

High and Classical Liberalism: Economic Liberties "Thin" and "Thick"

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ABSTRACT

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The focus of this thesis is to identify the differences and incompatibilities that exist between John Locke's and Thomas Hobbes' particular conceptions of liberty. When the incompatibilities are assessed, it becomes clear that they offer converse logical directions for their arguments. I contend that the Lockean position holds that the existence of law precedes the justification for liberties; while the Hobbesian position holds that liberties are justified antecedent to the existence of law.

Once the logical directions of the arguments from Locke and Hobbes are clear, I apply this distinction to a contemporary case. The contemporary case is John Tomasi on one hand and Liam Murphy and Thomas Nagel on the other. I claim that these contemporary philosophers have fallen into an irresolvable dispute due to a lack of consideration for the logical direction and conception of liberty they each employ. In conclusion, I attempt to offer a remedy that each side of this contemporary debate could, perhaps, accept.

DEDICATION

I dedicate this work to my parents. Without their support this thesis would not have been possible.

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CHAPTER 1: CONCEPTIONS OF LIBERTY: THOMAS HOBBS

AND JOHN LOCKE

Introduction

The goal of this chapter is to show that there are various ways to construe liberty. I am particularly interested in the incompatible aspects of different conceptions of liberty, which it is crucial to distinguish and be aware of when attempting to build a theory of liberty for oneself. I discuss the philosophers John Locke and Thomas Hobbes, who both develop influential theories of liberty, in order to show how conceptions of liberty can differ greatly. In this chapter I summarize the conceptions of liberty that Locke and Hobbes present in their respective works. The work that I draw upon for Hobbes is his famous essay, the *Leviathan*. For Locke I draw upon his ideas from *The Second Treatise of Government*. Locke and Hobbes build their political philosophies by creating a hypothetical situation called “the state of nature.” Locke conceives of a drastically different state of nature than Hobbes, and this difference is the first key difference in understanding why they end up building different theories of liberty. I begin by explaining the differences between Hobbes’ and Locke’s respective conceptions of the state of nature, the law of nature, and ideal government. I then explain how they ground different conceptions of liberty. These conceptions share similarities, as many conceptions of liberty do, but my aim is to bring to light their differences, and why they differ.

Section 1: Thomas Hobbes

The State of Nature

In order to adequately understand Hobbes' position on liberty we must first understand how he develops his conception of the state of nature and how he construes the law of nature.

Hobbes describes the state of nature as a state of war. That is not to say that the state of nature is always man fighting against man. A state of war "consists not in battle only, or the act of fighting . . . but in the known disposition thereto, during all the time there is no assurance to the contrary" (Hobbes 1998, p. 62). During this time there is a great amount of uncertainty. Without any form of civil society or government to enforce security, no individual can be safe or "assured" that no harm will befall him from the actions of others.

Hobbes justifies his hypothetical state of nature by taking an "inference from the passions" (Hobbes 1998, p. 62). Hobbes' position is an empirical one. He claims it is simple to see how individuals would act in a state of nature. In order to do so one needs to look no further than at our own individual actions and the actions of others while residing in a civil society. Even with armed public officers that maintain and protect the peace in a civil society, it is still the case that we lock our doors at night and do not leave precious belongings in places where it would be possible for them to be taken. If we act this way when there is a legal system to protect us, we can infer what it would be like in a state where no such system exists. Without civil law there is nothing (or no one) to revenge us when we are wronged, therefore extra precaution must be taken to protect

ourselves. This leads to a state of constant fear, and ultimately a state of war. The passions that constitute humanity are relatively fixed according to Hobbes. That is to say civil society, education, and relative peace can change many aspects of the way people act; however the nature of humanity remains constant in both a state of nature and a civil society. On this basis Hobbes argues that the state of nature would always be a state of a war.

Hobbes describes the state of nature as something that should be avoided at all costs. Without civil society, life is a state of “continual fear, danger of violent death; and the life of man [is], solitary, poor, nasty, brutish, and short” (Hobbes 1998, p. 62). Due to these terrible conditions of humanity, it becomes necessary to authorize the power of an absolute Sovereign to create peace by enforcing civil law so as to avoid the tragic circumstances of the state of nature. A reason why the state of nature is to be avoided is the lack of security. Because there is no security, mankind must focus its time and energy in predation,¹ and the ever present possibility of being on the receiving end of such predation. Security in this state is best secured by anticipatory attack rather than waiting to be attacked by others. Anticipatory attack is justified in the absence of a legal system because individuals, according to Hobbes, must always attempt to ensure their own self-preservation in the best way they deem possible.

Even if all of humanity in the state of nature desired to be peaceful, and actually acted in accordance with this desire, the state of nature would *still* be a state of war. The way that a person actually acts has little effect on whether the state of nature is a state of

¹ Predation in this sense can be understood as being predation towards animals for survival as well as predation (or violent attack) on other members of mankind in order to secure one’s survival and self-preservation.

war. Uncertainty is one of the most prevalent experiences that exist in the state of nature; uncertainty about how to secure living space, uncertainty about where to find food, and perhaps most importantly, uncertainty about other persons' aims and intentions. Due to this uncertainty Hobbes believes that one must consider the worst possibilities in all situations. Even if it is not a reality that man is acting violently towards man, it is still *psychologically possible*² that such can occur. As long as violence and the possibility of death are psychologically possible, man is forced to take precaution against such possibilities. This uncertainty leads persons in the state of nature to be in a constant position of distrust toward one another. Thus this uncertainty and distrust is another reason why the state of nature is to be avoided, and a civil society created.

The next section of this essay explains Hobbes' depiction of the laws of nature. His conception of the laws of nature offer more insight into the importance of exiting the state of nature. In fact, according to Hobbes the laws of nature cannot readily be applied in the state of nature; they can only be applied in a state of peace where a Sovereign exists. Following the discussion on the laws of nature I discuss the role of the sovereign, and with that the importance of the Sovereign in the creation of Hobbes' theory of liberty.

The Laws of Nature

The laws of nature, according to Hobbes, play a pivotal role in how people should interact with one another. What separates Hobbes' view of the laws of nature, from the views of others, such as Locke, is the fact that the laws of nature play little to no role in modifying the behavior of individuals in the state of nature. The laws of nature gain their

² For more information on this position see, John Rawls: *Lectures on the history of Political Philosophy*. 2007, p. 50.

force once a Sovereign has been established, and people live in a civil society. Hobbes describes as many as 19 different laws of nature.³ The 19 laws express the ways human beings should treat and interact with one another. The issue that arises is that when under the condition of the state of nature there is no Sovereign to assure that each individual is following the laws of nature. If every person is not abiding by the laws of nature, then it is not rational to follow such laws in order to best secure self-preservation.

In order to understand Hobbes' notion of the laws of nature we must understand the difference between what is "reasonable" and what is "rational." John Rawls in his *Lectures on the History of Political Philosophy* offers great insights into how it is best to understand these terms. We understand "'reasonable' to mean being fair minded, judicious, and able to see other points of view, and so forth; while 'rational' has more the sense of being logical, or acting for one's own good, or one's interests" (Rawls 2007, p. 54). This is important because "many of the laws of nature on Hobbes' lists fall under what we intuitively consider the reasonable" (Rawls 2007, p. 54). A main goal of Hobbes is to put humankind in a position where what is reasonable to follow is also rational.⁴ In the state of nature it is certainly reasonable to follow the laws of nature, but along the same lines it is not rational. Hobbes' first, second, and tenth laws of nature assist in showing why it is not rational to follow the laws of nature without the existence of a civil society.

³ See *Leviathan* Chapters 14-15

⁴ For more on this idea see *John Rawls: Lectures on the history of Political Philosophy*. 2007, p.54-55

These laws of nature are as follows,

- 1) The first Law of Nature: “Everyone ought to endeavor peace, as far as they have hope of obtaining it.” (Hobbes 1998, p. 64)
- 2) The second Law of Nature: “That we be willing, *when others are so too*, to lay down our right to all things and be content with so much liberty against others as we would allow others against ourselves” (Hobbes 1998, p. 64-65).
- 3) The 10th Law of Nature: “At the time of the social contract, no one to reserve any right that he is not willing that others reserve as well, *contra arrogance*” (Hobbes 1998, p. 77).

These laws of nature help show the differences between what is reasonable and what is rational. It is important to note that a key aspect of the laws of nature is that they become rational to follow once a Sovereign has been created; therefore complying with both the laws of nature and the laws of the Sovereign becomes reasonable and rational. If the majority of a civil society is not following the laws of nature and the laws of the Sovereign, then they are still reasonable to follow, but cease to be rational to follow. It would truly be foolish to lay down our “right to all things” if we were the only ones to do so, and to actively seek peace when others seek war is to put oneself in a precarious position that would not be rational.

Hobbes’ notion of the laws of nature is peculiar because the laws of nature only actively play a role in the lives of individuals in civil society, not in the state of nature. The discussion of the laws of nature gives way to the importance of the role of the Sovereign in Hobbes’ political philosophy. The way human life changes from existing in a state of nature to existing in civil society due to the creation of the Sovereign offers important insights as to how Hobbes develops his conception of liberty. Before moving to discuss Hobbes’ conception of liberty, we must first show the relevance and importance of the idea of the Sovereign.

The Sovereign

In this section I explain in more detail the reasons why a Sovereign is necessary. Rawls gives an insightful statement on behalf of Hobbes to show the main role of the Sovereign. He states that, “The role of the Sovereign is to stabilize and thereby maintain, that social state in which everyone, normally and regularly, adheres to the laws of nature, which state Hobbes calls the State of Peace” (Rawls 2007, p. 73). It is the sovereign that is the great enforcer of the laws of nature. As previously stated, the laws of nature have no normative force in the state of nature. Under a state of peace, with a Sovereign at the head, it is not only reasonable to follow the laws of nature, but it is also rational. The security offered by the Sovereign removes the great uncertainty of the state of nature, and without great uncertainty assurance of self-preservation is created. With the protections of the Sovereign in place, each individual can rely on the fact that most people will comply with the laws of nature, which is a foundational justification for adhering to the laws of nature.

But how does a Sovereign come to power? And how does this affect one’s liberties? Rawls brings to light an important distinction between two different accounts of how a Sovereign comes to power in two separate works of Hobbes.⁵ Rawls believes that Hobbes offers a particular account of how a Sovereign comes to power in an earlier worked titled *De Cive* and then later reformulates his argument in his larger work the

⁵ I will discuss both accounts that Hobbes gives, as it is worthy of showing that even with an updated account of the sovereign from the *De Cive* to the *Leviathan* it appears that there is little (or no) substantive difference between the former and the latter account. For direct discussion on this issue see *John Rawls: The lectures on the History of Political Philosophy*, 2007. P. 81.

Leviathan.⁶ In order for a state of peace to be created, and a Sovereign to exist, according to the *De Cive*, all persons must renounce their rights to resist the Sovereign.⁷ Once this occurs, all members of society effectively give up liberties that were possessed in the state of nature for the security offered by the Sovereign. However, “In the *Leviathan* everyone confers the use of their right on the Sovereign by means of a contract with each other, so the Sovereign becomes their agent; and Hobbes believes that in this case one has a different and stronger sense of social community than one has in *De Cive*” (Rawls 2007, p. 81). Initially there does seem to be a substantive difference between Hobbes’ two accounts. In the first account (*De Cive*) Hobbes claims that in order for a Sovereign to be Sovereign everyone must *surrender* their rights to him/her. In the later account, the *Leviathan*, Hobbes changes his position to persons *conferring* or *authorizing* with one another the creation of a Sovereign, who then becomes their agent. In the *Leviathan* it appears that individuals maintain their liberty to a higher degree due to conferring or authorizing a Sovereign to be their agent.⁸ However, this is not the case due to the way Hobbes understands the term *authorization*. Hobbes uses authorization so loosely that once it is cashed out, his idea in the *Leviathan* looks nearly identical to the idea he puts forward in *De Cive*.

To clarify further, I summarize a hypothetical account offered by Rawls in order to show what individuals are actually authorizing when they create a Sovereign. Rawls

⁶ See John Rawls: *Lectures on the history of Political Philosophy*, 2007.

⁷ *Ibid.* P. 81

⁸ *Ibid.* P. 81

offers two clauses that express the similarities between the *De Cive* and the *Leviathan*.⁹

The two clauses that Rawls states are as follows,

- 1) “I covenant to forgo my right of exercising my discretion in matters of the common good of the commonwealth and to forgo the right to private judgment as to whether the enactments of the Sovereign are good or bad, and to recognize that all these enactments are just and good so far as this is compatible with my inalienable right of self-preservation¹⁰ and the like” (Rawls 2007, p. 82).
- 2) “All this I do for the final end of setting up the Sovereign, for preserving my life, the objects of my affections, and the means of commodious living. The introduction of these constraints on myself is required . . . for the existence of an effective Sovereign, and so one regards all these conditions necessary” (Rawls 2007, p. 82).

Both of the above clauses help summarize the amount of liberties one must relinquish when contracting and authorizing a Sovereign. Members of the society are not able to judge the actions of the Sovereign normatively. The effect upon individual liberties of restricting one’s ability to judge the actions of the Sovereign shows both the importance that Hobbes places on security, and that even when people authorize a Sovereign, they necessarily surrender liberties. It must also be noted that the inability to judge the Sovereign’s actions unless the actions conflict with self-preservation is no small statement. If self-preservation alone is justification for judgment upon the Sovereign, then there can be innumerable laws or dictates from the Sovereign that must be carried out without question, and certainly without judgment.

The second clause states that the constraints upon what individuals can do is not only warranted, but required. There can be no sovereign, (i.e. no state of peace) unless

⁹ For all of the clauses see *John Rawls: Lectures on the history of Political Philosophy* -pages 82-83

¹⁰ I discuss what rights are inalienable in my next section, which focuses directly on Hobbes’ conception of liberty.

one relinquishes rights that one had in the state of nature. Security in one's self-preservation is obtained, but members of the society are beholden to the Sovereign, who is beholden to no one, and is the supreme arbiter of what is good and just.¹¹ Justice, according to Hobbes, does not exist in the state of nature. On the basis of this idea, together with his argument about the relation between justice and contracts, Hobbes claims that laws created by the Sovereign in civil society are necessarily just. The Sovereign is the person to whom everyone in society granted the power to use their rights for certain purposes, and one such purpose is the ability to create civil laws (Rawls 2007, p. 83). Civil law is made by the Sovereign and "all that is done by such power is warranted and owned by everyone of the people; and that which every man will have so, no man can say is unjust. Therefore, the Sovereign being the person whom everyone has covenanted as that person who is to make the laws, it follows that the Sovereign's laws are just" (Rawls 2007, p. 83). If the law is to be applied to every person in the society, which would necessarily be the case,¹² then no law could be unjust.

Hobbes' account of authorization is little more than a cleverly worded argument for a "submission" of liberties that existed in the state of nature to the Sovereign in a civil society. There are various supplemental justifications that assist in the explanation of how Hobbes uses authorization in a way that more readily resembles submission. (A) The authorization given to the Sovereign is fully comprehensive. When a Sovereign is

¹¹ It must be noted here that the Sovereign still may not deprive someone unnecessarily of their right to self-preservation, of their objects of affection, or their means of commodious living. These are three fundamental interests that the laws of nature and civil society are meant to protect. If the Sovereign is not protecting these fundamental interests then he is, arguably, no longer Sovereign.

¹² This is so because if each member covenanted to create a Sovereign then the Sovereign's laws must necessarily affect all who are part of the covenant, or else they would have no Sovereign and still be in the state of nature.

created, the members of the society fully give up their right to govern themselves, which is a much stronger statement than how authorization is usually understood. (B) The authorization of rights to the Sovereign is permanent and irrevocable (i.e. there is no undoing the submission of rights). This also is not how authorization is usually understood. (C) The right to judge whether the Sovereign is adequately upholding the covenant is forgone, therefore there is no way to assess whether the Sovereign is doing what he was authorized to do. (D) Perhaps the most important aspect is what motivated everyone to create a covenant in the first place, and that motivation is fear.¹³ A compact created out of fear, and a Sovereign authorized for the same reason, are also not how authorization is usually understood. A compact made out of fear implies at least the possibility that persons in the state of nature acted in a way that we usually understand as submission, rather than authorization.

We have not directly discussed liberty yet in this essay, and that is the next step, but each section that has been discussed offers different degrees of insight into understanding how and why Hobbes develops the theory of liberty that he does. Particularly, this section on the Sovereign gives indirect evidence not only of how Hobbes construes his conception of liberty, but how civil society directly affects the liberty that members of the society have. In the next section I directly discuss Hobbes' conception of liberty and how both the state of nature and the state of peace play crucial roles in Hobbes' particular theory of liberty.

¹³ For more information on (A)-(D) See Rawls: *Lectures on the History of Political philosophy* 2007, Chapter III, Appendix B, P. 92-93.

Hobbes' Conception of Liberty

In this section I assess Hobbes' view of liberty directly using the insights from the more foundational aspects of Hobbes' political philosophy from the *Leviathan*. The focus of this section is the definition of liberty given by Hobbes in the *Leviathan*, as well as the important relation between liberty and law in Hobbes' political philosophy.

First we must start with the definition that Hobbes gives of what constitutes liberty. Hobbes states that,

“By Liberty is understood, according to the proper signification of the word, the absence of external impediments; which impediments may oft take away part of a man's power to do what he would, but cannot hinder him from using the power left him according as his judgement and reason shall dictate to him.” (Hobbes 1998, p. 79-80)

The above definition given by Hobbes helps clarify how he understands liberty. Indeed, the most important aspect of the definition, in the sense that it is most helpful in clarifying Hobbes' notion of liberty, is the “absence of external impediments.” Taken alone and without context, however, it does not offer much information, because it is not clear what exactly constitutes an external impediment. Luckily, we do not completely lack context. The section on the Sovereign expressed that what constitutes an external impediment is the creation of the Sovereign, and from that the creation of law.

In the state of nature, according to Hobbes, man has the right to everything. To clarify, “everyone is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it followeth that in such a condition every man has a right to everything, even to one another's body” (Hobbes 1998, p. 80). In this condition of man, anything that may help in securing self-

preservation is the rational course of action to take. It may also be noted that, in this position of possessing a “right to everything,” there is no external impediment from civil or natural laws that restrict liberty. In the state of nature it can be inferred that man has complete liberty to do as he pleases, which promotes his safety. Hobbes believes that the state of nature is a state of complete liberty. This is justified according to Hobbes by the looseness of the terms ‘authorization’ and ‘self-preservation.’ Nearly every course of action in the state of nature can be justified by pursuing one’s own self-preservation. To commit violence, preemptive war, theft, etc. all can be justified with this loose understanding of self-preservation. The prevalence of uncertainty, which was previously discussed, helps explain why these actions can be committed and justified by individuals pursuing self-preservation. In view of this, the state of nature is a state of complete liberty that lacks restriction from civil and natural laws.

The loose understanding of self-preservation expressed by Hobbes brings to light the importance of rationality and self-preservation as grounding justificatory principles for individual liberties. Hobbes justifies the liberties that individuals possess in the state of nature through his notions of rationality and self-preservation. Thus we can see that the state of nature is a state of complete liberty because nearly any action one takes can be justified in terms of self-preservation. This sort of quasi-moral argument assists in showing the foundation of Hobbes’ view of liberty in relation to law. Hobbes’ argument expresses a logical structure that justifies individual liberties in the absence of law (both natural and civil). If this were not the case, then there would not be liberties to confer to a Sovereign during the creation of civil society.

If the state of nature is a state of complete liberty justified by Hobbes' quasi-moral argument from rationality and self-preservation, then we must ask how liberty of individuals is affected by the creation of a Sovereign. In the previous section on the Sovereign we discussed the fact that authorization of a Sovereign in order to avoid the state of nature is really a means of submission established in accordance with fear of untimely and violent death. With this being the case we can assume that sovereignty and security are necessarily at odds with liberty in Hobbes' political philosophy. In order to enter into a state of peace with the existence of a Sovereign, individuals must lay down their rights to everything, and now must follow the laws of nature. The laws of nature, which are the foundation of law, restrict the actions that one may take when pursuing one's interests. There appears to be no circumstance in which the creation of law promotes liberty on the Hobbesian theory; it is always the case that when law is created and enforced liberty is restricted. This offers no problem for the internal consistency of Hobbes' justification of state authority, since Hobbes considers security, not liberty, to be the end of society. The valuing of security over liberty is a central feature of Hobbes' overall political philosophy. Restricting liberty of individuals is, in fact, a desirable end rather than one to be avoided, according to Hobbes.

The idea that the creation of law can only restrict liberty is a necessary aspect of this particular conception of liberty. This way of thinking is coherent with Hobbes' definition of liberty. The only way for there to be a state of peace is for much¹⁴ of the liberty that the individual possessed in the state of nature to be forgone to the Sovereign in order to establish and maintain peace. A worthwhile point to consider is that Hobbes

¹⁴ This does not include the inalienable rights that no person can relinquish to the Sovereign.

does claim that the state of peace makes certain important aspects of life more accessible. That is to say that it becomes possible to secure property rights, to engage with confidence in productive behavior, and to have assurance that covenants will be upheld. What is rational to do changes in the state of peace. The state of peace allows individuals to create long term covenants where one can be assured that the other person will uphold their part of the agreement that may be required to take place at some future point in time. Though all of these aspects of human life become possible with the creation of the Sovereign, Hobbes cannot grant that these aspects of life are a promotion of individual liberty. The sole reason that these particular aspects of life are possible is because everyone has already conferred the liberty they had in the state of nature to the Sovereign.

Hobbes does argue that there are certain inalienable rights that cannot be transferred, authorized, or conferred to the Sovereign. Hobbes states, “The obligation of subjects to the Sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them. For the right men have by nature to protect themselves when none else can protect them can by no covenant be relinquished” (Hobbes 1958, p. 179).¹⁵ The right to protect oneself is an alienable right according to Hobbes, which is consistent with the importance that he places on human interest in self-preservation

Another inalienable right that cannot be transferred to the Sovereign is the right to be honored by one’s children. This is because the father of all children is the first Sovereign, who has power of life and death over the child. “For to relinquish such right was not necessary to the institution of the Sovereign power, nor would there be any

¹⁵ This quote is taken from Herbert W. Schneider’s edition: *Leviathan Parts I and II*.

reason why any man should desire to have children to take the care to nourish and instruct them if they were afterwards to have no other benefit from them than from other men” (Hobbes 1958, p. 267).¹⁶ Because it takes time and resources to raise a child, it is not necessary for the adequate functioning of the Sovereign for individuals to relinquish their right to raise a child in a way they see fit. This perhaps seems slightly superfluous towards Hobbes’ overall argument, but nonetheless it is worth noting that the above two inalienable rights are among a limited set of liberties that cannot be relinquished to the Sovereign. If this is the case then it appears there are many liberties that are not inalienable, which means that most liberties in the state of nature can, if necessary, be relinquished to the Sovereign.

As Hobbes conceives liberty, when humanity is in a state of nature there is complete liberty. The laws of nature in this state have no normative force to compel anyone to comply with them. Because no one complies with the laws of nature, there is no law (either civil or natural). If there is no law, then there is no external impediment upon the actions that one can or cannot commit. According to Hobbes, law does not promote liberty, and is in fact necessarily opposed to it. The only secure way for humanity to prosper is to relinquish liberties in order to obtain security. In each case there is a necessary trade of liberty for law, and ultimately for security.

In the next section of this chapter I discuss John Locke’s position on the state of nature, the law of nature, and his theory of liberty. Locke’s differences from Hobbes are fundamental and deep. So now I move to discuss John Locke’s political philosophy and how he develops his own unique and particular conception of liberty.

¹⁶ See Herbert W. Schneider’s edition: *Leviathan Parts I and II*.

Section 2: John Locke

The Law of Nature

John Locke, like Hobbes, uses the terms the “state of nature” and the “law of nature,” but he uses them differently. In this section I discuss the law of nature according to Locke. This is essential before discussing his view of the state of nature as a whole.

To start the discussion it is necessary to define Locke’s concept of the natural law. Locke’s use of natural law follows much of the natural law tradition. That is to say Locke sees natural law as,

“That part of the law of God which can be known by us by the use of our natural powers of reason. These powers discern both the order of nature open to our view and the intentions of God which are disclosed through that order. And on this ground, it is said that natural law is promulgated, or made known to us, by God through our natural reason (Locke, 1980 ¶57).¹⁷

God plays a necessary role in Locke’s conception of the law of nature. Unlike Hobbes, Locke cannot be seen as developing a secular moral system.¹⁸ Before continuing further I discuss why the terms “natural” and “law” are the appropriate terms for Locke’s project as a whole. By understanding how Locke uses these terms, we gain insights into how Locke’s position is inherently at odds with Hobbes’.

Rawls, in his *Lectures on the History of Political Philosophy*, gives a helpful definition of the term “law” as Locke uses it. Rawls states, “A law is a rule addressed to rational beings by someone with legitimate authority to regulate their conduct . . . for

¹⁷ For direct quote see John Rawls: *Lectures on the History of Political Philosophy*, Lectures on Locke Part I, Page 109.

¹⁸ In the previous part of this essay I did not discuss the religious interpretation of Hobbes in much detail. The reason for this is that Hobbes’ work does not out of necessity require the existence of God for its justification. Whether God is used as justification for his arguments or not does not change the formal or substantive structure of his arguments. Therefore, I believe, it is best to understand Hobbes work as a secular moral theory, rather than a theistic one. This distinction was expressed with great clarity by John Rawls. See *John Rawls: The lectures on the History of Political Philosophy*, 2007.

their common good” (Rawls 2007, p. 109). Law is the appropriate term due to God’s legitimate, and supreme, authority to regulate human conduct.¹⁹ Locke sees God as possessing the power to make and enforce law. In certain respects natural law could be considered metaphorical law. This is so because of the differences in the way natural law comes to be known (i.e. through our natural reason) compared to municipal or positive law which is law enacted by an authority within society.²⁰ Even though natural law may perhaps be thought of as metaphorical, “natural law is literally law, that is, it is promulgated to us by God who has legitimate and supreme legislative authority over all mankind. God is, as it were, the sovereign of the world and supreme authority over all its creatures; thus natural law is universal and associates mankind into one community with a law to govern it” (Rawls 2007, p. 109). It is clear that Locke understands law as being the commands of a legitimate authority. Due to the nature of Locke’s argument, God necessarily has legitimate authority over mankind due to mankind being his creation. In order to show the distinction between legitimate authority from worldly persons, and that of God, it is necessary to explain Locke’s use of “natural” in natural law.

The term “natural” in “natural law” is appropriate and necessary for Locke’s purposes. Law, as we have seen, must come from a legitimate authority, which could be worldly persons. This is not so for what constitutes natural laws. I once again resort to Rawls’ clear account of Locke’s use of the term “natural.” Rawls states that,

roughly, the idea is that given the faith that God exists (or alternatively, that God’s existence itself can be shown through reason), we are able to discern from

¹⁹ This idea was originally put forward by John Rawls, see *John Rawls: The Lectures on the History of Political Philosophy*, 2007.

²⁰ This idea was put forward by Rawls in his book *The Lectures on The History of Political Philosophy*, 2007.

the order of nature what God's intentions towards us must be, and that among these intentions is that we are to act from certain principles in our conduct toward one another. In view of God's authority, these principles discerned by natural reason as God's intentions are laws for us. Hence the term "natural" in the name "natural law" (Rawls 2007, p. 110).

The ability to discern God's existence through reason is a foundational aspect of Locke's view of natural law. God, as the creator of all life, ordered nature in such a way that it is possible for humans to be guided in their actions by the structure of nature. The idea that God is the creator of mankind is a necessary aspect of why Locke ascribes legitimate authority to God.

An important distinction that is raised by Rawls²¹ is the distinction between natural law and divine law. Divine law is law that can be known only through revelation. Revelation is distinct from natural reason. Man does not have the faculties or abilities through natural reason to acquire an understanding of divine law. Both divine law and natural law are law promulgated from God. However, if the intentions of God cannot be understood by reasonable and rational persons through their natural reason, then it becomes impossible to give justification for the law given by God. In fact, Locke's work is largely focused on denying justification for the divine right of kings. Divine law offers justification for an absolute monarchy which is an unjust form of government according to Locke.²²

Locke's discussion of the law of nature makes a subtle distinction between the law of nature and what he calls the fundamental law of nature. The fundamental law of

²¹ See *John Rawls: The Lectures on the History of Political Philosophy*, 2007. p. 110.

²² Divine law justifies the existence of an absolute monarch. This is so because many monarchs claim that their right to rule is divine and only they are aware of God's intentions to have them reign over men. Locke offers various reasons to justify why this is not the case, which will be discussed later.

nature is merely the most basic law of nature. Locke claims that “the fundamental law of nature [is that] man [is] to be preserved, as much as possible” (Locke 1980, ¶16). In accordance with this part of the fundamental law of nature Locke claims “it is the preservation of society (as far as will consist with the public good) of every person in it” (Locke 1980, ¶134). The fundamental law of nature, construed in this way, offers a glimpse of the similarities and differences between Locke and Hobbes. The fundamental law of nature creates the groundwork for Locke’s conception of liberty. The actions that one may take in the state of nature, according to Locke, are restricted by the law of nature.

Locke also offers two premises about natural rights that mankind possesses that do not derive solely from the fundamental law of nature. The premises given by Locke are 1) the fact of God’s silence and 2) the fact of equality.²³ These two premises are not directly derived from the fundamental law of nature. However, they supplement the fundamental law of nature by further showing the equality of man, and the natural right that each man be sovereign over himself, and not forced to follow the will of any other man in the state of nature. The two premises are stated by Locke as,

- 1) The fact of God’s Silence: That god has not designated anyone to exercise political authority over the rest of humankind; and
- 2) The fact of Equality: That we are creatures of the same species and rank promiscuously born to all the same advantages of nature [with respect to establishing political authority] and the use of the same faculties [powers of natural reason and will, and so on.] (Locke 1980, ¶4)

²³ These premises that do not derive solely from the fundamental law of nature were previously expressed by Rawls. See *John Rawls: The Lectures on the History of Political Philosophy*, 2007, P. 118.

If there were meant to be anything except equality in the state of nature, then God would have designated one or more persons to be the ruler of rest. This person must have noticeable differences from the rest of mankind. Because this is not so, we can infer from the design of nature that all men are meant to be considered equal with respect to political authority.

The State of Nature

The previous discussion of the law of nature gives the background necessary for adequately discussing Locke's notion of the state of nature. The state of nature constructed by Locke, much like his law of nature, differs greatly from Hobbes'. A difference to be kept in mind throughout this section is that under Locke's conception, the law of nature applies in the state of nature. Not only does it apply, but it has normative force that the laws of nature lacked in Hobbes' view. This is due to the previously discussed legitimate authority of God, and the fact that while natural law is perhaps thought of as metaphorical law,²⁴ it is "literally" law in the state of nature. This difference alone sets the two theories of the state of nature apart in important and relevant ways. As was previously stated, the fundamental law of nature establishes that mankind is to be preserved to the greatest degree possible. This necessarily entails that the taking of another's life or liberty cannot be justified solely under a loose understanding of self-preservation—as is the case for Hobbes.

²⁴ Law from God is metaphorical law only in the sense that it becomes known through reason, rather than known through the laws of men.

Locke claims that the “state of nature is a state of perfect freedom and equality” (Locke 1980, ¶4).²⁵ Ideas such as “perfect freedom” and “equality” warrant defining as these concepts can be, and often are, confusing and ambiguous. Locke understands the state of nature to be a state of perfect freedom because “all are at liberty to dispose of their persons as they see fit, within the limits set by the law of nature. It is not necessary that they ask permission of anyone else, nor are they dependent upon another’s will” (Rawls 2007, p. 115). The state of nature is a state of perfect freedom, but the parameters of what constitutes freedom are established by the law of nature. Even in a state of perfect freedom one must abide by the law of nature, as it derives its authority from God who has legitimate authority over all his creations.²⁶

First, I discuss how Locke understands and employs the term “equality;” then I discuss the same in relation to his use of the term “perfect freedom.” “Equality” for Locke should not be understood as a state where all people are equal in every way. For various reasons Locke allows for inequality to exist in the state of nature. An example of such inequality could be the amount of (real) property one possesses.²⁷ What constitutes equality according to Locke is “a state of equal power and jurisdiction among persons, all being as it were, equally sovereign over themselves: All being Kings” (Locke 1980, ¶123).²⁸ What this means for Locke is that each individual is autonomous over their own

²⁵ Later, in the section on Locke’s conception of liberty, it is discussed how perfect freedom exists in the state of nature, and how perfect freedom is coherent with the law of nature.

²⁶ This is true regardless of the state that man is in; whether it is the state of nature or civil society.

²⁷ Real property in this sense refers to actual amount of land that a person may possess. According to Locke man has a right to whatever he mixes his labor with. This is true in civil society and in the state of nature. If this is the case, then he must grant that certain inequalities such as real property would and can exist in the state of nature.

²⁸ For exact quote see John Rawls: *Lectures on the History of Political Philosophy* 2007, Lectures on Locke Part I, p. 115.

actions, and not beholden to any particular king (without one's own consent). "Equal power" is to be understood as one being sovereign over oneself inasmuch as every other person is equally sovereign over him or herself.

With Locke identifying the state of nature as a state of perfect freedom and equality, we see aspects that are both similar and different from Hobbes' position. Hobbes also believes that man is relatively equal in their mental and physical capacities, which is true in the state of nature. As we have seen however, Hobbes takes the relative equality to be yet another reason why the state of nature devolves into a state of a war. Equality for Locke is not a reason that the state of nature devolves into a state of war; in fact, it is quite the opposite for Locke. The fact that everyone is relatively equal is a reason why the state of nature need not always be in a state of war. The law of nature and the fact of relative equality keep individuals from readily entering into a state of war. This is largely due to Locke's conception that the law of nature has normative force in the state of nature, compared to Hobbes' position that lacks such normative force. Thus according to Locke, the actions one commits in the state of nature are limited by the law of nature, while in Hobbes' case one's actions are not limited in this way.

The state of nature is not always a state of war according to Locke, though the occurrence of a state of war is possible. A state of war becomes possible when members of the state of nature attempt to exert arbitrary power upon others through the means of force. Locke describes these persons as having "quitted reason" and "renounced the way of peace . . . and made use of the force of war" (Locke 1980, ¶172). The reasonable and

rational²⁹ person would not act in ways that are opposed to the law of nature, therefore the only way that the state of nature dissolves into a state of war is by persons no longer following their faculties of reason. Quitting reason can be further understood as persons acting in an irrational way and “revolting from his own kind to that of beasts” (Locke 1980, ¶172). According to Locke, what separates man from inferior beasts is man’s ability to use reason. If reason is forfeited, then the state of nature is liable to become a state of war.

Mixed Government

Locke’s conception of a just government offers further insights into how he understands liberty and also how he sees liberty in relation to law. In this section I discuss Locke’s justification for a mixed government, as well as the role the law of nature plays within civil society.

The civil society that Locke endorses is a constitutional mixed government. He believes that the power of the crown and the parliament should be coordinate with one-another.

“In a mixed constitution two or more constitutional agents share in the legislative power; in the English case these agents are the Crown and Parliament. Neither is supreme: rather they are coordinate powers. Legislation cannot be enacted without the Crown’s consent, as the Crown must approve purposed statutes before they become law. On the other hand, the Crown cannot rule without Parliament, on whom it depends for tax monies to run the government bureaucracy, support the army, and so on” (Rawls, p. 122).

The sort of “balance of powers” that Locke advocates can be seen roughly in modern times with the Unites States of America and various European countries. Though this is the government that Locke endorses, the most relevant aspect for this essay is perhaps not

²⁹ These terms are being used in the same manner they were defined in the section on Hobbes.

the intricacies of the civil society, but how it is to be formed. Earlier in this work we saw how Hobbes believes a just civil society must be created, and now we must do the same for Locke. Locke, as we shall see, claims that the absolute monarchy that Hobbes endorses is not a just form of government, and in fact is a situation of man that is *worse* than the state of nature.

The state of nature is a state of perfect freedom and equality. Because this is the case in the state of nature, man cannot be subject to the political authority of another against his will. Locke states that, “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” (Locke 1980, ¶95). This is a central aspect of Locke’s political philosophy. In order to leave the state of nature and form civil society, there must be the consent of each individual who will participate in the society. Nobody, if reasonable and rational, will put himself into a position that is worse than the state of nature. Such a position would be a society with an absolute monarch. When an absolute monarch exists, persons are bound to his will. It goes against the law of nature for men to arbitrarily give up their sovereignty over themselves and put it into the hands of one leader who may do as he pleases with the rights of all men in society. According to Locke, even municipal or positive laws must abide by the law of nature, and recognize the natural equality that all men possess. The contracting into civil society is not the surrendering of liberty to a civil society, but the creation of civil society as a protector of the liberty man has in the state of nature, by the law of nature.

Locke's position on the effect of civil society upon liberty can, with an unfocused eye, appear to possess relevant similarities with Hobbes' position. The apparent similarity must be clarified so that we can better understand that Locke's conception of liberty and a just society is actually quite different from Hobbes'. Locke claims,

“The only way whereby any one divests himself of his Natural Liberty, and puts on the *bonds of civil society* is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceful living one amongst another, in a *secure* enjoyment of their Properties, and a greater Security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest . . . When any number of men have *consented to make one community* or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest” (Locke 1980, ¶95).

Locke's position could be understood as stating that the civil society is a relinquishment of liberty, but this is not so. The aspect of consent and the idea that the freedom of individuals has not been injured shows the relevant differences from Hobbes' account of a civil society. According to Locke, persons only consent into a civil society that protects the liberties that one previously had in the state of nature. Thus the major distinction between Locke and Hobbes is that the civil society does not restrict the individual liberties that existed in the state of nature in order to promote security according to Locke. According to Hobbes, in civil society the Sovereign can restrict all liberties except for the few which Hobbes claims are inalienable rights. What I understand Locke to mean by “bonds of civil society” is not the relinquishment of liberties, but conferring one's liberties to enforce law (both natural and positive) to the civil society. Once again, no man who follows reason will consent into a civil society that does not protect the liberties he had in the state of nature.

Locke's Conception of Liberty

In this section I discuss Locke's conception of liberty as he presents it in the *Second Treatise of Government*. Locke characterizes liberty in the state of nature as "an uncontrollable Liberty, to dispose of his Person or Possessions" (Locke 1980, ¶ 6).³⁰ As previously stated, man in the state of nature is sovereign over himself and can act accordingly, as long as the action is permitted by the law of nature. Like Hobbes, Locke holds that the state of nature is a state of complete liberty. Even though this is the case, the two states of nature are distinct. For Locke, the state of nature is bound by the law of nature, and even though it is a state of perfect freedom, law exists. This is not so according to Hobbes, as the laws of nature are not binding, and it is irrational to follow them when there is no Sovereign.

Locke later makes reference to liberty and its relation to law. Locke claims in the *2nd Treatise of Government* in ¶ 87 and ¶ 123 that "liberty becomes part of man's possessions, along with life and property: the function of civil government is the protection of all of these possessions." Now we get a look as to how Locke construes the relation between liberty and law. The end of law is to protect the liberty of man. Security is also a primary function of civil society, yet it is not required that man surrender his liberty in order to obtain the security. The relation between law and liberty in Locke stands at odds with Hobbes' conception of the relation between law and liberty. Law protects liberty in Locke; liberty is surrendered for law in Hobbes. What changes with individual liberty, according to Locke, in the transition from the state of nature to civil

³⁰ Locke excludes suicide as a liberty that man has. To commit suicide would be to forgo one's natural reason and act contrary to the fundamental law of nature. For this quote and others related to Liberty see John W. Yolton, *A Locke Dictionary*, p. 130-131.

society, is not the liberty that one possesses, but how the liberty is enforced. In the state of nature one must enforce their own rights, and in civil society one's rights are enforced, and liberties protected, by the civil government.

To clarify further Locke's notion of liberty and law, I appeal to John Yolton's quote in *A Locke Dictionary*. Yolton states, "Natural liberty is to be free from any superior power on Earth, not free from God or from the constraints or guides of the law of nature or, in civil society, the positive laws. [Locke] insists that being free from the restraints and violence of others requires law" (Yolton, *A Locke Dictionary*, p. 130-131). Liberty in this case is understood as consistent with and necessarily compatible with law. Liberty is not to be understood simply as freedom from external impediment, although the quote from Yolton might be misread this way. In fact, what Hobbes considers external impediments (i.e. law) Locke considers as a necessary aspect of liberty. Perhaps Locke's most important characterization of his conception of liberty is that to be truly free, there must be law. Constraints are built into Locke's notion of liberty; therefore constraint by law is required for man to have liberty, and to be free. We now see a stark contrast between Locke and Hobbes. When (civil or natural) law exists, man's liberty is restricted according to Hobbes; if law does not exist, then liberty cannot exist, according to Locke.

The difference in the way that Locke views liberty in relation to law, as compared to Hobbes, offers a clear notion of how their respective positions are at odds, and perhaps incompatible with one another. It was previously noted that Hobbes expresses the justification for liberties through his quasi-moral argument from self-preservation. What

we now see from Locke is an argument that works in a converse direction from Hobbes. Locke explains the justification of liberties through the existence of natural law. Individual liberties, according to Locke, can only be defined after making reference to natural law, which necessarily precedes the justification for liberties. What is then clear is that the logical structure of Locke's argument is that the creation of law necessarily precedes the justification for liberties. This logical structure operates in the opposite direction from what was seen previously from Hobbes, namely, that the justification of liberties necessarily precedes the creation of law (both civil and natural).

It is clear, now, that there are various ways to formulate a conception of liberty. Locke uses similar language to Hobbes yet comes to a contrary understanding of liberty when compared to Hobbes. The way that Locke construes the law of nature provides the grounds for his conception of liberty. The necessity of law existing in the state of nature lays the foundation for the role of law in civil society. If a person possesses rights in the state of nature, it is irrational to contract into a civil society where those rights are restricted. With that being said, it is the end of law to promote the liberty of individuals rather than restrict it for the sake of security. The paradigm of security at odds with liberty is thrown away in Locke's view. Certainly it is an end of civil society in Locke's view to promote security, but obtaining security does not require a loss of liberty in one's actions.

A civil society in Locke's view is an extension of the law of nature. Because law is a condition that man is always in, one's liberty cannot justifiably be restricted with the creation of a civil society. This is why an absolute monarchy is worse than the state of

nature. An absolute monarch subjects individuals to his will, thereby taking away their (God given) rights under natural law. Thus a just civil society, according to Locke, can be brought about only by the consent of members of that would-be society, and it is how man can be in a state of complete liberty while also a part of civil society. The importance of this position is great, as it offers a foundation for understanding liberty as consistent with law. This coherence must not be overlooked. If liberty can adequately be understood as being promoted by law, then we must be careful not to assume that law entails a restriction of liberty. For future purposes, we must also be wary of the existence of multiple conceptions of liberty. With that knowledge in mind, it becomes easier to assess with a critical eye the conceptions of liberty put forward. With such a gaze it is possible to assess the compatible and incompatible elements that may exist in a particular position on liberty. Through our focus on Hobbes and Locke in this chapter, we can now see that elements of particular conceptions of liberty can be (or seem) compatible when in reality they are quite incompatible.

Conclusion

In this brief concluding section I attempt to summarize the aspects of Locke's and Hobbes' conceptions of liberty that are clearly incompatible. The purpose of this is to quantify the actual incompatibilities between Locke and Hobbes so that there is no question about which aspects between their two theories are indeed incompatible. The incompatibilities are as follows,

1. Hobbes defines liberty in terms of "external impediments." "External impediments," according to Hobbes, are the laws of nature and the laws of society. Both form of laws fit the criteria because the laws of nature are applied only once a civil society is created. Liberty, for Locke, can be known

only by reference to natural law which applies directly to the state of nature. Thus law, according to Locke, is not seen as an external impediment.

2. Hobbes defines the state of nature as a state of war. Locke claims that the state of nature is not a state of war, but it is possible for a state of war to ensue.
3. The law of nature has normative force in the absence of civil society, according to Locke. The laws of nature have normative force only in the presence of civil society, according to Hobbes.
4. Hobbes expresses a quasi-moral argument rooted in rationality and self-preservation to justify individual liberties in the absence of law. Locke offers an explanation of liberties that are justified only by the prior existence of natural law.
5. Hobbes and Locke offer logical arguments that go in converse directions. Hobbes' argument justifies liberties antecedent to law; while Locke's argument justifies liberties posterior to the existence of law.
6. Civil society, according to Hobbes, requires relinquishment of liberties to promote security. For Locke, natural law is required for liberty, and civil society must protect the liberties secured by the natural law.
7. According to Locke, constraint by law (both natural and civil) is consistent with liberty, and its promotion. According to Hobbes, constraint by law is necessarily opposed to liberty, and its promotion.
8. Security is the prime function of civil society, according to Hobbes; while protecting and enforcing liberties and other rights created by the existence of natural law is the prime function of civil society, according to Locke.

CHAPTER 2: APPLICATION OF LOCKE AND HOBBS: TOMASI, NAGEL,
AND MURPHY

Introduction

The goal of this chapter is to apply the discussion of Locke and Hobbes' conception of liberty in relation to law to a contemporary case. The contemporary case that is this chapter's focus is John Tomasi's notion of economic liberties, and their relation to law. In Tomasi's book *Free Market Fairness* he attempts to justify a "thick" set of economic liberties as basic rights by way of a moral argument. The moral argument that Tomasi offers is grounded in what he calls responsible self-authorship. In the process of building his argument Tomasi attempts to defend his position from various criticisms. However, this chapter specifically focuses on a particular charge made against Tomasi. The charge is from Liam Murphy and Thomas Nagel, derived from their book *The Myth of Ownership: Taxes and Justice*. Nagel and Murphy come from the conventionalist camp, that is to say, they believe that economic liberties are derived from a complex civil or legal system. Tomasi's focus on responsible self-authorship as being the justifying principle for economic liberties greatly differs from core aspects of the conventionalist position. With that being the case, I show that Tomasi need not worry about the charges from the conventionalist camp and can, in fact, be confident that his position stands uncompromised from Nagel and Murphy's conventionalist charge against him. In order to show why Tomasi's position remains unmolested from Nagel and Murphy I appeal to Locke's and Hobbes' conceptions of liberty and liberty's relation to law. By doing this we are able to see that the contrasting logical direction between liberty and law expressed

by Locke and Hobbes can be applied to this contemporary case. It then becomes clear that Nagel and Murphy's position also has a contrasting logical relationship between liberty and law from that of Tomasi. Upon noticing this important distinction about the logical relationship of the arguments we see that Tomasi's position is quite different, and is actually talking about something *different* from Nagel and Murphy, and thus stands unmolested from the charge they make against him.

Tomasi's Foundation

The focus of this section is to discuss Tomasi's notion of basic liberties as well as how he construes the term "a thick set of economic liberties." In order to show Tomasi's position we must first lay the groundwork of the various philosophical positions that Tomasi is in discourse with. Tomasi, in his book *Free Market Fairness* attempts to "bridge" the gap between what he calls High Liberalism and Classical Liberalism. From this he creates a position he calls neoclassical liberalism. Neoclassical liberalism is a hybrid of sorts, taking aspects from both previously mentioned traditional camps in order to develop a position that is distinct from both.

Tomasi claims that the figures at the forefront of the high liberal tradition are John Rawls and Samuel Freeman.³¹ High liberalism is defined as a position that, "understand[s] justice in terms of the principles of reciprocity and fairness proper to the democratic idea of society as a system of social cooperation between free and equal citizens. High liberals argue that the ideals of democratic society and citizenship lead to the conclusion that only a narrow range of economic liberties are basic rights" (Platz

³¹ Thomas Nagel, Samuel Scheffler, and Joshua Cohen are also considered to follow the high-liberal tradition. See Jeppe Von Platz, *Are Economic Liberties Basic Rights?* Politics, Philosophy & Economics. 2013.

2013, p. 24). The aspect of high liberalism that Tomasi accepts is society as a system of social cooperation between free and equal citizens. The aspect that Tomasi is—perhaps aggressively—opposed to is the conclusion of the high liberal argument: that only a narrow and “thin” set of economic liberties should be considered basic rights.

Of course, there are the classical liberals to also consider here. Tomasi considers prominent figures such as Adam Smith, F.A. Hayek, Richard Epstein, Milton Friedman, and John Locke as the individuals that laid the foundation for classical liberal thought. Traditional classical liberals are at odds with the high liberal position. “Classical liberals defend the economic liberties by the consequentialist argument that the economic liberties are necessary to maximize productive output and protect happy and productive living” (Platz 2013, p. 24). Tomasi is quite sympathetic with the classical liberal position that puts great value on the importance of economic liberties. It can be said that the classical liberal tradition holds a “thick” rather than “thin” conception of economic liberty. This difference in the importance of economic liberty is one of the major topics of disagreement between the high liberal and classical liberal traditions. Though Tomasi accepts the heavy defense of economic liberties that come with the classical liberal tradition, he does not accept the consequentialist aspects of the view.³²

Tomasi’s hybrid position is known as neoclassical liberalism. Neoclassical liberalism has aspects of both traditional camps, but puts a different spin on the status of economic liberties. The neoclassical liberal position “accept[s] the high-liberal view of the nature of justice and therefore reject[s] the classical liberal arguments. On the other

³² See Jeppe Von Platz “Are Economic Liberties Basic Rights.” *Politics, Philosophy & Economics*, p. 24. 2013.

hand, neoclassical liberals argue that the high-liberal view of justice implies that the full range of economic liberties are basic rights” (Platz 2013, p. 24). The goal of neoclassical liberalism is to show that economic liberties championed by classical liberals are consistent, and warranted even when taking the high liberal view on justice.

The discussion of the main traditions in this debate shows that the major point of contention between high liberals and classical liberals is the status they give economic liberties. The distinction resides in the terms “thin” conception of economic liberties and “thick” conception of economic liberties. Briefly, I will describe the intricacies of this distinction. High liberals, such as Rawls, believe that only a “thin” conception of economic liberties is required for a just society. A thin conception of liberty greatly limits the number of economic liberties that can be considered basic rights. Traditionally, high-liberals consider only two economic liberties as basic rights. The first of these is the “right to hold and to have exclusive use of personal property” (Platz, p. 27). Private personal property is required because without exclusive use to some form of private personal property one’s security and independence are greatly diminished. The second economic liberty held by high-liberals is the freedom of occupation. To be free to choose and pursue a particular profession one may desire is necessary. Without such a basic liberty in place then individuals could, in theory, be forced to do any sort of occupation against their will.

A “thick” set of economic liberties, on the other hand, is the position that holds that not only should more than just the two aforementioned economic liberties be recognized as constitutionally enforceable basic rights, but protection of many other

economic liberties as basic rights is required for a just society. Tomasi appeals to James Nickel in his article titled “Economic Liberties”³³ to assist him in how one is to understand a full range of economic liberties. The following economic liberties, considered under a “thick” conception of economic liberty, would be basic rights. Nickel gives four categories of economic liberties identified below,

1. *Liberties of Working*: This is the liberty to employ one’s body and time in productive activity that one has chosen or accepted, and under arrangements that one has chosen or accepted. Excluding forced labor and slavery, this category includes the freedom to sell, buy, trade, and donate labor.
2. *Liberties of Transacting*: This is the freedom to manage one’s economic affairs at the individual and household levels and on larger scales as well. It includes the liberty to buy and sell, to make things, to save and invest, to enter into market competition, and to profit from transactions. It also includes the liberty to start, run, and shut down a business, factory, farm, or other commercial enterprise.
3. *Liberties of Holding*: This category covers legitimate ways of acquiring and holding property, using and developing property for commercial and productive purposes, and property transactions such as investing, buying, selling, trading, and giving. It also includes freedom from expropriation without due process and compensation. These freedoms apply to both personal and productive property.
4. *Liberties of Using*: This is the liberty to make use of legitimately acquired resources for consumption and production. At the household level this liberty covers actions such as eating, drinking, inhabiting, wearing, and reading. It also covers production-related consumption such as the fuel used in a factory or the wood used in building furniture.³⁴

The above economic liberties are what are referred to when discussing a thick set of economic liberties. The list is quite expansive and covers important aspects in individuals’ private and public lives. If an expanded list such as the one given above were

³³ See Nickel J (2000) “Economic Liberties”. In Davion V. and Wolf C. *The idea of Political Liberalism: Essays on Rawls*. New York: Rowman & Littlefield.

³⁴ *Ibid* 156-157.

to be considered a basic set of constitutional rights then only a limited amount of government regulation would be acceptable in regard to economic liberties. Under the thin conception, the amount of governmental regulation upon economic liberties could, while not required, be much stricter.

At this point the philosophical battleground, so to speak, has been laid out. The general positions of the different camps of political thought have been established, and the amounts of economic liberty that each thinks a just society should have is now clear. In the next section I discuss Tomasi's conception of responsible self-authorship. This is perhaps the most important idea that runs through Tomasi's work. It is his major justifying principle for why a thick set of economic liberties is required.

Tomasi's Responsible Self-Authorship

Tomasi's moral argument based upon responsible self-authorship offers the justification for why a thick conception of economic liberties should be considered basic rights. The methodology that Tomasi uses in order to build his idea of responsible self-authorship follows the Rawlsian tradition. Tomasi defines two moral powers, which together make up his conception of responsible self-authorship. Rawls, in the high-liberal tradition, also gives and defines what he considers to be the two moral powers. Though this is the case, Tomasi's own conception of responsible self-authorship and the two moral powers is quite distinct from Rawls. For the purposes of this chapter I appeal solely to Tomasi's conception of the two moral powers and his argument from responsible self-authorship.³⁵

³⁵ For Rawls' account of the two moral powers see: Rawls J (2001) *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press.

Tomasi claims that “in order to endorse a set of political rules, people must first be capable of assessing those rules. To assess political rules, citizens must exercise powers of judgment known as “moral powers.”” (Tomasi 2012, p. 74). Without exercising one’s judgment through the moral powers, individuals are not capable of understanding what they believe society ought to allow them to do. (Tomasi, 2012). To clarify, the justification for various political rules comes from one’s ability to exercise their power of judgment through the moral powers. Tomasi defines the two moral powers as follows,

1. The 1st Moral Power: “As responsible self-authors, as I describe people exercising the first of these moral powers, Citizens are understood to have the capacity to make a realistic assessment of the life options before them and, in light of that assessment, to choose to pursue some course of life as their own.”
2. The 2nd Moral Power: This moral power “concerns the capacity people have to recognize their fellow citizens as responsible self-authors too. This involves recognizing that their fellow citizens likewise have lives to lead that are important to them.” (Tomasi 2012, p. 74-75).

The two moral powers ground what it means to be a responsible self-author. Why Tomasi argues for such a thick set of economic liberties becomes clear through understanding his notion of the two moral powers, and his idea of responsible self-authorship. In order for a person to be capable of achieving the 1st moral power there must be a limited amount of governmental regulation that restricts economic liberties. If there were heavy restrictions on the ability to own private productive property (and other necessary economic liberties), then in many ways an individual’s self-authorship is also restricted. In such instances a person is no longer free to pursue “some course of life as their own.”³⁶ For many people, in order to pursue such a life puts a significant amount of weight on what,

³⁶ See the 1st Moral Power, P. 37.

or what not, they are allowed to achieve in the economic arena. Without a broad acceptance of economic liberties as basic rights, many individuals will no longer feel they are in control of the direction of their life.

Tomasi's notion of responsible self-authorship is heavily tied to the self-respect that one has as a person. In fact, a necessary aspect of responsible self-authorship relies on this conception of self-respect. Tomasi states, "A person's self-respect is diminished if one is not (and so cannot think of oneself as) the central cause of the life one is leading. Having others secure them with "material means" could not provide liberal citizens with that form of self-respect. "(Tomasi 2012, p. 83). If a society greatly limits the economic choices that an individual is capable of making then the possibility of obtaining the form of self-respect that Tomasi values is nullified. The argument from self-respect helps further show that social welfare programs do not promote self-authorship because the "material means" are distributed to individuals rather than earned through their own free choices, faculties, and volitions.

Though Tomasi argues for a thick set of economic liberties as basic rights, it should be carefully noted that he does not claim that economic liberties should be considered absolute. By definition of how Tomasi understands basic liberties, it would be inconsistent for him to argue that economic liberties such as property rights are absolute (i.e. completely unregulated by civil society). Tomasi's use of his moral argument based on responsible self-authorship is only directed to justify that a full range of economic

liberties are on par with other basic liberties that a society deems necessary.³⁷ In order for a society to be just, and allow individuals to be responsible self-authors, the society must respect economic liberties as equal to other political and civil basic rights, such as the right to bodily integrity, the freedom of speech, and the freedom of movement.

According to Tomasi, basic rights and liberties can be regulated by government. The importance, however, rests on how they are to be regulated. If a liberty or liberties are to be considered basic rights then they can be limited and restricted only if they come into conflict with another basic liberty. This allows for a limited amount of regulation. The purpose of this would be to avoid economic liberties unfairly taking precedence over other liberties that a society also holds to be necessarily basic. A familiar example of a basic right being limited is a person yelling “Fire!” (when there is not one) in a crowded movie theatre. In countries like the United States the right to freedom of speech is protected as a basic liberty. Even though this is the case one still cannot, and should not, yell such things in a movie theatre without some form of repercussion. Freedom of speech is limited in this sense because of the panic and danger caused by yelling such a word at that particular time infringes upon other liberties individuals in the United States have as basic rights. Economic liberties, according to Tomasi, would be limited in the same way. Economic liberties should be basic rights equal with other civil and political basic rights, but not moral absolutes.

The next section discusses Thomas Nagel and Liam Murphy’s conventionalist position, and the charge they make against Tomasi’s own argument for a thick set of

³⁷ The basic liberties that a society holds may be ranging and different. The specifics of the liberties are not important to Tomasi’s position. Regardless of what the basic liberties are, economic liberties should be considered equal.

economic liberties. Nagel and Murphy, as we will see, argue that a thick set of economic liberties do not precede a legal system, and that legal systems such as taxation create and define certain rights, such as property rights.

Nagel & Murphy's Conventionalism

Thomas Nagel's philosophical position is largely considered to fall under the tradition of high liberalism. In his book *The Myth of Ownership: Taxes and Justice*, co-authored with Liam Murphy, Nagel offers a conventionalist argument stemming from the high liberal tradition. The conventionalist position expressed by Nagel and Murphy claims that the creation of a legal system necessarily precedes the creation of economic liberties. Nagel and Murphy claim,

“There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents, or a modern market economy—none of the institutions that make possible the existence of almost all contemporary forms of income and wealth” (Nagel and Murphy 2002, p. 32).

What we can see is that the economic liberties, according to Nagel and Murphy, appear to be conventional. If it were not for the legal conventions consisting partly in taxation none of the economic liberties could exist. It also appears to be the case that the breadth of Nagel and Murphy's conventionalism extends past mere property rights, and thus applies to the entire set of thick economic liberties that Tomasi attempts to justify through his moral argument from responsible self-authorship.

Tomasi believes that this conventionalist argument of economic liberties is not uncommon within the high liberal tradition. Tomasi states that one way, “high liberals

seek to undermine the importance of property rights is to claim that property is a legal convention. The economic liberty of ownership exists as a product of regulatory definitions, rules, and conventions” (Tomasi 2012, p. 69). Thus, the goal of such a position is to show that “claims to ownership are conceptually posterior to the regulatory rules that define and constrain them. So property rights cannot serve as a basis for limiting those regulatory rules” (Tomasi 2012, p. 69-70). What is clear is that Tomasi and Nagel and Murphy are at odds about the status and justification of economic liberties.

The main argument put forward by Nagel and Murphy is reliant upon the importance of a tax system and its effects on property rights, as well as the other economic liberties. They claim, “Private property is a legal convention, defined in part by looking at the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity” (Nagel and Murphy 2002, p. 8). The tax system is a large aspect of how a society defines its property rights; in the absence of such a system there is a lack of justification for the possession of property rights. Furthermore, we are looking in the wrong direction if we evaluate the tax system in terms of how it affects private property, because private property is partly a product of the tax system itself.

Nagel and Murphy further express their conventionalism by stating, “there may be good or bad reasons for the existence of such [legal] conventions, but it is essential, in evaluating them, to avoid the mistake of offering as a justification precisely those ostensibly—natural rights or norms that are in fact just the psychological effects of internalizing the convention itself” (Nagel and Murphy 2002, p. 9). This position assists

in showing the theoretical resistance of Nagel and Murphy toward moral arguments that attempt to justify economic liberties antecedent to a legal convention. They go as far as to say that it is a *psychological error* to assume there is a justification of economic rights or liberties without appealing to a legal convention. To do so would make the mistake of taking what is a socially constructed legal convention as something more basic, such as a natural right. Certain liberties such as the right to hold private property are so ingrained in the everyday lives of individuals in a legal system that they believe the justification for such property rights comes from a pre-societal right to private property, when in actuality it is the complex system of legal conventions that creates and defines the right (Nagel and Murphy 2002, p. 9).

Each point from Nagel and Murphy is an attempt to show that discussing economic liberties not in terms of a legal system is an error. Nagel and Murphy deny the acceptability of the form of justification for economic liberties that Tomasi attempts to give (i.e. his moral argument from responsible self-authorship). Not only is Tomasi's argument not acceptable, but it is a psychological error to make such claims. Nagel and Murphy take their position one step farther by claiming that arguments such as the one put forward by Tomasi are actually a form of circular reasoning. Nagel and Murphy claim, "To appeal to the consequences of a convention or social institution as a fact of nature which provides the justification for that convention or institution is always to argue in a circle" (Nagel and Murphy 2002, p. 9). This is precisely the sort of argument that Tomasi makes. If Nagel and Murphy are correct in their assumptions, then moral arguments such as Tomasi's notion of responsible self-authorship are misunderstood.

Whether this is the case or not is the focus of discussion in the next section, where Tomasi's defense against Nagel and Murphy is expressed.

Tomasi's Response to Nagel and Murphy

Tomasi offers multiple arguments in an attempt to show that Nagel and Murphy's objections do not render his position untenable. First Tomasi claims that Nagel and Murphy's position only (possibly) applies to an argument that attempts to justify property rights as absolutes. Because Tomasi argues for a thick set of economic liberties, rather than economic liberties as absolutes, Nagel and Murphy's objections fail to apply directly. Tomasi then offers three arguments in his defense. First he claims that Nagel and Murphy's argument from legal convention is too broad. That is to say that it could apply to other liberties a society might consider as basic rights and not solely economic liberties. Tomasi, in his defense, then offers two arguments from his own position directed at Nagel and Murphy. He argues (a) that Nagel and Murphy's objection is trivial, and (b) that Nagel and Murphy's own argument ultimately leads to circularity. Already we see that both sides of the argument charge one another with creating circular arguments. Perhaps Nagel, Murphy, and Tomasi do all create circular arguments. I argue, however, that what causes such trouble is that both parties are actually not in discourse with one another, in relation to economic liberties, as they initially thought.

Tomasi believes that Nagel and Murphy's position only applies directly to absolutist views on property, because such absolutist views attempt to justify the existence of property rights in the absence of a legal system.³⁸ Also such absolutist views

³⁸ The particular property absolutist that is discussed by Tomasi is Robert Nozick's Libertarianism from Nozick's notable work *Anarchy, State, and Utopia*, 1974.

deny the fact that property rights and other important economic liberties are socially constructed. As we have seen, the social construction of economic liberties is the core argument that Nagel and Murphy put forward. Tomasi attempts to avoid this charge, to at least a great degree, by accepting that “all basic rights and liberties are socially constructed in important ways” (Tomasi 2012, p. 71). If this is the case then Nagel and Murphy’s charge against Tomasi’s position is weakened. The reason for such is that Tomasi is in agreement with Nagel and Murphy about how basic rights and liberties come to be *created*. Even though they may be in agreement about how rights are created, Tomasi’s argument is still perhaps in error, from Nagel and Murphy’s conventionalist perspective, on the grounds that his position relies upon a moral argument from responsible self-authorship.

Before discussing Tomasi’s defense of his moral argument we must give, what Tomasi believes to be, the strongest objection to Nagel and Murphy’s complete position. Tomasi claims that Nagel and Murphy’s legal convention argument is too broad in application. The argument they apply to property rights also applies to other civil and political basic rights and liberties a society may hold. Examples of such are “(1) the right to vote, (2) the right of bodily integrity, or (3) the right to free intellectual development (such as that protected by freedom of the press)” (Tomasi 2012, p. 70). Each of these liberties that could also be considered basic rights fall into the same justificatory problem that economic liberties fall under in Nagel and Murphy’s view. The breadth of Nagel and Murphy’s position gives warrant to be alarmed according to Tomasi. Tomasi states, “According to the argument from legal convention, systems that impact on X cannot be

evaluated by asking whether they impact on X (as though X has an independent existence and validity) (Tomasi 2012, p. 70). Even if one were to grant that property rights cannot be known or justified in the absence of a legal system, it would seem we would not want to apply such a distinction to a (possibly basic) right such as the right to bodily integrity. Such a right is often heralded as having justification in the absence of a legal institution. To be free from bodily harm perhaps requires a legal institution for its protection, but it seems odd (and perhaps wrong) to say that such a claim derives its justification from that legal institution. In such a case, as I believe Tomasi would agree, a moral argument is required in order to justify that one ought to have that basic liberty. The job of a legal system is then to enforce and protect that basic liberty. Because Nagel and Murphy's position could be applied to other liberties a society might consider basic, Tomasi claims that the argument is unconvincing, and ultimately too broad in its application.

Now, I consider Tomasi's claim that Nagel and Murphy's position is both trivial and circular. Tomasi claims that the position that "property is a legal convention does no normative work on the specific issues of property" (Tomasi 2012, p. 71). The position that Nagel and Murphy put forward, according to Tomasi, is a sociological position that discusses how economic rights and liberties are created and constrained within a legal system. What the sociological position does not do, however, is offer the sort of justification that is required for assessing what degree of infringement a legal convention merits (Tomasi 2012). What is required is that we "must consider the best substantive arguments that can be advanced to tell us what degree of protection from impingement each of those 'legal conventions' merits" (Tomasi 2012, p. 71). According to Tomasi, in

order to understand the degree of protection that is required we must appeal to a moral argument, such as responsible self-authorship. Without the normative work of the moral argument, the fact that rights and liberties are socially constructed tells us nothing (Tomasi, 2012). “The strength (or weakness) of those arguments is unaffected by the statements about economic freedom’s status as a legal convention. With respect to assertions about the legitimacy of restrictions on economic liberty, the claim that such liberties are legal conventions is trivial” (Tomasi 2012, p. 71). Because Nagel and Murphy’s position lacks normative force it tells us very little, and thus is unconvincing.

Tomasi also responds to Nagel and Murphy’s charge of circularity with a similar charge of his own. In order for Nagel and Murphy to actively undermine Tomasi’s position it is required that they “assume that the moral arguments supporting such liberty are weak or nonexistent” (Tomasi 2012, p. 71). If it is required for Nagel and Murphy to appeal to a moral argument that is antecedent to a legal system in order to refute Tomasi’s position, then they do indeed beg the question. It is inconsistent for Nagel and Murphy to show any interest in economic liberties if the justifications are derived antecedent to the creation of a legal system. If Nagel and Murphy assess justifications of economic liberties that precede a legal system then they are committing a psychological error. Therefore, this route could not be taken. According to Tomasi, if Nagel and Murphy take this route they offer a circular argument; if they do not take this route then their position does not offer any convincing criticisms of his moral argument.

With both sides of the argument explained it still appears that neither side has given adequate objections to the other. Nagel and Murphy deny the justification of

economic liberties that precede the existence of a legal system. Thus, they deny Tomasi's moral argument from responsible self-authorship. They claim that arguments that take the consequences of a legal system as having an independent and prior existence, which provide the justification for that system is to always argue in a circle, and thus untenable (Nagel and Murphy 2002, p. 9).

According to Tomasi, Nagel and Murphy's position is too broad, trivial, and also circular. The question that now must be asked is why both parties' objections fail to land any sort of significant blow to the other. In the following section I attempt to show precisely why neither Tomasi nor Nagel and Murphy can offer an objection that has the necessary strength to weaken the other position. I believe that the weakness of each side's arguments comes from a deeper issue, rather than merely poor argumentation. This deeper issue is related to the distinct and incompatible foundations that Tomasi, Nagel, and Murphy develop within their own respective frameworks. This incompatibility, I believe, is what has dissolved their discourse into a state of irresolvability.

An Irresolvable Dispute

It would seem to be the case that Tomasi, Nagel, and Murphy have reached an impasse. The arguments that each side offers in an attempt to cripple the opposition have proven to be largely ineffective. I argue that a main reason for such an impasse is that Tomasi's objections are valid within his own "Tomasiian" framework; just as Nagel and Murphy's objections apply within their conventionalist framework. What creates this major impasse is that both respective positions on economic liberties are so distinct that their objections fail to apply to the opposing position directly. This issue shows more

clearly why both sides of the argument fail to give adequate objections that are capable of destabilizing the other position. I now elaborate this point by further showing in detail the weaknesses of the arguments Nagel and Murphy direct to Tomasi, as well as the arguments Tomasi deflects back in their direction.

In this first case Tomasi does appear to salvage a small “victory” in his response to the criticism offered by Nagel and Murphy. Nagel and Murphy make the claim that rights and liberties cannot exist in the absence of a legal system. Tomasi avoids this criticism simply on the grounds that he agrees with the socially constructed nature of basic rights and liberties. Tomasi, as previously noted, explicitly claims that “all basic rights and liberties are socially constructed in important ways” (Tomasi 2012, p. 71). Tomasi’s acceptance of this criticism, perhaps considered a minor victory, does little more than show that the two are not at odds on this particular issue.

So in what ways do Tomasi, Nagel, and Murphy appear to be talking past each other? The first of these issues is the charge of circularity directed at Tomasi from Nagel and Murphy. From Nagel and Murphy’s perspective if one were to make a moral argument for the justification of economic liberties, such as the one Tomasi makes, then a psychological error is committed and thus leads to circularity. From Tomasi’s perspective there is no psychological error, or circularity, in the notion of justifying economic liberties based upon a moral argument. From Tomasi’s perspective a moral argument is the only way that individuals can assess whether the laws of a legal system are just or unjust. At most, the charge of circularity only leads Tomasi to respond on his behalf with a blunt denial. Once denied by Tomasi, due to the different nature of both sides of the

argument, Nagel and Murphy have no grounds to continue to press the issue in any substantive way. This particular dispute becomes little more than one side charging circularity, with the other denying it. From the different perspectives from which each side works, I see no easy way within the current paradigm to remedy this dispute in any significant way. This is but one issue that exists between Tomasi, Nagel, and Murphy that gives insights into why their discourse sputters and eventually appears to become irresolvable.

The next instance of disconnection between Tomasi, Nagel, and Murphy resides in Tomasi's main charge against Nagel and Murphy that their position is too broad in application. Tomasi claims that Nagel and Murphy's position on economic liberties requires that they also apply the same argument of legal convention to the other non-economic civil and political basic liberties. Thus, Nagel and Murphy would be forced to claim that *all* basic rights and liberties can only be explained in reference to a legal system.

This particular charge from Tomasi raises important questions. Nagel and Murphy appear to be forced into a dilemma with perhaps no way of easy avoidance. If Nagel and Murphy were to accept that their position is fully conventional in relation to all basic rights and liberties they could indeed avoid Tomasi's broadness charge. If this were the route Nagel and Murphy were to go, which I believe they *do not*, then they could avoid Tomasi's charge unharmed. If all basic rights and liberties are products of legal convention, then whatever rights or liberties the convention dictates would be acceptable, and thus not too broad or too limited. Therefore, Tomasi's charge of broadness fails to

apply directly, as the potential broadness would only be inconsistent within his particular framework, and not within the conventionalist's distinct framework.

I think we should be hesitant to charge Nagel and Murphy with this extreme form of conventionalism in regard to *all* basic rights liberties. To hold that there is no justification for basic liberties, such as the right to bodily integrity, antecedent to a legal system seems to be incorrect. The idea is that the justification to be free from the violence of others does not, and perhaps should not, derive its justification posterior to the creation of a legal system. I believe that Nagel and Murphy would hold that this is the case; therefore, we should not assume that Nagel and Murphy express a fully conventionalist position in relation to all basic rights and liberties.

If we take Nagel and Murphy to not offer conventionalist arguments about the status of basic civil and political liberties, then it may be the case that they are open to objection from Tomasi on the grounds of unwarranted exceptionalism in regard to economic liberties. The exceptionalism arises because Nagel and Murphy accept that moral argumentation is required for the justification of certain basic rights and liberties, but restricts such possibilities for the justification of economic liberties. It is clearly the case that moral argumentation—such as Tomasi's argument from responsible self-authorship—can exist in a clear and understandable fashion. Thus it raises the question of why Nagel and Murphy hold this exceptional, and conventionalist, position in regard to economic liberties and not in the case of other non-economic basic rights and liberties.

We are then left with the possibility of Nagel and Murphy being arbitrarily exceptional in regard to economic liberties, or Nagel and Murphy must forgo the moral

argumentation discussion completely and hold that all basic rights and liberties are products of legal convention. This is a significant concern for Nagel and Murphy's position as a whole. Though this dilemma is significant in relation to the consistency of Nagel and Murphy's position, what remains without a doubt is that Nagel and Murphy offer a conventionalist argument in regard to economic liberties. The conventionality of Nagel and Murphy's position on property rights is made explicitly clear in the following statement. Nagel and Murphy state, "where our approach departs greatly from the standard mentality of day-to-day politics is in our insistence on the conventionality of property, and our denial that property rights are morally fundamental" (Nagel & Murphy 2002, p. 175).

What we now see is that where Nagel and Murphy's position stands in regard to non-economic basic rights and liberties offers no clarity to the impasse that has been reached with Tomasi in reference to economic liberties. The conventionality of Nagel and Murphy's position on economic liberties is beyond dispute, and thus the irresolvability between Tomasi's position on economic liberties, and Nagel and Murphy's position on economic liberties is unaltered.

Even if Nagel and Murphy do not hold a "fully" conventionalist position for all basic rights and liberties, it appears that the dispute with Tomasi has nonetheless sputtered to a halt. The main arguments each side directs at the other about the nature of economic liberties, instead of offering clarity, has led to what appears to be irresolvable differences between them. Neither platform has been destabilized by the other, nor does it seem that either of the respective positions are capable of directing adequate criticisms at

the other. Though this is the case, perhaps there is still hope to offer some form of resolution to this argument. In order to offer clarity, and perhaps resolution, to what seems to be an irresolvable dispute, I appeal to the guidance of John Locke and Thomas Hobbes. The particular conceptions of liberty put forward by Locke and Hobbes, and their conception of how liberty relates to law, may offer the necessary insights to untangle the complicated web that Tomasi, Nagel, and Murphy have spun in their dispute. By assessing and applying Locke and Hobbes, we see that major aspects that make the issue at hand seem irresolvable already exist within the context of Locke and Hobbes. What Locke and Hobbes tell us is that Tomasi, Nagel, and Murphy offer conceptually and logically different arguments about economic liberties that operate in different directions.

In the following section I apply the incompatible aspects of Locke and Hobbes' respective conceptions of liberty and its relation to law. From this we see that Locke's and Hobbes' incompatible conceptions of liberty and logical structure of their arguments can be applied to the contemporary case. The incompatibility between the quasi-moral argument from rationality and self-preservation expressed by Hobbes, as well as Locke's explanation of how liberties are created through the existence of (natural) law is echoed between Tomasi and Nagel and Murphy. What I attempt to show is that the main reason Tomasi, Nagel, and Murphy have reached an impasse is because Tomasi's argument logically follows the Hobbesian tradition, while Nagel and Murphy's argument logically follows the Lockean tradition. This shows that perhaps the difference in logical structure

is the main reason that neither side in the contemporary case can adequately object to the opposition's position in regard to economic liberties.

Application of the Logical Direction of Locke and Hobbes' Arguments

It is my contention that the dispute between Tomasi and Nagel and Murphy echoes a major logical difference that we can see clearly between Hobbes and Locke, given the structure of their positions provided in Chapter One. In order to show that this is the case, I reassess Locke's and Hobbes' conceptions of liberty and how liberty relates to law. By doing this it becomes clear that the disagreement in the contemporary case is an argument that follows the same logic as the debate between Locke and Hobbes as shown from the first chapter.

Hobbes

The first step is to refer back to Chapter One's discussion of Hobbes' notions of reasonableness and rationality. We understand "'reasonable' to mean fair minded, judicious, and able to see other points of view, and so forth; while 'rational' has more the sense of being logical, or acting for one's own good, or one's interests" (Rawls 2007, p. 54). Also worth noting is that "many of the laws of nature Hobbes lists fall under what we intuitively consider the reasonable" (Rawls 2007, p. 55). The laws of nature and the laws of civil society are always reasonable to follow. Such laws are reasonable because if all individuals were to follow them it would benefit everyone. Such a situation is clearly desirable over a circumstance (such as the state of nature) where man is constantly uncertain, and afraid, of the actions others will take. The main problem, as we know, is

that what is reasonable is not rational in the absence of law.³⁹ Because the laws of nature only have normative force when there is civil society, it can be said that law (civil or natural) does not truly exist until the time that the legal system is created.

The state of nature is a state of complete liberty, according to Hobbes. This is largely the case due to Hobbes' particular quasi-moral argument previously explained in Chapter One. What is rational in the state of nature is to not only pursue one's self-interest, but also to secure one's own self-preservation. In reference to the state of nature (i.e. the absence of law), Hobbes claims, "everyone is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it followeth that in such a condition every man has a right to everything, even to one another's body" (Hobbes 1998, p. 80). Both aspects of Hobbes quasi-moral argument are laid out in his above statement. To be governed by one's own reason is to do what is rational. In the absence of law it is always rational to seek any means necessary to preserve oneself in the best way possible. What we begin to see is that Hobbes' justification for why the state of nature is a state of complete liberty is based upon the gravity of his so called quasi-moral argument grounded in self-preservation.

Previously, I stated that without civil society uncertainty is a prevalent aspect of the human condition. Due to this uncertainty, anticipatory attack on others is often the most rational decision to be made. What is clear is that the justification for such anticipatory attack is grounded deeply in the argument from self-preservation. Thus,

³⁹ As stated in chapter one, what is reasonable only becomes rational when others are also following the laws of nature, or the laws of civil society. In the absence of such there is no guarantee that others will act reasonably, thus it is not rational to be reasonable in such a circumstance.

according to Hobbes, the justification for individual liberties is grounded in a quasi-moral argument from self-preservation.

The argument from self-preservation allows us to tease out the logical structure of Hobbes' position. What we then see is that the quasi-moral justification for liberties in no way requires the existence of law for the possession of individual liberties to be understood or justified. Thus, it can be stated that Hobbes' argument expresses a logical structure that relies on the justification of individual liberties in a state that is antecedent to both natural and civil laws.

Locke

Remember that the core idea in Locke is that natural law is created by God. Because mankind understands natural law through reason, it can be said that man is never in a state that lacks law. This position impacts heavily on how Locke conceptualizes the creation of liberties.

What is clear in the Lockean tradition is that liberties are understood through Locke's conception of natural law. Without natural law, no explanation can be offered as to how a person can come to understand what liberties he or she possesses. Because natural law necessarily does exist in every condition that man is in, it can be claimed that in the Lockean tradition that the existence of law precedes the justification for liberties. Thus, the logical direction of Locke's argument is apparent. Locke, unlike Hobbes, puts forward an argument about the creation of liberties through the necessary existence of law. So we have seen that the logical structure of Locke's argument works in a converse direction to that of Hobbes. The logical structure of Locke's position dictates that the

creation of law precedes the creation and justification for individual liberties. Individual liberties cannot be understood in the absence of law. As we have seen in the Hobbesian tradition however, the opposite is the case. For Hobbes, the justification of individual liberties necessarily precedes the creation of law.

This major incompatibility of logical direction sheds light on the contemporary debate between Tomasi and Nagel and Murphy. I contend that this same “logical direction” issue and incompatible aspects in conceptions of liberty that exist in Locke and Hobbes also exists between Tomasi on one hand and Nagel and Murphy on the other.

Nagel and Murphy's Incompatibility

The incompatible aspects of the logical direction taken by Locke and Hobbes are also shared by the positions expressed by Tomasi, compared with Nagel and Murphy. I believe it to be the case that Tomasi shares the same logical direction in his moral argument from responsible self-authorship that Hobbes had previously expressed through his quasi-moral argument from self-preservation. I also contend that Nagel and Murphy share the same logical direction expressed by Locke. Nagel and Murphy claim that the justification for economic liberties comes necessarily posterior to the creation of law (in this case civil law). Locke also had previously made the claim that the existence of law (in this case natural law) necessarily precedes the understanding, and justification of liberties. It is important to note that Nagel and Murphy discuss civil law more directly, while Locke discusses natural law more directly; though this is the case, it is of little significance in respect to the logical direction that both parties take.

The key aspects of logical direction taken by both the historical philosophers, as well as the contemporary philosophers gives the information that we have needed to understand why Tomasi, Nagel, and Murphy have ultimately failed to adequately object to one another. What has happened is that the contemporary philosophers are not in the discourse with one another that they thought they were. Their projects initially seemed similar enough, but with the application of Locke and Hobbes it appears to be the case that the difference in the logical direction taken by Tomasi, as well as Nagel and Murphy, has led them astray. They mistook one another as being on similar enough grounds to assert their own position in an attempt to destabilize the other. What we have seen is that Tomasi, Nagel, and Murphy in their debate have actually rooted themselves into different, and incompatible, traditions of thought, as well as different, and incompatible, conceptions of liberty.

The way that Locke and Hobbes respectively viewed liberty in relation to law was perhaps the most significant difference between their two theories. The difference was significant enough to show that Hobbes cannot make sense of Locke's notion of liberty within his own framework, and Locke cannot make sense of Hobbes within his respective framework. It is apparent that this is the same sort of debate that has led Tomasi, Nagel, and Murphy to what has seemed like an irresolvable dispute.

In the following section I attempt to offer some resolution to the contemporary debate by expressing the importance of keeping views of liberty distinct so as to avoid debates that will ultimately become irresolvable. More importantly however, I attempt to

suggest a way out of this debate that perhaps Tomasi, Nagel, and Murphy could all accept.

A Suggestion of Remedy

Perhaps, now, it is not surprising that Tomasi, Nagel, and Murphy have reached an impasse. The incompatibility of their conceptions of liberty shown by the application of Locke and Hobbes warns us of this. Because Tomasi adheres to a logical direction that is akin to Hobbes, and Nagel and Murphy adhere to a logical direction that is akin to Locke, the incompatibility becomes clear. The oversight between Tomasi, Nagel, and Murphy led them to believe they had adequate grounds for meaningful discourse. The dispute became irresolvable due to each side's lack of concern for the conception of liberty they employed on behalf of their respective positions. It is necessary not to make this significant error and overlook the conception of liberty that a particular position employs at its foundation. What we have seen as incompatible elements in Locke and Hobbes we now see in Tomasi, Nagel, and Murphy; certain conceptions of liberty are necessarily incompatible with one another. Due to the incompatibility of certain conceptions of liberty, it should be no surprise that the debate devolves into irresolvability.

Though the debate between Tomasi, Nagel, and Murphy expresses incompatible conceptions of liberty, I suggest a possible remedy that both parties could accept—though perhaps reluctantly. Thus, I suggest that we can more clearly assess this contemporary debate by claiming that Nagel and Murphy's focus is on the *creation* of economic liberties through the existence of law, and Tomasi's focus is on the moral

justification of economic liberties. To be blunt, Tomasi is concerned about *justification*, while Nagel and Murphy are concerned about the *creation* of liberties. What we see is that the positions are different enough that meaningful discourse is clearly impossible. I believe both parties could accept that their theories still hold steadfast within their respective frameworks. This leaves Tomasi in a position that is free from molestation from Nagel and Murphy, while also leaving Nagel and Murphy's position unmolested from Tomasi in regard to economic liberties.

Now, I believe, it is possible to leave the current irresolvable debate aside, and state that perhaps within their own framework both sides put forward valuable and consistent positions. The positions only become incompatible in the attempt to apply core aspects of one theory to refute core aspects of the other. Therefore, Tomasi's argument stands strong from the objections of Nagel and Murphy, as the objections cannot possibly apply directly. The same also goes for Nagel and Murphy's position. The criticisms directed by Tomasi also necessarily miss the mark.

At the current time I suggest that both parties should take satisfaction in knowing that the perceived opposition they believed existed really does not. Thus, we can conclude that Tomasi need not be concerned about the charges from Nagel and Murphy's conventionalism, and Nagel and Murphy need not be concerned about Tomasi's moral argument from responsible self-authorship. Furthermore, I suggest that the actual *creation* of economic liberties in a society may well presuppose all of the social conventions implied by the existence of laws therein, while the moral *justification* may nonetheless require an argument quite along the lines Tomasi has provided for us.

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