to provide an exhaustive or authoritative list of individuals' natural rights, although he does discuss several specific rights (e.g., the right to preserve oneself and others by means within the law of nature, the right to execute the law of nature, and the right to pursue innocent delights), which I have subsumed in the traditional trilogy of life, liberty, and property.

<sup>9</sup> See ASU, 102. Nozick suggests but never explicitly affirms that such natural "due process" rights exist. See ASU, 101, 107.

authority of a civil government in order to secure them. Rather, Nozick contends that human beings in the state of nature will use their ability to contract with one another in order to hire private protective associations to secure their rights for them. He then makes the empirical claim that because of the special nature of the services that protective associations provide, market forces will result in the rise of one dominant protective association in any given geographical area.<sup>10</sup> To this he adds the normative assertion that the dominant association may legitimately prevent any competitor from taking action against its clients on the basis of any guilt-determination procedure of which the dominant association does not approve,<sup>11</sup> as long as it provides its competitors' clients with in-kind compensation in the form of its own protective services.<sup>12</sup> But once a dominant protective association thus suppresses its competitors and provides its services to all persons in a geographical area, it has all the necessary attributes of a civil government (*ASU*, 22–23). Therefore, Nozick concludes that a civil government can spontaneously arise through a series of morally legitimate steps, that is, steps that do not violate any of the rights individuals possess in the state of nature. For Nozick, then, individuals delegate their power to the state indirectly by consensually creating an entity that evolves into a state through unplanned but morally legitimate human interaction.

Nozick's method of delegation transfers less power and produces a more severely limited state than does Locke's. Like Locke, Nozick sees

<sup>10</sup> Nozick regards the provision of protective services as what economists call a "network industry," one in which the value of the good increases as the number of users increases. He argues that

[t]he worth of the product purchased, protection against others, is *relative*: it depends upon how strong the others are. Yet unlike other goods that are comparatively evaluated, maximal competing protective services cannot coexist; the nature of the service brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other. Also, since the worth of the less than maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral. (*ASU*, 17)

Hence, "[o]ut of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or a group of geographically distinct minimal states" (*ASU*, 16–17). For an interesting attempt to refute this argument, see Bryan Caplan and Ed Stringham, "Networks, Law, and the Paradox of Cooperation," *Review of Austrian Economics* 16 (2003): 309–26.

<sup>11</sup> It may do this either because its clients have a procedural right to have their guilt determined by a reliable and fair procedure that the dominant protective association is authorized to exercise for them or because nonclients do not have the right to punish the association's clients on the basis of guilt-determination procedures that the association deems unreliable or unfair (*ASU*, 107).

<sup>12</sup> This is because it is morally permissible to prohibit activities that impose risks on others only if "those who are *disadvantaged* by being forbidden to do actions that only *might* harm others [are] compensated for these disadvantages foisted upon them in order to provide security for the others" (*ASU*, 82–83).

individuals as delegating their right to punish rights-violators to what becomes the civil government, thus empowering it to establish (rights-protecting) criminal laws and to adjudicate and apply criminal punishment.<sup>13</sup> Unlike Locke, however, Nozick does not see individuals as delegating a portion of their right to liberty sufficient to empower the government to establish regulatory laws for the common good. Beyond relinquishing their right to punish, individuals delegate none of their right to liberty and only that portion of their right to property that is necessary for the state to supply protective services to those who are entitled to receive them as compensation.<sup>14</sup> The exceedingly spare nature of this delegation strictly limits the power of the state to that necessary to protect the rights of its citizens. Hence, Nozick's argument provides a justification for "the night-watchman state of classical liberal theory" (*ASU*, 25) that provides police, adjudicative, and national defense services, and nothing more.

*B. The arguments' persuasive force or lack thereof*

Natural rights arguments for limited government have a powerful but limited appeal. Their power comes from their argumentative structure. Their limitations come from the foundations on which this structure rests.

Natural rights arguments are structurally valid arguments. Given their assumptions about individuals' pre-political moral entitlements, they provide cogent justifications for both government power and its limitations. If individuals are truly vested with natural rights, then government can function morally and command obedience only to the extent that it does not violate them. Both Locke's and Nozick's arguments chart a well-reasoned course from Lockean natural rights to morally legitimate limited government. Locke's consent-based argument rests on the fundamental moral propositions that one who consents to what would otherwise be an invasion of a protected interest has not been wronged and that one is morally bound by one's freely undertaken agreements. These propositions imply that to the extent that one's obligation to obey political authority has been voluntarily assumed, no underlying right has been violated and one is morally bound to obey political authority. The intuitive appeal of these underlying propositions is so great that Lockean social contract theory has maintained a strong hold on popular imagination in the United States since the nation's inception. Nozick's argument, which rests par-

<sup>13</sup> Individuals also delegate their "due process" right to be tried by reliable and fair procedures, if they have such a right. See note 9 above.

<sup>14</sup> Nozick does not explicitly state that individuals delegate a portion of their right to property, but this is the clear implication of his claim that "the dominant protective agency must supply the independents—that is, everyone it prohibits from self-help enforcement against its clients on the grounds that their procedures of enforcement are unreliable or unfair—with protective services against its clients . . ." (*ASU*, 112. See generally, *ASU*, 110–13).

tially on the binding force of voluntary agreement and partially on a philosophically sophisticated account of morally legitimate human interaction, can exert a similar hold on the philosophical imagination. If Nozick's contentions regarding individuals' procedural entitlements and the conditions under which risky behavior may be restrained when compensation is paid are correct, then he, too, provides a cogent justification for moving from a Lockean state of nature to a limited civil government. Arguments such as these can be extremely persuasive to those who believe that individuals do, in fact, have pre-political Lockean rights.

This statement, however, indicates the limitations of the arguments' power as well. For as effective as they may be at deriving limited government from Lockean natural rights, their appeal to those who are not antecedently committed to the existence of such rights is only as powerful as the underlying arguments for the rights themselves. These underlying arguments, however, are much less compelling than those they support.

For Locke's or Nozick's argument to gain purchase, natural rights theorists must first establish not only that natural rights exist in a generic sense, but also that the set of legitimate natural rights is coextensive with Locke's rights to life, liberty, and property. Establishing the first of these propositions has presented a notoriously difficult challenge,<sup>15</sup> but even if it could be overcome, establishing the second may prove equally formidable. Even natural rights theorists do not agree about what natural rights exist, as the foregoing discussion of Hobbes and Locke illustrates. To establish that Lockean rights constitute *the* set of natural rights, a natural rights theorist would have to produce an argument robust enough to counter Hobbesian arguments that yield a more limited set of rights, yet not so robust that contemporary liberals can extend its logic to yield positive welfare rights to fundamental goods or services such as health care or a minimally decent standard of living. Whether natural rights theorists can ultimately meet these challenges remains an open question. It is clear, however, that neither Locke nor Nozick has done so.

<sup>15</sup> Loren Lomasky explains this difficulty as consisting in

those ills endemic to any account that attempts to base moral status and obligation on "nature": on some characteristic that all and only those beings who are moral claimants possess and which is sufficient to justify their moral claims. Natural rights theories are a subclass of such nature-based theories. They routinely are embarrassed by the absence of any characteristic *universally* shared by those beings they wish to single out as rights holders, possessed *only* by them, shared *equally* by them (else rights possession would be an analog function admitting of degree rather than all-or-nothing), and which can credibly be taken as *justifying* the preferred moral status that is ascribed to rights holders. All such attempts to ground rights—or morality in general—in nature fail because the class of moral claimants does not coincide with the class possessing property  $\Phi$ , where  $\Phi$  is the alleged natural basis of rights.

Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 37–38.



Locke's "disturbing paucity of foundational work in the *Second Treatise*" has been noted by Simmons, who points out that although "[t]he content of parts of the natural law and the rights defined by it receive considerable attention . . . very little is said about why these are our duties and rights."<sup>16</sup> Nozick himself explicitly recognizes both Locke's and his own failure to provide a firm grounding for natural rights when he declares at the beginning of *Anarchy, State, and Utopia* that the "task is so crucial, the gap left without its accomplishment so yawning, that it is only a minor comfort to note that we here are following the respectable tradition of Locke, who does not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature in his *Second Treatise*" (ASU, 9). Nevertheless, the arguments that Locke and Nozick do provide are worth examining for what they reveal about the limitations on the persuasive force of natural rights theory.

Locke provides at least two lines of argument for the law of nature from which he derives his natural rights: one theological and one secular. The theological argument defines the law of nature as God's will with regard to human behavior, which human beings can discover by the powers of reason God impressed into their nature for that purpose.<sup>17</sup> When the law of nature is understood in this way, demonstrating its existence requires Locke to establish that God exists, that God created human beings as essentially rational creatures, that there is a normative duty to obey the commands of one's creator, and that reason allows human beings to derive the general principles of moral conduct from their knowledge of divine and human nature—none of which is an easy task.<sup>18</sup> The secular argument defines the law of nature as the law of reason commanding what is in the best interest of humanity. When it is understood in this way, Locke believes that the law of nature can be derived from the formal proposition that it is irrational to treat equals unequally and the substantive proposition that all human beings are of equal moral worth. This allows Locke to argue that the duty to preserve any human life logically entails the equal duty to preserve everyone's life, and hence the duty to preserve mankind by refraining from actions that impair the life, liberty, and property of others (STG §6).<sup>19</sup>

<sup>16</sup> A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992), 15.

<sup>17</sup> "[T]his law of nature can be described as being the decree of the divine will discernable by the light of nature and indicating what is and what is not in conformity with rational nature, and for this very reason commanding or prohibiting." John Locke, *Essays on the Law of Nature* (1676), ed. W. von Leyden (Oxford: Clarendon Press, 1988), 111.

<sup>18</sup> A good account of Locke's theological argument for the law of nature can be found in Simmons, *The Lockean Theory of Rights*, 23.

<sup>19</sup> The argument that Locke presents in §6 of the *Second Treatise* is not truly secular, since he supports his contentions that human life has value and that all human lives are equally valuable on the basis of the claim that they are all equally the workmanship of God. However, the argument itself is logically severable from its theological support. Any argument for the value of human life and for human moral equality can serve as well. Hence, it is not inappropriate to regard Locke as providing a secular grounding for his natural rights.

Nozick provides an argument that grounds rights not in the law of nature but directly on Kantian moral theory, identifying them as reflections of “the underlying Kantian principle that individuals are ends and not merely means” (*ASU*, 30–31). Nozick accepts the Kantian proposition that every human being possesses inherent moral value, that is, a dignity, that all others are required to respect. Rights, he argues, protect this dignity. By doing so, they “express the inviolability of other persons” (*ASU*, 32) and “reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good. There is no justified sacrifice of some of us for others” (*ASU*, 33). Thus, Nozick believes that an individual’s rights must be respected because the failure to do so “does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has” (*ASU*, 33).

To the extent that Locke’s or any natural rights argument has a theological basis, the limits of its appeal are patent. To begin with, establishing the existence of natural rights on this ground requires first establishing the existence of God, a proposition at least as difficult to substantiate as the one it is being offered to prove. Indeed, Locke does not even attempt to make such an argument, since he begins his *Essays on the Law of Nature* (1676) by simply assuming that God exists.<sup>20</sup> But even with this assumption, Locke must still prove that there is a duty to obey God’s will. Although this may seem obvious at first, it is not. For, with Humean hindsight, we know that the *fact* that God commands something does not in itself imply that human beings *ought* to obey. What, then, is the source of this obligation? For Locke, the source of human moral obligation is the law of nature. But because the obligation to obey God is being offered to prove that the law of nature exists, the law of nature cannot serve as the source of the obligation without rendering the argument circular. And if Locke simply identifies divine commandment as the property that makes something morally obligatory, he runs directly into the naturalistic fallacy.<sup>21</sup> Finally, even if these problems could be surmounted, Locke would then face the task of establishing that his version of the law of nature correctly embodies God’s will. Since he cannot rely on revelation, he can do this only by demonstrating that it is entailed by the respective natures of God

<sup>20</sup> “Since God shows Himself to us as present everywhere and, as it were, forces Himself upon the eyes of men as much in the fixed course of nature now as by the frequent evidence of miracles in time past, I assume there will be no one to deny the existence of God, provided he recognizes either the necessity for some rational account of our life, or that there is a thing that deserves to be called virtue or vice.” Locke, *Essays on the Law of Nature*, 109.

<sup>21</sup> The naturalistic fallacy is the improper identification of a normative property with a natural property, or more precisely, “the fallacy that results from construing the ‘is’ of attribution as an ‘is’ of identity, and thus supposing, for example, that because pleasure is (attributive ‘is’) good, good is identical with pleasure.” See George Edward Moore, *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan, 1967), 5:379.

and human being. Given the obvious difficulty of providing a compelling account of God's nature and the philosophical debate not only about what constitutes human nature, but about whether there even is such a thing,<sup>22</sup> the prospects of Locke (or any natural rights theorist) providing a convincing demonstration of this point must be considered remote.

Locke's secular argument does not fare much better. In this case, however, the difficulty is not so much with the substance of the premises as with whether they lead to the desired conclusion. There will be little disagreement either with the formal proposition that equals should be treated equally or with the substantive claims that human life has value and that human beings are equal in some morally significant respect. The difficulty for Locke is to establish that the respect in which human beings are equal is one that gives rise to a duty to preserve mankind that entails all and only the rights to life, liberty, and property that he endorses. In this respect, Locke's argument is both too weak and too strong.

Locke's argument is strong enough to establish a duty to preserve every human life and this would seem to entail a duty not to kill others or deprive them of the things necessary to preserve their lives. Whether it is strong enough to establish Locke's extensive rights to liberty and property would depend on whether these rights are truly necessary for the preservation of life in society. Although Locke assumes that they are (*STG* §6), there appears to be little reason for this. Clearly a right to some freedom of action and a modest right to keep those things necessary to maintain life could be established, but this falls far short of rights to one's "natural freedom, without being subjected to the will or authority of any other man" (*STG* §54) and to keep whatever one "hath mixed his labor with" (*STG* §27). The life of all may be very well preserved consistently with great restrictions on personal liberty and severely limited rights to personal possessions. Hence, Locke's argument is too weak to persuade those not already committed to a classical liberal conception of rights.

The more serious problem with Locke's secular argument, however, is that it is much too strong. This is because the duty to preserve every human life that it entails can give rise to positive welfare rights as easily as it can the classical negative rights to life, liberty, and property. A duty to equally preserve everyone's life certainly generates a duty not to take others' lives or otherwise impair others' efforts to survive, but it also appears to generate a duty to act positively to maintain others' lives. Thus, to the extent that Locke's argument establishes the desired negative rights to life, liberty, and property, it also establishes positive welfare rights to benefits such as a minimal standard of living and life-preserving health care—again rendering it unpersuasive as an argument for the classical liberal configuration of rights.

<sup>22</sup> See Margaret MacDonald, "Natural Rights," in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), 29–30.

In some ways, it is not unreasonable to view Nozick as rehabilitating Locke's secular argument. By basing his argument on a Kantian foundation, Nozick can be seen as arguing not merely that every human life has equal moral value, as Locke did, but, more specifically, that every human being is equally possessed of a dignity that requires respect for his or her autonomy.<sup>23</sup> This is a much more promising basis for an argument for the existence of Lockean rights. On the one hand, it is strong enough to ground not only the right to life, but also broad negative rights to liberty and property. A duty to respect others' autonomy bars not only taking their lives, but also coercing their persons both generally and, more specifically, in order to deprive them of justly acquired possessions. On the other hand, it does not appear to be strong enough to ground positive rights, because a duty to respect others' autonomy does not entail a duty to sustain their lives or benefit them in other ways.

Unfortunately, Nozick's argument has its own set of drawbacks. To begin with, both its moral and its metaphysical foundations are far from securely established. To the extent that it is expressly tied to Kantian moral theory, it is subject to the conventional philosophical criticisms of this theory and will be convincing only to those who accept Kant's categorical imperative as the fundamental principle of morality.<sup>24</sup> Further, the argument's underlying metaphysical assumptions have been attacked by both feminists and communitarians. Nozick explicitly bases his argument on the contention that human beings are *essentially* separate entities: that rights "reflect the fact of our separate existences." Feminists explicitly reject what they call the "separation thesis,"<sup>25</sup> arguing that "women are 'essentially connected,' not 'essentially separate,' from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life."<sup>26</sup> Communitarians argue that because human identity is socially constructed, because the self is a product of one's social and political roles in one's community that

<sup>23</sup> Nozick can be seen as providing the secular supporting argument for human moral equality that Locke's actual argument based on divine creation lacked. See note 19 above.

<sup>24</sup> In its most familiar version, the categorical imperative enjoins us to "[a]ct so that you treat humanity, whether in your own person or that of another, always as an end and never as a means only." Immanuel Kant, *The Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (Indianapolis, IN: Bobbs-Merrill, 1959), 9–10. Some of the more conventional objections to basing ethical theory on the categorical imperative are that it improperly discounts the moral significance of an action's consequences, that it cannot resolve conflicts among duties (e.g., whether one should lie to save an innocent life), and that it provides no ethical guidance in situations in which it is impossible to treat all as ends in themselves (e.g., an overcrowded lifeboat).

<sup>25</sup> The separation thesis consists in "the claim that human beings are, definitionally, distinct from one another, the claim that the referent of 'I' is singular and unambiguous, the claim that the word 'individual' has an uncontested biological meaning, namely that we are each physically individuated from every other, the claim that we are individuals 'first,' and the claim that what separates us is epistemologically and morally prior to what connects us. . . ." Robin West, "Jurisprudence and Gender," *University of Chicago Law Review* 55 (1988): 2.

<sup>26</sup> *Ibid.*, 3.

“arises through the common understanding which underlies the practices of our society,”<sup>27</sup> the concept of a pre-social or pre-political separate self is nonsensical. They contend that the very capacities that Nozick identifies as the grounding for his pre-political rights—rationality, free will, moral agency, and the ability to live according to an overarching plan of life (*ASU*, 49)—are only possible because individuals are formed in an already existing political society, and, hence, that Nozick’s argument is hopelessly circular.

The more serious problem with Nozick’s argument, however, is that he does not make it. He supplies no account of the steps in reasoning that lead from either the categorical imperative or the recognition of human beings as essentially separate selves to their inherent possession of Lockean rights.<sup>28</sup> It may appear obvious that respect for individuals as ends in themselves requires a right to life and a right to a significant amount of control over one’s existence, but it is not obvious that it requires the broad rights to liberty and property on which Nozick grounds his argument for the minimal state or that it necessarily excludes all positive rights. Unfortunately, all Nozick offers in support of his position is the claim that the possession of Lockean rights is necessary for individuals to have meaningful lives. But Nozick follows his assertion that “[a] person’s shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for a meaningful life” (*ASU*, 50) not with an argument showing why the possession of Lockean rights is necessary for this capacity, but with a list of ten questions that suggest that it may not be, followed by the declaration that he “hope[s] to grapple with these and related issues on another occasion” (*ASU*, 51). Because it seems obvious that one can have quite a meaningful life without rights guaranteeing that one remains *entirely* free from coercion by others (else no human being has ever had a meaningful life), Nozick’s remarks have little prospect of convincing those who do not already agree with him.<sup>29</sup>

<sup>27</sup> Charles Taylor, “Atomism,” in Alkis Kontos, ed., *Powers, Possessions, and Freedom: Essays in Honor of C. B. Macpherson* (Toronto: University of Toronto Press, 1979), 60.

<sup>28</sup> Judith Jarvis Thomson notes that Nozick’s argument that individual rights are inviolable “rests entirely on the supposition that they are” (Judith Jarvis Thomson, “Some Ruminations on Rights,” in Jeffrey Paul, ed., *Reading Nozick: Essays on Anarchy, State, and Utopia* [Totowa, NJ: Rowman & Littlefield, 1981], 137), while Thomas Nagel contends that “[t]o present a serious challenge to other views, [Nozick] would have to explore the foundations of individual rights and the reasons for and against different conceptions of the relation between those rights and other values that the state may be in a position to promote, . . . but no such arguments appear in the book” (Thomas Nagel, “Libertarianism without Foundations,” in Paul, ed., *Reading Nozick*, 192–93).

<sup>29</sup> A charge frequently leveled against natural rights theories is that they violate the Humean proscription against deriving a normative conclusion from purely empirical premises. Jeremy Waldron, for example, states that “[t]he idea of *natural* rights is seen as a particularly glaring example of the ‘Naturalistic Fallacy’, purporting to derive certain norms or evaluations from descriptive premises about human nature.” Jeremy Waldron, introduction to *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), 3.

My critique of Locke's and Nozick's arguments does not, of course, suggest that natural rights theorists cannot supply a secure grounding for Lockean natural rights, merely that neither Locke nor Nozick (nor anyone else that I am aware of) has done so. Until that grounding is provided, arguments like Locke's and Nozick's, which are profoundly persuasive to those who are antecedently committed to Lockean natural rights, are likely to remain equally unpersuasive to those who are not.

### III. AN ALTERNATIVE CONCEPTION OF NATURAL RIGHTS

#### A. "Empirical" natural rights

I make no pretense of being able to offer a satisfactory philosophical grounding for Lockean natural rights. Rather, I would like to sidestep the issue by offering an alternative conception of natural rights that is not beset by the foundational problems discussed in the previous section, but is nevertheless philosophically useful. In place of the traditional conception of natural rights as rights that human beings are inherently *endowed with* in the state of nature, I would like to offer a conception of natural rights as rights that *evolve in* the state of nature. For lack of a better term, I will refer to rights of this type as "empirical natural rights."

In offering this alternative, I am employing a conception of the state of nature that is similar to, but importantly different from, that employed by Locke and Nozick. Like both Locke and Nozick, I am interested in exploring human behavior in the absence of established government, not in the absence of any mechanism of interpersonal governance. Accordingly, my conception of the state of nature is one in which human beings are able to make interpersonal agreements or other private arrangements to ensure their personal security and enjoyment of life—that is, one that is consistent with both antagonistic and highly cooperative behavior. Thus, the conception of the state of nature that I am employing is much more like Locke's than Hobbes's. Unlike Locke and Nozick, however, I am advancing an empirical, rather than an essentially normative, conception of the state of nature.<sup>30</sup>

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To the extent that a natural rights theory attempts to derive rights solely from a description of human nature, this charge may be well founded. However, neither Nozick's argument nor Locke's secular argument falls prey to this critique. Both philosophers ground their arguments on genuinely normative premises about the moral status of individual human beings. Hence, I have not addressed the Humean objection in this essay.

<sup>30</sup> See the discussions of Locke's and Nozick's conception of the state of nature in subsection II A.

Perhaps like most readers, I had always assumed that Locke's conception of the state of nature was a purely empirical one—that, like Hobbes, Locke was simply referring to a situation in which there was no organized civil government. Recently, however, I have been persuaded by A. John Simmons's argument referenced above in the text accompanying note 4 that this is not the case and that Locke is offering an essentially normative conception of the state of nature that "captures the distinctive moral component of that state" (Simmons,

In the previous section, I described both Locke and Nozick as making genuinely normative arguments, as drawing their normative conclusions from normative premises about the moral status of human beings. Accordingly, their conception of the state of nature is an essentially normative one. Both Locke and Nozick were interested in exploring the human condition in the absence of *morally legitimate* government. Thus, for Locke at least, a person subject to a repressive, morally illegitimate regime would still be in the state of nature with respect to that regime.

This normative conception of the state of nature is too broad for my purposes. I am interested in how human beings behave in the absence of any established political authority, morally legitimate or not. Thus, the conception of the state of nature that I intend to employ is one defined by the absence of civil government *simpliciter*, that is, of any entity claiming or generally recognized as possessing a monopoly over the legitimate use of force in a geographical area or otherwise vested with the traditional trappings of government, such as “finance through taxation, claim of sovereignty, ultimate decision-making authority, and prohibitions on competitive entry.”<sup>31</sup> This conception sees the state of nature as an empirical state of affairs rather than a moral condition.

Once the state of nature has been specified, traditional natural rights theorists such as Locke and Nozick next ask what moral entitlements human beings possess therein. I intend to ask only what human beings do. This is an empirical question that can be answered only on the basis of empirical evidence.<sup>32</sup> Fortunately, there is a wealth of such evidence

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“Locke’s State of Nature,” 451). This implies that Nozick, who adopts Locke’s conception of the state of nature, is offering a normative conception of the state of nature as well. Thus, Locke and Nozick employ the state of nature to ask not how human beings *do* behave in the absence of civil government, but how they are *entitled* to behave in the absence of *morally legitimate* civil government.

Because in this essay I am interested in the former question, my remarks in the text accompanying and immediately following this note are intended to make it clear that I am adopting only Locke’s and Nozick’s *description* of the state of nature, not their normative characterization of it. Readers who naturally think, as I did, of the state of nature as a description of an empirical condition and who are unfamiliar, as I was, with its normative interpretation can probably avoid confusion by skipping the two paragraphs in the text immediately following this note.

<sup>31</sup> Tyler Cowen, “Law as a Public Good: The Economics of Anarchy,” *Economics and Philosophy* 8 (1992): 250.

<sup>32</sup> Because there are relatively few historical examples of people living in a true state of nature, the question of how human beings behave in such a state is necessarily hypothetical. That is, I am forced by circumstance to ask how people *would* behave in the absence of civil government rather than simply make empirical observations about how people living without civil government actually behave. Nevertheless, I intend to address this hypothetical question exclusively on the basis of observational data. That is, the evidence I will offer in support of my claim that people in the state of nature *would* behave as I describe is that, in the relevant historical cases that approximate the state of nature, people *did* behave in this way.

The counterfactual nature of the question being addressed does not imply that it cannot be adequately answered on the basis of empirical evidence. Indeed, I would argue that the best way to prove how people would behave under a counterfactual set of circumstances is

available both in the form of direct historical accounts of how those who found themselves in this situation behaved and in the form of analogies that can be drawn from situations in which existing governments failed to act with regard to particular avenues of human endeavor. Unfortunately, in the present context, space does not permit a thorough review of this evidence. Accordingly, I will have to make do with some broad generalizations accompanied by only a few illustrative supporting examples.<sup>33</sup>

First, the generalizations: Historical evidence suggests that life in the state of nature is indeed *originally* beset by the inconveniences Locke identifies. In the absence of civil government, most people engage in productive activity in peaceful cooperation with their fellows. Some do not. A minority engages in predation, attempting to use violence to expropriate the labor or output of others. The existence of this predatory element renders insecure the persons and possessions of those engaged in production. Further, even among the productive portion of the population, disputes arise concerning broken agreements, questions of rightful possession, and actions that inadvertently result in personal injuries for which there is no antecedently established mechanism for resolution. In the state of nature, interpersonal conflicts that can lead to violence often arise.

What happens when they do? The existence of the predatory minority causes those engaged in productive activities to band together to institute measures for their collective security. Various methods of providing for mutual protection and for apprehending or discouraging aggressors are tried. Methods that do not provide adequate levels of security or that prove too costly are abandoned. More successful methods continue to be used. Eventually, methods that effectively discourage aggression while simultaneously minimizing the amount of retaliatory violence necessary to do so become institutionalized. Simultaneously, nonviolent alternatives for resolving interpersonal disputes among the productive members of the community are sought. Various methods are tried. Those that leave the parties unsatisfied and likely to resort again to violence are abandoned. Those that effectively resolve the disputes with the least disturbance to the peace of the community continue to be used and are accompanied by ever-increasing social pressure for disputants to employ them.

Over time, security arrangements and dispute settlement procedures that are well-enough adapted to social and material circumstances to reduce violence to generally acceptable levels become regularized. Members of the community learn what level of participation in or support for

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to show how they did behave when those circumstances or ones relevantly similar obtained. This, at any rate, is the approach I take in this essay.

<sup>33</sup> Hence, the essay is entitled "*Toward a Theory of Empirical Natural Rights.*" The actual development of such a theory requires the hard work of providing the firm empirical grounding upon which the theory must rest. This, however, is the project of another day.



the security arrangements is required of them for the system to work and for them to receive its benefits. By rendering that level of participation or support, they come to feel entitled to the level of security the arrangements provide. After a time, they may come to speak in terms of their right to the protection of their persons and possessions against the type of depredation the security arrangements discourage, and eventually even of their rights to personal integrity and property. In addition, as the dispute settlement procedures resolve recurring forms of conflict in similar ways over time, knowledge of these resolutions becomes widely diffused and members of the community come to expect similar conflicts to be resolved in like manner. Accordingly, they alter their behavior toward other members of the community to conform to these expectations. In doing so, people begin to act in accordance with rules that identify when they must act in the interests of others (e.g., they may be required to use care to prevent their livestock from damaging their neighbors' possessions) and when they may act exclusively in their own interests (e.g., they may be free to totally exclude their neighbors from using their possessions). To the extent that these incipient rules entitle individuals to act entirely in their own interests, individuals may come to speak in terms of their right to do so (e.g., of their right to the quiet enjoyment of their property).

In short, the inconveniences of the state of nature represent problems that human beings must overcome to lead happy and meaningful lives. In the absence of an established civil government to resolve these problems for them, human beings must do so for themselves. They do this not through coordinated collective action, but through a process of trial and error in which the members of the community address these problems in any number of ways, unsuccessful attempts to resolve them are discarded, and successful ones are repeated, copied by others, and eventually become widespread practices. As the members of the community conform their behavior to these practices, they begin to behave according to rules that specify the extent of their obligations to others, and, by implication, the extent to which they are free to act at their pleasure. Over time, these rules become invested with normative significance and the members of the community come to regard the ways in which the rules permit them to act at their pleasure as their rights. Thus, in the state of nature, rights evolve out of human beings' efforts to address the inconveniences of that state. In the state of nature, rights are solved problems.

I turn now to the supporting examples. Two oft-cited examples of societies in which people lived for extended periods of time without a traditional civil government are ancient Israel in the time of the judges and medieval Iceland.<sup>34</sup> I prefer the example of Anglo-Saxon and early

<sup>34</sup> For a discussion of the latter, see William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago, IL: University of Chicago Press, 1990); and David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (1979): 399-415.

Norman England because I believe it offers a wonderful test case of how human beings behave in the absence of central political authority. With the collapse of Roman rule in Britain at the beginning of the fifth century, civil government essentially disappeared from the island. As the literate Romans left, so did their law, and as the legions departed, so did its enforcement. This left the inhabitants living in kinship and tribal groupings exposed to outside aggression and with no authoritatively established mechanisms for dealing with internal disputes—truly a good approximation of the state of nature.

In such circumstances, people's most urgent need was for a method of deterring violence and theft. This was originally supplied in the form of the blood feud, which consisted in direct reprisal against aggressors. When someone was assaulted, killed, or otherwise wronged, the expected, socially accepted response was for the members of the aggrieved party's household or clan to wage private war against the wrongdoer.<sup>35</sup> Because the prospect of an immediate violent response from a victim's entire family or support group was sufficiently fearful to discourage attack, the blood feud was an effective deterrent. However, the risk to life and limb and the disruption of normal life that the blood feud entailed also rendered it highly inconvenient. The violence inherent in the blood feud created strong incentives for people to find alternatives to its prosecution. Hence, the practice developed of holding the feud in abeyance while attempts were made to reach a peaceful settlement through negotiation.

The forum for these negotiations was the moot, a public assembly that served as the chief instrument of social administration.<sup>36</sup> When both parties agreed, they could lay their dispute before the moot, whose members, much like present-day mediators, attempted to facilitate an accommodation that both parties found acceptable. The blood feud would be prosecuted only if no accommodation could be reached. Because such negotiated settlements avoided the strife and physical risk of the blood feud, community pressure gradually transformed the effort to reach them from an optional alternative to the feud to a necessary prerequisite for receiving the help of one's group in prosecuting it.<sup>37</sup>

Unsurprisingly, successful negotiations usually involved some form of compensatory payment. As repetition of this process taught the community what level of compensation would restore peace, "extraordinarily detailed schedules of tariffs . . . for various injuries"<sup>38</sup> were established. Under the circumstances, requiring such payments constituted

<sup>35</sup> See Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2d ed. (Cambridge: The University Press, 1898), 1:46.

<sup>36</sup> When the conflict was between members of households or tribes that did not participate in the same moot, the negotiations took place directly between the clans or tribes.

<sup>37</sup> Pollock and Maitland, *The History of English Law*, 46–47.

<sup>38</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 54.

a very sensible system. The threat of heavy financial burdens upon the wrongdoer and his kin is probably a more effective deterrent of crime than the threat of capital punishment or corporal mutilation . . . and at least equally as effective as the modern sanction of imprisonment; and it is surely less expensive for society. Moreover, in terms of retributive justice, not only is the wrongdoer made to suffer, but in addition—in contrast to today's more "civilized" penology—the victim is thereby made whole.<sup>39</sup>

The success of this method of securing peace caused it to spread throughout Britain (and all of Germanic Europe), with the result that "[t]he institution of fixed monetary sanctions payable by the kin of the wrongdoer to the kin of the victim was a prominent feature of the law of all the peoples of Europe prior to the twelfth century."<sup>40</sup>

The process of negotiating settlements of potentially violent conflicts and repeating and eventually institutionalizing successful resolutions gradually produced a broad body of customary law that served as the basis for the English common law. Having grown out of the resolution of actual conflicts by a process of trial and error, the rules that comprised this law were practical and remarkably subtle and nuanced. For example, no compensatory payment was due if one killed a thief, so long as one immediately publicized the killing<sup>41</sup>—a requirement apparently designed to prevent people from manufacturing evidence of a theft after the fact to legitimize murder. Further, actions that subjected others to humiliation, such as "binding a free man, or shaving his head in derision, or shaving off his beard,"<sup>42</sup> demanded larger compensatory payments than any but the most serious injuries. Why? Apparently because these were precisely the types of actions most likely to evoke a violent response and most in need of discouragement if peace were to be preserved.

By establishing a schedule of payments associated with various types of actions that damaged the interests of others, customary law (which was not distinguished from morality) established the obligations members of the community owed to their fellows. In doing so, it also established the restrictions on the behavior of their fellows that members of the community were entitled to enforce. That is, it established rights. These included, of course, rights not to be murdered, maimed, or physically assaulted that protected one's physical integrity. But they also included a right to be free of certain types of assaults on one's honor that protected one's psychic integrity, a right to the "peace" of one's home that gave one dominion over one's home and special protection against its invasion, and a

<sup>39</sup> Ibid., 55.

<sup>40</sup> Ibid.

<sup>41</sup> Pollock and Maitland, *The History of English Law*, 53.

<sup>42</sup> Ibid.

right to the enjoyment of possessions such as cattle when purchased before the proper number of witnesses or land when held by "folk-right."<sup>43</sup> In short, customary law established a set of personal rights that facilitated a peaceful existence in the society of others.

A second useful example, although not a territorial one, is supplied by the Law Merchant in medieval Europe. With the revival of long-distance trade in Europe during the eleventh and twelfth centuries, merchants found themselves conducting business across cultural and political boundaries. As foreigners, however, international merchants were vulnerable to expropriation by hostile local merchants and officials. In addition, linguistic and cultural differences, the need to transact business through third-party agents, and the plurality of local customs "gave rise to hostility toward foreign customs and . . . ultimately led to mercantile confrontations"<sup>44</sup> for which there was no antecedently established method of resolution. Thus, *in their capacity as merchants*, medieval traders found themselves without civil government to provide security and resolve conflicts, a reasonable analog for the state of nature.

What happened? Local merchants wanted the benefits that could be reaped from long-distance trade, but foreign merchants would trade with them only if they had an assurance that their goods would not be expropriated and that they would be treated fairly. Accordingly, merchants sought arrangements that provided the needed assurance. Many such arrangements were tried. Those that worked best were widely copied and eventually institutionalized in the Law Merchant.

The most viable mercantile practices were enforced in the Law Merchant so that local practices were undermined where they diverged from the Law Merchant. . . . Established custom lay at the foundation of the Law Merchant. The universal system of law thus sought out those customs which were "constant," those practices which were "established" and, in particular, those habits which were capable of sustaining a high level of commerce to the satisfaction of merchants, consumers and rulers alike.<sup>45</sup>

As a result, "[i]n twelfth-century Europe the transnational character of the law merchant was an important protection against the disabilities of aliens under local laws as well as against other vagaries of local laws and customs."<sup>46</sup>

<sup>43</sup> *Ibid.*, 58–62.

<sup>44</sup> Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, CO: F. B. Rothman, 1983), 11.

<sup>45</sup> *Ibid.*

<sup>46</sup> Berman, *Law and Revolution*, 342.

Medieval merchants also lacked an established system for resolving the disputes that arose among them. The court systems of the various nations and localities were not viable forums for mercantile disputes because they lacked expertise with regard to trade practices and worked too slowly for merchants who could not remain long in one place. In response, merchants began settling disputes among themselves on the basis of informal proceedings and highly streamlined decision-making procedures. To the extent that these procedures produced successful and rapid resolutions of mercantile disputes, they became regularized. The merchant courts that evolved in this way eventually grew into a European system of commercial courts in which merchant judges quickly applied the tenets of the Law Merchant to resolve commercial disputes.<sup>47</sup>

The process of applying the principles of the Law Merchant in these courts to resolve the actual disputes that arose among merchants established an extremely sophisticated body of customary commercial law that “supplied a great many if not most of the structural elements of the modern system of commercial law.”<sup>48</sup> This law facilitated the creation of bills of exchange and promissory notes and recognized their negotiability, invented the chattel mortgage and other security interests, supported the development of deposit banking and bankruptcy law, and established the limited liability joint venture.<sup>49</sup> In doing so, the Law Merchant established the obligations that those engaged in commerce owed to each other, and hence the rights that each enjoyed as a participant in commerce. Thus, good-faith purchasers of goods gained the rights of holders in due course and the right to rely on an implied warranty of fitness and merchantability; creditors gained the preferential right to collect property on which they held a security interest; and entrepreneurs gained the right to enjoy limited liability in joint ventures and the protection of trademarks.<sup>50</sup> In short, in the absence of a European civil government, the inconveniences of the “mercantile state of nature” forced merchants to address the problems of security and dispute resolution themselves. The trial and error process by which they did so produced the Law Merchant and the system of merchant courts that eventually established a set of commercial rights that facilitated peaceful exchange and the flow of commerce.

Examples of situations in which civil government is entirely lacking will necessarily be rare. Evidence of how human beings behave in the absence of government is not limited to such examples, however, but may also be drawn from situations in which existing governments fail to act.

<sup>47</sup> See Trakman, *The Law Merchant*, 12–17. For a good synopsis of the development of the Law Merchant and merchant courts, see also Bruce L. Benson, *The Enterprise of Law: Justice without the State* (San Francisco, CA: Pacific Research Institute for Public Policy, 1990), 30–35.

<sup>48</sup> Berman, *Law and Revolution*, 350.

<sup>49</sup> *Ibid.*, 349–50.

<sup>50</sup> *Ibid.*

My final two supporting examples will be of this type: one is drawn from the English common law and the other from the experience of sea horse fishermen in the Philippines.

In my opinion, the English system of common law offers valuable analogical evidence of how rights evolve in the state of nature, for although the English government provided a forum for resolving interpersonal disputes in its common law courts, until fairly recently it neither directly resolved the disputes nor provided substantive rules for doing so. Instead, the fundamental rules of social order were left to evolve out of the resolution of actual disputes in ways that seemed fair to the ordinary members of the community who served as jurors. And the rules that actually evolved through this process produced the much-vaunted "rights of Englishmen."<sup>51</sup>

Consider, for example, the common law of assault and battery. In modern terms, the law of battery forbids one from intentionally making "harmful or offensive contact" with another. This prohibits not only direct blows, but snatching a plate out of someone's hand or blowing smoke in his or her face. The law of assault forbids one from intentionally causing another to fear he or she is about to be battered, but it does not prohibit attempts at battery of which the victim is unaware or threats to batter someone in the future. These rules invest individuals with a fairly strong set of personal rights. They establish the right to be free not only from physically harmful contact, but from all offensive physical contact, as well as from fear that such contact will be immediately forthcoming. What accounts for this high level of protection for individuals' bodily and psychic integrity?

In earlier centuries, one of the most urgent social needs was to reduce the level of violence in society. This meant discouraging people from taking the kinds of actions that were likely to provoke an immediate violent response. Quite naturally, then, when suits arising out of violent clashes were litigated, juries tended to hold parties who had taken such actions liable. But what types of actions were these? Obviously, direct physical attacks on one's person were included, but affronts to one's dignity or other attacks on one's honor were equally if not more likely to provoke violence. Hence, the law of battery evolved to forbid not merely harmful contacts, but offensive ones as well. Furthermore, an attack that failed was just as likely to provoke violence as one that succeeded, and thus gave rise to liability. But if the intended victim was not aware of the attack, it could not provoke a violent response, and if the threat was not

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<sup>51</sup> The advent of the English common law is usually dated to the reign of Henry II (1154–89), who provided a nascent form of trial by jury in royal courts. See Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston, MA: Little, Brown, 1956), 19. The common law evolution of the rules of private law continued with relatively little interference from the political organs of the English government until well into the nineteenth century.

immediate, the threatened party had time to escape, enlist the aid of others, or otherwise respond in a nonviolent manner. Hence, the law of assault evolved to forbid only threats of immediate battery of which the target was aware.

In the absence of direct government intervention, people faced the problem of how to reduce public violence. They dealt with this problem in the entirely natural manner of holding those who took actions likely to provoke violence responsible for the injuries that resulted. As more and more cases were decided on this basis, people came to expect that future cases would be as well and adjusted their behavior to that expectation. Over time, these repeated decisions coalesced into the rules specifying what constitutes assault and battery. These rules define individuals' obligations to respect others' personal integrity, and hence their rights to be free from unwanted physical intrusions and threats. The strong personal rights protected by the law of assault and battery are the solution to the past problem of excessive social violence.

Finally, consider the modern example of the Philippine sea horse fishermen.<sup>52</sup> In one of the most impoverished regions of the Philippine Islands, the population survives by harvesting sea horses for export to Hong Kong and the Chinese mainland, where sea horses are prized for their supposed medicinal and aphrodisiacal properties. For most of the region's population, the sale of sea horses constitutes the only source of income beyond subsistence fishing. Until recently, the waters in this area were open to all and the fishermen simply went out and harvested as many sea horses as they could. By the mid-1990s, the population of sea horses in these waters was rapidly declining. One reason for this was the harvesting of pregnant sea horses, each of whom carried large numbers of young, before they could give birth. No fisherman was willing to forgo harvesting pregnant sea horses because doing so merely meant that another fisherman would take the sea horse and the first would have relinquished an immediate benefit for no resulting gain. The Philippine government had virtually no presence in this impoverished region and took no action to solve the fishermen's problem.

Sea horse fishermen in the village of Handumon were shown by a marine biologist how to construct netting with mesh small enough to contain adult sea horses, but large enough to allow newly born fish to escape. Armed with this knowledge, Handumon fishermen built their

<sup>52</sup> This example is taken from the PBS science show *Nova*, "The Kingdom of the Seahorse," broadcast on April 15, 1997. There is a large body of scholarly literature exploring how property rights evolve in the absence of government that, due to limitations of space, cannot be reviewed here. A good starting point for such a review is Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57, no. 2 (Papers and Proceedings, 1967): 347-59. In addition, David Schmidtz provides a useful overview of some of the work in this field in David Schmidtz, "The Institution of Property," *Social Philosophy and Policy* 11, no. 2 (1994): 42-62, and recently, an entire issue of the *Journal of Legal Studies* has been devoted to the subject. See *Journal of Legal Studies* 31, part 2 (2002).

own floating cages in which they placed the pregnant sea horses that they found. They then allowed the sea horses to give birth before removing them from the water for sale. They also agreed to place a portion of the reef near their village off-limits to all fishing in an attempt to increase the sea horse population. These practices were successful at increasing the sea horse population, but as a result, fishermen from surrounding islands and villages began to "poach" sea horses from the waters around Handumon. In response, the Handumon villagers began patrolling these waters to keep the poachers out. Eventually, fishermen from surrounding areas came to Handumon to learn what the villagers were doing and copied their techniques. As a result, the sea horse population of the entire region is recovering.

In the absence of governmental action, the fishermen of the Philippines had to address the problem of the declining sea horse population themselves. The villagers of Handumon developed fishing practices and security arrangements that reversed the decline. The villagers' success stimulated others to inquire into their practices and copy them, thereby transforming them into widespread practices. These practices imposed new obligations on Philippine fishermen to respect each other's cages, to refrain from fishing in the preserve, and to participate in or support the security arrangements. Looked at from the fishermen's point of view, these obligations gave them property rights to the contents of their personal cages and to fish within the patrolled waters. The rights of the Philippine sea horse fishermen are the solution to the problem of the declining sea horse population.

These examples are offered as a temporary stand-in for more rigorous empirical evidence demonstrating that human beings in the state of nature act in ways that ultimately produce individual entitlements. What I am calling "empirical natural rights" are rights that evolve as a by-product of human efforts to address the inconveniences of the state of nature. Empirical natural rights are the solutions to the problems the state of nature presents.

### *B. The character of empirical natural rights*

Are the rights I have labeled "empirical natural rights" truly natural rights? Traditionally, natural rights have consisted in moral entitlements that human beings possess simply by virtue of their humanity; rights that spring directly from human nature or fundamental principles of morality. Such rights are inherent in, not created by, human beings, and require no human interaction for their existence. The rights I have described clearly do not fit this model. They are not inherent in human beings and do not spring from human nature or fundamental moral principles. They are certainly not "natural" in the sense of not having been created by human action. Although not consciously created by any human mind, they depend



on human interaction for their existence. Thus, although they are “the result of human action, but not the execution of any human design,”<sup>53</sup> they are indeed the creation of human beings.

Empirical natural rights are natural only in the sense that they are the rights that naturally evolve in the state of nature. Nevertheless, I want to claim that this is sufficient for them to be regarded as true natural rights. In my opinion, the essential element of a natural right is its pre-political character. Along with Simmons, I would argue that to qualify as a natural right, a right need only be one that “could be possessed independently of (and logically prior to) civil society, whose binding force is non-conventional”<sup>54</sup>—that is, one that has “natural grounds and could be possessed in the state of nature.”<sup>55</sup> Empirical natural rights clearly meet this test. By definition, they are rights that human beings possess in the state of nature and that predate the formation of civil government. They depend on no conscious human convention (such as a social contract), but merely on the empirical fact (i.e., the natural ground) that human beings tend to act to relieve discomfort. A conception of rights as solved problems depends only upon a conception of human beings as natural problem-solvers.

Although empirical natural rights are true natural rights, they are quite different in character from traditional natural rights. Empirical natural rights are more flexible, more mutable, and less philosophically perfect entities than the rights usually advanced by natural rights theorists. Because traditional natural rights are logically derived from inherent features of human nature or fundamental principles of morality, they are typically seen as vesting individuals with conceptually complete, timeless moral entitlements. For example, the natural right to property is traditionally depicted as the right to the exclusive use and control of an object. In contrast, because empirical natural rights arise out of the uncoordinated efforts of human beings to resolve the problems they encounter in the state of nature, these rights rarely consist in such philosophically elegant entities. The empirical natural right to property can only be described in extremely inelegant terms as the right to a great amount of use and control of an object most of the time, with exclusive use and control at some times and no use or control at others.

If the natural right to property derives from one’s moral entitlement to one’s own person, as Locke would have it (*STG* §27), or from the Kantian injunction to treat all human beings as ends in themselves, as Nozick would have it (*ASU*, 30–31), then it is perfectly logical to see the right to property as consisting in the exclusive use and control of objects. Because

<sup>53</sup> Adam Ferguson, *An Essay on the History of Civil Society* (Edinburgh: Printed for A. Millar and T. Caddel in the Strand, London, and A. Kincaid and J. Bell, Edinburgh, 1767), part 3, § 2.

<sup>54</sup> Simmons, *The Lockean Theory of Rights*, 90.

<sup>55</sup> *Ibid.*

no one can have an ownership interest in another's person and no one is morally entitled to use another merely as a means, there is no ground for seeing individuals as vested with less than full control over their property. In contrast, the empirical natural right to property evolved to help human beings solve the problems of life in the state of nature, the most urgent of which was the need to peacefully resolve conflicts that would otherwise lead to violence. As the burgeoning literature on the evolution of property rights makes clear,<sup>56</sup> the recognition of individual property rights in what would otherwise be a commonly held resource is, in most cases, an excellent mechanism for accomplishing this end. But not in all cases. Consider, for example, the situation in which one person acquires all the real property surrounding the home of another and then denies the homeowner permission to cross his or her land in an effort to force the homeowner to sell at an extortionately low price. In this case, a property right that invests the acquisitive party with the exclusive use and control of his or her property is a prescription not for peace, but for violence. Not surprisingly then, property rights evolved to prevent the employment of this tactic by automatically granting enclosed property owners an easement of necessity that allows them to cross others' property. Consider, also, cases of emergency in which one person's life may depend on the use of another's property, such as when the captain of a ship caught in a deadly storm lashes the ship to another's dock. Once again, because a right to exclusive use and control that allowed property owners to deny others what they need to save their lives would be a prescription for violent confrontation, property rights evolved to permit the use of others' property in emergencies (although compensation must be paid for any damage done). Thus, in contrast to the more philosophically pleasing conception of the traditional right to property, the empirical right is a highly flexible, exception-laden one that invests individuals with the exclusive use and control of objects only to the extent that doing so facilitates a more peaceful life in society.

The same contrast can be seen in the context of individuals' personal rights. If natural human equality invests all human beings with the equal right to be free from subjection to the "will or authority" of others, as Locke would have it (*STG* §54), or if respect for human beings as ends in themselves demands respect for their autonomy, as Nozick would have it, then it is logical to see the natural right to liberty as consisting in the ability to act free from the direct application of coercion or its threat. In contrast, the empirical personal rights that actually evolved are both less and more extensive. As noted in the discussion of assault and battery, these rights are less extensive because they protect individuals not against the threat of coercion *per se*, but only against the threat of its *immediate* application. Yet they are more extensive because they protect individuals

<sup>56</sup> See, e.g., the journals cited in note 52 above.

against not only coercion, but also offense. The contours of these rights were determined not theoretically, but by what was necessary to reduce social violence to generally acceptable levels. Protection against the threat of future coercion was not necessary to achieve this end, so the rights did not include such protection. Protection against serious affronts to dignity was, so they did. Thus, whereas the traditional conception of the right to liberty consists in a conceptually neat sphere of protection against interference with one's activities, the empirical right to liberty consists in an oddly shaped, indented, and bulging bubble of personal protection that corresponds to precisely the amount of freedom necessary to solve the problem of excessive social violence.

Individual empirical natural rights, then, are theoretically imperfect, exception-laden, fuzzy-edged entities. Yet, taken together, they form a remarkably good approximation of Lockean natural rights. This is not coincidence, but is due to the empirical fact that Locke's set of broad negative rights to life, liberty, and property consists in precisely those rights that are most likely to produce peaceful relationships among human beings in the absence of civil government.<sup>57</sup>

Consider the right to life. Murder, as the least compensable of all injuries, calls forth the strongest desire for revenge and is more likely than anything else to provoke a violent response. The first priority of any community wishing to live in peace must be to discourage such intentional killings. As a result, the security arrangements that evolve invariably reserve their strongest disincentives for unjustified intentional killings. As these security arrangements give rise to patterns of behavior that become institutionalized into rules, the rules reflect the relatively greater seriousness of murder in comparison to other wrongs. Thus, the rules institutionalize a special level of protection for individuals against having their lives taken, a level of protection that is significant enough to cause the taking of life to be viewed as different in kind from other wrongs. In other words, the rules provide individuals with a distinct, especially important entitlement not to be unjustly killed by others—a right to life—that is identical to Locke's.

Next, consider the right to liberty. Besides murder, there are many other actions that provoke violent responses. Physical attacks on one's person or the immediate threat of such an attack will do so, as will physical restraints on one's freedom of movement and certain types of serious affronts to one's dignity. As a result, people in the state of nature establish security arrangements that discourage these actions and that eventually evolve into rules prohibiting assault, battery, and false imprisonment. Generally speaking, individuals respond violently only when others inter-

<sup>57</sup> Indeed, it is not unreasonable to view Locke and later natural rights theorists as providing a *post hoc* philosophical justification for a set of rights that had actually evolved, and in doing so, smoothing out their philosophically rough edges.

fere with the pursuit of their goals and desires in ways they cannot reasonably avoid. Otherwise, they nonviolently sidestep the interference. But unavoidable interferences are virtually always coercive ones. As a result, the rules that evolve in the state of nature are those that suppress coercion. When the rules prohibiting assault, battery, false imprisonment, and other forms of coercive interaction are taken together and viewed from the perspective of the individual member of the community, they look very much like a general right to be free from coercive interference with one's activities—that is, like a broad negative right to liberty. Although, as noted above, this empirical natural right is not identical to Locke's right to liberty, it does constitute a remarkably close approximation of it.

Now consider the right to property. Murder and the use of force against one's person are not the only actions that provoke violence. Depriving one of his or her possessions or attempting to do so will also elicit a violent response. In addition, violence frequently erupts when different people try to use objects held in common in incompatible ways. As a result, the security arrangements that people in the state of nature devise discourage the forcible dispossession of goods. As people conform their behavior to the incentives of these arrangements, rules evolve that protect possession and eventually give rise to a right of continued possession. Simultaneously, the members of the community search for peaceful resolutions to the disputes that arise over the use of common goods. As successful resolutions are found and repeated, rules governing the use of physical (and intangible) objects emerge. These rules specify procedures by which individuals can acquire control over an object and the extent to which they may exclude others from its use. As a matter of empirical fact, violent conflicts are usually best avoided by allowing those in proper possession of an object to exclude others from using it in most ways most of the time. Therefore, the rules that evolve tend to invest those in possession of an object with almost exclusive control over it.<sup>58</sup> However, because some ways of using objects and some forms of exclusion provoke rather than allay conflict, the rules do not permit those uses or those forms of exclusion. When taken together, the rules that protect possession, that prescribe the procedures by which individuals may acquire possession of objects, and that specify the ways in which those in proper possession may exclude others from using the objects create a set of individual entitlements that look very much like a negative right to private property. As previously noted, this empirical right to property is not

<sup>58</sup> But note that these rules do not result in everything being privately held. In certain cases, holding property in common does not produce conflict and may even facilitate peaceful interaction. This may be the case for roads and waterways that aid in commerce. See Carol Rose, "The Comedy of the Commons," in Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview Press, 1994), 105–62. Where there is no conflict, there are no resolutions, and hence no rules evolve that restrict the use of the commons.

a perfect match for Locke's right to property, but because the limitations on individuals' control over objects are relatively minor and infrequent, it is a reasonably close approximation of it.

Finally, note that there are no positive empirical rights. There is, of course, no reason why there cannot be. It is logically possible that people in the state of nature would respond to the insecurities and inconveniences of their condition in ways that produced rules imposing uncompensated obligations on individuals to supply others with particular goods or services. But, as a matter of fact, they do not.

Once practices that reduce the threat of violence to manageable levels have evolved, people in the state of nature may then confront the problems posed by the lack of assurance that they will have enough to eat, or will receive medical treatment when needed, or will obtain an education. They may try many different ways to address these problems. The evidence suggests that the arrangements that are most effective in doing so, and hence are repeated and become institutionalized, are those that involve reciprocal obligations to participate in mutual assurance schemes. That is, people agree to contribute their labor or some of their resources to a pool in return for the right to draw upon the pool when needed. In essence, people in the state of nature create self-insurance mechanisms.<sup>59</sup>

I suspect that the reason positive rights do not evolve in the state of nature is that they tend to give rise to rather than resolve interpersonal conflicts. The fundamental problem faced by people in the state of nature is to align individuals' incentives so that they pursue their personal interests in ways that facilitate rather than impede others in the pursuit of their interests. Eliminating the use of violence toward others as a means of pursuing one's interests is a major step in this direction. In contrast, imposing obligations on individuals to provide others with goods or services without compensation places the interests of individuals in con-

<sup>59</sup> And, of course, they encourage purely charitable activities on the basis of religious or cultural beliefs about what God requires or what will make one a good person.

A good source of analogical evidence of how people address these problems when government does not do so for them is historical research into the practices of Jewish communities in Christian Europe, immigrant communities in northern cities of the United States in the nineteenth and early twentieth centuries, and black communities in the southern United States during the segregation era. Although these groups existed within states with civil governments and thus were not, strictly speaking, in a state of nature, they were cut off from governmental provision of any welfare services and, as a result, were in a virtual state of nature with regard to such services. (Given the ubiquity of government in the modern world, isolated enclaves within modern states that are denied governmental services are perhaps the best modern proxies for the state of nature. Such enclaves supply real-world situations that allow empirical observation of how people behave in the absence of civil government.) David T. Beito, in his *From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890-1967* (Chapel Hill: University of North Carolina Press, 2000), demonstrates how the latter two groups were able to supply such services as poor relief, unemployment compensation, health care, old age annuities, and burial insurance through voluntary mutual assurance arrangements. See also Charles Murray, *In Pursuit of Happiness and Good Government* (San Francisco, CA: ICS Press, 1994), chap. 12.

flict. To the extent that individuals are required to serve others' interests, they are not free to serve their own. If individuals are required to give others some of their property or to labor for others without compensation, then they are in the position of those subject to forcible dispossession or coercive restrictions on their freedom of movement. As we have seen, these are situations that tend to provoke rather than resolve conflicts. Voluntary mutual assurance schemes in which everyone who participates receives a personal benefit do a much better job of aligning incentives, and hence would be selected for in the trial and error process by which people in the state of nature solve problems.

The absence of the evolution of positive rights in the state of nature can be usefully illustrated by the fact that no duty to rescue someone in danger ever evolved in either the customary or common law of England. Such a duty would create the fairly minimal positive right to the efforts of others to save one from danger when feasible. If any positive rights were to evolve, this would surely be one of the most likely candidates. The fact that it did not may be due to purely practical difficulties such as the inability to determine the level of risk a rescuer should be required to run, to judge whether a rescue would have succeeded, or to calculate what one person owes another for failing to save the other from a danger that the former did not create. But it may also be that holding individuals liable for failing to incur personal risks to render aid to others is simply a poor way of resolving disputes and promoting social peace. Indeed, it seems more like a recipe for drawing third parties into dangerous conflicts than for discouraging such conflicts. Whatever the reason, however, even this fairly minimal positive right failed to evolve.

In sum, then, empirical natural rights are true natural rights that evolve out of human interaction in the state of nature. They are theoretically imperfect, exception-laden entities that are the by-product of the efforts of human beings to learn how to live together peacefully in the absence of civil government. And yet, when taken together, they form a set of rights that corresponds fairly closely to Locke's negative rights to life, liberty, and property without also including any positive rights to fundamental goods or services. When we recall that the challenge that neither Locke nor Nozick could meet was to establish not only that natural rights exist, but that they consist in all and only the Lockean rights to life, liberty, and property, empirical natural rights begin to look like potentially useful philosophical entities.

### *C. The normative status of empirical natural rights*

I have argued that empirical natural rights exist and form a fairly good approximation of the Lockean rights to life, liberty, and property. As yet, however, I have said nothing about why they are entitled to any respect. Empirical natural rights are merely the rights that evolve in the state of

nature. But the fact that they evolve is, in itself, without normative significance.<sup>60</sup> To argue from their mere existence to the conclusion that individuals are morally entitled to have them respected would be to run afoul of Hume's injunction against deriving normative conclusions from purely empirical premises. What, then, is the normative basis for empirical natural rights?

I can offer no argument that empirical natural rights have any intrinsic moral value. I cannot demonstrate that they capture any principles of justice or embody any moral principles. I certainly cannot claim to know which underlying moral theory is correct, or even whether to take a deontological, consequentialist, or Aristotelian approach to ethics. I can, however, argue that empirical natural rights have instrumental moral value regardless of which moral theory and general approach to ethics one adopts. This is because empirical natural rights facilitate peaceful human interaction and peace is an important, if not preeminent, moral value in virtually all moral theories.

To make this point, I would like to offer an analogue of the Rawlsian concept of a "primary good" that might be called a "primary value." Rawls defines primary goods as "things that every rational man is presumed to want [because t]hese goods normally have a use whatever a person's rational plan of life."<sup>61</sup> Primary goods have universal instrumental value because "whatever one's system of ends, primary goods are necessary means."<sup>62</sup> Thus, goods such as health, intelligence, liberty, and wealth are all primary goods. Analogously, I would define a primary value as something that every moral theory regards as valuable because it normally advances the realization of the ultimate end of the (consequentialist or Aristotelian) theory or is entailed by the fundamental principles of the (deontological) theory. Primary values have universal instrumental moral value because whatever a moral theory's ultimate goals or requirements, primary values are means to their fulfillment.

Peace, I would argue, is a primary value. Whatever the end (or ends) of a consequentialist moral theory, peace makes its realization more likely. Whether the theory requires the maximization of one or the optimal increase in each of many human goods such as pleasure, happiness, the satisfaction of rational desires, social wealth, knowledge, friendship, etc., peace is a necessary prerequisite to the achievement of the theory's goal. Further, whatever an Aristotelian moral theorist may mean by human flourishing, a peaceful social environment is necessary for its realization. It is much more difficult for one to live well or reach one's potential when

<sup>60</sup> This is the cost of adopting a purely empirical definition of the state of nature. See the beginning of subsection III A. By rejecting a normative definition of the state of nature of the type employed by Locke and Nozick, I have forgone the opportunity to claim any normative significance for results of human behavior within it.

<sup>61</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 62.

<sup>62</sup> *Ibid.*, 93.

surrounded by strife. Finally, it is difficult to imagine a deontological moral standard that does not either explicitly prescribe peaceful behavior or implicitly require a peaceful environment in order for human beings to behave as it prescribes.

Peace, then, is morally valuable because it is a prerequisite for or facilitates the realization of all other moral values. Empirical natural rights are rights that exist precisely because they facilitate peaceful interaction among human beings. Hence, empirical natural rights are entitled to respect because they are instrumental in promoting the primary value of peace. They are entitled to respect not merely because they *evolve* in the state of nature, but because they *are productive of peace* in the state of nature. Therefore, empirical natural rights have genuine, if instrumental, moral value.

#### *D. The philosophical value of empirical natural rights*

In Section II, I argued that the weakness of natural rights political philosophy lies not in its derivation of limited government from the existence of Lockean natural rights, but in its inability to supply a firm normative foundation for Lockean natural rights. I now want to suggest that empirical natural rights can supply such a foundation.

Let me begin by reviewing the essential role that natural rights play in political philosophy. Natural rights serve as a basis on which to determine whether political authority is morally justified. To be morally legitimate, political authority must come into existence in ways that are consistent with the natural rights of those subject to it. To retain its legitimacy, political authority must not be exercised in ways that violate those natural rights. Thus, the essential philosophical purpose of natural rights is to serve as a ground upon which to morally evaluate both the existence and the actions of civil government. To serve this purpose, natural rights must be morally well-grounded entities whose existence in no way depends upon civil government. That is, natural rights must be morally legitimate, logically pre-political entities; they must be rights that can exist in the state of nature.

As previously discussed, empirical natural rights are neither direct grants from God, logically deducible from inherent features of human nature, nor directly entailed by fundamental moral principles. Further, they are artificial entities in the sense that they are the creation of human action. They are natural only in the sense that they naturally evolve in the state of nature and are logically independent of the existence of civil government. Yet, if they are normatively well grounded, this is all that is required for them to perform philosophically as natural rights; for as long as they supply a ground outside of the political realm on which to base evaluative judgments about political arrangements, a sort of normative Archimedean point from which to move the political world, they need



possess no particular ontological, metaphysical, or normative pedigree to function as true natural rights.

Further, empirical natural rights are normatively well grounded. They exist only because they have been proven to facilitate peaceful social relationships among human beings. Empirical natural rights are, by their nature, productive of peace. And peace is a primary value, one that is morally valuable, if not in itself, then instrumentally because it facilitates the realization of virtually all other moral values. Empirical natural rights help produce the good or help ensure that human beings act rightly regardless of how the good and the right are defined. They therefore possess genuine moral value.

Finally, when taken together, empirical natural rights comprise a set of rights that corresponds closely, although not perfectly, to Locke's negative rights to life, liberty, and property. Because murder, coercive interference with others' persons and freedom of movement, forcible dispossession of goods, and conflicts over the use of resources are the activities most likely to produce violence in the state of nature, these are the activities that people in the state of nature most urgently seek to discourage. Hence, the rules that evolve out of these efforts vest individuals with rights that protect their lives, persons, freedom, and goods against invasion by others. These rights may be conveniently and reasonably grouped together under the rubric of the rights to life, liberty, and property to produce a set of rights almost as extensive as Locke's. However, because giving some people claims over the labor or possessions of others tends to promote rather than reduce interpersonal conflict, no positive rights evolve. As a result, empirical natural rights consist in almost everything that constitutes Lockean rights and nothing else.

Once natural rights theorists such as Locke and Nozick complete their demonstrations that Lockean natural rights entail that only limited government can be morally justified, they face the skeptical question of why one should believe that Lockean natural rights and only Lockean natural rights exist and should be respected. The philosophical value of the concept of empirical natural rights is that it can supply an answer to this question: Lockean natural rights and only Lockean natural rights exist because Lockean rights and only Lockean rights evolve in the state of nature. And Lockean natural rights should be respected because doing so promotes social peace, which is necessary to realize any and all other moral values.

The fact that (Lockean) empirical natural rights exist and are normatively well grounded tells us nothing, in itself, about the contours of a morally justified civil government. Those contours are determined by the method by which individuals delegate the power conferred by these rights to the government and the amount of power so delegated. Thus, empirical natural rights will not by themselves settle any of the substantive questions concerning the morally proper extent of government power.

They will, however, get the natural rights project off the ground by providing the normative grounding for natural rights that Locke and Nozick could not.

Grounding one's argument for limited government on empirical rather than traditional natural rights has both advantages and disadvantages. The main advantage is the potentially greater persuasive force of arguments grounded on empirical natural rights. Because accepting the existence and normative force of empirical natural rights requires no prior theological, metaphysical, or normative commitments, arguments based on these rights can have a very broad appeal. One need not believe in the existence of God, or that certain substantive propositions are self-evident, or that human beings are essentially equal or essentially separate or have any essential non-socially-constructed nature at all to believe that empirical natural rights exist. One need only observe the behavior of people in the state of nature.<sup>63</sup> Therefore, arguments based on empirical natural rights should have the power to persuade not only those who do not subscribe to a Lockean or Nozickian theological or metaphysical position, but also those who do not engage in theological or metaphysical reflection at all. Answering the question of why one should believe that natural rights exist by pointing at the way the world works is a much more promising way of persuading those of primarily empirical intellectual orientation than is presenting a complex theological or metaphysical disquisition. Further, one need not subscribe to any particular moral theory to recognize the normative force of empirical natural rights. One need only appreciate that empirical natural rights are productive of peace and that peace is a primary value. Therefore, arguments based on empirical natural rights have the potential to persuade not only those who do not subscribe to Kantian moral theory, but all those who perceive the normative value of peace. Thus, empirical natural rights can allow natural rights-based arguments for limited government to avoid the metaphysical and normative cul-de-sacs in which they have become trapped in the past.

The main disadvantage of basing arguments for limited government on empirical natural rights is that the grounding is less certain than that aspired to by those who base their arguments on traditional natural rights. God's commands, the essential features of human nature, and the inviolability of individuals all represent morally fundamental considerations. If natural rights really derive from one of these sources, then they have an absolute moral force that is not subject to being overridden or abridged for the sake of other moral concerns. There really can be no stronger grounds upon which natural rights can rest. The normative force of empirical natural rights, in contrast, derives from their capacity to promote

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<sup>63</sup> Or, more accurately, one need only review the available historical evidence of how people behaved when living either in societies without civil government or in situations in which extant governments did not provide basic security or welfare services.

social peace. But peace is an instrumental moral value and, as such, retains its value only so long as it promotes more ultimate moral values. This implies that empirical natural rights may be overridden or abridged when doing so would better promote such ultimate moral values. And this apparently opens the door to arguments that there are conditions under which civil government may legitimately abridge empirical natural rights.

I believe, however, that this does not constitute as serious a drawback as it may initially appear. In the first place, peace is a primary value. Therefore, although peace may possess only instrumental value, it is a particularly strong form of instrumental value. Because peace facilitates the realization of all other moral values, cases in which social peace must be sacrificed to attain a more ultimate moral value are exceptionally rare.<sup>64</sup> Indeed, it is difficult to imagine a situation in which sacrificing a peaceful social environment would truly help to realize a more significant moral end. This suggests that the conditions under which civil government would be justified in abridging an empirical natural right would be equally rare. But secondly and more significantly, there is, at present, no alternative to employing empirical natural rights. It would indeed be better to ground arguments for limited government on natural rights derived from morally fundamental values that cannot be overridden. As we saw in Section II, however, neither Locke nor Nozick was able to provide an effective argument demonstrating that Lockean natural rights can be derived from such values. This, of course, does not mean that such arguments may not be found, and, indeed, such arguments constitute the holy grail of natural rights theory. But while the quest for them continues, empirical natural rights represent the best available ground for natural rights-based arguments for limited government. The fact that arguments based on empirical natural rights cannot provide a guarantee that there are no situations in which one's natural rights can be legitimately overridden is no reason not to make such arguments, if empirical natural rights are the only well-grounded natural rights one has. I conclude, therefore, that the advantages of empirical natural rights outweigh their disadvantages sufficiently to render them a philosophically promising foundation for arguments for limited government.

#### IV. CONCLUSION

Shorn of all metaphysical and normative presuppositions and viewed from a purely empirical perspective, rights are solved problems. When

<sup>64</sup> This claim must be read in context. It is, of course, true that nations are often forced to go to war to realize values more important than maintaining international peace. But this is not the sense in which the term "peace" is being used at present. The peace protected by empirical natural rights is "social peace," i.e., the peace internal to a society that consists in the maintenance of nonviolent relationships among the members of a community.

human beings with their various and often incompatible personal interests live together in a world of scarcity, conflicts invariably arise. Given all that human beings have in common, certain types of conflicts regularly and widely recur. The discomfort and disruption these conflicts produce give rise to a widely shared desire to resolve or avoid them.

In a society with civil government, this desire frequently expresses itself in a call for action by government to address the problem. For example, in a society beset by racial antipathy, citizens may exert sufficient pressure to cause the government to enact a law prohibiting employers from making any employment-related decisions on the basis of race. Imposing such an obligation on employers simultaneously vests citizens with a right to be free from racial discrimination in the workplace. Thus, the right to be free from discrimination is the solution to the problem of widespread racial antipathy. In a society with civil government, rights are often the solutions to social problems *that are produced by politically effective forces*.

In the state of nature, there is no civil government for people to call on to resolve widely recurring conflicts for them. Hence, they must find ways to resolve such conflicts for themselves. They could do this through explicit collective action. The members of the community could meet together to create a set of rules to regulate their future behavior toward one another. They do not. Rather, they pursue many uncoordinated efforts to address the problems caused by the conflicts; they repeat successful resolutions and discard unsuccessful ones; and they observe, learn from, and copy the successful resolutions of others. In doing so, they create widespread practices to which the members of the community conform their behavior, practices that eventually evolve into rules imposing obligations on community members and, hence, simultaneously endowing them with rights. For example, the need to reduce public brawling causes members of the community to bring pressure on their fellows not to engage in the actions most likely to give rise to it. This evolves into the obligation to refrain from making harmful or offensive physical contact with others, which vests each member of the community with the right not to be battered. Thus, the right not to be battered is the solution to the problem of excessive public violence. In the state of nature, rights are the solutions to social problems—*solutions that have been proven by experience to produce a predominantly peaceful social environment*.

From a purely empirical standpoint, the difference between the rights one enjoys due to membership in a society with civil government and one's natural rights is the problem-solving mechanism employed in their creation. To the extent that societies with civil government employ the political process to resolve social problems, citizens' rights reflect, for good or ill, the dominant political influences within their society. In contrast, because people in the state of nature are forced to employ a trial and error process of learning through experience to resolve their social prob-

lems, their rights reflect the practical demands of maintaining life in society with others. Accordingly, what I have been calling empirical natural rights encapsulate the wisdom of centuries of human experience concerning how human beings can best live with each other in peace. Because a peaceful social environment is a prerequisite to the attainment of almost everything that makes life worthwhile, this is a wisdom that should not be lightly disregarded. I believe that it is also a good basis from which to make moral judgments about the quality of civil government and its actions. Accordingly, I offer empirical natural rights as an alternative foundation for the classical liberal arguments for limited government advanced by John Locke and Robert Nozick.

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