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The Context of the State of Nature

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Terror and suffering have always been integral to European life and thought. Modern European political thought is constructed on the idea that terror is a legitimate source of sovereign power and law. What modern European political thought conceals, however, are the effects of such terror on those who suffer under the rule of this law.[1] Following the tradition of ideographic mapping on birch bark used by the Aboriginal peoples of the eastern forests of North America, I want to map the cognitive contours and choices that have led to the domination and oppression of Indigenous peoples and their terror and suffering. Specifically, I want to map the British seventeenth-century construct of the "state of nature," show how this idea created the competing frameworks of treaty federalism and colonialism, and critique the relevance of the construct in Indigenous struggles.

Modern European political thought has its roots in the "state of nature" theory propounded by the seventeenth-century English political philosopher Thomas Hobbes. Hobbes's vision of the state of nature remains the prime assumption of modernity, a cognitive vantage point from which European colonialists can carry out experiments in cognitive modelling and engineering that inform and justify modern Eurocentric scholarship and systemic colonization. Indigenous peoples have experienced this concept as slavery, colonization, and imperialism, as well as liberalism, socialism, and communism. These derivatives of Hobbes's vision are the source of our difference, our suffering, and our pain, and it is our experience of them that unites us against continued domination and oppression.

Since the Hobbesian vision of the state of nature and the ideas derived from it exist in our minds as part of the cognitive prison imposed on us by our Eurocentric educations, Indigenous peoples need to understand both the nature and the function of this ideology. To understand why and how we were taught in these ideas, which constrain both our present abilities and our children's future, we have first to understand the artificial context

of European thought. The best way to understand this phenomenon is through the idea of contextuality.

The Idea of Contextuality or Artificial Paradigms

In attempting to understand our changing views of the natural order of the world, Thomas Kuhn, a historian and philosopher of science, in *The Structure of Scientific Revolutions* labelled the process of those changing views "paradigm shifts."[2] Kuhn argued that long periods of "normal science" have existed in history, periods in which the fundamental assumptions and concepts are accepted and not seriously questioned. The unreflective era gives way to a "scientific revolution" in which new assumptions, theories, and ideas change the existing conceptual foundations of science. Kuhn calls these competing conceptual foundation "paradigms." Paradigms include not only fundamental assumptions but also systems of theories, principles, and doctrines. A paradigm shift occurs when scientists cannot explain certain data or natural phenomena (often called "anomalies") by reference to established scientific theories. Periodically, certain scientists discover that these anomalies have a unity that requires a new theory, and a new scientific paradigm is created. The paradigm shifts in the history of science, from the Copernican to the Newtonian, and from the Newtonian to the Einsteinian, demonstrate how scientists change their views about how the world works.

In law and the social sciences, such explanatory paradigms are called "contexts." Contexts are related to the paradigm shifts in natural science. Just as a paradigm reflects current scientific thought about the natural world, so a context reflects current social, political, and legal thought about the human social order. Roberto Unger, a Brazilian legal scholar, has asserted that, if a context allows people to move within it to discover everything about the world that they can discover, then it is a "natural" context. If the context does not allow such natural movement, then it is an "artificial" context derived from selected assumptions.[3]

Unger asserts that three theses define artificial contexts. The first thesis is the principle of contextuality. Contextuality is the belief that assumptions or desires that humans take as given shape people's mental and social lives. These givens can be either institutional or imaginative. These assumptions form a picture of what the world is really like and even a set of premises about how thoughts and languages are or can be structured. They also provide a framework for explaining and verifying worldviews. These worldviews are artificial because they are dependent on assumptions made about human nature or society and not on what the world is really like independent of people's beliefs about it.[4]

Unger's second thesis is that these artificial worldviews are conditional and can be changed but that such changes are exceptional and transitory.

Any context can be supplemented or revised by other empowering ideas about features that make one explanatory or society-making practice better than another.[5] Thus, small-scale, routine adjustments in a context can turn into a more unconfined transformation. If the conditionality of any context is overcome, then people do not simply remain outside all context but also create new assumptions and contexts: "At any moment people may think or associate with one another in ways that overstep the boundaries of the conditional worlds in which they have moved till then. You can see or think in ways that conflict with the established context of thought even before you have deliberately and explicitly revised the context. A discovery of yours may be impossible to verify, validate, or even make sense of within the available forms of explanation and discourse; or it may conflict with the fundamental pictures of reality embodied in these forms."[6]

Like Kuhn's "normal science," Unger's third thesis is that the conditionality of any artificial context is rarely replaced. Changes to artificial context are exceptional and transitory because the context is viewed as "normal" or "natural" and is relatively immune to theories or activities. Disregarding the distinction between routine and transformation maintains the immunity of artificial context and prevents its conditionality from being questioned or opened up to revision and conflict.[7] As Unger explains, however, the more people become aware of the conditionality of a context, the more likely they are to be able to effect meaningful change to that context:

> But you can also imagine the setting, representation, and relationship progressively opening up to opportunities of vision and revision. The context is constantly held up to the light and treated for what it is: a context rather than a natural order. To each of its aspects there then corresponds an activity that robs it of its immunity. The more a structure of thought or relationship provides for the occasions and instruments of its own revision, the less you must choose between maintaining it and abandoning it for the sake of the thing it excludes. You just remake or reimagine it.[8]

Certain humans, for example, created modern society. Modern society is a human artefact. It has been derived from an artificial context, an assumption about the "state of nature" that has been unquestioningly accepted by modern thinkers. Indigenous people must remember that modern thought is conditional upon this assumption. If this assumption about the state of nature is wrong, then Indigenous peoples have the right to reject modern thought and assert a new assumption for the state of nature and an Indigenous theory of society.[9] This is precisely what the

international human rights movement and current constitutional and legal reforms are attempting to accomplish by rejecting the idea of the Indigenous savage. We are seeking to challenge and transform the modernist vision of the state of nature and to replace it with an extraordinary context-breaking vision that relies on Indigenous teachings about our place in nature. For the present, it is sufficient to state that Indigenous peoples are attempting to effect a paradigm shift to replace the Eurocentric way of viewing the world with a new context that would be an ecological or natural context of Indigenous knowledge rather than a refined artificial one.

Unger asserts that no social theory or thinker has ever taken the idea of society as artefact to its ultimate conclusion. Most Eurocentric social theories have either ignored this idea or balanced it with an ambition to develop a lawlike explanation of history, such as Marxism. Most liberating Eurocentric political movements based on lawlike explanations have failed. Unger argues that the failures of these schemes have prepared the way for a more radical revision of the context. He argues that understanding artificial contexts allows people to explain themselves and their societies and enables them to broaden and refine their sense of the possible. If society is constructed with a disbelief in natural contexts and on artificial assumptions, then oppressed peoples can break loose from established views of themselves as helpless puppets of social worlds that others have imagined, built, and inhabited and from the lawlike forces that supposedly brought these worlds into being. Moreover, Unger argues that, by understanding how contexts stick together, come apart, and get remade, people can disrupt the "implicit, often involuntary alliance between the apologetics of established order, and the explanation of past or present society,"[10] and they can understand how the failures of artificial contexts prevent people from revising them. Faced with the immunity of artificial contexts and power of human-made legal orders of colonization, Indigenous peoples need a deeper understanding of the modernist theory of context and its immunity from transformations.

Unger's central thesis is that all major aspects of human empowerment or self-assertion depend on our success at diminishing the distance between context-preserving routines (law) and context-transforming conflict. Human empowerment relies on people's ability to invent institutions and practices that manifest context-revising freedoms.[11] From an understanding of artificial contexts, Indigenous peoples can understand how to inspire alternative contexts to end the domination and oppression that are the residue of colonialism. A constructive understanding of contexts also gives us greater mastery in reconstructing a more equitable society and more equitable human relationships. From this framework, let us turn to the artificial construct of the state of nature.

The Artificial Construct of the State of Nature

The construct of the state of nature emerged from the political thought of seventeenth- and eighteenth-century Europe, and it formed the basis for the artificial context of the modern state. The artificial context argued against established political context and discourse developed by Aristotle that held the state and village emerged from the hierarchical male-dominated family.[12] The seventeenth-century Dutch jurist Hugo Grotius developed the first comprehensive theory of international law by translating Aristotle's concepts into a belief that humans by nature are not only "reasonable" but also "social." For Grotius, "natural" was derived from reason alone (whether God exists or not), and he believed that it was because people were naturally reasonable that they were able to live in harmony with one another.

The British philosopher Thomas Hobbes argued that no such natural order exists. Hobbes considered philosophy to be a practical study of two kinds of bodies: natural and civil. He declared that "natural bodies" included everything for which there is rational knowledge of causal processes. He rejected the Platonic view that there was an objective reality that corresponded to ideas and words; he considered all reality to be subjective and all groupings to be created by artificial agreements.

After experiencing the ruinous English Civil War of 1642 to 1648, Hobbes was convinced that the ancient political and religious edifice was ending. While the Restoration court of Charles II sought his prosecution for heresy, during his exile in Paris Hobbes wrote his main work, *Leviathan; or the Matter, Forme, and Power of a Commonwealth, Ecclesiastical and Civil,* published in 1651.[13] The book was a philosophical study of the political absolutism that had replaced the supremacy of the Church. He created the context of the modern, artificial state out of the central concepts of fear, distrust, misery, and passion.

According to Hobbes, the state of nature was "the Naturall Condition of Mankind, as concerning their Felicity, and Misery."[14] The Hobbesian state of nature was a condition in which many European peoples existed under conditions of "high moral density" or morality but with no "common power to keep them all in awe."[15] He argued that the state of nature was a nonpolitical and antipolitical condition. The constitutive elements of the natural state were primarily and fundamentally individuals who were free and equal and who lived in natural associations such as families or households.

In the state of nature, a scarcity of desired things created competition for resources, distrust ("diffidence"), and glory (war and conquests). In Hobbes's view, the natural condition for each European man was to be in a state of fear of desiring others, resulting in personal and collective wars.

Self-preservation was the necessary condition for all of his satisfactions and pleasures, and each European man was equal with respect to his ability to preserve his life and realize his wants. Since each was equally able, each had an equal chance to fulfil his desires. Hobbes builds human equality not from cognitive facilities[16] but from an explosive concept that every human is at once vulnerable to being killed and capable of killing.[17]

Hobbes did not see European men as naturally social. He argued that the natural passions of European men were directed toward "good" – being their self-interests and desires – and that they had to be educated to see the long-term best interests of everyone.[18] To redeem them from their natural passions and aggressions and to educate them, the artificial man-state, the absolute sovereign, must be created by personal convenants.

Hobbes's state of nature was derived not from a scientific analysis of nature but from his understanding of European "human nature." Hobbes characterized the state of nature as a condition of desires and passions that creates distrust and universal enmity among people in a realm where nothing is unjust: "The notions of Rights and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no Law: where no Law, no Injustice."[19] The natural state is a state of war that "consisteth not in actual fighting; but in the known disposition thereto."[20] Thus, "a state of war" is a condition in which each individual or group is ready to fight with the others and in which this fact is common knowledge. It is a condition in which human stagnation and misery is self-evident: "In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Seas; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continually feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."[21]

Hobbes is concerned with irrationality rooted in the passions, which he believes lead to conflict. Even if a person is rational, no one is assured of the rationality of others, and, lacking assurance about the rationality of others, rational individuals can land in a state of war.

Hobbes did not assert the universality of the state of nature. He did not believe that the state of nature "ever generally" existed "over all the world."[22] Instead, he asserted that there were "many places" where the state of nature did exist: "the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before."[23] Hobbes used savages in America to illustrate the universal negative standards of primal chaos and the natural

state of war.[24] The savage state envisioned by Hobbes provided more than the force creating and sustaining law and political society, however; it also created a spectacular repository of negative values attributed to Indigenous peoples.

Hobbes asserted that the state of nature and civil society are opposed to one another. The state of nature has a right of nature ("*Jus Naturale*"): "the liberty each man has to use his own power, as he will himself, for the preservation of his own nature, that is to say, his own life; and consequently, of doing any thing which in his own judgment and reason he shall conceive to be the aptest means thereto."[25] By the right of nature, "every man has a right to every thing, even to one another's body."[26] This reinforced the wretched and dangerous condition of the state of nature.

Hobbes emphasized the tendency toward the state of nature in European society by noting the existing civil wars. He thought that these wars testified to the fact that European sovereigns remained in a state of nature toward each other as well as toward their subjects. He also believed that, with the separation between political and ecclesiastical authority in European society, the whole of Europe was not far from falling into the state of nature or the image of civil war, much in the same way as the ancient republics had been transformed into "anarchies."[27]

After Hobbes made this distinction between the state of nature and civil society, the state of nature became the starting point in Eurocentric discussions of government and politics. The state of nature was the conditionality or the assumption or the given upon which the idea of the modern state or civil society was constructed. Those who attempted to construct a rational theory of the state began from Indigenous peoples in a state of nature being the antithesis of civilized society. These political philosophers ranged from Spinoza to Locke, from Pufendorf to Rousseau to Kant. These philosophers created the natural-law theory of the modern state. Hegel eliminated the state of nature as the original condition of humans but merged the theory in the relations among states.

By the early eighteenth century, the usual explanation of the origin of the state, or "civil society," began by postulating an original state of nature in which primitive humans lived on their own and were subject to neither government nor law.[28] As the first systematic theorist of the philosophy of Liberalism and Hobbes's greatest immediate English successor, John Locke took up where Hobbes left off.

In 1690, Locke published *Two Treatises of Government*.[29] Like Hobbes, he started with the state of nature. However, he opposed Hobbes's view that the state of nature was "solitary, poore, nasty, brutish, and short" and maintained instead that the state of nature was a happy and tolerant one. He argued that humans in the state of nature are free and equal yet insecure and dangerous in their freedom. Like Hobbes, Locke had no proof of

his theory. Indeed, there is no proof that the state of nature was ever more than an intellectual idea, since no historical or social information about it has ever existed.[30] Of course, there was nothing to disprove the idea either, and Locke simply stated that "It is not at all to be wonder'd that *History* gives us but a very little account of Men, *that lived together in the State of Nature*."[31] Following Hobbes, he argued that government and political power emerged out of the state of nature.

"In the beginning," Locke wrote, "all the World was America."[32] That America is "still a Pattern of the first Ages of Asia and Europe,"[33] and the relationship between the Indigenous peoples and the Europeans in America is "perfectly in a State of Nature."[34] Thus, Locke, despite his differences with Hobbes on the state of nature itself, used the idea to justify European settlement in America[35] and to give Europeans the right to wage war "against the Indians, to seek Reparation upon any injury received from them."[36]

The Artificial Man-State

From the idea of the state of nature, Hobbes and the political philosophers who followed him constructed the idea of the artificial man-state and the positive content of the law.[37] These philosophers believed that civil society arose to correct or eliminate the shortcomings of associations between people in the state of nature. The transformation from individual or family freedom and equality to civil society did not occur because of nature; rather, it took place through one or more conventions made by individuals who were interested in leaving the state of nature. Civil society "made by the wills and agreement of men" Hobbes called "the Commonwealth": "[Thus] is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in latine, CIVITAS), which is but an *Artificall Man*, though of greater stature and strength than the Naturall ... The *Pacts* and *Covenants*, by which the parts of this Body Politic were at first made, set together, and united, resemble that *Fait,* or the *Let us make man,* pronounced by God in the Creation."[38]

According to Hobbes, the force that impelled the transfer of power to an artificial state was negative necessity. Given the state of nature, Hobbes argued, individuals needed a superordinate power to make and sustain a political covenant:[39] "I Authorise and give up my Right of Governing my selfe to this [artificial] Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his actions in like manner."[40] Consequently, the origin and foundation of government are voluntary and deliberate acts. The principle of legitimation of artificial civil society is consent, rather than a natural society of families or households.

For Hobbes, only the artificial man-state could end the savage state of nature and create civil society. He secured this pact and its artificial

creations, the commonwealth and the sovereign, against any change or possibility of legitimate disturbance. The artificial man-state was total and eternal.[41] Hobbes concluded that rebellion against the man-state broke society's basic convenant and was punishable by whatever penalty the sovereign might exact to protect his subjects from a return to the original state of nature. The sovereign had to seek and maintain peace by putting the fear and terror of the state of nature to the law breakers. The sovereign subject who created the compact became comprehensively committed to all actions of the indivisible power of the sovereign "as if they were his own."[42] The great liberty of the subjects depended on the silence of the sovereign's law.

Locke rejected Hobbes's idea of the legitimacy of absolute monarchy or "absolute Arbitrary Power." He also rejected that for the sake of self-preservation individuals surrendered their rights to a supreme sovereign through a social contract and that this sovereign was the source of all morality and law. Locke argued instead that the social contract preserved the preexisting natural rights of the individual to life, liberty, and property and that the enjoyment of individual rights led, in civil society, to the common good: "Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide controversies between them, and punish Offenders, *are in Civil Society* one with another; but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect *state of Nature."*[43] In short, each individual who joined society retained fundamental rights drawn from natural law that related to the integrity of person and property. He accepted a right of rebellion or civil war against a despot or a tyrant.

In Locke's theory, a sovereign with limited powers was the source of governmental authority. "The Supreme Power," Locke wrote, "cannot take from any Man any part of his Property without his own consent ... it is a mistake to think, that the Supreme Legislative Power of any Commonwealth, can do what it will, and dispose of the Estate of the Subject arbitrarily, or take any part of them at pleasure."[44] The reason for this limitation on any government was that people bring property rights into political society, which was set up specifically to protect these rights: "For the preservation of Property being the end of Government, and that for which Men enter into society, it necessarily supposes and requires, that the People should have Property, without which they must be suppos'd to lose that by entring into Society, which was the end for which they entered into it, too gross an absurdity for any man to own."[45]

Locke saw property rights as a natural law that existed before society was formed. Other natural rights were the rights of subsistence, which

included the right of each individual to the material necessities for support and comfort. Beyond subsistence rights, there were acquired natural rights. These rights included rights acquired as a result of actions and transactions that individuals had undertaken on their own initiative and rights acquired when individuals had laboured on a resource or put something of themselves into a resource that gave them an entitlement to that resource. These natural rights were independent of political society or any civil framework. They were established before the origin of political society and constrained the Crown and popular will. Therefore, it was not open for governments to abrogate, derogate, or reorder them based on what governments thought society ought to do.

Interestingly, although Locke allowed that individuals could acquire natural property rights through labour, he did not apply this theory of property to the Indigenous nations of America. He stated:

> There cannot be a clearer demonstration of any thing, than several Nations of the *Americans* are of this, who are rich in Land, and poor in all the Comforts of Life; who Nature having furnished as liberaly as any other people, with the materials of Plenty, i.e. a fruitful Soil, apt to produce in abundance, what might serve for food, rayment, and delight; yet for want of improving it by labour, have not one hundreth part of the Conveniencies we enjoy; And a king of a large and fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in England.[46]

Locke tied entry into political society under a central, sovereign command with the need to secure property. "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is *the Preservation of their Property*."[47] He proceeded to delineate law as a response to "many things wanting ... in the state of Nature." The "Civiliz'd part of Mankind" was characterized by "positive laws"[48] that were absent in the natural state. These positive laws were a response to the natural chaos of individual assertions of passion and self-interest: "First, [in the state of nature] There wants an establish'd, settled, known *Law,* received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them ... *Secondly,* In the State of Nature there wants a *known and indifferent Judge,* with Authority to determine all differences according to the established Law ... *Thirdly,* In the state of Nature there often wants *Power* to back and support the Sentence when right, and to *give it* due *Execution.*"[49]

The theory that Indigenous people lacked positive law had certain self-serving implications for Europeans. If they had nothing resembling European law, then they had no government until they allied themselves with a European Crown. The implication was that Indigenous nations needed a

relationship with a European Crown. With some false pride, Englishmen looked upon their laws as the most rational, efficacious, and perfect in the whole world; hence, the Crown was initially uncritical of any proposals to impose English legal traditions on Indigenous societies. These attempts failed. The "lawless" Indigenous nations rejected the imposition of English (and French) law and the leadership imposed by Europeans.[50]

Positive Law as Command

Hobbes created the notion of positive law, and he is considered the father of legal positivism. His purpose was not to show what is law here and there but what is law in general.[51] In the man-state, laws were the "command" of the sovereign to the sovereign subjects,[52] and only the sovereign could make valid laws.[53] The "laws of nature" could not be "properly law" until they took form as a sovereign command.[54] However, once the absoluteness of the sovereign command was accepted, the sovereign's law, originally described as chains, turned into "hedges."[55] This command theory went on to become the predominant notion in English jurisprudence.[56]

Sir William Blackstone's version of the nature of law in the *Commentaries on the Laws of England* reflected the Hobbesian notion of positive law.[57] Blackstone acknowledged the command that humans should live honestly, hurt nobody, and render each his due, and he asserted that self-love was the constitution of humanity and universal principle of action, and divine law helped us to discover the original law of nature and the law of nations that depended on the rules of natural law.[58] Blackstone agreed with Hobbes and noted that municipal or civil law was created because natural law allowed man to pursue his own good. In contrast to convenants, compacts, or agreements of the law of nations, municipal law was a prescribed rule dependent "upon the maker's will," and those who were bound by it were notified of universal tradition and long practice. Municipal law was defined as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[59]

In 1832, legal scholar John Austin reinterpreted Hobbes into English jurisprudence and colonialism.[60] A professor of jurisprudence at the University of London, Austin defined law as the command of a political superior to a political inferior.[61] In Austin's system, an exclusive and independent sovereign was accorded general and habitual obedience by its subjects. This subjection was a necessary precondition for "political society" and law to exist.[62] Thus, positive law depended on the existence of a sovereign.[63]

The exclusive foundation for Austin's positive law was savagery in nature. Austin distinguished a general state of savagery that he called "natural society" as opposed to "political society." He stated that "A natural society, a society in a state of nature, or a society independent but natural,

is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence."[64] Following in the tradition of Hobbes and Locke, Austin illustrated natural society by "the savage ... societies which live by hunting or fishing in the woods or on the coasts of New Holland" and by those "which range in the forests and plains of the North American continent."[65]

Austin characterized the state of nature as completely wild and lawless.[66] Moreover, even if natural society were not wild and lawless, he asserted that "Some ... of the positive laws obtaining in a political community, would probably be useless to a natural society which had not ascended from the savage state. And others which might be useful even to such a society, it probably would not observe; inasmuch as the ignorance and stupidity which had prevented its submission to political government, would probably prevent it from observing every rule of conduct that had not been forced upon it by the coarsest and most imperious necessity."[67] Thus, the irredeemable savage and natural society are the ultimate limiting case against which Austin's theory of law was constituted.

European philosophers have noted that the elaboration, transmission, and refinement of the theory of the state of nature and the rise of the artificial state accompanied the rise and development of bourgeois society in Europe. Few have noted that the rise of the artificial state also accompanied the rise and development of colonialism. The meaning of the artificial state spanning artificial colonies in various states of nature has been largely ignored.

The Law of Nature and the Treaty Commonwealth

According to these early political thinkers, colonialism and the artificial man-state's law as command were not the only options available to people in the state of nature, and the ideology of the state of nature did not condemn Indigenous peoples to lives of slavery and oppression. In *Leviathan*, Hobbes devoted most of the first two chapters on the law of nature to a discussion of contracts and covenants (mutual promises) between sovereigns and their subjects, and he asserted that justice demands that these covenants be kept. The importance and interrelations of justice and these covenants in moving to civil society have often been overlooked.

According to Hobbes, the prudent and rational rules of the laws of nature *("Lex Naturalis")* provided savages with a means of escaping the state of nature. The laws of nature are precepts or general rules, discovered by reason, that preserve life by prohibiting activities that destroy life.[68] To Hobbes, the first law of nature was that everyone ought to seek peace but

could defend himself by war.[69] The second law asserted that in seeking peace people needed to lay down their natural rights to all things and transfer them to a sovereign who, in return, would look after the safety of the people.[70] The third law asserted that, in transferring their natural rights to a sovereign, people must be willing to keep their covenants with this sovereign, and the sovereign, in turn, needed to keep his convenants with his subjects. The idea of transferring natural rights to an artificial man-state is integral to Hobbes's idea of civil society, but it is also integral to creating peace between sovereigns in the law of nations: when rights are transferred, obligations are created.

Hobbes argued that only through binding convenants between a sovereign and his subjects is the state of nature transcended. Without convenants, a sovereign would only be a man of strength, who would remain an enemy. The artificial man-state and civil society arose to correct the shortcomings of natural associations in the state of nature. The transformation took place through one or more convenants made by individuals who were interested in leaving the state of nature. Without these convenants, men remained in the state of nature toward one another, where no act was unjust.

Hobbes placed a limitation on the convenants that could be made: no one could contract away self-preservation, for that right is inalienable; no one could contract to do anything impossible; and no one could contract away a right that had already been transferred. Hobbes thought that convenants were impossible between people who could not share speech, since language created the structure and validity of the convenants.[71]

These convenants had to establish a "common Power set over them both, with right and force sufficient to compell performance."[72] They created an absolute sovereign, and the absolute sovereign made the convenants secure.[73] Thus, civil society "made by the wills and agreement of men" Hobbes called "the Commonwealth." This process was the original foundation of the law of nations and international law.

The international treaty order began at the end of the Holy Roman Empire in the 1648 Treaties of Westphalia. It was a conventional community of sovereign and independent, secular, artificial man-states associated by treaties of alliance, commerce, or "protection," under a conception of natural law that recognized the equality of all peoples and states.

In America, Hobbes's concept of the law of nature created the additional idea of treaties of peace and friendship with Indigenous nations, a notion that Locke was later to call the treaty commonwealth. The idea of treaty commonwealth with the British sovereign was the alternative idea to colonialism. The order of the treaty commonwealth was built on a theory of a compact between sovereign nations. It was the original form of covenant made with Indigenous peoples in North America. The treaties of the treaty

commonwealth were voluntary and conditional commitments between artificial sovereigns, political societies, or nations. They manifested a customary law of nations. They were at that time and remain to this day the cement that has held and still holds the global artificial states together. The object of the promissory regime was to produce an ordered and just system between nations, grounded in principles of universal humanity, peaceful relationships, and protection.

Initially, the treaty commonwealth was based on European aristocratic customs and values.[74] It was an intellectual product of diplomats and jurists who were searching for an alternative to the law of war. This practical process ran parallel to the theoretical efforts of Hobbes and Locke to end civil warfare. The idea of an international treaty order was guided by the principle that states may impose obligations on themselves where none existed before. The idea was that agreements between artificial man-states could create a shared order based on accepted values of trust and promises. In the absence of agreement, no binding rules existed between artificial man-states. Thus, rules of international law emanated from the free will of artificial man-states. This is a classic illustration of the Hobbesian order. It is composed of principles and rules that the sovereigns have agreed to observe. It is a unique kind of legal order that is not built on either force or coercion.[75] At one level, the treaty order represents universal rules of negotiation, consent, and remedies. At another level, specific agreements between communities vary from place to place, creating locally binding principles and rules. Rules can be expressed by written conventions or discovered in generally accepted usage. The collected treaties and practices are the closest things to sovereign will and legislation in international law.

The original treaty commonwealth is best understood from a historical survey of practice, but it is useful to settle some questions of terminology. It is based on a recognition that *others* outside Europe are part of the same human world and can share in a single international order.

For example, Locke was aware that Indigenous nations had governments. Indigenous nations did not govern themselves in an individual and independent manner as laid out in the description of the state of nature. Locke asserted that Indians were grouped in nations[76] ruled by elected kings.[77] He also said that their kings were "little more than Generals of their Armies" who "command absolutely in war." In times of peace and in internal affairs, the kings or council or people "exercise very little Dominion, and have a very moderate Sovereignty."[78] The resolution of peace and war resided ordinarily either in the people or in a council.[79]

Locke argued that Indigenous nations lacked European institutions and desires, which he took as the universal criteria of political society. For example, he wrote that their kings did not have the exclusive right to

declare war and peace.[80] Also, they lacked an institutional legal judiciary, legislature, and executive.[81] However, Locke asserted that the reason for the absence of these institutions was that the Indigenous nations had no need for them. They have "few Trepasses, and few Offenders," "few controversies" over property, and therefore "no need of many laws to decide them."[82]

In his analysis, Locke neglected the customary system of government and law that maintained such an order in Indigenous nations. Instead, he argued that the absence of European institutions was due to the limited desires of Indigenous people. "Confining their desires within the narrow bounds of each mans small propertie made few controversies."[83] Indigenous people, he argued, had "no temptation to enlarge their possessions of Land, or contest for wide extent of Ground," because they lacked money and large populations, which activated the desire to possess more than one needed.[84]

Locke's theory also created a need for Europeans to have a consensual relationship with Indigenous nations. In the early eighteenth century, the British Crown and Indigenous nations developed the coherent theory of treaty commonwealth or federalism. Prerogative treaties established a constitutional relationship between First Nations and Great Britain. These prerogative treaties respected Indigenous autonomy and legal institutions under international and civil law. They united the First Nations directly with the British sovereign as protected partners, distinct from European settlements.[85] These compacts allowed Indigenous nations to enter "civil society" in one body without surrendering their customs.

Consistent with Hobbes's and Locke's versions of a necessary compact, His Majesty's notion of a treaty commonwealth was posited in positive commands to colonial servants. The prerogative instructions in New England, Nova Scotia, and other colonies respected Indigenous governments and their legal systems. These prerogative instructions accepted Indigenous land tenure and started the policy of fair and honest purchases from Indian tribes under British law.[86] Beginning with the prerogative treaties such as the Wabanaki Compact of 1725, and extending across both Canada and the United States, the British sovereign brought Indigenous nations under his protection through covenants or promises.

The scope of British authority or commonwealth in North America was dependent on consensual agreements with freely associated Indigenous nations. Creating an international treaty order with Indigenous nations was not a uniquely North American phenomenon. During the eighteenth and nineteenth centuries, treaties were made with many Indigenous nations in Latin America, Africa, India, the Pacific, and Asia. The French, Spanish, Dutch, and other empires made treaties with the same aims as those of the British.[87] These aims were to establish territorial claims and

economic spheres of influence that would be respected by other European powers. In fact, the entire system of imperial relationships and colonization that dominated world affairs until 1914 relied on treaties with Indigenous nations. Thus, the treaty relations between the Indigenous nations and the United Kingdom can best be understood as a branch of international law.[88]

These treaties brought the Indigenous nations into "civil society." Under the prerogative law of the imperial Crown, these treaties formed the first and fundamental legal structure of the British Empire, often called the "hidden constitution of Canada."[89] They also formed part of the international treaty order that created relationships with European sovereign states. Locke argued that the relationships between independent states comprise the hypothetical original condition of humans without political superiors:[90] "Those who have the supreme power of making laws in England, France, or Holland are to the Indians but like the rest of the world – men without authority."[91] As independent states, the Indigenous nations could enter into treaties to create a more stable political environment and to secure their rights. Locke considered the resulting legal compact to be distinct from domestic government.[92] His treaty commonwealth was a limited contractual alliance in the law of nations, while the domestic social compact of the English realm was a more comprehensive subordination of individual wills. Both addressed the deficiencies of the imagined state of nature by guaranteeing possessions and by establishing laws for the peace, safety, and public good of the people concerned.

After the 1648 Treaty of Neutrality between Britain and France, the Atlantic colonies in North America saw the first application of Locke's treaty commonwealth principles. His Majesty's instructions directly incorporated Locke's suggestions by clearly requiring colonial governors to enter into treaties and political associations with the "several heads of the said Indian Nations or clans and promising them friendship and protection in his Majesty's part."[93] These prerogative treaties were to establish a formal alliance with the Indigenous nations and place them under the protection of the Crown. The treaties were also designed to terminate any competing Indigenous tenures among the settlers and to prevent the colonists from using tribal dominion to exempt them from His Majesty's authority and taxation. The issue of international treaty order and the relations between the European sovereign and Indigenous nations achieved its zenith in the 1880s, when the world system of treaty commonwealth linked the European states and about 1,000 Indigenous nations globally.

The Austinian definition of a determinate superior as sovereign was at the heart of the international treaty order: "If a *determinate human* superior,

not in a habit of obedience to a like superior, receive *habitual* obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent."[94] Under this definition, Indigenous leaders were no less superiors than British sovereigns were. In this international treaty order, the stronger state did not incorporate the weaker one into its municipal law: "There is neither a *habit* of command on the part of the former [stronger state], nor a *habit* of obedience on the part of the latter [feeble state]."[95] Each allied state retained its distinct force, its distinct centre of power. Each alliance created its own conditionality: "No indeterminate party can command expressly or tacitly, or can receive obedience or submission: ... no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment."[96] This is compelling evidence of bridging the gap between the civilized and people in the state of nature, yet this compelling evidence was ignored as colonialism unfolded.

The Artificial Construction of Colonization

Colonialism was the choice of the immigrants; it was not inevitable or predetermined by their views of the state of nature. They could have adhered to the concept of the treaty commonwealth, but they chose to create an artificial context for their own benefit using the negative aspects of the state of nature. The actual practices of the treaty commonwealth in British history and law illustrate that the state of nature premise of colonization can be challenged, but few have done so. The idea of colonization has remained immune to the issues of the law of nature and the treaty commonwealth. This immunity resides in the belief that Indigenous people could not make treaties and flies in the face of evidence that the imperial Crown did make treaties with the Indigenous nations.

The colonizers argued that the existence of the prerogative treaties in the law of nature and nations had no bearing on the status of Indian nations in international or domestic law.[97] They took the view that Indigenous peoples were "savages" or "barbarians" rather than sovereign nations. They used the ideas of the artificial man-state and law as command to create colonial assemblies and to begin their quest for self-rule and responsible government.

Typically, the colonial ideology arose as resistance to the prerogative treaties entered into by the Crown. Relying on European fears of Indigenous savages living in the state of nature, the colonizers immunized the colonial order from reconstruction by the European homeland by threatening "nihilism." They stressed the Hobbesian savagery of Indigenous society in the state of nature rather than the existing compacts with the

imperial Crown. They then used the ideology of the state of nature to justify using brute force and terror to maintain their artificial context, and they used colonial laws to justify the process.

Colonial thought ignored the political and legal meaning of the covenants of the treaty commonwealth. Some writers have argued that the historical agreements with Indigenous nations and tribes were mere agreements or contracts, not "treaties," and as such were respected only out of the honour and generosity of the European sovereign or state. This argument disregards the importance of history and custom in international law and adopts a post hoc colonial and racist theory that is completely inconsistent with the primacy of consensual obligations in international law. Colonial thought used the theory of the state of nature to incapacitate actual state practices in international law. The colonizers then constructed alternative theories and artificial histories to justify colonization.

The colonizers circumvented and undermined the principle of treaty commonwealth and reinscribed the state of nature on the Indigenous nations. They then created new forms of dominion and oppression. The colonizers created a legal order and consciousness around the sovereign or state, that great fictitious entity of Eurocentric thought by which everyone seeks to live at the expense of everyone else,[98] especially Indigenous peoples and their resources. Traditionally, Europeans have dominated and oppressed other peoples under a mandate from God or nature and a notion of sovereignty or rule from above. For example, Judeo-Christian biblical writings are a chronicle of the exploitation of the weak by the more powerful, of a minority ruling a majority because of the majority's alleged human frailties. Just as the Jewish peoples have endured their oppression, Indigenous peoples have survived the path of their holocaust and the subtle and innovative brutality of modern consciousness.[99] Afro-Caribbean psychiatrist Frantz Fanon has defined colonized people as "every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality ... [which] finds itself face to face with the language of the civilizing nation; that is, with the culture of the mother country. The colonized is elevated above his jungle status in proportion to his adoption of the mother country's cultural standards. He becomes white as he renounces his blackness, his jungle."[100] The tensions between cultures and languages, the inferiority complex, the assimilative choice are all elements of the subtle brutality of colonization.

The evidence used in justifying colonization was limited, and knowledge that would have undermined the strategy was ignored. Indeed, copious evidence existed that the Indigenous peoples of North America were not savage.[101] The colonizers manipulated descriptions of Indigenous peoples to show them as "without subordination, law, or form of government," and there were increasing efforts "to civilize this barbarism, to

render it susceptible of laws."[102] Anthropologist Margaret Hodgen has rejected the concept of the savage and has challenged attempts to identify American savagery with classical antiquity or with older versions of savagery in European thought: "So much is certain: it was not because of the validity of the correspondences cited ... The number of plausible likenesses elicited ... were at best relatively few and usually trivial ... [and] they were offset, and the conclusions derived from them were neutralized, by an overwhelming body of divergences which were seldom mentioned, much less assembled for comparison of relative proportions."[103] The large kinship confederations to be found in North America were simply disregarded. Political and legal philosophers went so far as to change evidence to conform to their theories. For example, they identified Aboriginal cultures with a lack of progress despite powerful evidence to the contrary. When they did recognize the ability of these cultures to change, they attributed it to Aboriginal imitation of European culture.[104]

Four hundred years of colonialism around the Earth was a process of conscious choice supported by manipulated facts on the part of the colonizers. These 400 years have had tragic consequences for Indigenous peoples. The consequences are more than mere conquest or the exercise of tyrannical power, slavery, and genocide;[105] they go to forced cognitive extinction.[106] After the British treaties, the colonizers created a systemic colonialism and racism that estranged Indigenous peoples from their beliefs, languages, families, and identities; that deprived Indigenous peoples of their dignity, their confidence, their souls, and even their shadows. Their only choices were wretched assimilation to the colonizers' values and living a mistaken and disconnected life or existing in the colonizers' imposed misery of the state of nature.

The philosopher Iris Young provides definitions for this systemic colonization. She defines "domination" as the colonizers' established regimes that inhibit or prevent people from participating in political life and in legislative law making and decision making. "Oppression" she defines as the systemic processes in society that inhibit or prevent the oppressed from communicating in contexts in which others can listen or prevent them from developing their human skills to resolve material deprivations.[107]

According to historian Lise Noël, systemic colonization is grounded in intolerance.[108] Intolerance comes from unconscious assumptions that underlie "normal" institutional rules and collective reactions; it is a consequence of following these rules and accepting these reactions in everyday life.[109] The causes of this intolerance are embedded in the modernist concept of unquestioned norms, habits, symbols, and everyday practices of a well-intentioned liberal society. In systemic colonization, no single source of oppression or dominion can be assigned causal or moral primacy. Colonization theories are embedded in every consciousness and

work as routine or normal activities. Instances of intolerance are so pervasive in modern society that scholars cannot individualize them. If the oppressed cannot point to single causes or forms of oppression, then the oppressor and his consciousness become invisible:

> The oppressor has no apparent existence. Not only does he not identify himself as such, but also he is not even supposed to have his own reality. His presence is so immediate and dense, and his universe coincides so totally with the Universe, that he becomes invisible. Rarely seen, rarely named, he is unique, nonetheless, in having a full existence; as the keeper of the word, he is the supreme programmer who confers various degrees of existence on those who are different from himself ... As the embodiment of the universal, the dominator is also the only Subject, the Individual who, never being considered to belong to a particular group, can study those impersonal categories of the population who pose a "problem," represent a "question," constitute a "case," or simply have a "condition."[110]

Systemic colonization cannot be reduced to one essential definition or a unified phenomenon; instances of oppression operate together as a collective consciousness and infect most modern theory. Young asserts that there are at least five faces of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and violence.[111] Noël argues that we must look at many levels of domination and oppression, since a person and a group can be oppressed or dominated in many different ways. She points out that a person can be defined by, and therefore oppressed because of, general characteristics arising both from biological categories (race, gender) and from sociological variables (age); membership in a socioeconomic group (social class, poverty) or a sociocultural group with or without specific physical traits (ethnicity or identity); or individual characteristics, most often randomly transmitted, which relate to the individual's sexual orientation, mental or intellectual state, or physical condition – specifically his or her health, integrity, or appearance (shape, size, beauty).[112] Only a multivoice or plural explanation of the consciousness of the oppressed can comprehend the brutal magnitude of the systemic colonization that Indigenous peoples experience and have to transform.

Conclusion

The idea of difference arising from the theory of the state of nature created the Eurocentric thought, consciousness, and reasoning that justify colonialism. The theory of the state of nature created an interpretive monopoly of human nature. From this interpretive monopoly, Eurocentric thought has dreamed and created liberal societies using force. The social

and governmental theories of these liberal societies have remained flawed and have been experienced by Indigenous peoples as artifices of domination, oppression, and racism. Neither the Europeans' word-worlds nor their life-worlds have created human solidarity. Instead, they have created the global state of war itself. European artificial constructs remain unrealized realms contaminated with deep-seated economic, organizational, and psychological constraints.[113] Roberto Unger commented that Eurocentric thoughts and desires have never fit within the artificial structure that Europeans have imposed on their beliefs and actions:

> often we treat the plain, lusterless world in which we actually find ourselves, this world in which the limits of circumstance always remain preposterously disproportionate to the unlimited reach of striving, as if its structures of belief and action were here for keeps, as if it were the lost paradise where we could think about the thoughts and satisfy all the desires worth having. When we think and act in this way, we commit the sin the prophets called idolatry. As a basis for self-understanding, it is worse than sin. It is a mistake.[114]

Aboriginal thinkers have long noted this mistaken idolatry. As early as 1777, a Cherokee commented about Eurocentric thought: "Much has been said of the want of what you term 'Civilization' among the Indians. Many proposals have been made to us to adopt your law, your religion, your manners and your customs. We do not see the propriety of such a reformation. We should be better pleased with beholding the good effects of these doctrines in your own practices than with hearing you talk about them or of reading your newspapers on such subjects."[115] A century later, in 1880, a Lakota stated: "White men have education and books, and ought to know exactly what to do, but hardly any two of them agree."[116]

Indigenous peoples must transform the false assumptions behind the state of nature and its social theories to begin their transformation to a postcolonial order. It is the key to our cognitive confinement. We must clearly understand the disadvantages of creating artificial societies from wrong assumptions. We should avoid affirming or copying the distorted European views of the state of nature or accommodating their made and imagined "normal" social and political constructs. We must continue to see the organization of life in terms of the Indigenous knowledge about living in balance with an ecology. We must use our traditional knowledge and heritage to force a paradigm shift on the modernist view of society, self, and nature.

Contemporary colonialists violently resist remaking or reimagining or even changing their social or governmental constructs or institutions to accommodate Indigenous knowledge. They deny that their artificial

construct can be reimagined and remade; they deny that its assumptions could be wrong, because if they were their privileges would be threatened. Such resistance is the immunity of modern contextual thought. Faced with the realization that the Indigenous view of ecological order might create a better context of sustainable development, Eurocentric thinkers and governments continually evoke the Hobbesian nightmare of the chaos that would ensue if the state of nature and its derivative theories were replaced. Yet they seem to be unaware that we have been living in the chaos caused by their artificial state and society for the past 400 years.

Eurocentric thinkers fear what would happen if their contrived superiority were challenged. As one Eurocentric scholar has suggested, "When we discover that there are several cultures instead of just one and consequently at the time when we acknowledge the end of a sort of cultural monopoly, be it illusory or real, we are threatened with the destruction of our own discovery. Suddenly it becomes possible that there are just others, that we ourselves are an 'other' among others."[117] Thus, Eurocentric consciousness and its imagined society live in endless fear of a cycle of routine and revolution that has haunted their colonization of the Earth's peoples. If limited strategies of reform and retrenchment do not affirm their imaginative contexts and structures, then the artificial man-state resorts to coercive authority or violence to maintain enslaving visions by means of either the legal system or the army. In our struggles with systemic colonization, it has not changed, but Indigenous peoples have.

Both Noël and Young stress that the brutal practices of colonization are united by a web of desire and intolerance that holds Indigenous peoples captive. Indigenous people must question whether they agree that without civil society and positive law humans become disoriented and lose all capacity for caring, loving, solidarity, and thought. As part of the restoration of Indigenous knowledge and heritage, Indigenous scholars must confront the assumption of the state of nature. The theories and the choices behind this assumption require analysis by those Indigenous peoples who have survived colonialism and are seeking to transform it. They require a critique from the vantage point of Indigenous thought.

We must question why Eurocentric thought has devoted so few resources to studying the violence inflicted on Aboriginal people after 400 years of colonization. Obviously, Europeans remain anxious about the possibility of impending chaos. Rather than leave these notions to oblique allusion and rapacious innuendo, Eurocentric thought needs to seek to understand Aboriginal knowledge, language, and legal order. Surely, these studies will be more important to everyone in the next century than the existing political rhetoric and legal myth of dead white men creating artificial societies.

Additionally, we must use treaty commonwealth to demonstrate how assumptions about the state of nature underlie modern theory. The treaty commonwealth united the best of Indigenous and European traditions. It should not be characterized as a series of small-scale, routine adjustments to the context of colonialism. It was an alternative context-breaking explanation of the law of nature and nations that respected our sovereignty, our humanity, and our choices to preserve peace. The historical and legal legacy of the treaty commonwealth brings into question the necessity of colonization. It can transform dominant assumptions about the artificial context of colonialism, it can illustrate an explanatory or society-making practice better than colonialism, and it can be used as a vantage point from which to evaluate the false necessity of colonialization.

Notes

1 See, e.g., W.E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering* (Brookfield, VT: Ashgate Publishing, 1998).

2 Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962); D. Bohm and F.D. Peat, *Science, Order, and Creativity* (New York: Bantam Books, 1987). A paradigm is a set of implicit assumptions, concepts, theories, and postulates held in common about the natural world by several members of a community, enabling them to explore jointly a well-defined and delimited area of inquiry and to communicate in a specialized language about the subject. These paradigms define the boundaries of acceptable inquiry and the limiting assumptions within a discipline.

3 R.M. Unger, *Passion: An Essay on Personality* (New York: Free Press, 1984) at 5–15; R.M. Unger, *Social Theory: Its Situation and Its Task: A Critical Introduction to Politics, a Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987) at 18–25. In legal thought, a context is about a human-constructed view of society; it functions similarly to a natural paradigm. A legal context is the study of lawyers' fundamental assumptions, the explanatory or argumentative structures that ordinary legal inquiries take for granted. Jeremy Bentham spoke of it negatively as "the art of being methodically ignorant of what everybody knows." Every lawyer usually takes for granted the meanings of statements such as "that is a rule of law," "the decision is binding on the Court of Appeals," and "X has a legal right to be paid by Y." All these implicit assumptions create contexts. The relative strength of a context lies in its resistance to being shaken by the normal actions that it helps to shape. The purpose of jurisprudence and legal scholarship is to elucidate and evaluate rules of juridical contexts.

4 *Social Theory,* ibid. at 18-9. Unger explained the contextual or conditional quality of all human activity: "To say that extended conceptual activity is conditional is to say that its practice depends on taking for granted, at least provisionally, many beliefs that define its nature and limits. These assumptions include criteria of validity, verification, or sense; a view of explanation, persuasion, or communication, and even an underlying ontology – a picture of what the world is really like. It may even include a set of premises about whether and in what sense thought and language have a structure" (ibid.).

5 Ibid. at 9.

6 Ibid. at 20.

7 *Passion, supra* note 3 at 10.

8 Ibid. at 10.

9 Ibid.

10 Ibid. at 5.

11 Ibid. at 6–8.
12 Aristotle, *Politics*, trans. E. Barker (London: Oxford University Press, 1958) (1252b) at 4. See also Marsilius of Padua, *Densor Pacis* (Toronto: University of Toronto Press, 1967) I, III, 4–5 at 10–3; J. Bodin, *The Six Books of a Commonweale* [1606], reprint of Knolle's translation (Cambridge: Harvard University Press, 1962) I at 1; J. Althusiu *Politica Methodice Digesta of Johannes Althusius* (Cambridge: Harvard University Press, 1932) vol. 8 at 39.
13 Thomas Hobbes, *Leviathan; or the Matter, Forme, and Power of a Commonwealth Ecclesiastical and Civil,* ed. C.B. Macpherson (Baltimore: Penguin Books, 1968). See R. Tuck, *Hobbes* (Oxford: Oxford University Press, 1989). In his political treatise, Hobbes compares the state, with its innumerable competing members, to the largest of natural organisms – the whale or leviathan. By this analogy, Hobbes argued that the state, like the whale, requires a single controlling intelligence to direct its motion.
14 Ibid. Hobbes ch. 13 at 182. See parallel chapters in T. Hobbes, *De Cive* (Philosophical Rudiments Concerning Government and Society) in B. Gert., ed., *Man and Citizen* (Garden City, NY: Doubleday, 1972) ch. I; and T. Hobbes, *Elements of Law, Natural and Politic,* ed. F. Tönnies (Cambridge: Cambridge University Press, 1928) part I, ch. 14.
15 Ibid. ch. 17 at 223.
16 Ibid. ch. 13 at 183, and ch. 10 at 151. Hobbes notes that the equality of wits is evidenced by each man's deep-seated satisfaction with his own wisdom, which is the source of his ability to kill another and to secure himself from his enemies, ch. 15 at 203-5.
17 Ibid. ch. 13 at 187.
18 Ibid. ch. 14 at 192.
19 Ibid. ch. 13 at 187-8. This notion is contradicted in Hobbes's writing by his idea of the concept of natural law (*lex naturalis*) and rights (*ius naturalis*), ch. 14 at 189. Also see *De Cive*, *supra* note 14, ch. 14 at 274, and *Elements of Law*, *supra* note 14, part II, ch. 10 at 148. Hobbes resolved this dilemma by arguing that laws of nature were not the same as the civil law of the sovereign but personal "conclusions, or Theorems" concerning self-preservation. However, if the theorems were delivered by the word of God, then they were laws, see ch. 15 at 215.
20 Ibid. ch. 13 at 186.
21 Ibid.
22 Ibid. ch. 13 at 187.
23 Ibid.
24 Hobbes also invokes the similar antagonistic condition existing between "king and persons of sovereign authority" (ibid. ch. 17 at 223-8), but he does not develop the comparison.
25 *Leviathan*, *supra* note 13, ch. 14 at 189.
26 Ibid., ch. 14 at 189-90.
27 *De Cive*, *supra* note 14, ch. 12 at 246.
28 P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980) at 1.
29 J. Locke, *Two Treatises of Government* [1690], reprint 2 vols., ed. P. Laslet (Cambridge: Cambridge University Press, 1970) *Second Treatise* at para. 138.
30 In their historical political evolution, European states have gone from feudal states to the Standestaat, to absolute monarchy, to constitutional monarchy, and so forth. There has not been any reciprocal consent of free and equal individuals creating a state.
31 Locke, *supra* note 29, para. 101 (original emphasis).
32 Ibid. at para. 49.
33 Ibid. at para. 108.
34 Ibid. at paras. 14 and 109.
35 Ibid. at para. 36.
36 Locke, *supra* note 29, vol. I, *First Treatise*, at para. 130-1.
37 E. Cassirer, *The Philosophy of the Enlightenment*, trans. Fritz Koelin and James Pettegrove (Boston: Beacon Press, 1955) at 19.
38 Hobbes, *supra* note 13 at 81-2 (part of emphasis added). Ironically, this is the Roman legal idea of *status civilis* or "the civil condition"; at the greatest level of generality, the commonwealth does mean "condition" or "way of being" ("the state of one's health").

39 Ibid., part II of Commonwealth, chs. 17-31 at 223-408.
40 Ibid. ch. 17 at 227. This phrase is a negative act of renouncing right and agreeing to authorize his action, but it does not require a positive swearing of allegiance.
41 Ibid. chs. 18 and 19 at 228-51.
42 Ibid. The rise of state sovereignty had permanent effects on European political thought. It slowly limited the older contexts of ecclesiastical and private law and prerogative. This process was reflected in Immanuel Kant's 1797 declaration that the only natural political relation was that between single individuals and states. By this time, the medieval notion of a society made up of smaller societies had been generally discredited. G.W.F. Hegel argued that the modern state was the "mind on earth." The Hegelian state, however, was not a Hobbesian state. It was a monarchy moderated by the law-drafting functions of disinterested civil servants and moderated above all by the Hegelian notion that individuals must be able to find subjective satisfaction in their being willing members of a rational, free institution that secures the pursuit of absolute values inherent in philosophy, art, and religion.
43 Locke, *supra* note 29, *Second Treatise* at para. 87 (original emphasis).
44 Ibid. at para. 138.
45 Ibid.
46 Ibid. at para. 41 (original emphasis).
47 Ibid. at para. 124 (original emphasis).
48 Ibid. at para. 30.
49 Ibid. at paras. 124–6 (original emphasis). Also see A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, 1776* (Oxford: Clarendon Press, 1976) ch. 1, part 2; W. Blackstone, *Commentaries on the Laws of England,* 14th ed. (Oxford: Clarendon Press, 1766–9) at 5.
50 Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990) at 151–226.
51 *Leviathan*, s*upra* note 13 at 130.
52 Ibid.
53 Ibid. at 131.
54 Ibid.
55 Ibid. Compare ch. 21 at 263 to ch. 30 at 388.
56 But it did involve an immediate problem in that people have to know of commands in order to obey them. Hence, the command of the commonwealth is law only to those who have the means to take notice of it. "Over natural fools, children or madman there is no law, no more than over brute beasts" (ibid. at 132). But if law were to be dependent on popular knowledge, this condition could undermine the whole edifice of authority. With uncharacteristic equivocation, Hobbes opts largely, and understandably, for the maxim that ignorance of the law is no excuse (ibid. at 139).
57 "On the Nature of Law in General" in *Commentaries on the Laws of England*, *supra* note 49.
58 Ibid., vol. I at 40-4.
59 Ibid. at 44-5.
60 J. Austin, *The Province of Jurisprudence Determined*, 2nd ed. (London: John Murray, 1832), and *Lectures of Jurisprudence*, 3 vols. (London: John Murray, 1861–3).
61 Ibid., *Lectures,* vol. I at 1, 5.
62 Ibid., vol. III at 170-3.
63 Ibid., vol. II at 313.
64 Ibid., vol. I at 176.
65 Ibid., vol. I at 184. Austin also draws on both a general and existent state of savagery and the "imaginary case" of a solitary savage child abandoned in the wilderness, which he takes "the liberty of borrowing from ... Dr. Paley" (*Lectures,* vol. I at 82). The borrowing could be W. Paley, *The Principles of Moral and Political Philosophy* (Dublin: [s.n.], 1785) at 5. This solitary savage was "a child abandoned in the wilderness immediately after its birth, and growing to the age of manhood in estrangement from human society" (*Lectures,* vol. I at 82). As such, it could not be a "social man," would not appreciate the necessity of property, would be in total conflict with "his" fellows, and hence "the ends of

government and law would be defeated" (*Lectures,* vol. I at 85). The savage "mind" is "unfurnished" with certain notions essential for society: they "involve the notions of political society; of supreme government; of positive law; of legal right; of legal duty; of legal injury" (*Lectures,* vol. I at 85).

66 Ibid., vol. II at 9.

67 Ibid., vol. II at 258. Additionally, Austin does take into account the domestic challenge of the "poor and ignorant" to British order (vol. I at 62). This affliction is attributed to their ignorance of "the imperative good of property and capital." Its cure lies in a full appreciation of the principles of utilitarian ethics, particularly of the Malthusian variety: "if they adjusted their numbers to the demand for their labour, they would share abundantly, with their employers, in the blessings of property" (ibid.). Distinguishing them from the "stupid" savage who can only respond to the imperatives of the inexorable (vol. II at 258), "the multitude ... can and will" come to "understand these principles" (vol. I at 60).

68 Hobbes, *supra* note 13, ch. 14 at 189.

69 Ibid. at 190-1.

70 Ibid.

71 Ibid. at chs. 14 and 21.

72 Ibid., ch. 14 at 196.

73 Ibid., ch. 29 at 364-8; ch. 30 at 376-85.

74 D. Kennedy, "A New Stream of International Law Scholarship" (1988) 7 *Wis. Int'l L. J.* 1, 3. Kennedy criticizes twentieth-century scholarly output in international law as bound in "European doctrinal formalism."

75 *Reservations of the Convention of Genocide Case*, Advisory Opinion I.C.J. Reports 1951: 15. (It is well established that in its treaty relations a state cannot be bound without its consent.)

76 Locke, *supra* note 29, *Second Treatise,* at para. 41.

77 Ibid. at para. 108.

78 Ibid. Cf. *First Treatise* at para. 131.

79 Ibid.

80 Ibid., *Second Treatise,* at paras. 144-8.

81 Ibid. at para. 87.

82 Ibid. at para. 107.

83 Ibid.

84 Ibid. at para. 108.

85 R.L. Barsh and J.Y. Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal" (1982) 17 *Journal of Canadian Studies* at 55–81.

86 Royal Instruction of 1761, Royal Proclamation of 1763. See J. Borrows, "Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 1 *University of British Columbia Law Review* at 2, 6, 7, 41.

87 See, generally, R.L. Barsh and J.Y. Henderson, "International Context of Crown-Aboriginal Treaties in Canada" in CD-ROM, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996); C. Alexandrowicz*, The European African Confrontation: A Study in Treaty-Making* (Leiden: Sijthoff, 1973); C. Alexandrowicz*, An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967); Sir W. Lee-Warner, *The Native States of India* [1910] (New York: AMS Press, 1971); R. Strickland, ed., *Cohen's Handbook of Federal Indian Law* (Charlottesville, VA: Michie Company, 1982) at 62-126; M.F. Lindley, *The Acquisition of Backward Territory* (London: Longmans, Green, 1926); A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke, 1880, rpt. Saskatoon: Fifth House Publishers, 1991).

88 *Worcester* v. *Georgia* 31 US (6 Pet.) 515 (1832); F.S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States" (1942) 31 *Geo. L. Rev.* 1, 17; M. Savelle*, Empires to Nations: Expansion in America, 1713-1824* (Minneapolis: University of Minnesota Press, 1974), 138-43.

89 B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 *Am. J. of*

Comp. Law 361; and B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall L.J.* 1.

90 Locke, *supra* note 29, *Second Treatise,* at para. 4.

91 Ibid. at paras. 9, 105, and 108.

92 Ibid. at paras. 144-5. It was not every compact, Locke argued, "that put an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another, and yet still be in the state of nature. The promises for truck between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of nature in reference to one another: for truth and keeping the faith belongs to men as men, and not as members of society," ibid., *Second Treatise*, at para. 14.

93 Cf. L.W. Labaree, *Royal Instructions to British Colonial Governors 1670-1776*, 2 vols. (New York: D. Appleton-Century, 1935), vol. II, 469, 478-80, 742, 806.

94 Austin, *supra* note 60, *Lectures,* vol. 1 at 170 (original emphasis).

95 Ibid. at 173 (original emphasis).

96 Ibid. at 175. Cf. E. Vattel, *Le Droit des gens, ou principes de la loi naturelle* (1758), *The Laws of Nations or the Principles of Natural Law* (Chitty tr. 1839, book I, ch. 18); and *Worcester* v. *Georgia* (1832) 31 US (6 Pet.) 515.

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98 F. Bastiat, *Selected Essays on Political Economy*, trans. S. Cain (Princeton: Van Nostrand, 1964).

99 See, generally, L. Noël, *Intolerance: A General Survey*, trans. A. Bennett (Montreal: McGill-Queen's University Press, 1994); I. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); J.R. Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986); H.A. Bulhan, *Frantz Fanon and the Psychology of Oppression* (New York: Plenum Press, 1985); J. Axtell, *The Invasion Within: The Conquest of Cultures in Colonial North America* (New York: Oxford University Press, 1985); A. Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism* (Delhi: Oxford University Press, 1983); A. Memmi, *Dominated Man: Notes Toward a Portrait* (Boston: Beacon Press, 1969); F. Fanon, *Black Skin, White Mask*, trans. C.L. Markman (London: MacGibbon and Kee, 1968); F. Fanon, *The Wretched of the Earth*, preface by Jean-Paul Sartre, trans. Constance Farrington (London: MacGibbon and Kee, 1965); A. Memmi, *The Colonizer and the Colonized*, trans. Howard Greenfield (New York: Orion Press, 1965).

100 Ibid., *Black Skin, White Mask*, at 18.

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102 J. Axtell, *supra* note 99 at 50.

103 M.T. Hodgen, *Early Anthropology in the Sixteenth and Seventeenth Centuries* (Philadelphia: University of Pennsylvania Press, 1964) at 354–5. Also see H.S. Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* (Garden City, NY: Anchor Press-Doubleday, 1977); W. Brandon, *New Worlds for Old: Reports from the New World and Their Effect on the Development of Social Thought in Europe 1500-1800* (Athens, OH: Ohio University Press, 1986).

104 B.G. Trigger, *Native and Newcomers: Canada's "Heroic Age" Reconsidered* (Kingston: McGill-Queen's University Press, 1985) at 51, 65.

105 Noël, *supra* note 99 at 100.

106 M.A. Battiste, "Micmac Literacy and Cognitive Assimilation," in J. Barman, Y. Hébert, and D. McCaskill, eds., *Indian Education in Canada: The Legacy* (Vancouver: UBC Press, 1986); Assembly of First Nations, *Towards Linguistic Justice* (Ottawa: AFN, 1990); and Assembly of First Nations, *Rebirth of First Nations Languages* (Ottawa: AFN, 1992).

107 Young, *supra* note 99 at 33–8.

108 Noël, *supra* note 99 at 5. (Intolerance is the theory; domination and oppression are the practices.)

109 Young, *supra* note 99 at 41.
110 Noël, *supra* note 99 at 11.
111 Young, *supra* note 99 at 42-65.
112 Noël, *supra* note 99 at 5.
113 See, generally, R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy,* part I of *Politics, a Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987).
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115 Old Tasse, in N.S. Hill, Jr., ed., *Words of Power: Voices from Indian America* (Golden, CO: Fulcrum Publishing, 1994) at 36.
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117 P. Ricoeur, *History and Truth*, trans. C. Kelby (Evanston, IL: Northwestern University Press, 1965) at 278.