

Chapter 5

Inconveniences of the State of Nature and Their Remedy

If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? ... To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion by others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure.

...

I easily grant, that civil government is the proper remedy for the inconveniences of the state of nature

John Locke (1689/1980), *Second Treatise of Government*: §123, §13.

Recall that, besides rights to life, liberty, and estate, each individual possesses by nature rights to engage in self-defence, to extract restitution for rights-violating losses, and to punish rights violators. If Abe attempts to enslave Bea on the isolated island that they inhabit, Bea may use force (or deception) to thwart Abe. If Abe manages to enslave her, Bea has the right not only to escape but also to extract reparations from Abe and to punish Abe for his violation of her right to liberty (*ST* §10). Locke refers to these rights to protect and enforce the rights of life, liberty, and estate as “the executive power of the law of nature” (*ST* §13).

Locke holds that in the state of nature—especially prior to the introduction of money—most people will be inclined to comply with others’ rights

to life, liberty, and estate, at least when they expect reciprocal compliance by others. However, this is not true of all people. People who do not consult reason, which teaches us that we are each equal and independent beings who are not to be subordinated to others, may well not abide by core laws of nature. Others may consult reason and, thus, be aware that each person is “absolute lord of his own person and possessions” (*ST* §123) and yet still tend to behave “as beasts of prey” (*ST* §16). Some people may desire “the benefit of another’s pain” (*ST* §34) and, hence, attempt to seize the labour of others or the products of their labour or the goods these others have acquired through voluntary exchange.

In the state of nature, the prospect of people exercising their rights of defense, restitution, and punishment will tend to deter the violation of rights. And the accurate and effective exercise of the rights to retribute and to punish will counteract rights violations that have not been deterred. However, not every reaction to *perceived* rights violations will be accurate and effective. For, in the state of nature, people will be judges of their own cases and of how much defensive force, restitution, and punishment they may impose on those they judge to be guilty. In addition, “... self-love will make men partial to themselves and their friends; on the other side, ... ill nature, passion and revenge will carry them too far in punishing others ...” (*ST* §13). Individuals may believe they are exercising the executive power of the law of nature while they are in fact engaged in unjust uses of force. And others who anticipate such unjust force may themselves rush to faulty judgment.

Locke believes that inconveniences of this sort will be infrequent prior to the introduction of money. During this pre-monetary stage of the state of nature, “what portion a man carved to himself, was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed” (*ST* §51). “The equality of a simple poor way of living, confining their desires within the narrow bounds of each man’s small property, made few controversies, and so no need of many laws to decide them, or variety of officers to superintend the process, or look after the execution of justice, where there were but few trespasses and few offenders” (*ST* §107).

However, the introduction of money greatly increases the forms of property that will exist and the ways in which one person’s use of what is (or seems to be) her property may be thought to infringe upon the property rights (or what seem to be the property rights) of others. After the introduction of money, Bea extends her cultivation to land that requires irrigation and begins

to draw so much more water upstream of Abe's watermill that the watermill ceases to function. Does Bea's impingement upon Abe's endeavours constitute a violation of Abe's right to dispose of his possessions as he sees fit? Does Abe have a right to the flow of water that operates his mill? Or Cici builds a railroad, the noise from which disturbs Dee's cows and lessens their production of milk. More controversies arise, including more *honest* disputes about who has injured whom and about what the appropriate compensation for that injury should be. Moreover, the general increase of wealth enhances some individuals' incentives to engage in more sophisticated forms of theft and fraud. So, even though everyone stands to benefit from economic life becoming more extensive, complex, and dynamic as long as rights to life, liberty, and estate are duly recognized and enforced, these developments greatly magnify the danger that in the state of nature these rights will not be duly recognized and enforced.

This danger makes each man

... willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others ... for the mutual *preservation* of their lives, liberties, and estates, which I call by the general name, *property*. (ST §123)

...

To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have *standing rules* to bound it, by which everyone may know what is his (ST §136)

Note that these inconveniences do not arise from individuals exercising their rights to freedom, that is, rights to do as they see fit with their own persons and possessions. Rather, they arise from lack of clarity about precisely where one person's rights end and where the rights of others begin; and from people's individual, idiosyncratic, inaccurate, or ineffective exercise of their rights of defence, restitution, and punishment. Thus, the natural solution to these inconveniences lies in the establishment of a standardized body of known law that will be applied by impartial judges and effectively enforced by the united power of those subject to this body of law (ST §124–§126).

The first step in the establishment of these legal institutions is for people to transfer their individual rights to defence, restitution, and punishment to a single common agency, which Locke labels “political society”. Each rational individual, “seeks out, and is willing to join in society with others, who are already united or have a mind to unite, for the mutual *preservation* of their lives, liberties, and estates, which I call by the general name, *property*” (*ST* §123 and see *ST* §134). To fulfill its purpose, political society—which, once formed, operates by majority rule (*ST* §95)—creates a structure of legal institutions that will more clearly specify and more impartially and effectively enforce the *retained* rights to life, liberty, and estate of the contracting individuals. This is the second step in overcoming the inconveniences of the state of nature.

A sensible political society will create a mixed constitutional order with an internal division of powers. We would expect this mixture to include three distinct branches, *viz.*, legislative, executive, and judicial. However, when Locke sets out the distinct powers of the well-ordered commonwealth (in *ST*, ch. *xii*), he describes a legislative power and an executive power; but there is no mention of a judicial power. What explains this omission?

Unlike many anti-authoritarian theorists in the 17th century, Locke never appeals to evolved customary or judge-made law as a basis for assessing exercises of political power. For instance, Locke never invokes the idea of an evolved “law of the land” to criticize attempts by the monarch to impose taxes without the consent of Parliament. Instead, Locke takes all human law (as opposed to natural or divine law) to be *legislation*, that is, to be enactments by some legislating individual or assembly. Neither custom nor judicial decisions can be sources of law. It follows that the only role for judges is the impartial application of legislation that has been created by the legislative branch of government and is supposed to be enforced by the executive branch. Hence, judges can only be agents of these other branches of the legal order. Indeed, Locke may think of judges (as Hobbes did!) as simply subordinates of the chief of the executive branch.

The legislative branch is responsible for enacting laws that more finely articulate people’s rights of life, liberty, and property, make these more readily known, and establish public mechanisms for their adjudication and enforcement. Locke worries about whether members of the legislature will be “apt to grasp at power” rather than legislate to enhance the security of each individual’s rights. However, he believes that a structural feature of the legislative branch will guard against this. He thinks that, if the members of the legislative assembly

are charged with enacting laws that apply equally to all persons *and* the enforcement of this legislation is placed in the hands of the executive branch rather than the legislature itself, the legislators themselves will be “subject to the laws they have made”. Hence, these legislators will “take care that they make [these laws] for the public good” (*ST* §143, also see *ST* §94). Unfortunately, Locke vastly underestimates the capacity of legislators to formulate legislation that, while perhaps having the form of general rules, will benefit themselves or their sponsors or cronies at the expense of others; and the capacity of the legislators and the executive to collude in the formulation and enforcement of such enactments.

The absence of a judicial branch on an equal footing with the legislative and executive branches seems to leave us with two *distinct* basic branches within a well-ordered commonwealth. However, Locke’s position differs from this in two important ways. First, the legislative and executive branches will not be entirely distinct. For, the monarch, who will be the chief of the executive branch, will have a share of the legislative power. In a well-ordered commonwealth no legislation can be valid without the chief executive’s endorsement.

Second, Locke identifies a *third* power within a well-ordered commonwealth, a power that also resides within the chief executive. This is the “federative” power (*ST* §145–§148). It is the power to conduct foreign policy and to wage war and make peace. Locke holds that this federative power is not subject to legislative control because conducting foreign policy and war and peace are not matters of following or enforcing the enacted rules for regulating the interaction of the members of the society in question. Foreign policy and war and peace cannot be “directed by antecedent, standing, positive laws”. Rather, it “must be *left* in great part to the *prudence* of those who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth” (*ST* §147).

Locke’s position here seems to run contrary to the classical liberal demand for strong constraints on the exercise of all coercive power, especially as it is concentrated in the head of the executive branch. A possible response by Locke is that, although the federative power cannot be constrained by “antecedent, standing positive” legislation, it is subject to constraint by political society, which can appeal to the law of nature when the federative power is not being employed “for the advantage of the commonwealth” (*ST* §147).

Despite the chief executive’s prerogative to conduct foreign policy and war and peace as he sees fit without legislative oversight, Locke maintains

that the legislative branch has “supreme authority” within a well-organized commonwealth. Nevertheless, this supreme authority does not mean that the legislature may rule “by extemporary arbitrary degrees” (ST §136). For the legislature “*is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges ...*” (ST §136). The legislature “can never have a right to destroy, enslave, or designedly to impoverish the subjects” (ST §135).

To fulfill the role entrusted to it, it is not enough for the legislature to secure each individual’s property from the deprivations by fellow subjects. It is also essential that the legislators (and chief executive) “never have a power to take to themselves the whole, or any part of the subjects *property* without their own consent” (ST §139). “And thus the *community* [*i.e.*, political society] perpetually *retains a supreme power* of saving themselves from attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject” (ST §149). Not only the legislators but also the chief executive must be subject to enacted law that serves to secure everyone’s rights of life, liberty, and property. “*No man in civil society can be exempted from the laws of it*” (ST §94).

Neither individuals in the state of nature nor individuals as members of political society would accede to a sovereign who was above the enacted law. For,

absolute monarchs are but men; and if government is to be the remedy of those evils, which necessarily follow from men’s being judges in their own cases, and the state of nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of nature, where one man commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or controle those who execute his pleasure? (ST §13)

To think, as Hobbes did, that individuals would seek to escape from the problems of the state of nature by agreeing to submit to a sovereign of unlimited authority “is to think, that men are so foolish, that they take care to avoid what mischiefs may be done by *pole-cats* or *foxes*; but are content, nay, think it safety, to be devoured by *lions*” (ST §93).