

# John Locke's Republicanism

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## ABSTRACT

Daniel Mark Layman: John Locke's Republicanism  
(Under the direction of Gerald Postema)

This dissertation is a study of the shape, function, and implications of republican ideals in Locke's political philosophy. I argue that according to Locke, a person is free only when she enjoys her natural rights on her own terms, without arbitrary dependence. The relationship Locke posits between the absence of arbitrary power and freedom is constitutive rather than instrumental; to attain the ideal of freedom *just is* to be free from arbitrary power within the scope of natural rights.

The project proceeds in two parts. In the first part, which includes two chapters, I argue that Locke is centrally committed to a republican conception of freedom. I then develop a precise framing of that conception and locate it within the broader contours of Locke's theory of moral equality and obligation. In Chapter One, I argue that Locke's explicit statements about the value of freedom and its relationship to the wills of other people, together with his polemic against absolutism in the *First Treatise of Government*, establishes that Locke's ideal of freedom demands the absence not just of interference, but of domination. In Chapter Two, I turn to the relationship between Locke's republicanism and his heavily theological notions of moral equality and moral obligation. I argue that by Locke's lights, both moral equality and moral obligation depend on moral accountability, and God's role is to anchor our accountability relationships with one another.

In the second part, I use Locke's reconstructed republicanism to address three problems that arise when Locke applies his fundamental political values to concrete political problems. The first problem, which occupies me in Chapter Three, concerns Locke's conception of private property. While there is good textual reason to doubt that Locke requires appropriating individuals to leave any particular amount of resources for others, he clearly indicates that there is something wrong with distributions in which some suffer while others thrive. But what exactly is the problem? I argue that once people use their natural rights to acquire large properties, Locke's republican norm of non-domination requires people to enter and support civil societies that guarantee physical wellbeing and independence from arbitrary power. In Chapter Four, I consider Locke's infamous consent doctrine, which stipulates that political power cannot be legitimate without the consent of those subject to it. I argue that Locke actually offers two distinct conceptions of political consent, one elective and one participatory. According to the elective conception of consent, individuals must freely choose to perform a discrete act of consent before any political authority can be legitimate with respect to them. This strand of Locke's thinking about consent is, I argue, almost entirely unsuccessful. But according to Locke's participatory framing of political consent, consent to government is a dimension of political participation itself, not a separate, elective act that precedes it. I argue that this second conception of consent, though little noticed, is much more successful in relation to Locke's central project of rendering political power compatible with individuals' freedom from arbitrary power.

To Mom, for teaching me to write.

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## CHAPTER 1: LOCKE ON FREEDOM

### 1. The Varieties of Freedom

Locke has a good deal to say about freedom of several kinds. My concern in this dissertation is with his conception of *social freedom*, or the morally significant freedom people can and should have with respect to one another within communities. I will argue that Locke's notion of social freedom has been only incompletely understood, and that once we have achieved a better grasp of it, much of his political theory emerges in a new and promising light. But in order to attain a clear view of social freedom as it features in Locke's texts, we first need to distinguish carefully the several other varieties of freedom Locke discusses. Only once we have done so will social freedom stand out clearly and reveal to us its structure and significance.

It will be best to begin with the several types of freedom a person can possess quite apart from any social or political relationships with other human beings. We can call these varieties of *personal freedom* in order to contrast them with social freedom. The most straightforward kind of personal freedom Locke discusses is simple freedom of action, or the capacity to act as one might choose. Locke devotes a considerable portion of his chapter on power in the *Essay Concerning Human Understanding* to this form of freedom. His framing of freedom of action is uncomplicated; a person is free with respect to a particular action if, and only if, she can either perform the action or not according to her choice. Locke writes: "so far as any one can, by the direction or choice of his Mind, preferring the existence of any Action, to the non-existence of that Action, and vice versa, make it to exist, or not exist, so far he is *free*."<sup>1</sup> This is almost an

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<sup>1</sup> E 2.21.21. I will cite Locke's major works as follows. For the *Essay Concerning Human Understanding*, I will use 'E' followed by book, chapter, and paragraph (e.g. E 3.2.1 for *Essay*, Book 3, Chapter 2, Paragraph 1). For the *Two*



exact match for Hobbes's framing of free action, which he takes to exhaust all that we can sensibly mean when we talk about freedom. Here is Hobbes's framing:

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."<sup>2</sup>

Locke illustrates freedom of action with his famous example of a man carried asleep into a room that is then locked with him inside.<sup>3</sup> The man awakes to find himself in the company of a friend and so has no desire to leave. Nevertheless, he is not free with respect to his remaining in the room, as he could not leave even if he chose to.

It is important to note that freedom of action is the absence of *external* impediments to the execution of choices, not the absence of *internal* impediments, such as the passions, weakness of will, etc. If a person finds she is too weak of will to choose a course of action, she is not necessarily unfree with respect to it. Whether she is free with respect to that action depends on the counterfactual question of whether any external impediments *would* frustrate the action if she chose to perform it.

The second kind of personal freedom Locke discusses is somewhat more difficult to delineate clearly, not least because Locke intermingles some of his treatment of it with his discussion of freedom of action. In the first edition of the *Essay*, Locke argues that a person always chooses the action she judges, at the time of performance, to be the most conducive to her own happiness. He writes in that edition: "That which at the time appears to him the greater

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*Treatises of Government*, I will use 'I' or 'II' followed by a paragraph number (e.g. I 22 for *First Treatise*, paragraph 22). For *Essays on the Law of Nature*, I will use 'ELN' followed by a page number. For other works of Locke, I will follow the standard format.

<sup>2</sup> Hobbes, *Leviathan*, 79

<sup>3</sup> E 2.21.10

Good absolutely determines his preference.”<sup>4</sup> However, in the second and later editions, Locke supplements this view with his doctrine of suspension, according to which a person need not (and indeed should not) act until she has paused, or “suspended,” her action to consider how all of the options before her relate to her overall happiness in the long run.<sup>5</sup> Furthermore, Locke tells us that this power of suspension, and not the power to act as one chooses, is the most important feature of liberty for rational creatures:<sup>6</sup>

This is the hinge on which turns the liberty of *intellectual* Beings in their constant endeavours after, and a steady prosecution of true felicity, that they can *suspend* this prosecution in particular cases, till they have looked before them, and informed themselves, whether that particular thing, which is then proposed, or desired, lie in the way to their main end, and make a real part of that which is their greatest good... [.] This as seems to me is the great privilege of finite intellectual Beings; and I desire it may be well consider’d, whether the great inlet, and exercise of all the *liberty* Men have, are capable of, or can be useful to them, and that whereon depends the turn of their actions, does not lie in this, that they can *suspend* their desires, and stop them from determining their *wills* to any action, till they have duly and fairly *examin’d* the good and evil of it, as far forth as the weight of the thing requires.<sup>7</sup>

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<sup>4</sup> E 2.21.33, 1<sup>st</sup> ed.

<sup>5</sup> This change was most likely a response to pressure from William Molyneux, who challenged Locke on the adequacy of the first framing in correspondence. Molyneux writes in a letter of December 22, 1692:

The Next place I take Notice of as requiring some Farther Explication is Your Discourse about Mans Liberty and Necessity. this Thread seems so wonderfully fine spun in your Book, that at last the Great Question of Liberty and Necessity seems to Vanish. and herein you seem to make all Sins to proceed from our Understandings... [.] Now it seems harsh to say, that a Man shall be Damn’d, because he understands no better than he does.

Locke replied on January 20, 1693:

I do not wonder that you find my discourse about liberty a little too fine spun, I had so much that I thought of it my self, that I said the same thing of it to some of my friends before it was printed.

See Locke, *Selected Correspondence*, 175, 178.

<sup>6</sup> For authoritative scholarly treatment of this feature of Locke’s thought, see Yaffe, *Liberty Worthy of the Name*.

<sup>7</sup> E 2.21.52

While simple freedom of action exists inasmuch as an agent's options are not blocked by external impediments, the sort of freedom presented in this passage, which we can call *rational freedom*, exists inasmuch as an agent is not driven by the uneasiness of the moment. It is thus a kind of rational self-rule, or rule by reason, in a way that simple freedom of action is not. Rational freedom incorporates freedom of action while supplementing it with the condition that choice must follow and depend upon rational consideration during suspension.

In the *Second Treatise*, Locke develops his picture of rational freedom in a distinctly moral direction. He explains there that a person enjoys freedom that accords with her status as a rational agent to the extent that she has sufficient reason to direct herself *in accordance with a law*:

The *Freedom* then of Man and Liberty of acting according to his own Will, is *grounded on his having Reason*, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrain'd Liberty, before he has Reason to guide him, is not the allowing him the privilege of his Nature, to be free; but to thrust him out amongst Brutes, and abandon him to a state as wretched, and as much beneath that of a Man, as their's.<sup>8</sup>

Freedom as described here seems to include rational freedom as suspension and more besides. Just as rational freedom builds on freedom of action by adding a suspension condition, the freedom under moral law Locke treats here builds on rational freedom by adding the requirement that an agent must use law to guide her suspension. In light of this addition, I believe we may identify the sort of freedom Locke refers to here as a third, still more complex variety of freedom, which we may call *moral freedom*. While a being who lacked moral obligations or

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<sup>8</sup> II 63

could not appreciate them could meet the conditions of both freedom of action and rational freedom, she could not meet the demands of moral freedom.<sup>9</sup>

There is a great deal to be said about each of these dimensions of personal freedom. Nevertheless, they concern me here only inasmuch as they stand in contrast to, and to a considerable degree lay a foundation for, Locke's conception of social freedom. Although social freedom importantly depends on dimensions of personal freedom, it is not simply an extension of personal freedom to social circumstances. To the contrary, social freedom is essentially concerned with relations of power and accountability between persons. Let us consider it now.

Locke trumpets the importance of social freedom at the very outset of the main text of the *Second Treatise*. Along with natural equality, it is one of the foundations from which he says we must proceed in order to come to a correct understanding of politics:

TO understand Political Power right, and derive it from its Original, we must consider, what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.<sup>10</sup>

How exactly are we to understand this freedom? By far the most common interpretation is that Locke's social freedom is freedom of action a moral agent<sup>11</sup> (that is, someone with moral freedom) enjoys within the space of her rights.<sup>12</sup> A person's rights, which Locke sometimes calls a person's property, include all and only the options to which she is entitled, and which others

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<sup>9</sup> Locke's moral freedom is in some ways similar to Kant's conception of autonomy within moral law, although the details of Kant's account are markedly different. In particular, while Locke does not assert that the moral law is in any sense contained within or issued by practical reason, and it is not entirely clear that he has the conceptual tools to even make sense of such an idea.

<sup>10</sup> II 4

<sup>11</sup> For an exhaustive scholarly study of Locke on moral agency, see LoLordo, *Locke's Moral Man*.

<sup>12</sup> This reading has been standard at least since Isaiah Berlin, who in his famous "Two Concepts of Liberty" classed Locke, along with almost all other British liberals, as theorists of "negative liberty" *from* interference, which Berlin contrasts with "positive liberty" *to* authentic self-development. See Berlin, "Two Concepts of Liberty."

therefore may not take or alter without consent.<sup>13</sup> The basic idea is that a person enjoys social freedom to the extent that no person or institutional arrangement interferes with her capacity to enjoy her rights in accordance with her own choices. John Simmons has offered the clearest and most sophisticated version of this standard reading of Locke's conception of social freedom. According to Simmons, freedom of this sort can be understood as a kind of grand composite right, which he calls the right of self-government:

The composite right is what Locke calls the "right of freedom to his person" (II 90) and what I will hereafter refer to as the *right of self-government*. It includes the right to our duty (our equal mandatory rights), the right to pursue our nonobligatory ends (our equal optional rights), and the powers to make special rights.<sup>14</sup>

There can be no doubt that Simmons's reconstruction is onto something; Locke clearly does think that freedom of action within the scope of rights is a necessary condition of social freedom. He makes this clear in the II 4 passage quoted above, in which he explains that persons' natural freedom includes the capacity to "order their Actions, and dispose of their Possessions and Persons as they think fit, within the bounds of the Law of Nature." Nevertheless, Simmons's framing is incomplete. For as Locke makes clear in the final two clauses of II 4, a socially free person must have the power not just to enjoy all of her rights, but to do so "without...depending upon the Will of any other Man." Moreover, he adds a little later: "*Freedom* from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's preservation, that he cannot part with it, but by what forfeits his Preservation and Life together."<sup>15</sup>

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<sup>13</sup> E.g. II 123

<sup>14</sup> Simmons, *The Lockean Theory of Rights*, 85

<sup>15</sup> II 23. In the third paper of this dissertation, I discuss at length the relationship between preservation and social freedom. I argue there that social freedom is an important dimension of moral preservation, or the kind of preservation important for us as moral beings (as opposed to merely material beings, such as non-human animals).

Locke has much more to say about social freedom and its relationship to arbitrary power, and I will consider several more significant texts in the next section. But it will be helpful to state upfront the framing of freedom I believe Locke means to defend. Locke's view, I suggest, is that in order to be a free person in relation to others within a community, a person must (1) be a moral agent, endowed with the moral freedom to guide her action according to law who (2) possesses the freedom to act as she sees fit, without interference from others, within the scope of her rights and duties (3) without depending on the arbitrary will of any other person.

*Prima facie*, it might seem that condition (3) is otiose in light of condition (2). How, you might ask, could someone possess the freedom to enjoy her rights while also depending on someone's arbitrary will? The answer is that someone might hold arbitrary power over someone else but decide to let her do as she pleases. If do not interfere with you but could do so how ever I saw fit and with total impunity, you are subject to my arbitrary power, no matter what range of choice or action I might decide to allow you.

As I have just framed it, Locke's conception of social freedom includes a right to freedom from arbitrary power as a kind of second order right that ranges over first order rights. As Simmons correctly points out, Lockean individuals possess a lineup of natural rights that includes rights to do as we are morally required, rights to do what is morally optional, and rights to contract with others to create special rights. There is a great deal of controversy about how to understand the precise content and relative priority of these rights, and I since my topic is Locke's theory of freedom rather than his theory of rights, I will largely leave that controversy to one side.<sup>16</sup> What does matter to my project, however, is the relationship Locke posits between

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<sup>16</sup> The primary source of controversy is whether duties or permissions are conceptually prior. James Tully argues that under natural law, permissions exist only insofar as they facilitate the discharge of duties. See Tully, *A Discourse on Property*, 44. Simmons replies (convincingly, I think) that Locke provides no clear reason to think that either duties

natural rights and objectionably arbitrary power. According to Locke, people do not have a right to be free from arbitrary power *per se*. Rather they have a right to enjoy their first order natural rights—which is to say their natural rights other than non-domination—without depending on the arbitrary power of any person. Outside the scope of first order natural rights, it does not matter whether people depend on the sheer wills of others. But if a person must depend on another’s arbitrary power in order to enjoy some or all of her first order natural rights, her social freedom has been compromised.

In order to see that this is so, let us return to Locke’s framing of natural freedom at II 4. Locke states there that natural freedom is people’s right “to order their Actions, and dispose of their Possessions and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.” It is tempting to read “within the bounds of the Law of Nature” as something like ‘within the bounds of what is morally permissible.’ Thus, it is tempting to read this passage as claiming that dependence on another person’s will is problematic within the scope of *any* morally permissible activity. However, this cannot be right, as Locke spends no less than an entire chapter explaining how people may acquire natural property rights in the world’s resources.<sup>17</sup> As long as owners do not allow others to starve, they may refuse others access to their property as they see fit.<sup>18</sup> In this way, property rights make large numbers of options entirely, and properly, subject to others’ arbitrary choices. Moreover, Locke famously insists that every person has a “property in his own person,” which means that no one may interfere with a (law abiding) person’s body or action without

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or permissions are prior and that he at least hints at a kind of coherentism in which each sort of normative entity supports the other. See Simmons, *The Lockean Theory of Rights*, 76.

<sup>17</sup> II 25-51

<sup>18</sup> Locke holds that if someone is in danger of death from lack of resources, she may take and use others’ property, with or without permission. See I 42.

permission.<sup>19</sup> This too places a wide range of action under the normative control of individuals' sheer preference. So what is going on?

I think the answer is that the “bounds of the Law of Nature” Locke refers to in the passage are not limited to what the law of nature permits, but rather include what the law of nature requires in the course of a rationally-led life. Although Locke’s language at II 4 may seem to imply that law is wholly or primarily a system of side constraints, Locke’s explicit statements about the character of all law, whether natural or political, stand in contrast to this impression. For instance: “*law*, in its true notion, *is* not so much the limitation as *the direction of a free and intelligent agent* to his proper interest.”<sup>20</sup> If law truly is the direction of an agent to her “proper interest,” it becomes reasonable to understand “within the bounds of the Law of Nature” as “within the course of living in such a way that one proceeds towards one’s proper interest as set by natural law, in a way permitted by natural law.” On this reading, it is clear how people can unproblematically own property, control themselves, and subject others to their wills within the course of play, competition, romance, and so forth: as long as all can still effectively pursue their good under natural law without arbitrary dependence, social freedom is safe. But when some people’s capacity to live well under natural law comes to depend on others’ arbitrary wills, social freedom is in jeopardy.

I suggest, then, that the best sense to make of Locke on the scope of morally significant non-domination is that individuals have a natural right to be free from arbitrary power within the scope of the actions and choices necessary to live a good life within natural law and its political determinations. In this way, the right to be free from arbitrary power is a second order right that

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<sup>19</sup> II 27

<sup>20</sup> II 57



morally conditions the exercise of first order rights. This facet of Locke's view will prove significant later on in connection with the consequences of Locke's system for political economy.

Locke's emphasis on the pernicious character of arbitrary dependence places Locke in the long tradition of republican thinking about liberty, a tradition whose central doctrine Algernon Sidney—a radical Whig contemporary of Locke—succinctly stated this way: “Liberty solely consists in an independency upon the will of another, and by the name of slave we understand a man, who can neither dispose of his person nor goods, but enjoys all at the will of his master.”<sup>21</sup> Most members of this tradition prior to Locke, perhaps most notably Cicero<sup>22</sup> and Machiavelli,<sup>23</sup> linked the republican theory of freedom *qua* non-domination to a theory of participatory government within which alone they believed such freedom could thrive. As Quintin Skinner puts their point, “it is only possible to be free in a free state.”<sup>24</sup> Although Locke's theory of social freedom is squarely republican, his relationship to the tradition of republican government is somewhat more complicated. I will address that relationship in connection with Locke's consent doctrine in the fourth and final paper of this dissertation.

## **2. The Standard of Arbitrariness: Freedom, Law, and Accountability**

Now that we have observed the basic direction of Locke's thinking about social freedom as a kind of republican freedom, we need to take up two questions. First, what further textual

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<sup>21</sup> Algernon Sidney, *Discourses Concerning Government*, 17

<sup>22</sup> Cicero's most famous—and influential—framing of republican ideals is in his dialogue *Republic*, which is loosely modeled on Plato's eponymous dialogue. Cicero extols the virtues of the Roman model of republican government and castigates those he perceives (often not unreasonably) as a threat to it.

<sup>23</sup> Machiavelli's *Discourses on Livy*, in which Machiavelli elaborates on themes from Roman political history taken up by Titus Livius Patavinus (59 BC – AD 17), was perhaps the most significant republican work of the late renaissance.

<sup>24</sup> Skinner, *Liberty before Liberalism*, 60

support is there for my claim that Locke takes arbitrary power *per se* to offend against social freedom? Second, what determines whether power counts as arbitrary or non-arbitrary? In this section, I will address both questions together by considering how Locke approaches social freedom in the *First Treatise*, as well as how he links freedom to law and accountability in the *Second Treatise*. In the following section, I will take up the second question in greater depth by comparing Locke's notion of non-arbitrariness to Philip Pettit's contemporary framing. To begin, let us turn to Locke's polemic against absolutism in the *First Treatise*.

Locke's aim in the *First Treatise* is to undercut Sir Robert Filmer's argument for absolute government, which Filmer grounded in paternal rights he took kings to have inherited from Adam. Filmer's *Patriarcha*, which contains his primary defense of absolutism, was already more than six decades old when Locke wrote against it, but it had recently been recalled from (well-deserved) obscurity by the political allies of the Stuarts, who employed it in support of Charles's and James's ambitions for French-style absolute monarchy.<sup>25</sup> Thus, in attacking Filmer's reasoning, Locke sought both to clear the ground for his own liberalism, which he would develop in the *Second Treatise*, and to knock out a major quasi-theoretical, but mainly political, impediment to the Glorious Revolution that would end the threat of absolutism just a few years later in 1688.<sup>26</sup> My primary interest in the *First Treatise*, however, lies in what the complaints about absolute government Locke develops therein can teach us about his conception of social freedom. To begin gleaning that information, let us turn to the *First Treatise*'s opening paragraphs.

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<sup>25</sup> For a helpful treatment of the relationship between Filmer's absolutism and Locke's project, see John Marshall, *John Locke: Resistance, Religion, and Responsibility*, ch. 6.

<sup>26</sup> For the classic—and now widely accepted—defense of the thesis that Locke composed the *Two Treatises* as a theoretical framework for a future revolution, see Laslett, "Introduction."

Locke opens the *First Treatise* with a bold thesis; if Filmer is right, and some few people have standing to rule over all others according to their absolute will and power, every person not born a monarch is permanently, irremediably unfree. He writes:

In this last age a generation of men has sprung up amongst us, who would flatter princes with an Opinion, that they have a Divine Right to absolute Power, let the Laws by which they are constituted, and are to govern, and the Conditions under which they enter upon their Authority, be what they will, and their Engagements to observe them never so well ratified by solemn Oaths and Promises. To make way for this doctrine they have denied Mankind a Right to natural Freedom... [...] We must believe them upon their own bare Words, when they tell us, we are all born Slaves, and we must continue so; there is no remedy for it: Life and Thralldom we enter'd into together, and can never be quit of the one, till we part with the other. (I 3-4)

According to Locke, then, no person subject to an absolute ruler can be free; freedom and such subjection are conceptually incompatible. Now, although Locke claims to be merely taking Filmer at his word, Filmer presents his position quite differently. According to him, the freedom to obey a (hopefully) benevolent, paternal monarch is the sole freedom proper to human beings.

Filmer writes:

The greatest liberty in the world (if it be duly considered) is to live under a monarch... [...] All other shows or pretexts of liberty are but several degrees of slavery, and a liberty only to destroy liberty.<sup>27</sup>

Locke's strict identification of all subjection to absolute power as slavery, utterly incompatible with freedom, is a result of his own theoretical commitments. In particular, it is a consequence of his commitment to the position that social freedom requires freedom from arbitrary power.

To see that this is so, let us suppose for a moment that Locke takes social freedom to be merely freedom of action within the space of rights with no extra demands about the power structures within which people enjoy such freedom of action. If this were the case, it would simply be untrue—even if we grant Filmer his theory of natural absolutism—that “Life and

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<sup>27</sup> Filmer, *Patriarcha*, 4

Thralldom we enter'd into together, and can never be quit of the one, till we part with the other.” For as Locke was well aware, absolute power includes the capacity to benefit those subject to it as well as the capacity to do ill. There is no reason why an absolute monarch, or other absolute master, might not decide to give some or even most of those subject to her power very considerable freedom of action. In fact, Hobbes himself, with whose work Locke was intimately acquainted, points out that absolute sovereignty (which he endorses) does not entail that sovereigns cannot or should not leave their subjects plenty of room to benefit themselves through their own projects as they see fit.<sup>28</sup> Thus, Locke’s claim that freedom is flatly incompatible with absolutism must have something to do with absolute power *per se* and not just with absolute power in relation to further obstacles it tends to produce. In particular, Locke seems to be suggesting here that to be subject to someone’s arbitrary power *just is* to be unfree with respect to that person, no matter what he or she might decide to do with that power.

The impression we get from the *First Treatise* discussion of arbitrary power—that absolute power within the scope of rights *per se* is a sufficient condition for social unfreedom—finds confirmation in Locke’s *Second Treatise* analysis of the close relationships between law, freedom, and accountability. I will treat each of these topics at length later in this dissertation. However, a brief foray now will afford us a better grip on what Locke takes arbitrary power to be and how such power and its absence relate to the rule of law, whether natural or political.

When Locke wrote, the world of letters was grappling with proclamations from Hobbes, Filmer, and other anti-republicans that law, though instrumentally necessary, is always a

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<sup>28</sup> Hobbes writes:

The office of the sovereign...consisteth in the end for which he was entrusted with sovereign power, namely, the procuration of the *safety of the people*, to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself. (Hobbes, *Leviathan*, 219)

hindrance to the freedom of those under it. These statements were grounded in the more basic position that social freedom is simply freedom of action as it relates to social circumstances. It was this commitment that led Hobbes to famously assert that the subjects of a dictatorship (such as Constantinople) are not necessarily any freer than citizens of a republic (like the Italian city-state of Lucca):

There is written on the turrets of the city of Lucca in great characters at this day, the word LIBERTAS; yet no man can thence infer that a particular man has more liberty or immunity from the service of the commonwealth, there than in *Constantinople*. Whether a commonwealth be monarchical or popular, the freedom is still the same.<sup>29</sup>

Locke vigorously rejects this notion of law as inherently freedom-limiting, embracing instead the traditional republican ideal of at least some law as freedom-enhancing. He writes:

Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other Man's Humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.<sup>30</sup>

According to Locke, then, law is an agent of freedom insofar as it is a guard against “domineer(ing) humour” and “arbitrary will(s).” Why, though, should we think that law is likely to be like this? If law is simply an edict—or perhaps even an edict that meets such internal standards of legality as clarity, prospectivity, and so forth<sup>31</sup>—issued by those in power, why should law have this morally salutary, freedom-preserving character? Does not history, both prior to Locke's time and after it, provide an abundance of cases where law was precisely an instrument of arbitrary power? The answer to these questions lies in Locke's conception of law,

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<sup>29</sup> Hobbes, *Leviathan*, 140

<sup>30</sup> II 57

<sup>31</sup> I have in mind here what Lon Fuller terms the internal morality of law, which establishes standards that law must meet not in order to be good law, but to be law at all. See, for instance, Fuller's *The Morality of Law*.

which is an instance of what we might call a morally thick conception. Locke rejects the stark legal positivism that Hobbes embraces and which would rise to prominence with Bentham a century later. According to Locke, a set of norms in force in a community only counts as legal if it meets stringent requirements of both structure and content. In particular, law proper, as opposed to mere force under color of law, must (1) apply equally to everyone in the community, including those charged with passing law, judging law, and enforcing law; (2) include only norms that reflect the interests of the people as they understand those interests; and (3) be issued and enforced by officials who are accountable, on pain of dismissal, to whole body of the people. Once we have unpacked each of these requirements, we will be better positioned to understand the shape of Locke's notion of arbitrary power.

Locke defines membership in political society as a moral relationship people bear to each other in virtue of being mutually accountable within a single legal community:

It is easie to discern who are, and who are not, in *Political Society* together. 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.<sup>32</sup>

It follows from this understanding of civil society that a "law-giver" who, like Hobbes's sovereign or Filmer's monarch, stands outside the system of law she issues is not actually a member of any civil society with those she controls. For such a figure and her subjects do not have "a common established law and judicature to appeal to." Now, someone might grant this point but still hold that law-givers are unbound by the laws they issue. In order for there to be a civil society, one might say, there must be an extra-civil power to issue the law that binds its members. But Locke denies this:

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<sup>32</sup> II 87

Hence it is evident, that *Absolute Monarchy*, which by some Men is counted the only Government in the World, is indeed *inconsistent with Civil Society*, and so can be no Form of Civil Government at all. For the *end of Civil Society*, being to avoid, and remedy those inconveniencies of the State of Nature, which necessarily follow from every Man's being Judge in his own Case, by setting up a known Authority, to which every one of that Society may Appeal upon any Injury received, or Controversie that may arise, and which every one of the Society ought to obey.<sup>33</sup>

Locke's view, then, is that an absolute authority ruling over a civil society would be positively antithetical to the purpose of civil society, which Locke says is to establish a source of public judgment in lieu of myriad individual judges. If someone holds arbitrary power unbounded by law, this goal has not been achieved. For although the confusion of everyone judging in her own case may have been replaced by a single source of judgment in the arbitrary ruler, that judgment is nonetheless *private*, or reflective of an individual's will rather than the judgment of the community. Law properly understood is an expression of a public will that binds each person without being the will of any individual. Locke explains:

'Tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is *the Soul that gives Form, Life, and Unity* to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion: And therefore, when the *Legislative* is broken, or *dissolved*, Dissolution and Death follows. For the *Essence and Union of the Society* consisting in having one Will, the Legislative, when once established by the Majority, has the declaring, and as it were keeping of that Will.<sup>34</sup>

If legal relations between individuals make for civil societies, and if the legal relation is a moral relation in which individuals are represented by a public will, absolute power is quite out of the question. For no individual's will can ever be public in the way sufficient for establishing political relationships of accountability to public judgment.

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<sup>33</sup> II 90

<sup>34</sup> II 212

Let us take a moment to review. We saw that in the *First Treatise*, Locke holds absolute power to be conceptually incompatible with social freedom; there can never be a case in which a person is both subject to someone's arbitrary will within the scope of her rights and politically free, no matter what the latter might choose to do with her power. Moving ahead to the *Second Treatise*, we observed that Locke holds that law, which restricts options, increases social freedom by preventing people from being subject to arbitrary power. Finally, we have begun to see why this might be so; according to Locke's anti-positivist conception of a legal framework, law is the set of shared norms that makes people accountable to a public will that represents everyone equally and issues judgments on behalf of all. With all this in hand, let us turn to the role of accountability in rendering power non-arbitrary.

According to Locke, the collective act of convening into a civil society is identical to the act of transferring a large portion of natural rights to public control. The result of this act is the legislative power, which is naturally vested in the majority of the whole body of consenting members. The legislative holds its power of legal judgment and enforcement as a trust from each individual member. Moreover, the body of the people has the right to invest some subset of its membership with all or some of the legislative power it naturally holds as a corporate body. But no matter where the body of the public places the legislative power, those who hold it are accountable to the public will for using it only on the terms, and for the purposes, for which it was given. The practical bite of this accountability is that the duties of law-subjects are conditional upon law-givers' proper discharge of their trust; if legislators violate their trust, they no longer have standing to demand obedience. Locke writes:

The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set, as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion, of every Part and



Member of the Society. For since it can never be supposed to be the Will of the Society, that the Legislative should have a Power to destroy that, which every one designs to secure, by entering into Society, and for which the People submitted themselves to Legislators of their own making; whenever the *Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power*, they put themselves into a state of war with the people, who are thereupon absolved from any farther Obedience.<sup>35</sup>

I want to suggest, then, that Locke is committed to the following framing of social freedom: a moral agent, or person with moral freedom, is socially free to the extent that she is free to act within the scope of her rights without depending on any person's arbitrary will, where an arbitrary will is a will that is unaccountable within a public legal structure. Note that since Locke takes the extent of law and legal community to exceed the extent of political life, social freedom and unfreedom can be at issue in the state of nature, which is governed only by the law of nature. Indeed, as I will argue in chapter three, damage to social freedom creates strong moral reasons to enter civil society.<sup>36</sup> Now, though, I want to delve more deeply into the notion of accountability that plays such an important role in Locke's framing of non-arbitrariness to Philip Pettit's conception of that value.

### 3. The Shape of Arbitrariness: Pettit vs. Locke

Pettit has developed a version of freedom from arbitrary power that depends entirely on descriptive power relations between persons and groups. According to him, one person, A, dominates another person, B, or holds arbitrary power over her, if and only if (1) A has the capacity to alter B's options (or the cost of her options), and (2) that capacity is not forced to track B's avowed interests.<sup>37</sup> In recent work, Pettit has suggested that people's social and

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<sup>35</sup> II 222, bold added

<sup>36</sup> See my third chapter, *passim*.

<sup>37</sup> Pettit, *Republicanism*, 55

political relationships with one another can avoid being marked by arbitrary power only if those subject to power control the power others hold over them.<sup>38</sup> Pettit cashes out his notion of control in purely descriptive modal and causal terms; to have control over some event, action, or state of affairs is to have the capacity to alter it, as one wishes it to be altered, through one's own chosen action. He calls control so understood the capacity to make a "directed difference."<sup>39</sup>

It is clear that Locke is happy to count as non-dominating power relations within civil society that fail to meet Pettit's standards of non-domination. As we saw earlier, Locke holds that civil societies may entrust the legislative power to sub-groups of citizens. He argues that this transfer can result in any number of forms of government, including constitutional monarchy.<sup>40</sup> And although Locke insists that people must always be represented in government to the extent that the government takes portions of their estates through taxation,<sup>41</sup> he does not insist on anything like democratic government. Consequently, it does not seem that normal citizens usually have control over the actions of government, at least not in Pettit's sense. Moreover, Locke takes the primary means by which the people may hold government officials accountable to be rebellion in the event of a violation of trust.<sup>42</sup> While it is intuitively plausible that the threat of justified rebellion is a real source of accountability, it is much less plausible that it in any way allows citizens to control officials' power while they still hold office. Locke, then, either

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<sup>38</sup> Pettit, *On the People's Terms*, 50

<sup>39</sup> Pettit, *On the People's Terms*, 50

<sup>40</sup> II 132. Locke's allowance of non-republican forms of government creates complications for his theory of consent. I will discuss this matter at length in chapter four.

<sup>41</sup> II 138

<sup>42</sup> II 222

understands arbitrariness quite differently from Pettit, or else he fails to make good on his professed commitment to freedom from domination.

I believe that the former is true; Locke's standard of non-domination in terms of arbitrariness as unaccountability is different at bottom from Pettit's standard of non-domination in terms of arbitrariness as lack of control. According to Pettit, to attribute domination or non-domination to a relationship is simply to describe the distribution of causal power among that relationship's participants. By his lights, we can identify domination and its absence merely by observing how causal powers are distributed. If A *can* interfere with B's options in a way that B cannot control, A dominates B. Locke's standard, by contrast, is moral all the way down; there is no way to correctly describe it without reference to moral elements. For Locke, arbitrary power is unaccountable power, and one person, A, is accountable to another, B, when (1) A *owes* compliance with a norm to the B (2) within a coercive public structure of norms A and B share. Freedom and domination are moral relations between persons, not merely counterfactual causal relations between persons.

Now, although Locke's standard of non-domination is moralized and so not merely causal, it is not *entirely* non-causal. For the kind of accountability that makes for non-arbitrariness is accountability under law, and Locke holds (plausibly enough) that law utterly without prospects of enforcement cannot count as law at all.<sup>43</sup> Indeed, Locke states explicitly that if the issuer of a rule (whether an individual or a community) cannot “reward the compliance with, and punish deviation from his Rule, by some Good and Evil, that is not the natural product and consequence of the Action it self,” the rule in question is not properly legal in character.<sup>44</sup>

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<sup>43</sup> The question of whether purely moral accountability is possible without the threat of coercion is more complicated. I will address it in connection with God's obligations to his creatures in the next chapter.

<sup>44</sup> E II.28.6

But by the same token, it is not the case that one person dominates another simply in virtue of possessing some non-negligible capacity to impose her will in the event that she might see fit to do so. And this is a virtue of Locke's approach, because even where mechanisms of law enforcement have a considerable degree of power, they are unlikely to be anywhere close to perfectly effective, especially when it comes to preventative measures as opposed to post hoc punishment. If the causal standards of social freedom required that the probability of individuals being causally able to impose their wills on others be very low, social freedom would be nearly impossible to achieve.

In order to see more clearly how the dual elements of (1) moral accountability within a legal community and (2) the causal power of such a community to enforce its norms function in Locke's theory, it will be useful to consider an objection Matthew Kramer has raised against Pettit. Kramer argues that Pettit's view problematically entails that a person of extraordinary size and strength necessarily dominates those around her, regardless of how she behaves, what she intends, and what she owes to others.<sup>45</sup> He asks us to imagine a "gentle giant," G, who is, like all other citizens, forbidden to impose her will on others outside the bounds of law and who has no interest in doing so. G could overpower most others if she wished, but she respects the legal norms that forbid such behavior, as well as her fellow citizens' standing relative to those norms. Given G's capacities, Pettit is pressured to say that G dominates her fellow citizens, facts about G's intentions and moral relationships to others notwithstanding. After all, G's extraordinary natural capacities place her activity well beyond most other individuals' control and indeed beyond many groups' control. But it seems intuitively bizarre to conclude that G is consequently a dominator possessed of objectionably arbitrary power; how could G dominate others despite being a model citizen within an appropriately structured legal community?

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<sup>45</sup> Kramer, "Liberty and Domination, 47-48

Kramer's objection is, I think, a very serious worry for Pettit and anyone else who endorses a purely causal, counterfactual conception of freedom-compromising arbitrary power. For if domination amounts to nothing more than counterfactual power relations, it is unclear how any moral qualities of powerful individuals or the relationships in which they stand to others could make any difference to whether they dominate those over whom their power extends. But Locke does not have to allow that G compromises her fellow citizens' social freedom simply in virtue of the fact that she is strong and capable to a highly unusual degree. The reason for this is the moralized character of Locke's conception of arbitrary power, according to which arbitrary power is unaccountable power. Given G's relationship to others within the legal norms of the community they share, G may be accountable to her fellow citizens even though she could overpower them. To be sure, it must be admitted that since accountability under law depends—at least for the purposes of social freedom—partly on the possibility of enforcement, G cannot, perhaps, be at once *completely* untouchable by mechanisms of enforcement and a non-dominator.<sup>46</sup> If we stipulate that G is truly godlike, with capacities utterly beyond those of her fellows, Locke must grant that G *ipso facto* dominates those around her. To this extent, Kramer's concern has a degree of bite, even for Locke. However, it isn't clear to me that Locke needs to worry about this. Locke tells us explicitly that his concern is social and political relations between human beings who are at least roughly similar in their natures and capacities. His project, he explains, is to trace the social and political implications of natural equality among "creatures...promiscuously born to all the same advantages of nature, and the use of the same faculties."<sup>47</sup> Just as Hume would later push aside states of affairs with either very high or very

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<sup>46</sup> The question of whether purely moral accountability requires the possibility of effective enforcement is somewhat more complicated. I will address it in the next chapter.

<sup>47</sup> II 4

low material scarcity as outside of the "circumstances" of justice,<sup>48</sup> Locke limits his treatment of justice to relations among beings who are, at least broadly speaking, of the same mortal, vulnerable, imperfectly rational variety.<sup>49</sup>

#### **4. Equal Moral Rank: The Significance of Freedom from Arbitrary Power**

We have before us a workable sketch of the ideal of social freedom as Locke understands it. The question that arises now is why this ideal might be the right one. As I have reconstructed Locke's conception of social freedom, the absence of arbitrary power is valuable not just as security against pernicious interference, but intrinsically. For Locke, arbitrary power within the scope of natural rights is always sufficient for social unfreedom, no matter how anyone might choose to use that power. But why should this be? What is so important about the absence of arbitrary power? I think Locke's answer is that all human beings share a common moral dignity, or rank, in virtue of their moral capacities (consequent) moral relationships to God and to one another. Locke's clearest statement about the moral rank all agents share comes in the opening passage of the *Second Treatise's* main text:

There (is) nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection.<sup>50</sup>

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<sup>48</sup> Hume, *A Treatise of Human Nature*, 312

<sup>49</sup> Moreover, it is far from clear that it is especially counterintuitive to suppose that any godlike "citizen" must necessarily dominate those around her. For isn't it true that domination would be our fate if gods lived among us? That has certainly been the feeling of peoples whose lives have been infused with the belief that they shared their world with divine beings. Just think, for instance, of the impression of humanity as wholly dependent on whimsical divine preference that we receive from Greek mythology.

<sup>50</sup> II 4

Locke seems to offer two distinct explanations for the equal moral rank he attributes to all moral agents. He borrows the first, which is by all appearances secular, from Richard Hooker:<sup>51</sup>

This *equality* of Men by Nature, the Judicious *Hooker* looks upon as so evident in it self, and beyond all question, that he makes it the Foundation of that Obligation to mutual Love amongst Men, on which he Builds the Duties they owe one another, and from whence he derives the great Maxims of *Justice* and *Charity*. His words are,

*The like natural inducement, hath brought Men to know that it is no less their Duty, to Love others than themselves, for seeing those things which are equal, must needs all have one measure; If I cannot but wish to receive good, even as much at every Man's hands, as any Man can wish unto his own Soul, how should I look to have any part of my desire herein satisfied, unless my self be careful to satisfie the like desire, which is undoubtedly in other Men, being of one and the same nature? ... [F]rom which relation of equality between our selves and them, that are as our selves, what several Rules and Canons, natural reason hath drawn for direction of Life, no Man is ignorant. Eccl. Pol. Lib. 1.*<sup>52</sup>

But the second explanation, which appears in the following paragraph, grounds equal moral rank in each person's special relationship to God as a servant "about his business."

Reason...teaches all Mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men (are) all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order, and about his business.<sup>53</sup>

There is much scholarly controversy about whether Locke's conception of equal moral rank is theological or secular at bottom.<sup>54</sup> What matters for our present purposes, however, is an implication Locke draws from that conception; since each person shares a high moral rank, it is important not only that everyone can comfortably survive or even act extensively within the

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<sup>51</sup> Richard Hooker (1554-1600) was an English theologian whose *Laws of Ecclesiastical Polity* did much to anchor the political theology of the young Anglican Church.

<sup>52</sup> II 5

<sup>53</sup> II 6

<sup>54</sup> For a theological reading, see Jeremy Waldron, *God, Locke, and Equality*. For a secular reading, see Eric Mack, *John Locke*.

scope of her natural rights, but also that no one is subject to other people's power sheer wills in the course of doing so. Locke draws this connection explicitly in his treatment of parental power:

The *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, to his *Natural Freedom*, without being subjected to the Will or Authority of any other Man.<sup>55</sup>

I will discuss the structure of Locke's idea of moral agency, which grounds his notion of high moral rank, and its relationship to theology and accountability in the next chapter. For now, though, I would like to conclude by pointing out that whatever the details of its foundation, Locke's position that all persons enjoy an equally high moral rank that rules out certain kinds of dependence, regardless of the consequences of that dependence, should not strike us as counterintuitive. To see this, consider for a moment the Anglo-American world's more recent experience with chattel slavery. During the 19th century, many apologists of the institution of slavery appealed to purported details of slaves' lives under their masters and urged their readers to agree that these were really not so bad, or at least less bad than what might be expected for slaves in the event of their emancipation. For instance, Alabama newspaper editor Ryland Randolph bemoaned in 1869 what he took to be the ill consequences of emancipation for former slaves:

[Slavery was] a God-send for the negro race. Negroes, as bondsmen, were happier, more sleek and greasy-looking, and better clothed, than they are now. We never hear the ringing horse-laugh, the picking of banjos, beating of tamborines, and knocking of feet against puncheon-floors, that formerly marked their sans-souci existence.<sup>56</sup>

Now, to be sure, Randolph's claims and others like them are as dubious as they are offensive; most American slaves lived lives of near-constant misery. But most of us now think—

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<sup>55</sup> II 54

<sup>56</sup> Quoted in Smith, *An Old Creed for the New South*, 19.



and many abolitionists thought during the 19<sup>th</sup> century—that whether or not slaves enjoyed various comforts and ranges of choice is entirely beside the point; the moral outrage of slavery is a consequence of the fact that it places some people’s options and fortunes at the whim and pleasure of others, not of the fact that slave owners usually did, or would, mistreat their slaves. Such abject dependence is an outrage, we think, on account of a deep moral equality that slavery savagely ignores. Frederick Douglass put the point well in 1847, when he described the paramount evil of slavery this way:

Only look at the condition of the slave: stripped of every right—denied every privilege, he had not even the privilege of saying “myself ”—his head, his eyes, his hands, his heart, his bones, his sinews, his soul, his immortal spirit, were all the property of another. He might not decide any question for himself—any question relating to his own actions. The master—the man who claimed property in his person—assumed the right to decide all things for him.<sup>57</sup>

Francis Wayland, in a debate with South Carolina clergyman Thomas Fuller in 1845, agreed with Douglas that sheer power relations between masters and slaves constitute the principle moral evil of slavery. Those relations are morally evil, he insisted, because they offend against “the immutable relations which God has established between his moral creatures.”<sup>58</sup> As we have already seen briefly and will consider in greater depth in the next chapter, Locke would surely agree with both Douglass and Wayland.

## **5. Looking Ahead**

The aim of this introductory chapter has been to sketch the main shape and motivation of Locke’s notion of social freedom. In the rest of this dissertation, I offer three largely self-standing papers in which I further explore the foundations of Locke’s conception of social

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<sup>57</sup> Quoted in Buccola, *The Political Thought of Frederick Douglass*, 23.

<sup>58</sup> Quoted in Hill, *Law, Morality, and Abolitionism*, 76.

freedom, develop its details and implications, and apply it to political and economic questions that Locke tackles in his texts. I will try to show that Locke's conception of social freedom as I have reconstructed it casts Locke's doctrines of natural property rights and political consent in a new and plausible light. The result of the whole project, I hope, will be the beginnings of a new Lockean liberal framework that theorists will be able to employ in answering questions in contemporary political theory.

Here is how I will proceed. In chapter two, I will take up the relationship between the moral status that justifies the importance of non-domination and Locke's theological conception of moral accountability. I will do my best to reconstruct Locke's moral theory as it exists in his texts before offering some tentative suggestions about how to secularize it while retaining its essential structure. Next in chapter three, I will consider the implications of Locke's doctrine of social freedom for natural property rights in relation to the transition to civil society. I will argue there that by Locke's standards, the ideal of freedom from domination morally requires most individuals to submit to civil society once a monetary economy has produced widespread disparities in the sizes of private estates. In chapter four, I will urge that Locke's conception of social freedom allows us to see the shape and motivation of a more successful doctrine of political consent than most have found in the *Second Treatise*. On the reading I will offer, the point of consent, which may take place through participatory processes rather than discrete acts, is to secure social freedom *inside* civil society rather than to protect freedom of choice *outside* civil society. Finally, I have attached as an appendix my paper, "The Compatibility of Locke's Waste Restriction and his Political Voluntarism." Although this paper is only indirectly concerned with social freedom and its moral foundations, it bears on issues referenced throughout the main body of the dissertation, so readers may find it helpful to consult it.

## CHAPTER 2: MORAL AND THEOLOGICAL FOUNDATIONS<sup>59</sup>

### 1. Introduction

In the last chapter, we observed that according to Locke, freedom from arbitrary power within the scope of our natural rights matters morally because every member of the community of agents shares equally in a high moral rank, or standing. We also observed that Locke links this moral standing to his theological conception of persons' moral vocation in relation to God. In this chapter, I will work to understand the structure of Locke's moral theory and identify theology's role therein. On the reading I will present, God's role is to secure accountability for the content of natural law, which depends on human wellbeing rather than arbitrary divine decrees. I will then briefly consider the extent to which it might be possible to replace the theological components of Locke's setup without sacrificing the distinctive normative structure of his approach.

### 2. The Force and Content of Natural Law

Nearly all 17th century natural lawyers followed their medieval predecessors in offering deeply theistic moral theories. Indeed, even Hugo Grotius, who famously claimed that the natural law would be valid even if God did not exist or was uninterested in our behavior, granted that God does issue that law and that we ought to obey him.<sup>60</sup> Nevertheless, most members of this tradition distinguished the content of natural law from its binding force, arguing that while the

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<sup>59</sup> Sections two through four of this chapter appear in Layman, "Accountability and Parenthood in Locke's Theological Ethics."

<sup>60</sup> Grotius, "On the Law of War and Peace," 92

force of law depends on God's commands, its content does not. For instance, Francisco Suarez and Thomas Hobbes, two thinkers deeply opposed in many respects, are in accord on this point.

Suarez writes:

Divine volition, in the form of a prohibition or in that of an [affirmative] command, is not the whole reason for the good or evil involved in the observance or transgression of the natural law; on the contrary, it necessarily presupposes the existence of a certain righteousness or turpitude in these actions, and attaches to them a special obligation.<sup>61</sup>

Similarly, Hobbes insists that although the content of natural law is determined by its substantive aim (self-preservation, Hobbes thought), that content becomes obligatory only once God issues it as law:

These dictates of reason men use to call by the name of laws; but improperly; for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves, whereas law, properly, is the word of him that by right hath command over others. But yet if we consider the same theorems, as delivered in the word of God, that by right commandeth all things; then are they properly called laws.<sup>62</sup>

Locke shares at least the basic framework of this model with Suarez and Hobbes. According to Locke, the content of the natural law is determined by its aim, which is the preservation, or good, of the whole moral community. He writes in the *Second Treatise*: "Law...prescribes no farther than is for the general good of those under that law: could they be happier without it, the law, as an useless thing, would of itself vanish."<sup>63</sup> However, natural law obligates only because God issues it. As Locke states forthrightly in the early *Essays on the Law*

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<sup>61</sup> Suarez, "On Law and God the Law-Giver," 77

<sup>62</sup> Hobbes, *Leviathan*, 100

<sup>63</sup> II 57. This passage, along with Locke's claim (which I will examine later) that God is bound by covenants, count strongly against the view, recently endorsed by Antonia LoLordo, that the content as well as the binding force of natural law depends on God's will. For if this was correct, law that did not serve the end of happiness would not vanish "of itself," but would rather require God to remove it. See LoLordo, *Locke's Moral Man*, 7-8.

*of Nature* (henceforth ELN): "The basis of obligation...is the will of a supreme Godhead."<sup>64</sup> And in the *Essay*, Locke writes: "the true ground of Morality...can only be the Will and Law of a God."<sup>65</sup>

It is important not to infer from Locke's insistence that a commander is necessary in order for law to bind that he endorses a sanction theory of the sort we find in Hobbes, according to whom God's commands obligate us solely on account of his "Irresistible Power."<sup>66</sup> Locke rejects this position. Perhaps with Hobbes in mind, Locke explains in the ELN that if self-interest is the root of the natural law's binding power, "virtue would seem to be not so much man's duty as his convenience."<sup>67</sup> Moreover, he writes in the same text: "Not all obligation seems to consist in, and ultimately to be limited by, that power which can coerce offenders and punish the wicked, but rather to consist in the authority...which someone has over another."<sup>68</sup> Locke reaffirms this judgment in the *Essay*, where he writes of God's practice of issuing moral law: "He has a right to do it; we are his creatures: he has goodness and wisdom to direct our actions to that which is best: and he has power to enforce it by rewards and punishments, of infinite weight and duration, in another life."<sup>69</sup> If Locke's position is that God's authority derives straightforwardly from his power, the first two reasons he offers here make little sense in the context.

There are two objections someone might raise at this point. First, Locke claims that law without enforcement would be "in vain." In the *Essay*, he argues:

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<sup>64</sup> ELN 189

<sup>65</sup> E 1.3.6

<sup>66</sup> Hobbes, *Leviathan*, 235

<sup>67</sup> ELN 181

<sup>68</sup> ELN 183-184

<sup>69</sup> E 2.28.8

For since it would be utterly in vain, to suppose a Rule set to the free Actions of Man, without annexing to it some Enforcement of Good and Evil, to determine his Will, we must, where-ever we suppose a Law, suppose also some Reward or Punishment annexed to that Law. It would be in vain for one intelligent Being, to set a Rule to the Actions of another, if he had it not in his Power, to reward the compliance with, and punish deviation from his Rule, by some Good and Evil, that is not the natural product and consequence of the Action it self. For that, being a natural Convenience, or Inconvenience, would operate of it self without a Law. This, if I mistake not, is the true nature of all *Law*, properly so called.<sup>70</sup>

Locke makes the same point in the *Second Treatise*. He argues there that outside civil society, each person must have standing to enforce the law of nature, because "the *Law of Nature* would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders."<sup>71</sup> Why, someone might press, would law without enforcement be "in vain" if obligation under law is not just a matter of sanction and reward? The answer, I think, is that Locke's point here is about what it would make sense for a law-giver to do, not about what constitutes obligation.<sup>72</sup> This is especially clear in the passage from the *Essay* quoted above, in which Locke explains that it would be in vain "*for one intelligent being* to set a rule to the action of another" if that agent were not prepared to enforce it. The idea, I suggest, is that if an agent means to secure obedience from a group of people, some of whom have no great love for her, it would be silly for that agent to withhold enforcement. If she did, the motivations of at least many of the people whose behavior she sought to modify would remain unchanged. It would not be in vain to withhold enforcement if the law giver's aim were to secure something like *loving* obedience rather than obedience *simpliciter*. But Locke (reasonably enough) does not suppose that political law-giving ever has this aim, and even God, who does seek loving obedience, seeks

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<sup>70</sup> E 2.28.6

<sup>71</sup> II 7

<sup>72</sup> Here I agree with LoLordo. See *Locke's Moral Man*, 23.

general obedience as well.

The second objection hinges on a more general observation about Locke's moral psychology. Locke is a straightforward hedonist about motivation, including moral motivation. According to him, it is impossible for any intelligent agent, including even God, to be moved to action by anything other than the prospect of happiness or unhappiness.<sup>73</sup> As Locke makes clear in the revisions he added to the second edition of the *Essay*, agents need not be moved by the strongest *immediate* prospect of happiness or unhappiness, because intelligent beings can "suspend" their action in order to consider how their options relate to their happiness in the long run.<sup>74</sup> Nevertheless, he consistently affirms, as he does in the late fragment, "Of Ethic in General," that "Happyness & misery are the two great springs of humane actions."<sup>75</sup> If we grant Locke this point, it might seem that no one could possibly be moved by anything about God's commands other than the rewards and punishments he annexes to them. Thus, it would seem that if our obligation to obey God does not rest solely on his power to punish us, the grounds of moral motivation come apart entirely from the grounds of moral obligation. On any plausible conception of obligation, such a deep fissure between these two grounds would be very strange, to say the least.<sup>76</sup>

Happily, this is not a serious problem for Locke. Like any reasonable hedonist, Locke allows that it is possible take pleasure in any number of things, including duty and our

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<sup>73</sup> Concerning God's necessary pursuit of happiness, Locke writes: "God Almighty himself is under the necessity of being happy; and the more any intelligent Being is so, the nearer is its approach to infinite perfection and happiness" (E 2.21.50)

<sup>74</sup> E 2.21.48, 53

<sup>75</sup> Locke, "Of Ethic in General," 298

<sup>76</sup> Stephen Darwall sees just such a deep fissure between the motivational force and rational standing of morality. As he reads Locke, it is fear of punishment alone that makes God's commands binding on us. He writes that for Locke, "what makes God's commands morally obligatory seems to have nothing intrinsically to do with what makes them rationally compelling." See Darwall, *The British Moralists*, 37.

relationships with God and others. People who love God and other people take pleasure in doing what the natural law requires. Such people, who have the character God would like to see in all of his rational creatures, are motivated to obey God quite apart from any considerations of rewards or punishments. Locke makes this clear in a fragment entitled “Ethica A”:

Happiness ... is annexed to our loving others and to our doing our duty, to acts of love and charity, or he that will deny it be so here because everyone observes not this rule of universal love and charity, he brings in a necessity of another life (wherein God may put a distinction between those that did good and suffered and those who did evil and enjoyed by their different treatment there) and so enforces morality the stronger.<sup>77</sup>

Thus, while some people find in the threat of Hell or the promise of Heaven whatever motivation to obey God they can muster, others can and do find it in grounds more closely linked to God's moral standing and to the content of morality. Moreover, a person's motivation to obey God will depend less on the prospect of punishment or reward the more virtuous she becomes.

I think we may safely conclude, then, that according to Locke, the content of natural law is determined by the good of all those under it, but that law obligates us morally only inasmuch as God issues it. Furthermore, God's commands obligate us not just because God is powerful enough to enforce them with eternal rewards and punishments, but because he has moral standing to issue them. While this is right as far as it goes, it leaves two important questions unanswered. First, why does the natural law need God's commands, or indeed anyone's commands, in order to bind? If its content derives from the conditions of our happiness, why is there any need for someone to promulgate that content authoritatively? Second, even if there is some work left over for God to do, what in particular gives God the special moral standing necessary for him to do it? We have seen that it is not merely his power that explains this

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<sup>77</sup> Locke, “Ethica A,” 319. Patricia Sheridan also notices this text and uses it to make the same point. See Sheridan, “Pirates, Kings, and Reasons to Act,” 43.



standing, but it is unclear what does explain it, vague gestures towards goodness and creation notwithstanding. Must we conclude, with David Gauthier, that Locke thinks it is simply obvious that God has moral standing to obligate us?<sup>78</sup> In what remains, I will try to answer these questions. I will argue that, as Locke understands obligation, to have an obligation is to be accountable to someone with appropriate standing to call one to account and issue blame for one's failings. Consequently, Locke's theory requires that all moral duties be owed *to* someone, and Locke casts God as that someone. Once this schema is in place, I will consider why Locke thinks God is suited to play the role in which he casts him, that is, why Locke takes God to have standing to hold us accountable. I will argue that according to Locke, God has this standing because he alone can and does direct rational agents to their good by promulgating a moral law. In this way, the relationship Locke posits between God and human beings is closely analogous to parents' relationships with their children. Just as children are accountable to their parents because parents are bound to provide education and support that children cannot provide for themselves, we are accountable to God because he is bound, by covenant, to reveal our good to us through his moral law, which we cannot fully discern without his aid.

### **3. Obligation and Accountability**

In his recent book, Eric Mack argues that Locke leaves no work for God to do in his moral theory.<sup>79</sup> As Mack reads Locke, the content of natural law is independent of God's will, and it is accessible through rational reflection. How then, he asks, might God's commands add some obligatory quality that wasn't already in place? Locke could have secured a place for God

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<sup>78</sup> Gauthier, "Why Ought One Obey God? Reflections on Hobbes and Locke," 431-432

<sup>79</sup> Mack, *John Locke*, 33-34.

by collapsing moral obligation into the fear of divine punishment and the prospect of divine reward, but as Mack recognizes and we have observed, Locke rejects this route. In light of the apparent absence of any clear role for God to play in Locke's theory, Mack remarks that Locke *should* have followed Grotius and granted that natural law would bind even if God were non-existent or disinterested.<sup>80</sup>

If Mack is right, we can simply write off Locke's theology, at least insofar as his moral theory is concerned. However, I do not think matters are quite so easy. For according to Locke, an agent is obligated to perform (or omit) a given action just in case she is *accountable* for performing (or omitting) that action. And in order to be accountable for performing an action, a person must be accountable *to* someone for performing it. Thus, if we are obligated by natural law, we must be accountable to someone for our obedience. God's most important role in Locke's moral theory is to make this accountability possible; he is the person to whom we are ultimately accountable for obeying the natural law.

In order to begin hashing out the relationship Locke sees between obligation and accountability, it will be useful to consider Samuel Pufendorf, whom Locke read closely and professed to admire, because Pufendorf offers a conceptual template we can use to approach Locke's own account.<sup>81</sup> According to Pufendorf, an action can have a moral quality only if it is imputable to an agent. In order for an action to be imputable to an agent, it is not enough for that agent to simply cause it. Rather, she must be responsible for it in the literal sense of being *answerable* for it; that is, she must be liable for an *account* of her decision.<sup>82</sup> Moreover, she must

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<sup>80</sup> Mack, *John Locke*, 29.

<sup>81</sup> On Locke's debt to Pufendorf, see Laslett, "Introduction," 75.

<sup>82</sup> See Darwall, "Pufendorf on Morality, Sociability, and Moral Powers" 219.

understand herself as thus accountable, and this understanding creates a kind of "moral bond" in the agent":

By *Obligation* then is usually meant, *A moral Bond, whereby we are ty'd down to do this or that, or to abstain from doing them.* That is, hereby a kind of a Moral Bridle is put upon our *Liberty*; so that though the *Will* does actually drive *another* way, yet we find our selves hereby struck as it were with an *internal* Sense, that if our Action be not perform'd according to the *prescript Rule*, we cannot but confess we have not done *right*; and if any Mischief happen to us upon that Account, we may fairly charge *our selves* with the same; because it might have been avoided, if the *Rule* had been follow'd as it ought.<sup>83</sup>

According to Pufendorf, then, when we are accountable, we experience a kind of internal bondage or compulsion. As accountable agents, we owe accounts of our actions to others and, to the extent that we properly internalize our obligations, to ourselves as well.<sup>84</sup>

Locke offers a similar account in ELN. After stating that obligation is not just a matter of sanctions, Locke explains that when a person is obligated by the command of a superior, she finds herself compelled to grant that she *owes* it to the superior to comply with her command:

Indeed, all obligation binds conscience, and lays a bond on the mind itself, so that not fear of punishment, but a rational apprehension of what is right, puts us under an obligation, and conscience passes judgment on morals, and if we are guilty of a crime, declares that we deserve punishment...Anyone would easily...perceive that there was one ground of his obedience when as a captive he was constrained to the service of a pirate, and there was another ground when as a subject he was giving obedience to a ruler; he would judge in one way about disregarding obedience to a king, in another about wittingly transgressing the orders of a pirate or robber. For in the latter case, with the approval of conscience, he rightly had regard only for his own well-being, but in the former, though conscience condemned him, he would violate the right of another.<sup>85</sup>

Locke and Pufendorf, then, seem to agree that to be morally obligated is to be accountable *to* someone who has standing to demand that we discharge the obligation and to

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<sup>83</sup> Pufendorf, *The Whole Duty of Man and Citizen*, ch. 2, par. 3

<sup>84</sup> Darwall develops this basic structure of accountability in his own moral theory. See Darwall, *The Second-Person Standpoint*.

<sup>85</sup> ELN 185

rightfully accuse or blame us when we fail to do so. And when we understand our accountability to that person, we accuse *ourselves* in conscience just as the other person accuses us. To be obligated to perform an action is thus to be accountable to someone who has standing to demand it of us, in her own voice and on her own authority, in such a way that we recognize that we owe it to her to perform it. This picture finds confirmation in the *Essay*, where Locke argues that moral personhood requires the capacity to impute one's actions to oneself and to understand oneself as accountable for them:

Where-ever a Man finds, what he calls *himself*, there I think another may say is the same *Person*. It is a Forensick Term appropriating Actions and their Merit; and so belongs only to intelligent Agents, capable of a Law, and Happiness and Misery. This personality extends it *self* beyond present Existence to what is past, only by consciousness, whereby it becomes concerned and **accountable**, owns and **imputes** to it *self* past Actions, just upon the same ground, and for the same reason, as it does the present... Conformable to this, the Apostle tells us, that at the Great Day, when every one shall *receive according to his doings, the secrets of all hearts shall be laid open*. The Sentence shall be justified by the consciousness all Persons shall have, that they themselves...are the same, that committed those Actions, and deserve that Punishment for them.<sup>86</sup>

Locke's point is clear; in order to be bound by law, and so be a person in the "Forensick" sense, one must have the capacity to impute one's actions to oneself as acts for which one is liable to a rightful authority figure for an account. In the case of moral accountability, with respect to which all will be settled at the Last Judgment, that authority figure is, ultimately, God. This is not because we lack moral obligations to anyone else; as Locke discusses at length, we are accountable to other human agents for our contracts (including marital contracts and political contracts),<sup>87</sup> for charity and mutual aid,<sup>88</sup> and, in the case of parents, for care and education.<sup>89</sup>

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<sup>86</sup> E 2.27.26, bold added

<sup>87</sup> II 77-87

<sup>88</sup> I 42, II 6

<sup>89</sup> II 58

But Locke holds that accountability between created agents ultimately depends on our overarching moral accountability to God:

Indirectly and by delegated power the will of any other superior is binding, be it that of a king or a parent, to whom we are subject by the will of God... [W]e are bound to obey them because God willed thus, and commanded thus, so that by complying with them we also obey God.<sup>90</sup>

Locke's view, then, is that in order for us to have moral obligations, we must be accountable, not just to the particular individuals with whom we have our various moral relationships, but to an agent who endorses and ratifies the entire system of moral relationships. But why is God suited to play the role of anchoring the whole moral system by holding us accountable? That is, why are we accountable to God? Let us turn to this question now.

#### **4. God's Standing as Parent**

Does Locke offer any good reason to think that God has standing to hold us accountable? As we saw earlier, Locke seems to offer, in the second part of the *Essay*, two reasons why God has standing to hold us accountable: his status as creator and his supreme goodness.<sup>91</sup> But are these good reasons?

Let us begin with the appeal to creation. On the face of it, it is mysterious why the fact that God creates us might mean that he has any particular standing.<sup>92</sup> Some commentators, however, have suggested that Locke supplements his appeal to creation with the premise that God's creation makes us his *property*, and that this is supposed to explain his special standing.<sup>93</sup>

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<sup>90</sup> ELN 187

<sup>91</sup> E 2.28.8. See also pp. 2 above.

<sup>92</sup> This is how LoLordo reads Locke. See LoLordo, *Locke's Moral Man*, 21-22.

<sup>93</sup> See, for instance, Feser, *Locke*, 111-113.

On this reading, it is a bedrock moral principle that agents, whether human or divine, own what they make; this principle is supposed to explain why, as Locke argues at length in the *Second Treatise*, human beings gain property rights in the fruit of their labor.<sup>94</sup> Since God made us, we are his property. And since we are his property, we are accountable to Him for obeying his commands.

If this is Locke's argument, it faces serious difficulties. First, it is not clear that it is valid. Even if we suppose that God owns me and so has rights to do what he wants with me, it does not follow that I am accountable to him for obedience. This is because the concept of ownership, in Locke's time as well as in our own, includes nothing about duties on the part of possessions. Rather, it has to do only with rights of owners and duties of third parties. According to Locke, the "nature" of property in "Estates and Possessions" is that "*without a Man's own consent, it cannot be taken from him.*"<sup>95</sup> It follows from this definition that if I am among God's possessions (supposing that he has some), no one may take me from God, or otherwise prevent God from doing as he likes with me, unless God grants permission. This might generate the further conclusion that I may not destroy myself, as this could amount to taking one of God's possessions without his permission.<sup>96</sup> However, it does not follow that I have a general duty of obedience to God. Consider the case of my ownership of my computer. It follows from the fact that I own my computer that I may impose my will on it as I see fit, including even to destroy it,

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<sup>94</sup> II ch. 5, *passim*

<sup>95</sup> II 193

<sup>96</sup> Locke suggests something like this at II 6. But as I suggest in the main text, I think God's property rights in us are distinct in kind from ownership rights—which make up a particular class of property rights—that human beings can hold against one another. Moreover, it is worth noting that it is not clear how anyone could successfully contravene a decision on the part of God—an omnipotent being—to use something in a particular way. For instance, if God adopts the aim of keeping me alive, it follows that I will remain alive. If it is impossible to prevent God from using things as he sees fit, that is one more reason to think that God and his actions are ill-suited to the moral categories associated with ownership.

and that no one may impose her own will on it without my permission. However, it does not follow that my computer has a duty to obey the commands I enter through its operating system. Now, you might respond that this is only because my computer is not the sort of thing that can have duties; *if* it could have duties, it would have a duty to do as I say. But what could ground the truth of this counterfactual? Certainly not ownership *qua* moral relationship between finite agents, as that kind of moral relationship strictly excludes things capable of duty from being objects of ownership; when people claim to own others, they are mistaken, at least insofar as morality (rather than mere convention) is concerned. If ownership as we know it has nothing to do with duties on the part of things we own, how can we conclude that such duties exist in the particular case of God's ownership of his human creations? Someone might reply that God's ownership of us, along with its concomitant power to bind us morally, is wholly *sui generis*. However, it is unclear how this move could amount to much more than an appeal to mystery.

Second, even if we were to grant the conditional claim that God has the standing to hold us accountable *if* he relates to us as we relate to the things we own, Locke's argument for natural human ownership rights provides no reason to think that God does bear this relation to us. This is true for two reasons. First, Locke does not think we have to make anything in order to attain an ownership right through labor.<sup>97</sup> For instance, in order to attain full natural ownership of a nut, one need only pick it up; there is no need to make anything out of it. Someone might urge that since Locke forbids waste, one must at least eat the nut before it goes bad, thereby "making" sustenance out of it. But in addition to the fact that this move does almost comic violence to the ordinary sense of the word 'make' and its synonyms, God's creation *ex nihilo* has nothing significant in common with simply putting an object into a digestive system. Moreover, Locke

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<sup>97</sup> II 28, 46

identifies the natural ownership rights we acquire through labor as individuations of a preexisting common right that we share, as a result of God's gift, with all other people.<sup>98</sup> If our individual ownership rights in resources depend essentially on God's common gift, God's own rights can hardly be of the same variety. To be sure, Locke does insist that we, along with all creation, are, in some sense, God's property.<sup>99</sup> But Locke consistently uses the term 'property' to refer to rights in general, not just to rights of ownership. For instance, a human person's "property" includes not just her "estate," or possessions, but also her "life" and "liberty."<sup>100</sup> Thus, even if we suppose that we are God's property, it does not follow that we comprise his estate in the sense that houses, apples, and so forth might comprise a human being's estate. There is no clear reason to think that the characteristically human institution of estate possession is one in which God participates at all.

The argument from God's property, then, is a non-starter. But what about God's goodness? Taken simply, this argument is also off limits to Locke, as he quite explicitly rejects the notion that a person's goodness alone gives her standing to hold anyone accountable for doing as she says. This is perhaps clearest in the context of politics. Locke states unequivocally that no adult person can be accountable for obeying the dictates of anyone else unless she has given her consent.<sup>101</sup> No matter how wise and good a person is, she has no standing to issue laws to other people and hold them accountable for obedience unless those others have chosen to

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<sup>98</sup> II 25-27

<sup>99</sup> II 6

<sup>100</sup> II 123

<sup>101</sup> II 95



invest her with authority. If goodness grants authority, this is hard to explain.<sup>102</sup>

If these appeals to creation and goodness are all Locke has to offer in support of God's standing to hold us accountable, his argument is a failure. However, I do not think that either of these appeals is meant to carry the weight of explaining why we are accountable to God. Instead, I believe that goodness and creation are constituents of a more nuanced explanation grounded in God's ongoing relationship with us. Consider once more Locke's explanation of God's authority from the *Essay*:

That God has given a Rule whereby Men should govern themselves, I think there is nobody so brutish as to deny. He has a Right to do it, we are his Creatures: He has Goodness and Wisdom to direct our Actions to that which is best: and he has Power to enforce it by Rewards and Punishments, of infinite weight and duration, in another Life; *for no body can take us out of his hands.*<sup>103</sup>

This final line suggests that we depend on God to direct us to our good. This suggestion finds confirmation in ELN, where Locke explains our obligation to God in terms of our dependence on God, not just for our existence but for our "work," or proper activity: "we are bound to show ourselves obedient to the authority of His will because both our being and our work depend on His will."<sup>104</sup> For some reason that is as yet unclear, we need God in order to do what it is important for us to do as the sort of agents we are.

Locke's emphasis on our dependence on God calls to mind the classical Christian doctrine of God's fatherhood, according to which all of God's rational creatures relate to him in

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<sup>102</sup> Some commentators have argued that Locke makes an exception for exceptionally good rulers. See, for instance, West, "The Ground of Locke's Law of Nature," 9. They have in mind the following passage from the *Second Treatise*: "Such God-like princes indeed had some Title to Arbitrary Power, by that Argument, that would prove Absolute Monarchy the best Government, as that which God himself governs the Universe by: because such Kings partake of his Wisdom and Goodness"(II 166). However, the argument Locke refers to here, which "would prove absolute monarchy the best government," is Robert Filmer's, which Locke spends the entire *First Treatise*, not to mention much of the *Second Treatise*, attacking, or a closely related one. Consequently, this passage can hardly be read as an endorsement of a natural right for "God-like princes" to rule.

<sup>103</sup> E 2.28.8, emphasis added

<sup>104</sup> ELN 183

much the way that a child relates to her parents during her minority. He affirms this doctrine in the *First Treatise*, where he grants Robert Filmer's point that "the Power which God himself exerciseth over Mankind is by Right of Fatherhood," although he insists, contrary to Filmer, that "this Fatherhood is such an one as utterly excludes all pretence of [political] Title in Earthly Parents."<sup>105</sup> According to Locke, then, we depend on God as a kind of father. The idea I want to pursue in the rest of this section is that God's right to hold us accountable is a *parental* right. In order to see if this will work, we need to turn to Locke's analysis of parental authority.

By Locke's lights, parents' rights over their children are inextricable from their responsibilities to their children; they are what Simmons calls mandatory rights, or rights to do what is morally required.<sup>106</sup> Indeed, it is not a stretch to suggest that Locke would agree with Jeremy Waldron, who urges that parental rights fall within a class of rights that *just are* responsibilities.<sup>107</sup> Parents are obligated to see to the well-being and education of their children, and they have the standing to authoritatively direct their children's action in order to achieve these ends.<sup>108</sup> Just as children are accountable to their parents, parents are accountable to their children, who have a legitimate complaint against their parents if the latter do not support, educate, and protect them. According to Locke, it is appropriate for parents to command their children, even though all persons are equal, because children are constitutionally incapable of

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<sup>105</sup> I 53

<sup>106</sup> Simmons, *The Lockean Theory of Rights*, 74

<sup>107</sup> Waldron, "Dignity, Rights, and Responsibilities," 1114

<sup>108</sup> For Locke's account of parental power, see II, 52-76. It is important to note that it is not an anachronism to attribute to Locke a doctrine of parental power rather than merely paternal power. He writes: "Whatever obligation Nature and the right of Generation lays on children, it must certainly bind them equal to both the concurrent Causes of it. And accordingly we see the positive Law of God every where joyns them together, without distinction, when it commands the Obedience of Children, *Honour thy Father and thy Mother*, Exod. 20. 12" (II 52). For more on Locke on the equality of the sexes, see Jeremy Waldron, *God, Locke, and Equality*, 21-43.

seeing to their own good until they have reached adulthood.<sup>109</sup> As he puts the point, minor children are born *to* equal standing under the moral law, but they are not born *with* it.<sup>110</sup> For no matter how intelligent and promising a child might be, she is not in a position to responsibly direct and answer for her own action until she has reached what Locke calls the "Age of Discretion."<sup>111</sup> Once a child reaches this age, her parents' duty to protect her and provide for her expires along with their authority over her. Although adult children retain a debt of gratitude to their parents throughout life, their parents have no more standing to hold them accountable for obedience than they have such standing over any other adult.<sup>112</sup>

Since Locke grounds parental authority in the incapacities that typically accompany childhood rather than in childhood *per se*, it would seem to follow that adult human beings who fail to develop normal capacities might be subject to parental authority their entire lives. Locke explicitly affirms this upshot of his position:

But if, through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of Reason, wherein he might be supposed capable of knowing the Law, and so living within the Rules of it, he is *never capable of being a Free Man*, he is never let loose to the dispose of his own Will (because he knows no bounds to it, has not Understanding, its proper Guide) but is continued under the Tuition and Government of others, all the time his own Understanding is incapable of that Charge. And so *Lunaticks* and *Ideots* are never set free from the Government of their Parents.<sup>113</sup>

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<sup>109</sup> According to Locke, biological parents have a natural duty to either raise their children themselves or see to it that someone else takes up the office of parent with respect to them (II 55, 69). His reasons for this are not, I think, especially deep; he seems to simply observe that children need parenting once they come to exist, and that biological parents are uniquely responsible for this state of affairs and so naturally suited to take on the concomitant responsibilities. Nothing in his text, however, suggests that he would object to a culture in which other people reliably took up the office of parenthood.

<sup>110</sup> II 55

<sup>111</sup> II 59

<sup>112</sup> II 67-68

<sup>113</sup> II 60

What I want to suggest is that all created agents are accountable to God throughout their lives in a way that is analogous to children's accountability to their parents, which endures as long as they are constitutionally unable to direct themselves responsibly. While children normally develop to a point at which they are no less capable than their parents, all finite agents require God to guide their action and reasoning by promulgating and clarifying the natural law, thereby allowing them to do the "work" Locke mentions in ELN. Unless God performs this service, normal adult human beings are no more able to live well than are children without their parents. Before God, we are all "*Lunaticks and Ideots*," so his parental authority is permanent.

To be clear, I am not claiming that God's standing to hold us accountable derives from, or is somehow less basic than, the rights human parents have to hold their children to account. Nor am I claiming that the standing of human parents derives from God's standing. What I *do* mean to claim is that both human parenthood and God's parenthood are instances of a single kind of moral office, namely that of securing a good for another person that he is constitutionally unable to secure for himself.<sup>114</sup> What explains both human parental standing and God's standing is the occupation of this office, albeit with respect to different classes of dependents.

I have urged that, according to Locke, God is suited to the moral office of parenthood with respect to all agents because he alone can direct us to our good via the natural law. It might seem, though, that God does not need to direct us in this way, since the moral law is accessible through reason. Although Locke argues that morality is, in principle, a demonstrative science,<sup>115</sup> and although he asserts that the most basic norms of the law of nature are available to "all

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<sup>114</sup> For more on Locke's conception of parenthood as a moral office, see Franklin-Hall, "Creation and Authority: The Natural Law Foundations of Locke's Account of Parental Authority," 273-278.

<sup>115</sup> E 3.11.16

Mankind, who will but consult it,"<sup>116</sup> he denies that human beings are capable of deducing the whole system of morality-or indeed even most of the system of morality-without divine aid. Locke sets out this position at length in the *Reasonableness of Christianity as Delivered in the Scriptures* (henceforth *Reasonableness*), which appeared in print only six years after the *Two Treatises* and the *Essay*.<sup>117</sup> He writes there:

'Tis true there is a *Law of Nature*. But who is there that ever did, or undertook to give it us all entire, as Law; No more, nor no less, than what was contained in, and had the obligation of that Law? Who, ever made out all the parts of it; Put them together; And shewed the World their obligation? Where there any such Code, that Mankind might have recourse to, as their unerring Rule, before our Saviour's time? If there was not, 'tis plain, there was need of one to give us such a Morality.<sup>118</sup>

'Tis plain in fact, that humane reason unassisted, failed Men in its great and Proper business of Morality. It never from unquestionable Principles, by clear deductions, made out an entire Body of the Law of Nature. And he that shall collect all the Moral Rules of the Philosophers, and compare them with those contained in the New Testament, will find them to come short of the Morality delivered by our Saviour, and taught by his Apostles; A College made up for the most part of ignorant, but inspired Fishermen.<sup>119</sup>

Locke seems to recognize that some of his readers might object that if the law of nature is really the law of reason, it ought to be accessible to anyone who is rational. In response, he urges that we cannot conclude from the fact that a truth is suitable to being deduced from first principles that any finite agent can actually deduce it without help. The truths of divine

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<sup>116</sup> II 6

<sup>117</sup> This work appeared anonymously in 1695, while the *Two Treatises* and the *Essay* appeared (the former also anonymously) in 1689. While it is perhaps tempting to think that Locke's admission in the *Reasonableness* that human beings cannot successfully demonstrate the content of morality on their own reflects a change in position from the *Essay*, I see no reason to believe that it does. For in the *Essay*, Locke claims only that moral demonstration is *possible*, as "the precise real Essence of the Things moral Words stand for, may be perfectly known" (E 3.11.16). He does not claim that anyone is able to carry out the entire demonstration, and it does not follow from the fact that something is demonstrable in principle that anyone can, in fact, demonstrate it.

<sup>118</sup> Locke, *Reasonableness*, 197

<sup>119</sup> Locke, *Reasonableness*, 196

revelation are often ones that we cannot deduce on our own, their rationality notwithstanding:

As soon as [the truths of revelation] are heard and considered, they are found to be agreeable to Reason; and such as can by no means be contradicted. Every one may observe a great many truths which he receives at first from others, and readily assents to, as consonant to reason; which he would have found it hard, and perhaps beyond his strength to have discovered himself.<sup>120</sup>

Someone might further object that in order for the relationship between God and human beings to mirror the one between parents and children, God would have to be accountable to human beings for discharging his parental obligations, which cannot be. But Locke disagrees; he holds that God can be, and in fact is, accountable to us. In the *First Treatise*, he mocks Filmer's claim that human monarchs cannot have promissory obligations by pointing out that even God is accountable for his covenants:

SIR R.F.'s great Position is, that *Men are not naturally free*. This is the Foundation on which his absolute Monarchy stands, and from which it erects itself to an height, that its Power is above every Power, *Caput inter nubila*<sup>121</sup>, so high above all Earthly and Human Things, that Thought can scarce reach it; that Promises and Oaths, which tye the infinite Deity, cannot confine it.<sup>122</sup>

He repeats the same point in the *Second Treatise*: "The Obligations of that Eternal Law...are so great, and so strong, in the case of *Promises*, that Omnipotency it self can be tyed by them. *Grants, Promises and Oaths* are Bonds that *hold the Almighty*."<sup>123</sup>

Moreover, in *Reasonableness*, Locke endorses the traditional view that God has entered human history through a series of covenants, or promises, with human beings. First, in what Locke follows tradition in calling the "Old Covenant," God covenanted with the people of Israel to lead and protect them in exchange for their obedience to his law. Second, God applied that

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<sup>120</sup> Locke, *Reasonableness*, 195

<sup>121</sup> That is, "head among the clouds."

<sup>122</sup> I 6, bold added

<sup>123</sup> II 195

law, along with an offer of salvation by faith, to the whole world through the New Covenant of the death and resurrection of Christ. Locke explains that although the New Covenant lessened the "Rigour" of the Old Covenant, the latter's "obligations...never ceased."<sup>124</sup> According to this picture, God binds himself to his rational creatures by covenant, thus making himself accountable to them for guidance and protection no less than they are accountable to him for obedience.

It might seem odd that God can be accountable to us, since his power is infinitely greater than ours. Due this difference in power, no one could ever compel God to keep a covenant he was inclined to break. While it is true that no one could compel God to do anything, this does not mean that God cannot be accountable to us. For as we saw above, Locke understands accountability as a *moral* relationship whereby one agent is able to authoritatively issue a demand to another agent who is in turn morally liable for compliance. There is no need for an agent to possess any particular degree of power, either relatively or absolutely, in order for others to be accountable to her. This corresponds to our normal moral intuitions. For instance, few would claim that we are *less* morally accountable to the poor or the weak than to the rich and the powerful. The difference between our power and God's, then, does not interfere with God's being accountable for his covenant to guide us as our parent.

## **5. Lockean Accountability without God?**

I have argued that by Locke's lights, obligation under natural law depends on accountability to God, which is in turn grounded in God's covenant with us to guide us to our good by clarifying the moral law. At this point, it is reasonable to wonder whether Locke is right to suppose that our moral relationships with one another ultimately depend on accountability to

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<sup>124</sup> Locke, *Reasonableness*, 182

God. In this final section, I want to briefly consider how some contemporary philosophers have developed accountability-based theories of obligation without appealing to any theological premises. To the extent that these are successful (or similar theories could be successful), it might be possible to have a moral theory that is genuinely Lockean with respect to its normative structure without relying on anything like Locke's ambitious theistic metaphysics.

In recent work, both Stephen Darwall and T.M. Scanlon have developed accounts of the general structure of morality and obligation that have much in common with the picture I've been sketching on Locke's behalf. Like Locke, Scanlon argues that the moral landscape is constructed from relationships, and that individuals are accountable for the dispositions and actions constitutively required of particular relationships. Furthermore, Darwall joins Locke (and even takes himself to be following Locke) in arguing that obligation is a matter of accountability. Unlike Locke, however, both Darwall and Scanlon eschew theology. These facts together raise a question: can Locke's framework be secularized by replacing his theology with elements borrowed from the kind of secular approach that these two philosophers endorse?

Let us begin with Scanlon. According to Scanlon, relationships are constituted by dispositions and intentions to behave in some ways rather than others. While Scanlon takes this to be a true descriptive claim about relationships, its implications are not merely descriptive, but normative as well. This is true because particular token relationships are, or to some degree fail to be, instantiations of "normative ideals" of relationships.<sup>125</sup> Scanlon's point is that our relationships can only be comprehensible to us and inhabitable by us if we understand them as cases of some more or less familiar kind; we cannot make sense of our particular relationships as entirely *sui generis*. Our particular relationships, to the extent that they go well, instantiate the

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<sup>125</sup> Scanlon, *Moral Dimensions*, 133



norms of the type of relationship they are. Conversely, if one party to a relationship that essentially includes some disposition lacks that disposition, she is to that extent a defective participant in the relationship.

Moreover, in addition to being generally criticizable by anyone who might take note of her failure, a person who fails to act or be disposed to act is properly subject to *blame* by the others party (or parties) to the relationship. Blame is, on Scanlon's view, a rather complex structure of dispositions, actions, and expressions.<sup>126</sup> What is important about blame within relationships in the present context, though, is that when you blame someone who has failed to live up to the normative ideal of the relationship you share with her, you hold that person accountable, often through the imposition of some kind of sanction. According to Scanlon, persons in relationships with one another have standing to hold one another to the standards that constitute the normative ideal of the relationship they share. Furthermore, on Scanlon's view, blame and its attendant holding-accountable *presupposes* a relationship. For to hold someone accountable in the way we do when we place blame is to address the other person with a claim about a relationship-governed norm she has violated or neglected. To blame someone is not just to point out that the other person's behavior is bad (or even *very* bad). It is rather to exercise one's relationally grounded standing to call the wrongdoer to account.

If this is the basic structure of blame, it has important consequences for morality. In particular, moral blame must likewise be grounded in a relationship. But unlike the blame and accountability that is peculiar to the particular relationships that fill our lives, moral blame can often be issued by anyone at all. So if Scanlon is on the right track, there must be a moral relationship in which all persons stand to one another. Scanlon realizes that this is an implication

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<sup>126</sup> Scanlon, *Moral Dimensions*, 123-131

of his view, and he embraces it, though not without admitting that it may sound odd at first. He suggests that all persons stand in this relationship to one another in virtue of their shared rationality:

In my view, morality requires that we hold certain attitudes toward one another simply in virtue of the fact that we stand in the relation of “fellow rational beings.” It requires us to take care not to behave in ways that will harm those to whom we stand in this relationship, to help them when we can easily do so, not to lie to them or mislead them, and so on.<sup>127</sup>

This all sounds fairly plausible. But one might reasonably wonder what is so special about our shared rationality. Scanlon’s own answer, which he develops elsewhere, is that each rational person has a reason (where ‘reason’ means ‘consideration in favor’) to want to “live with others on terms that they could not reasonably reject insofar as they are also motivated by this ideal.”<sup>128</sup> But Darwall picks up the shared-rationality thread and develops it in a way that is, in my judgment, at once closer to something Locke could have endorsed and more compelling on its own terms. According to Darwall, our practice of addressing one another second-personally with reasons we expect one another to take seriously, which he calls our practice of second personal address, commits every person who takes part in it to accept that others possess dignity as a rational agent that is equal to her own. Whenever one person says (or otherwise indicates second-personally) to another, “You must (or must not)  $\phi$  with respect to me,” she presupposes that the addressee is an agent who, like her, can and should be moved by reasons rather than by force. And this commits the person making the address to the conclusion that the other agent is a source of reasons for her. To borrow a term from Kant, the practice of second

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<sup>127</sup> Scanlon, *Moral Dimensions*, 139-140

<sup>128</sup> Scanlon, *What We Owe to Each Other*, 154

personal address commits us to seeing everyone else as a bearer of “dignity.”<sup>129</sup> According to Darwall we cannot even enter into the practice of addressing practical reasons to one another unless we presuppose that each of us is a member of a moral community of accountability grounded in shared dignity. As Darwall puts it,

...the dignity of persons and the autonomy of the will not only entail one another...but also...are presupposed by the second-person standpoint. Both are transcendental conditions for the very possibility of second-personal reasons.... So we must presuppose them when we address second personal reasons of any kind.<sup>130</sup>

According to Darwall, then, we cannot make sense of the practice of addressing and receiving moral reasons, a practice that is constitutive of what is distinctively moral about our interactions with one another, unless we presuppose that each of us is accountable, as source of valid reasons, to everyone else. Moreover, we cannot make sense of ourselves and one another as moral agents unless we presuppose that we are mutually accountable in the way that makes second-personal address work. Just as in Locke's theological worldview we cannot make moral sense of ourselves except as accountable within a relationship with God, in Darwall's view we cannot make moral sense of ourselves as agents except as accountable to one another.

If we follow Scanlon and Darwall in supposing that all agents as such relate to one another in a moral relationship that both requires and presupposes mutual accountability, we have, through wholly secular avenues, gotten quite close to a Lockean foundation for morality. Recall that for Locke, obligation requires accountability, and that accountability only makes sense within a structure of norms governing a relationship. Further recall that in order for there to be an all-encompassing set of norms of the sort capable of grounding unified agency, there must

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<sup>129</sup> That is, in Kant's German, *Würde*. See Kant, *Groundwork*, 42.

<sup>130</sup> Darwall, *The Second-Person Standpoint*, 277

be a relationship within which all persons are accountable for all of their actions and choices. By Locke's lights, our relationship with God is the only eligible candidate relationship. But we now have on the table another candidate relationship, one grounded in the conceptual demands of normative relations within a community of equal, non-divine persons. A complete assessment of the secular accountability-based framework I have been sketching in this final section would require (at least) a paper of its own. However, I hope this brief treatment suffices to show that although theology occupies an important role in Locke's moral theory, there is no reason to despair of assigning that same role to secular stand-ins.

## **6. Conclusion**

Locke holds that freedom from arbitrary power matters insofar as each human being shares a high moral rank, or status, in virtue of her membership in the moral community. In several texts, Locke explicitly links the moral accountability for natural law that establishes membership in the moral community to each individual's moral vocation in relation to God and his commands. This move raises two questions: how exactly does Locke's theological voluntarism work, and how deeply intertwined is that voluntarism with the deep structure of his moral theory? I argue that according to Locke, the conditions of human happiness establish the content of natural law, but God's commands make it morally binding. This raises two further questions. First, why does moral obligation require an authority figure? Second, what gives God authority? I argued that according to Locke, moral obligation requires an authority figure because to have an obligation is to be accountable to someone. I then argued that according to Locke, God has a kind of parental authority inasmuch as he is bound by covenant to guide us by revealing the content of the moral law. Finally, I considered how recent moral philosophy by

T.M. Scanlon and Stephen Darwall provides a way to retain the normative structure of Locke's position without relying on his theological commitments.

## CHAPTER 3: PROPERTY, FREEDOM, AND POLITICAL ECONOMY

### 1. Locke without the Proviso

Most scholars of John Locke's political philosophy believe that his theory of property includes a proviso, or restriction, that prohibits people from appropriating resources to such an extent that there is not enough left for others. This norm has variously been called the "sufficiency restriction,"<sup>131</sup> the "Lockean proviso," or simply the "proviso."<sup>132</sup> The key text commentators use to attribute the proviso to Locke appears near the outset of his famous chapter on property, where Locke explains that labor on unowned resources affords the laborer property in those resources, "at least where there is enough, and as good left in common for others."<sup>133</sup>

Jeremy Waldron has leveled a sustained challenge to this received reading.<sup>134</sup> According to Waldron, the only restriction that limits individuals' natural moral power to create property rights is a waste restriction that forbids people to take more than they can use. A right of charity allows those in desperate need to use others' property to survive, but there is no sufficiency-oriented restriction on individual acquisitive acts.<sup>135</sup> Waldron's argument is, I think, quite compelling, and it will be useful to reproduce some of its central features. First, Locke simply does not assert that leaving enough and as good is a necessary condition of just, property-

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<sup>131</sup> See, for instance, Varden, "Locke's Waste Restriction and his Strong Voluntarism," 127-141.

<sup>132</sup> Robert Nozick employs both of these latter two labels. See *Anarchy, State, and Utopia*, 179

<sup>133</sup> II 27

<sup>134</sup> Waldron, "Enough and as Good Left for Others," 319-328. See also Waldron, *The Right to Private Property*, 209-218.

<sup>135</sup> For Locke's discussion of charity as distinct from justice, see I 42.

creating acquisition. Rather, he identifies leaving enough and as good as a *sufficient* condition of just, property-creating acquisition. Here is the full text of II, 27:

Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, **at least** where there is enough, and as good, left in common for others.<sup>136</sup>

Surely it is most natural to read ‘P, at least where Q’ as ‘ $Q \rightarrow P$ ’ rather than as ‘ $P \rightarrow Q$ .’ Thus, it is most natural to read this passage as saying that if there is enough and as good left for others, then everyone has a right to what she has appropriated. But in order to constitute a necessary condition on the justice of individual acts of appropriation, the conditional would have to run the other way.

Second, Locke repeatedly identifies the waste restriction as the sole natural restriction on individuals’ moral power of appropriation. Here are two representative passages:

It will perhaps be objected to this, That if gathering the Acorns, or other fruits of the Earth, &c. makes a right to them, then any one may *ingross* as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also *bound* that *Property* too. *God has given us all things richly*, 1 Tim. vi. 17. is the Voice of Reason confirmed by Inspiration. But how far has he given it us? *To enjoy*. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others.<sup>137</sup>

He that *gathered* a Hundred Bushels of Acorns or Apples, had thereby a *Property* in them; they were his Goods as soon as gathered. He was **only** to look, that he used them before they spoiled; else he took more than his share, and robb’d others...the *exceeding of the bounds of his just Property* not lying in the largeness of his Possession, but the perishing of any thing uselesly in it.<sup>138</sup>

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<sup>136</sup> II 27, bold added

<sup>137</sup> II 31

<sup>138</sup> II 46, bold added

The first of these two passages appears only four paragraphs after the famous “enough, and as good” passage. Why would Locke take up, as though for the first time, the challenge of how much individuals may appropriate and answer it by appealing to a waste restriction if he had already answered the same question completely differently less than two pages earlier?

Third, if individuals may not appropriate in ways that worsen others’ positions, it might sometimes be mandatory to violate the natural law. Locke explains that everyone’s first duty is to herself; once someone has seen to her own “preservation,” she is obligated to help others with their preservation, but not before.<sup>139</sup> However, if each person must leave enough and as good for others, it follows that she might, under conditions of scarcity, be required to sacrifice her own preservation. You might reply that the proviso is meant to apply only under conditions of great plenty such as Locke takes to have marked the early generations of human history. But even if this is right, there is still the difficulty of future generations. John Sanders has pointed out that if each individual must leave enough and as good not just for each member of her own generation but for future generations as well, no one may ever appropriate more than a tiny bundle property, if any at all.<sup>140</sup> This concern applies with particular force to property in land, the supply of which is naturally limited. Locke, though, takes property in land to be paradigmatic of the sort of property people may acquire in the state of nature through individual appropriation.<sup>141</sup>

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<sup>139</sup> II 6. Parents may be required to see to their children before themselves. See II 56.

<sup>140</sup> Sanders, "Justice and the Initial Acquisition of Private Property," 377

<sup>141</sup> II 32



The arguments just reviewed have won few converts;<sup>142</sup> John Simmons,<sup>143</sup> John Marshall,<sup>144</sup> Eric Mack,<sup>145</sup> and many others continue to find the traditional proviso in Locke's account of property. This is, I think, hardly surprising. For in spite of the textual considerations that count against the received reading, Locke repeatedly suggests that there is something morally wrong with distributions in which some people's property leaves others with very little. In particular, he contrasts the original age of abundance—in which “there could be no doubt of Right, no room for quarrel,”<sup>146</sup> and in which people had no “reason to complain, or think themselves injured”<sup>147</sup>—with later ages of scarcity during which some people experienced “prejudice” and “injury.”<sup>148</sup> As John Simmons aptly notes: “The clear implication is that in later ages, when scarcity *is* a problem, there is room for doubt about...largeness of possession.”<sup>149</sup> Moreover, one of Locke's fundamental commitments is that God gave the world to humankind in common.<sup>150</sup> If all persons are equally the recipients of the world's resources as a gift from God, surely there must be something wrong with situations in which some people's property prevents

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<sup>142</sup> John Tomasi is a kind of half-convert. As he reads Locke, Locke does endorse an enough-and-as-good proviso on acts of appropriation, but only as a kind of “buttress” meant to supplement the waste proviso. Tomasi writes: “He [Locke] is saying something like this: ‘In the early stages of man, non-spoiling appropriations that are achieved by the mixing of one's labor are legitimate, especially since those appropriations do leave enough and as good in common for others’” (John Tomasi, “The Key to Locke's Proviso,” 454). I think Tomasi's reading is right insofar as the early stages of the state of nature are concerned. But as I will argue below, conditions in which there is not enough and as good for all, which arise after the introduction of money, are morally problematic, albeit not on grounds of rights violation, even if no one is wasting resources.

<sup>143</sup> Simmons, *The Lockean Theory of Rights*, 291-298

<sup>144</sup> Marshall, *John Locke: Resistance, Religion, and Responsibility*, 268

<sup>145</sup> Mack, *John Locke*, 61-75

<sup>146</sup> II 39

<sup>147</sup> II 36

<sup>148</sup> II 36

<sup>149</sup> Simmons, *The Lockean Theory of Rights*, 291

<sup>150</sup> I 86-87, II 25

others from enjoying that gift. Finally, why would Locke bother pointing out that the availability of enough and as good for all is a sufficient condition of just appropriation if he did not take that availability to be morally significant?

It seems, then, that we are faced with a puzzle. On the one hand, there is reason to doubt that Locke was committed to the Lockean proviso as it has traditionally been understood. But on the other hand, Locke's text makes it very hard to deny that there is some kind of serious moral problem with distributions that leave some people badly off while others thrive. This puzzle raises three questions. First, if acts of appropriation never violate the rights of others unless there is waste involved, what *kind* of moral problem could there be with efficient distributions that leave some people with very little? Second, assuming there is a good answer to the first question, what *in particular* is wrong with such distributions? Third, what moral duties do people acquire once such distributions have arisen? In what remains, I will address these questions in turn. First, I will argue that in order to be morally acceptable, a distribution must both respect everyone's rights and support the two dimensions of human well-being, or "preservation," at which the natural law aims. These are material preservation, which pertains to physical health and comfort, and moral preservation, which is a matter of independence from arbitrary power, or social freedom as discussed in the first chapter. Second, I will argue that once pre-political monetary economies usher in full appropriation of resources, most people suffer harm with respect to moral preservation even though they benefit with respect to material preservation. Finally, I will argue that once full appropriation has rendered natural property rights insufficient to guarantee both material preservation and moral preservation for all, individuals acquire a duty to consent to civil authority in order to secure these goods for themselves and others.

## 2. What kind of moral problem could there be with conditions of insufficiency?

In *Anarchy, State, and Utopia*, Robert Nozick distinguishes historical conceptions of distributive justice from end-state conceptions of distributive justice.<sup>151</sup> According to historical conceptions, whether a given distribution of some good (material or otherwise) is morally acceptable depends entirely on its pedigree. As long as each exchange leading up to the distribution took place without violating any rights, there is nothing morally problematic about it. Thus, according to historical conceptions, it is wrong-headed to assess the moral acceptability of a distribution by asking whether it manifests any particular pattern or instantiates any particular goal. End-state conceptions of distributive justice, by contrast, insist that the history of a distribution is insufficient to settle whether it is morally acceptable. For according to these conceptions, a distribution can only be morally acceptable if it manifests a certain pattern or achieves a certain goal. For instance, a proponent of an end-state conception might insist that even if (contrary to fact) the current distribution of wealth in the United States had been reached by a series of impeccably rightful steps, that distribution would nonetheless be morally problematic, as it concentrates wealth too heavily among the wealthiest citizens. It is possible to divide end-state conceptions into two subgroups, whose members we can call 'pure end-state conceptions' and 'mixed end-state conceptions,' respectively. According to pure end-state conceptions, the fact that a distribution manifests a particular pattern or meets a particular goal is necessary and sufficient for its moral acceptability; no question of its pedigree is germane to the question of its moral acceptability. According to mixed end-state conceptions, manifesting a pattern or meeting a goal is necessary but insufficient for the moral acceptability of a distribution; in order to be morally acceptable, a distribution must both possess a clean pedigree and manifest a pattern or meet a goal.

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<sup>151</sup> Nozick, *Anarchy, State, and Utopia*, 153-155

Nozick claims that the entirely historical conception of distributive justice he endorses is basically the same as Locke's.<sup>152</sup> If Nozick is right about this, it unclear how Locke could hold that there is something morally wrong with distributions in which there is not enough and as good for all without endorsing something like the traditional proviso. However, Nozick has Locke wrong; Locke's conception is not a wholly historical conception, but rather a mixed end-state conception. According to Locke, a distribution must *both* accord with the aim of natural law and result from a series of rightful transfers in order to be morally acceptable. Locke holds that all law, whether natural or political, aims at the "preservation," or simply the "good," of all those under it. He writes, for instance, that "the *fundamental Law of Nature* [is] *the preservation of Mankind*,"<sup>153</sup> and that "the Foundation and End of all Laws [is] the publick good."<sup>154</sup> Moreover, securing the preservation, or good, of the people subject to law is the sole purpose of law. Locke writes: "*Law*...prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the *Law*, as an useless thing would of itself vanish."<sup>155</sup> Thus, law as Locke understands it is not simply a collection of rights, but rather a system of rights justified within a basically teleological structure. To be clear, I am not attributing to Locke the position that the rights people hold in consequence of rightful appropriations and transfers are only valid against intrusion by others if the resulting distribution secures preservation for all. That would be incompatible with Locke's understanding of rights, according to which rights are property,<sup>156</sup> and

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<sup>152</sup> Nozick, *Anarchy, State, and Utopia*, 9

<sup>153</sup> II 135

<sup>154</sup> II 165

<sup>155</sup> II 57

<sup>156</sup> II 123

property is that to which a person cannot lose her claim unless she consents.<sup>157</sup> To the contrary, I am claiming that by Locke's lights, if rightful appropriations and transfers result in a distribution that fails to secure preservation for all, there is something morally objectionable about that distribution *even though* it is compatible with everyone's rights. If people's rights end up undercutting that goal rather than supporting it, there is a moral problem afoot that is distinct from rights violation and compatible with the absence of any rights violations.

The preservation at which law aims has both a material dimension and a moral dimension. The material dimension of preservation is uncomplicated, and nearly all commentators have noticed it in Locke's text. It pertains to the good of each person as a material being in need of sustenance, shelter, clothing, and related goods. It is in order that everyone might enjoy material preservation that "the Earth, and all that is therein, is given to Men for the Support and Comfort of their being."<sup>158</sup> By contrast, the moral dimension of preservation pertains to the good of each person as a moral agent who enjoys a high moral "rank." This dimension of Locke's conception of preservation is a matter of social freedom, or the capacity of moral agents to enjoy their rights and duties without depending on anyone's arbitrary power. As we saw in the first chapter, every morally equal agent holds a claim to enjoy not just the free exercise of her natural rights, but the free exercise of those rights *without depending upon the arbitrary power of any person*. Moreover, we observed that Locke understands arbitrariness in terms of accountability under law; one person's power is arbitrary with respect to another if the former is not accountable for her use of it within a structure of law she shares with the other person. Although Locke devotes much of his treatment of domination concerns about arbitrary

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<sup>157</sup> II 138

<sup>158</sup> II 26

power within civil relationships and under positive law, he takes the natural law to be no less fully legal than positive law, and whether power relations in the state of nature are arbitrary depends whether they are accountable to the standards of natural law. Thus, if some people hold power that fails to meet the standards of non-arbitrariness, whether under positive law or under natural law alone, others' preservation is infringed. Indeed, such power relations compromise preservation no less severely than material deprivation.

There are, then, two distinct ways in which a state of affairs can fail to meet the end of natural law, which is preservation. Most obviously, it can fail to secure material preservation for some or all people. But additionally, it can feature relations of arbitrary dependence, relations which may, or may not, contribute to material deprivation. In the next section, I will argue that although persons may rightfully appropriate as much as they can use without wasting, the development of monetary economies allows rightful appropriators to bring about distributions in which many people's moral preservation, or social freedom, is compromised.

### **3. What in particular is wrong with conditions of insufficiency?**

According to Locke, there was no serious risk of material insufficiency prior to the development of monetary economies, a development which Locke thinks can occur, and in many cases did occur, outside of civil society.<sup>159</sup> Until this economic transition took place, no one had either a right—due to the waste restriction—or an incentive to hoard up more than she could use before the onset of spoilage, and such modest estates could not even begin to exhaust the earth's plenty.<sup>160</sup> However, once people began to use durable items as media of exchange, it became

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<sup>159</sup> II 50

<sup>160</sup> II 36

possible to rationally and licitly accumulate much larger properties, including large holdings in land.<sup>161</sup> Since money does not go to waste like naturally useful resources do, individuals could permissibly accumulate large amounts of it and then use it to hire workers, which in turn made it possible to develop more land and produce more goods to sell.<sup>162</sup> Consequently, where there was once an abundance of land and other resources for the taking, money introduced scarcity of resources for appropriation.

Did the rise of monetary economies undercut material preservation, moral preservation, or both? Let us first consider material preservation. It is tempting to think that once some people's appropriations left most others unable to appropriate for themselves, there must have been widespread material harm. But this is a mistake; Locke argues, quite plausibly, that full appropriation of land and other resources left everyone materially better off. He writes:

Nor is it so strange, as perhaps before consideration it may appear, that the *Property of labour* should be able to over-ballance the Community of Land: for it is *labour* indeed that *puts the difference of value* on every thing...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; whom Nature having furnished as liberally 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 hundredth 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*.<sup>163</sup>

The reasoning this passage suggests is familiar from economics; when resources remain common, a commons tragedy, wherein resources fail to find their most efficient uses, often

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<sup>161</sup> II 50

<sup>162</sup>This is how Simmons (correctly, I think) understands Locke's rather threadbare explanation of how the introduction of money gives rise to insufficiency. See Simmons, *The Lockean Theory of Rights*, 300-301.

<sup>163</sup> II 40-41

threatens to leave all people worse off than they otherwise could be.<sup>164</sup> Moreover, although Locke does not explicitly address this point, the wage labor money brings in tow facilitates the division of labor, an institution whose virtues for all classes Adam Smith would later elaborate.<sup>165</sup>

Some commentators have urged that since the full appropriation of resources improves everyone's material condition, there is nothing morally suspect about it.<sup>166</sup> But this is too fast. For even if we grant that full appropriation makes everyone better off with respect to material preservation, it does not follow that no one is harmed with respect to moral preservation. In fact, there is good reason to believe that full appropriation *does* harm most people with respect to moral preservation, since the large majority of people in an extra-political, and so totally unregulated, monetary economy must receive their livelihoods at their employers' pleasure or else not at all. Laborers in such an economy enjoy an increase in material preservation relative to the pre-monetary status quo, but at the cost of dependence on the arbitrary power of others and, thus, a sharp dive in moral preservation.

A challenger might object that, although employees certainly do depend on employers, the dependence is bi-directional. Employers, after all, depend on labor for their success; this is why very large estates were rare before the rise of money made it possible to hire workers efficiently. However, individual employees' smaller capital reserves make it very difficult for

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164 David Schmitz argues that according to Locke, people are morally *required* to appropriate resources because this prevents the development of commons tragedies. See David Schmitz, "When is Original Appropriation Required?" 504-518.

165 Adam Smith, *The Wealth of Nations*, 13-24. Locke may have division of labor at least partially in mind when he emphasizes the importance of the "the right employing" of workers at II 42.

166 See, for instance, Mack, *John Locke*, 69-70.



them to hold out against employers in disputes over wages and other benefits, at least in completely natural labor markets. Adam Smith makes this point especially clearly:

What are the common wages of labour depends every where upon the contract usually made between those two parties, whose interests are by no means the same. The workmen desire to get as much, the masters to give as little as possible... [...] It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms... [...] In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.<sup>167</sup>

One might grant my (and Smith's) point about the uneven dependence of laborers on employees within pre-political monetary economies but point out that there are likewise cases of uneven dependence in everyday property relations between individuals. Why, this challenger might ask, should dependence in the context employment be objectionable while the power of owners need not be? Suppose that Jill has appropriated a particularly luscious apple. Her neighbor, Jack, could simply pick another apple from one of the many nearby trees, but he has a unique and intense desire for Jill's apple. Whether Jack is able to eat the apple depends on whether Jill feels like giving or trading it to him and, therefore, on Jill's will. According to Locke, there is nothing objectionable about this dependence. But why not? And how is dependence on employers any different?

The answer to these questions hinges on the framing of Locke's conception of social freedom. Recall from the chapter one that according to Locke, a person is socially unfree if she is subject to unaccountable power within the scope of exercising her (other) rights. Non-domination is a right, but it is a kind of meta-right that affords individuals standing to enjoy first-

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<sup>167</sup> Adam Smith, *Wealth of Nations*, 83-84

order rights without subjection to arbitrary power. Locke is enormously unhelpful when it comes to stating the exact content of our first order rights, and this content remains highly controversial in the literature. Nevertheless, it is clear that although all people share a natural right to use the earth and its resources for their needs, this natural community does not entail a natural right to any particular portion of those resources, at least not prior to acts of appropriation.<sup>168</sup> With this in mind, consider once more the power Jill holds over Jack in virtue of her ownership of the apple. Given that she owns the apple, it is right to say that her power over Jack, limited though it is to his use of the apple, is arbitrary; whether he may use the apple depends on her will and nothing else. But it is not *objectionably* arbitrary in a way that infringes social freedom, because the actions of Jack over which Jill's will is absolute fall beyond the scope of his first-order natural rights. Jack, after all, has no natural right to enjoy any particular relationship to Jill's apple.

While Jill's limited arbitrary power over Jack does not range over his natural rights, the power of employers over employees in the pre-political monetary economy is global; whatever employees are in a position to do, they are able to do so only at the pleasure of their employers. For employees little or no capital of their own, and resources for original appropriation are, at best, enormously scarce. Moreover, although the natural duty of charity prevents anyone from allowing another person to starve if she can help it, employers hold their capital by right, having properly acquired it, so they are not accountable to their employees for more than that (apart, of course, for whatever terms they agree to). The upshot is that once monetary economies develop outside of the state of nature, the natural law goal of moral preservation is undercut by widespread social unfreedom. This is not due to unrightful behavior, but due to rightful behavior

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<sup>168</sup> Locke writes: God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being (II 26).

that, although originally supportive of both dimensions of preservation, has created a state of affairs contrary to preservation. The right and the good, we may say, no longer stand in their proper relationship to one another.

Someone might object at this point that if I have reconstructed the moral situation in pre-political monetary economies correctly, Locke is guilty of a kind of rule-worship.<sup>169</sup> For why shouldn't rights—including the property rights—simply cease to have any force in the event that they come to conflict with the goals that support them? If rights are justified by a relationship to a goal, why should they outlive that relationship in the way I have suggested rights to control large estates outside civil society outlive the positive relationship between property accumulation and social freedom? The right answer to this challenge draws attention to a feature of Locke's system we have had occasion to comment on before; Locke's moral theory fundamentally a *legal* theory.<sup>170</sup> That is, it is a theory about how morally equal people can and should structure their lives under shared public norms. If rights under natural law were subject to cancellation under circumstances such as those that arise in pre-political monetary economies, someone would have to issue and enforce judgments about their cancellation and about how to replace them. Just as rule of law within political societies demands a publically authorized and recognizable instrument of change in order for legal norms to lose their force, rule of natural law outside civil society would require an appropriately authorized judge to establish whether and how a legal norm had lost its force. However, this kind of judgment on behalf of others is precisely what life under natural law alone rules out; according to Locke, “want of a common judge with authority” is the defining feature, and can quickly become the central defect, of the natural legal order.<sup>171</sup> It

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<sup>169</sup> I am grateful to Geoffrey Sayre-McCord for this objection.

<sup>170</sup> See chapter one above.

<sup>171</sup> II 19

is on account of this lack of judgment and its various moral and economic consequences that the prospect of amending that legal order through political communities becomes—both morally and prudentially—such an attractive option.

#### **4. How should people address the problem of insufficiency?**

If I am right about the moral consequences of pre-political monetary economies as Locke understands them, we need to consider how people within such economies ought to address those consequences. Most scholars read Locke as attempting to justify the consequences of money by appealing to consent.<sup>172</sup> This interpretation cannot, I think, be correct, for it is untenable on both systematic and textual grounds. Locke makes it clear that no one can enter into a contract or agreement to put herself under the arbitrary power of any other person. He writes: “no Man, or Society of Men, (has) a Power to deliver their *Preservation*, or consequently the means of it, to the Absolute Will and arbitrary Dominion of another.”<sup>173</sup> In light of the two dimensions of preservation we have been discussing, it is clear why no one can give valid consent to her own complete dependence on someone else; if such consent were possible, it would follow that people have a moral power to directly and purposely subvert one dimension of the basic aim that justifies moral powers in the first place.

Furthermore, Locke simply does not assert that consent justifies the effects of monetary economies. Rather, he invokes consent to explain how money came into use. The only

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<sup>172</sup> According to Simmons, for instance: “Locke could hardly be clearer about what he thought justified inequality. We consent to the use of money, so we consent to the natural consequences of the use of money (large appropriations, scarcity, inequality).” Simmons, *The Lockean Theory of Rights*, 303.

<sup>173</sup> II 149

consideration he employs in defense of the results of money is that money does not spoil. Locke writes:

But since Gold and Silver, being little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its *value* only from the consent of Men, whereof Labour yet makes, in great part, *the measure*, it is plain, that Men have agreed to a disproportionate and unequal Possession of the Earth, they having, by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to any one, these metalls not spoiling or decaying in the hands of the possessor.<sup>174</sup>

According to the traditional reading, this passage contains three elements. First, there is an explanation of how objects lacking what Adam Smith would later call “value in use” came to have what Smith would term “value in exchange.”<sup>175</sup> The answer on offer is that money acquired its value in exchange by consent. Second, there is an attempt to justify the effects of money by appeal to consent. Third, there is, in the remark following the final comma, an attempt to answer the potential objection that very large estates violate the waste restriction.

I propose a different reading. As I read this text, it contains two claims. The first is that consent explains how money came to have value in exchange. The second is an explanation of how it was possible, given the demands of natural law, for individuals to acquire rights to large estates. This was possible, Locke says, because these estates satisfied the waste restriction, which is the only natural restriction on individual appropriation. This does not entail anything about whether distributions containing such estates are, all things considered, morally acceptable. There *would* be such an entailment if Locke endorsed a pure historical theory of distributive justice. But as we have seen, Locke endorses a mixed end-state theory of distributive justice,

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<sup>174</sup> II 50

<sup>175</sup> Smith, *Wealth of Nations*, 44

according to which a distribution must both achieve the goals of natural law and possess a rightful pedigree in order to be morally acceptable, all things considered.

Two further considerations suggest that my reading is right and the received reading is wrong. First, while Locke's text makes clear that consent was the mechanism through which people assigned value to money and thereby made it possible for people to increase the size of their properties, it includes no direct indication that this same mechanism justified the economic state of affairs marked by such properties. Second, if consent is sufficient to justify the effects of money, the point of invoking the waste restriction must be to rebut the objection that large estates must be wasteful. But why would such estates be wasteful? After all, no one would suspect that money itself might rot, and besides, the whole reason why some estates were able to become so large was that wage labor made it possible to grow estates efficiently and productively. Thus, the only plausible role for the appeal to waste in this passage is that of explaining how it was possible for individuals to attain rights in very large properties that made it hard for others to appropriate. And since Locke holds that the waste restriction is *the* rule of property applicable to individuals in the state of nature, this appeal seems well-suited to the role.<sup>176</sup>

The foregoing discussion has left us with the conclusion that although the development of monetary economies does everyone some material good, it does many people serious moral harm that cannot be justified by consent. This harm is not attributable to any malfeasance or rights violations; after all, everyone has the right to appropriate as much as she can use. The problem is instead with the condition of the natural legal order itself. People have operated, within its boundaries, in a way that has rendered those boundaries insufficient to its ends. Consequently, it would seem that the proper remedy is not private action under the natural law in its unaltered

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<sup>176</sup> My interpretation is compatible with each of the following additional passages in which Locke discusses money in relation to consent: II 36, II, 37, II, 46, and II, 47.

condition, but rather reconstruction of the law itself on terms that respect its goals. In other words, the proper solution is the creation and maintenance of civil societies capable of redistributing property to ensure material preservation and moral preservation for all. For this reason, individuals have, by the standards of Locke's system, a duty to consent to civil society once a monetary economy has ushered in full appropriation, at least where civil society can secure moral preservation without allowing material preservation to fall below pre-monetary levels. This follows straightforwardly from the first law of nature, which requires each person to preserve herself in all cases and to preserve others when doing so "comes not in competition" with self-preservation.<sup>177</sup> If a person is one of the majority of people who lack moral preservation under conditions of monetary full-appropriation, she must enter civil society to preserve herself. And if she is lucky enough to be among the highly-proprietyed few, she must enter civil society to preserve others, as her own preservation is already secure in all respects.

I have mentioned this before, but it is important enough to bear repeating: it won't do to object that people might instead defend their rights outside the state. For as we have seen, the moral problem at hand is not that anyone's rights have been violated, but that rightful appropriations and transfers have resulted in a distribution that does not accord with the aim of natural law. It is the system of rights itself that needs to change, and no one has the standing to alter rights except through a common authority to which all have consented.

I have already sketched the reading of Locke on natural law and its goals that supports the conclusions I set out in the previous paragraph. In the remainder of this section, I want to defend those conclusions further by situating them in relation to some other features of Locke's text. The first textual point worth considering is the narrative arc of Locke's chapter on property.

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<sup>177</sup> II 6

In the final section of that chapter, Locke writes: "It is very easy to conceive without any difficulty, *how Labour could at first begin a title of Property* in the common things of Nature, and how the spending it upon our uses bounded it."<sup>178</sup> Notice Locke's use of the past tense; in summing up the argument of the chapter, he makes it clear that he is talking about something that happened in the past. Labor *at first began* a title, but it does not necessarily explain everything about people's proprietary entitlements through all of history. Indeed, in the immediately foregoing paragraph, Locke explains that "in Governments the Laws regulate the right of Property, and the possession of land is determined by positive constitutions."<sup>179</sup> By contrast, "in the beginning and first peopling of the great Common of the World, it was quite otherwise. The Law Man was under, was rather for *appropriating*."<sup>180</sup> Taken as structured whole, then, Locke's property chapter explains how there was *at one time* a set of property norms that allowed for free appropriation subject to the waste restriction before giving way to civil property law.

Second, consider Locke's description of the state of affairs that precipitated the move to civil society. According to Locke, this was a condition of great "inconveniencies" brought on by everyone attempting to enforce their rights under circumstances that made these rights highly controversial.<sup>181</sup> It is easy to assume that Locke meant by "inconveniencies" what we might mean by it today, namely something like 'annoyances.'<sup>182</sup> But as Kirstie McClure has pointed out, 'inconveniency' and its related verbal and adjectival forms possessed in the 17<sup>th</sup> century

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<sup>178</sup> II 51

<sup>179</sup> II 50

<sup>180</sup> II 35

<sup>181</sup> II 13, 127

<sup>182</sup> This is how Katrin Flikschuh, who correctly takes herself to be reporting the received reading of Locke on the transition to civil society, presents Locke's appeals to the "inconveniencies" of the state of nature. See Flikschuh, "Reason, Right, and Revolution: Kant and Locke," 378.



elements of semantic content that are now obsolete.<sup>183</sup> In general usage, it could connote an offense against reason generally or an offense against moral reason in particular.<sup>184</sup> And in more distinctly legal and political contexts, it was used to refer to a legal or juridical disruption affecting the community as such rather than a mere “mischief” or “injury” against one person or sub-group in particular.<sup>185</sup> Consider how Locke uses this language in the context of tyrannical acts by officials who have violated their public trust:

But if...these illegal Acts have extended to the Majority of the People; or if the Mischief and Oppression has light only on some few, but in such Cases, as the Precedent, and Consequences seem to threaten all; and they are perswaded in their Consciences, that their Laws, and with them their Estates, Liberties, and Lives are in danger, and perhaps their Religion too; how they will be hindered from resisting illegal force, used against them, I cannot tell. This is an *Inconvenience*, I confess, *that attends all Governments* whatsoever, when the Governours have brought it to this pass, to be generally suspected of their People.<sup>186</sup>

I suggest that by Locke’s lights, the rise of monetary economies led to the inconvenience of many people lacking moral preservation, even in the absence of any rights violations. The (natural) legal organization of the community was not suited to deal with this problem, so dependence persisted, generating reasonable conflict that was irresolvable in the absence of civil institutions.<sup>187</sup> Only once people left this condition for a political one did inconveniency cease and moral order return.

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<sup>183</sup> McClure, *Judging Rights*, 157

<sup>184</sup> Consider that the translators of the 1599 Geneva Bible could write in their preface to the Book of Numbers: “God is ever true in his promise, and governeth his by his holy Spirit, that either they fall not to such inconueniences, or else return to him quickly by true repentance.” See *The Bible*, 52-53.

<sup>185</sup> Gerard de Malynes wrote in his *Consuetudo, vel lex mercatoria* of 1622:” It is better to suffer a mischiefe than an inconuenience; the mischiefe being attributed to one or some particular persons, and the inconuenience to the whole Common-wealth in generall.” See “Inconvenience, n.”. OED Online.

<sup>186</sup> II 209

<sup>187</sup> I think this is the right way to understand the state of war Locke describes, and contrasts with the original state of nature, in the *Second Treatise*. See II, 16-21.

One might object at this point that even if the condition of “inconvenience” people abandon for life in civil society is a morally bad one, people’s motivations for entering civil society are not typically moral. To the contrary, people leave in order to better secure their rights.

Locke writes:

IF Man in the State of Nature be so free, as has been said; If he be absolute Lord of his own Person and Possessions, equal to the greatest, and subject to no Body, why will he part with his Freedom? Why will he give up this Empire, and subject himself to the Dominion and Controul of any other Power? To which ‘tis obvious to Answer, that though in the state of Nature he hath such a right, yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others.<sup>188</sup>

I certainly agree that according to Locke, most people’s choice to consent to civil society is motivated by such prudential concerns as securing their rights. But this does not cause a problem for my reading; I have argued on Locke’s behalf that the arbitrary power occasioned by the rise of monetary economies creates a moral reason to enter and support civil society, but I have not made any claims about what *motivates* people to enter civil society. Moreover, Locke urges that although personal utility is not the ground of our moral duties, it is typically a consequence of abiding by them: “utility is not the basis of the law or the ground of obligation, but the consequence of obedience to it.”<sup>189</sup> Consequently, it is not surprising that prudential considerations should motivate people to do their duty. Furthermore, my reading does much to make sense of Locke’s assertion that the insecurity of rights that precedes the transition to civil society stems from reasonable confusion about rights rather than from anything like an innate human tendency toward violent competition. Let us consider at greater length a passage I quoted a little earlier:

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<sup>188</sup> II 123

<sup>189</sup> ELN 133

And thus, I think, it is very easie to conceive without any difficulty, *how Labour could at first begin a title of Property* in the common things of Nature, and how the spending it upon our uses bounded it. So that there could then be no reason of quarrelling about Title, nor any doubt about the largeness of Possession it gave. Right and conveniency went together; for as a Man had a Right to all he could employ his Labour upon, so he had no temptation to labour for more than he could make use of. This left no room for Controversie about the Title, nor for Ineroachment on the Right of others.<sup>190</sup>

Locke here describes the young state of nature as a peaceful condition in which rights were not insecure. It was, as he puts the point elsewhere, a condition of “Men living together according to reason, without a common Superior on Earth.”<sup>191</sup> Only later did confusion about rights develop and damage the security of people’s rights. My reading explains why rights became insecure and how this insecurity reflected reasonable confusion; pre-political monetary economies generated the morally confused—and confusing—situation in which individual rights failed effectively to support both dimensions of preservation under natural law.

I have urged that people have a duty to submit to political authority once monetary economies generate full appropriation of resources. But some might object that according to Locke, life in civil society is morally optional, something in which people may elect to participate if they wish, but which they may also freely eschew.<sup>192</sup> Locke certainly does argue that there can be no legitimate civil power, and indeed no truly *civil* power at all, without the consent of everyone subject to it.<sup>193</sup> However, it does not follow from the fact that a person's

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<sup>190</sup> II 51

<sup>191</sup> II 19

<sup>192</sup> Helga Varden has recently argued (on different grounds) that although Locke ends up committing himself to a duty to enter civil society, this is incompatible with the consent requirement. See Varden, “Locke’s Waste Restriction and his Strong Voluntarism,” 127.

<sup>193</sup> I have argued elsewhere that according to Locke, consent is a necessary condition not just of legitimate political authority, but of political authority *per se*; non-consensual force can never be political. See Layman, “The Compatibility of Locke’s Waste Restriction and his Political Voluntarism. See also Grant, *John Locke’s Liberalism*, 102.

consent is required in order for civil power to be legitimate with respect to her that she cannot have a duty to give her consent. To the contrary, cases in which one person may not do something unless another consents, but in which the latter is duty-bound to give her consent, are very common. Most people believe, for instance, that parents are morally required to consent to their children's vaccinations, but few object to laws forbidding doctors to administer vaccinations to children without parental consent.

It is also significant that Locke never makes the claim, which would have been *very* radical in his time and place, that life in civil society is always, or even usually, morally optional. To the contrary, he offers some remarks that suggest that civil life is morally required. For instance, in the *First Treatise*, Locke seems to grant that while everyone has a duty to submit to authorized government, this entails nothing about what government is authorized. This opens up a space between the moral importance of government and the political power of particular people, a space Locke fills with his consent doctrine. Locke writes:

Though Submission to Government be every ones duty, yet since that signifies nothing but submitting to the Direction and Laws of such Men, as have Authority to Command, 'tis not enough to make a Man a Subject, to convince him that there is *Regal Power* in the World, but there must be ways of designing, and knowing the Person to whom this *Regal Power* of Right belongs, and a Man can never be oblig'd in Conscience to submit to any Power, unless he can be satisfied who is the Person, who has a Right to Exercise that Power over him.<sup>194</sup>

Moreover, Locke suggests in a commonplace book from the 1670s that political life is established by God as proper for human beings:

If he finds that God has made him and all other men in a state wherein they cannot subsist without society and has given them judgment to discern what is capable of preserving that society, can he but conclude that he is obliged and that God requires him to follow those rules which conduce to the preservation of society?<sup>195</sup>

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<sup>194</sup> I 81

<sup>195</sup> Locke, "Law of Nature," 270

Additionally, Locke writes in the *Second Treatise*: “I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature.”<sup>196</sup> There is, then, no reason to infer from Locke's consent doctrine that political life is morally optional, and there are textual reasons to suppose that Locke joined nearly all of his contemporaries in holding that people have moral reason to leave the state of nature for civil society, at least once the natural law cannot achieve its aims without political alterations.

## 5. Lockean Political Economy

I have argued that once a monetary economy leaves many people objectionably dependent on employers, most people have a moral duty to enter and support a civil society capable of securing independence for all. How, though, should the state work to achieve this goal? A full and satisfying answer would require (at least) another paper. But by way of conclusion, I will offer some cursory thoughts to set the stage for a more extended discussion.

Although unregulated employment relationships are, for the reasons I have set out, morally problematic within Locke's framework, the same cannot be said of employment relationships in general. Locke would not have agreed with Marxian critiques of employment, according to which the relationship between labor and capital is inherently, and objectionably, disposed to alienate workers from their production. He never questions the basic permissibility of wage labor, and he takes it for granted that those who can afford to do so may innocently hire servants.<sup>197</sup> Nevertheless, a just Lockean state must secure material preservation and moral

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<sup>196</sup> II 13

<sup>197</sup> II 28

preservation so that no one is less well off in either respect than she would have been in the pre-monetary state of nature. Taken alone, the requirement to secure material preservation is not very demanding; for reasons we have already considered, nearly all people in monetary economies enjoy at least this level of material preservation. But the requirement to secure moral preservation is much more demanding, and even states with highly developed economies must take significant policy steps in order to meet it. In particular, states must make sure that individuals and corporations cannot purchase votes and other forms of political influence, and they must guarantee each individual an economic stake, which she can control on her own terms, that is sufficient to give her significant leverage with respect to what work she will do, for whom, and on what terms.

Although a just Lockean state must take steps to secure people against arbitrary power, it is important to note that Locke's conception of social freedom limits does not require the state to minimize *all* arbitrary dependence between individuals. This is because, as we have observed, Locke is not worried about arbitrary dependence *simpliciter*, but rather arbitrary dependence within the scope of exercising first order rights. Consequently, it is not necessarily the case that a Lockean state must be highly a highly intrusive one that concerns itself with rooting out arbitrary dependence wherever it might crop up. This is a positive result for Locke, as one recurring criticism of contemporary versions of republicanism, which do not limit the moral significance of arbitrary power to particular spheres of behavior, is that they permit (or even require) the government to forbid at-will employment, even in cases in which the employee receives an enormous salary.<sup>198</sup> Such arrangements obviously involve arbitrary power—the employer may end the relationship on a whim—but it seems absurd to object to them out of concern for the

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<sup>198</sup> See Brennan and Lemasky, "Against Reviving Republicanism," 247.

employee. On Locke's model, there is no need for the government to be concerned about at will arrangements unless they threaten either party's enjoyment of first order natural rights. And while such threats are a real possibility at the bottom of the income scale, they are very unlikely at the top of it.

The very general considerations just canvassed leave wide open the question of what specific policies states should enact in light of the conclusions drawn in this paper. This question very is difficult, not least because it depends on empirical economic contingencies. Most western countries have in place (or had in place until recently) policies aimed at minimizing the political influence of economic power, and we can look to these for guidance. But when it comes to guaranteeing each person a sufficient, and sufficiently independent, economic stake, we need to turn to more theoretical political-economic proposals. Two recently-developed proposals stand out as especially promising. One of these, which Bruce Ackerman and Anne Alstott defend in their book, *The Stakeholder Society*, is that states should provide each individual with a large (Ackerman and Alstott proposed \$80,000 in 1999), unconditional grant at birth.<sup>199</sup> Another, which has its best-known defender in Philippe van Parijs, is that states should pay citizens an equal and unconditional basic income in periodic installments.<sup>200</sup> Both of these policies have the potential to solve the problem at hand, which is objectionable dependence of employees on employers, without ushering in equally undesirable dependence on state planners. Further discussion of these policy questions will, however, have to wait.

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<sup>199</sup> Ackerman and Alstott, *The Stakeholder Society*.

<sup>200</sup> See van Parijs, "Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income." Daniel Moseley argues for a Lockean right to a basic income, albeit on slightly different grounds. See his "A Lockean Argument for Basic Income."

## CHAPTER 4: FREEDOM, ACCOUNTABILITY, AND CONSENT

### 1. Introduction: Locke's Infamous Consent Doctrine

In the generally contentious domain of Locke scholarship, Locke's consent doctrine, according to which no person can be subject to political obligation without her consent, is a rare point of consensus. With only a few exceptions, scholars agree on what Locke takes consent to be and why he thinks that it is a necessary condition of legitimate government.<sup>201</sup> According to the consensus, Locke takes consent to be a deliberate act that constitutes an undertaking of obligation, and he requires political consent because (a) every person is a free, equal, and sovereign individual, and (b) a free, equal, and sovereign individual cannot be subject to non-natural obligations unless she elects to take them on.<sup>202</sup> It is not hard to find passages in Locke's text that support this consensus, at least in spirit if not clearly in the details. For instance, Locke writes:

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*. 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 joyn and unite into a Community.<sup>203</sup>

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<sup>201</sup> John Dunn somewhat curiously suggests that according to Locke, consent is nothing more than behavioral acquiescence. I suspect that Dunn is moved by some of the considerations that lead me to the participatory reading of Locke on consent that I endorse later in this paper. See Dunn, "Consent in the Political Theory of John Locke" in *Political Obligation in its Historical Context*. Hannah Pitkin has offered a reading of Locke as a hypothetical consent theorist in the vein of Rawls, but I agree with Simmons that this reading is almost entirely without any foundation in Locke's text. See Hannah Pitkin, "Obligation and Consent," 995-997. For Simmons' commentary, see his *On the Edge of Anarchy*, 206.

<sup>202</sup> This is how John Simmons understands Locke's position. See Simmons, *On the Edge of Anarchy*, 202-217.

<sup>203</sup> II 95



The scholarly consensus concerning the point of Locke's consent doctrine has long been accompanied by a less happy (for Locke, at least) consensus that the doctrine is largely unsuccessful. At least since Hume responded to the Whig social contract tradition in his essay, "Of the Original Contract," critics have observed that Locke's consent doctrine seems to be caught in a dilemma.<sup>204</sup> And more recently, others have observed that some of Locke's moral commitments about property rights entail that life in civil society is morally mandatory. It will be useful briefly to review each of these problems.

Let us begin with the dilemma.<sup>205</sup> On the one hand, Locke might insist that consent must be fully voluntary and informed in order to create political obligations. But if Locke embraces this stringent standard, it follows that almost no one has any political obligations, and that almost all public power is consequently mere force without right. This is because almost no one has ever had the opportunity to give consent that meets such a standard; most of us must live under the political institutions of our birth or else face tremendous cost and hardship. On the other hand, Locke might lower the standards of consent in order to allow various constrained and ill-informed actions to count as bindingly consensual. This route would render the verdict that there are plenty of people with political obligations, but at the cost of casting a deep pall of implausibility over the whole theory. For how could "consent" that is not properly voluntary and informed create any obligations? It looks like Locke is in the unenviable position of having to choose between faux consent and philosophical anarchism.

Both horns of the dilemma find some support in Locke's text. The first horn seems at least very strongly in the spirit of claims such as: "*the consent of freemen, born under*

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<sup>204</sup> David Hume, "Of the Original Contract," 186-201

<sup>205</sup> Simmons suggests the dilemma in his framing of what he calls the "standard critique" of Locke on consent. My statement of the problem is somewhat different, however. See Simmons, *On the Edge of Anarchy*, 199.

*government*, which only *makes them members of it*, being given separately in their turns, as each comes to be of age.”<sup>206</sup> But in other passages, Locke appears to grasp the other horn by endorsing standards of consent that seem implausibly permissive. For instance, in his quasi-historical treatment of the development of early societies, Locke informs us:

Thus ‘twas easie, and almost natural for Children by a tacit, and scarce avoidable consent to make way for the *Father’s Authority and Government*... [...] Thus the natural *Fathers of Families*, by an insensible change, became the *politick Monarchs* of them too.<sup>207</sup>

If we take Locke at his word here, political consent can be both “scarce avoidable” and “insensible” (that is, unnoticeable), and consequently neither voluntary nor informed.<sup>208</sup> It thus looks like in addition to trapping himself in a nasty dilemma, Locke contradicts himself by grasping both of its horns.

Let us now turn to the moral critique of the consent doctrine. If political relationships are strictly optional, it might seem odd for them to be morally obligatory as well. However, Locke’s norm requiring sufficient resources for all people creates a duty to consent to political authority, at least in conjunction with a monetary economy. I argued for this conclusion at length in chapter three, but it will be useful to review the basics of that argument here.<sup>209</sup> According to Locke, there is a serious moral problem afoot when some people’s well-being, or “preservation,” is compromised by the size of others’ properties. According to Locke, preservation comes in two dimensions, material and moral. Material preservation is the well-being people can (and,

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<sup>206</sup> II 117

<sup>207</sup> II 75-76

<sup>208</sup> Jeremy Waldron suggests that although people may not have been aware of the full political consequences and character of their consent to the authority of father kings, each act of such consent was nonetheless a discrete, informed, and intentional act. This reading, I think, severely strains Locke’s text, especially since Locke claims that consent and change—and not just their full character and long-term consequences—where “scarce avoidable” and “insensible,” respectively. See Waldron, “John Locke: Social Contract Versus Political Anthropology,” 19.

<sup>209</sup> See my chapter three, *passim*.

according to Locke's conception of natural law, should) possess as material beings with material needs such as food, shelter, and defense. Moral preservation, by contrast, is the well-being that is appropriate for people inasmuch as they are moral beings who share equally in a high moral status, or "rank." One important element of moral preservation is non-domination; if a person must, on account of property relations, depend on the sheer, unbounded will of another person in order to enjoy her natural rights, the former's moral preservation is compromised. Now, although Locke holds that in the state of nature, each person may appropriate as many resources as she can without wasting, rightful appropriations can, with the help of money (which makes very large estates possible), result in distributions that leave some people abjectly dependent on others. In the state of nature, no one has the authority to decide unilaterally how to redistribute wealth in order to correct this problem. Consequently, moral preservation for everyone is in the offing only if everyone in the economy forms a political community authorized to act on the part of all. Now, Locke states explicitly: "Every one, as he is *bound to preserve himself*, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind.*"<sup>210</sup> Consequently, there must be a general obligation to enter civil society after the development of monetary economies in the state of nature.

Furthermore, Helga Varden has recently offered a strong case for thinking that Locke's waste proviso, according to which proprietors are forbidden to waste resources, entails a duty to enter civil society once the state of nature becomes a condition of conflict and insecurity.<sup>211</sup> In a state of war, it would be very difficult to make efficient use of one's resources; after all, they

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<sup>210</sup> II 6

<sup>211</sup> Varden, "Locke's Waste Restriction and his Strong Voluntarism." I take up some concerns about Varden's argument in my "The Compatibility of Locke's Waste Restriction and his Political Voluntarism," which I have included as the appendix to this dissertation.

would be constantly subject to theft and destruction. Since leaving the state of war for civil society, which secures property within a positive legal framework, would be the only reliable, morally permissible way to improve one's stewardship of one's resources, it is difficult to avoid the conclusion that it would be impermissible for a property holder to eschew civil society for life in an extra-political state of war.

It seems, then, that if the received understanding of Locke's consent doctrine is right, Locke faces two very serious problems. First, Locke is stuck between philosophical anarchism, according to which almost no one has political obligations, and a conception of consent too weak to guarantee that people are subject to political authority on their own terms. Moreover, there appears to be, by the standards of Locke's own system, a moral obligation to submit to political authority. If political life is morally required, what is the point of consent in the first place? In sum, Locke's consent doctrine seems to be both internally crippled and curiously under-motivated.

There can be no doubt that Locke does sometimes talk as though consent is a discrete act, preceding political obligation, the point of which is to guarantee that political life is optional for sovereign individuals. To the extent that he does so, I believe he is simply unsuccessful; I have no intention of salvaging the traditional picture. However, I think that Locke offers another, largely unnoticed line of reasoning about political consent, one that is certainly more central to Locke's overall political project than the story traditionally attributed to him. According to this line of thought, political consent is not a discrete act that precedes consensual political relationships, but rather a dimension of ongoing political activity. And such consent matters not because political life is morally optional, but because civil society is bound to have the wrong internal character if its members do not participate on consensual terms. In particular, a non-

consensual political association would be one in which the power of the government was arbitrary with respect to the people.

I will proceed as follows. In §2, I will sketch Rousseau's conception of political consent and its purpose in order to provide a template we can use to better understand Locke's picture, which I will reconstruct in §3. I will address the relationship between Locke's conception of consent and majoritarian government in §4 before briefly closing in §5.

## **2. Rousseau's Social Contract**

It may come as a surprise that I have chosen to approach Locke's understanding of consent through Rousseau. After all, Locke and Rousseau hardly have a reputation for complementing one another. However, I think that their reputed incongruity has been greatly exaggerated, and that Locke's more successful conception of political consent and its purpose is a close cousin to Rousseau's. Once we have seen this, we will be in a position to appreciate Locke's consent doctrine in its best form.

Like Locke, Hobbes, and most other early moderns, Rousseau claims that legitimate government must be grounded in the consent of the governed.<sup>212</sup> He writes: "Since no man has a natural authority over his fellow man, and since force does not give rise to any right, conventions therefore remain the basis of all legitimate authority among men."<sup>213</sup> Given this move, it might be tempting to suppose that Rousseau takes individuals to have some kind of morally significant freedom outside and independently of civil society, freedom that no one may violate by forcing

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<sup>212</sup> My reading of Rousseau on the social contract is influenced by Frederick Neuhouser's approach to Rousseau's text, although I do depart from his reconstruction at some points. See his "Freedom, Dependence, and the General Will."

<sup>213</sup> Jean-Jacques Rousseau, *The Basic Political Writings*, 144

political power on anyone. However, Rousseau denies that there is morally significant freedom outside civil society:

This passage from the state of nature to the civil state produces quite a remarkable change in man, for it substitutes justice for instinct in his behavior and gives his actions a moral quality they previously lacked... [.] To the preceding acquisitions could be added the acquisition in the civil state of moral liberty, which alone makes man truly the master of himself. For to be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.<sup>214</sup>

Outside of civil society, we have no morally significant freedom to speak of, but rather only the "freedom" to act on appetite. Hegel, who took his own political philosophy to be heavily indebted to that of Rousseau, succinctly (and, I think, correctly) frames Rousseau's position this way:

The human being is free, and this is certainly his substantial nature. This freedom is not something that is surrendered in the state; rather, it is first constituted therein. Natural freedom, the predisposition to freedom, is not real freedom.<sup>215</sup>

If Rousseau places little or no value on natural freedom, why should it matter whether political relationships result from consent or from force? I think Rousseau's answer is this: freedom in the civil community is the freedom of self-legislation through a public general will, and it is only possible to participate in the general will through the social contract. The social contract itself *just is* each individual's submission of her private will to the general will, a submission that is itself constituted by a relationship between the individual and the community rather than by a discrete act preceding that relationship.

To begin working out these points in detail, let us turn to Rousseau's statement of what he takes to be the central problem of political philosophy:

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<sup>214</sup> Rousseau, *Basic Political Writings*, 151

<sup>215</sup> Quoted in Neuhouser, "Freedom, Dependence, and the General Will," 364

Find a form of association which defends and protects with all common forces the person and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before.<sup>216</sup>

Rousseau here lists two goals that an adequate normative theory of political association must meet. In addition to the familiar goal of securing the “person and goods of each associate,” the state must allow each person to “remain as free as before” by “obey(ing) himself alone.” Why is it necessary for people within the state to remain as free as they were before, and why does this freedom amount to obeying only oneself? The answer to both of these questions is to be found in Rousseau’s conception of freedom from domination. A free person, Rousseau explains in *Emile*, is someone who “does his own will.”<sup>217</sup> But this statement, Rousseau elsewhere makes clear, is insufficient. In order to be meaningfully free, a person must do her own will under conditions in which her doing so is not itself subject to anyone else’s arbitrary power. In addition to doing one’s own will, a person must not be subject to anyone else’s will, at least not under conditions in which the foreign will is simply that of another person rather than an instrument of public power common to all. And so Rousseau tells us that “freedom consists...in not being subject to the will of others.”<sup>218</sup> It might at first seem that the second of these conditions is otiose; if I do my own will, how could I be at the same time subject to someone else’s will? The answer, I think, is straightforward; someone might have me under her power but nonetheless allow me act as I see fit. A person thus subject to another person’s power, Rousseau wants to say, might possess freedom of action to a considerable extent, but she cannot be a free person. Indeed, such a person’s position might be morally indistinguishable from that of a slave with a lazy or

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<sup>216</sup> Rousseau, *Basic Political Writings*, 148

<sup>217</sup> Quoted in Neuhaus, “Freedom, Dependence, and the General Will,” 380

<sup>218</sup> Quoted in Neuhaus, “Freedom, Dependence, and the General Will,” 380

indifferent master. Thus, in order to be free, a person must be free from domination, and in order to be free from domination, she must both (a) not be subject to another person's will and (b) control herself and her options through her own will.

With these conditions in place, we can beneficially turn to Rousseau's proposed solution to the central problem we considered at the opening of this section, which is the social contract.

Rousseau explains:

In giving himself to all, each person gives himself to no one. And since there is no associate over whom he does not acquire the same right as he would grant others over himself, he gains the equivalent of everything he loses, along with a greater amount of force to preserve what he has.<sup>219</sup>

The key to making sense of these bold claims is the general will, which Rousseau takes to be the upshot of the social contract. He writes:

Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole.<sup>220</sup>

Rousseau's point in these passages is that the social contract solves the central problem by securing each person while meeting the necessary conditions of individual freedom from domination. It meets the necessary conditions of individual freedom from domination because everyone gives up her individual will completely to the general will, at least insofar as public life is concerned. Since each person entrusts the general will to act on her behalf, obeying the general will amounts to obeying one's own will. And since everyone else does the same, there is no possibility of depending on any other person's individual will.

Freedom, then, requires each individual to self-legislate through the public will of the community, which creates omnilateral dependence of all on all while removing unilateral

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<sup>219</sup> Rousseau, *Basic Political Writings*, 148

<sup>220</sup> Rousseau, *Basic Political Writings*, 148



dependence between private wills. This leads us to the idea of the social contract and thereby to political consent. According to Rousseau, each individual has a private will, which is oriented towards her private interests and goals, and a general will, which is oriented towards the interests and goals of the political community as a whole.<sup>221</sup> The *public* general will—that is, the collective will of the whole society—only exists inasmuch as the individuals who participate in the civil society give their individual public wills precedence over their individual private wills. This submission to the general will is not a discrete act of signing up or anything of the sort. Rather, it is an ongoing disposition of a person’s will in relation to the interests of the community. Moreover, the social contract *just is* the relationship in which individuals stand to one another when they are mutually engaged in submitting their individual private wills to the public general will. Thus Rousseau writes: “The act of association *includes* a reciprocal commitment between the public and private individuals.”<sup>222</sup>

We may, I think, usefully label the general variety of individual consent on which Rousseau relies as *participatory consent*. Participatory consent stands in contrast to what we may call *elective consent*, with which we are more familiar in contemporary ethics. On the model of elective consent, an activity or undertaking is rendered consensual by a discrete act of consent, an act that is logically, and usually temporally, prior to the consensual character of the activity or undertaking at hand. For instance, we typically say that a surgery performed on me is consensual only if I have first chosen to perform an act of consent prior to undergoing the surgery. It is entirely possible, though, for an act to be fully consensual in character without being preceded by a distinct act of consent. David Hume provides a helpful example of such an act in his case of

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<sup>221</sup> Rousseau, *Basic Political Writings*, 150

<sup>222</sup> Rousseau, *Basic Political Writings*, 149

two men rowing a boat together.<sup>223</sup> It can make sense to say that their rowing is consensual—something they genuinely do together—even if they never discuss their plans or perform acts of consent distinct from the rowing itself. That is, each man's act of rowing in cooperation with the other constitutes participatory consent to the project. By Rousseau's lights, the social contract must be consensual in the participatory sense that individuals must undertake together to secure their mutual freedom and safety through the practice of legislating together from the public perspective. If someone were brought into the territory of a civil society by force, she might be subject to the power of the community. But as long as the community related to her as a foreign power, she would not act through the general will and so would not achieve her freedom through the community.

It is important to emphasize that the distinction between elective consent and participatory consent is different from the more familiar distinction between tacit consent and express consent. On most versions of the express consent/tacit consent distinction, both express consent and tacit consent are varieties of what I am calling elective consent. While cases of express consent are those in which a person gives consent through some explicit, often linguistic expression of her intention to consent, cases of tacit consent are those in which a person gives consent by performing some other sort of act which, under the circumstances, constitutes an indication of consent. For instance, I might expressly consent to pay for a meal by uttering a promise or signing a contract, but I might also tacitly consent to do so by sitting down at a restaurant table. In both cases, however, an act of consent temporally and logically precedes the

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<sup>223</sup> Hume writes:

When [a] common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part. Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. See Hume, *A Treatise of Human Nature*, 315.

consensual character of the action that follows. Participatory consent, by contrast, is consent that is a dimension or aspect of a consensual action itself, not an act, whether express or tacit, that precedes it.

To sum up, Rousseau identifies political consent with the social compact, which is itself an ongoing “mutual undertaking” through which individuals attain self-legislation *via* a public general will. Consent, so understood, is a necessary condition of legitimate government because the freedom from domination civil life offers is impossible without it, not because freedom outside civil society requires it. Let us now consider how Locke pursues a similar path.

### **3. Locke on Freedom through the General Will**

I am about to argue that Locke, like Rousseau, believes that political communities must derive from consent so that each person can be free from domination by giving law to herself through a collective, public will. Before I do so, though, I want to draw two contrasts between Locke and Rousseau's conceptions of freedom. First, we have observed that according to Rousseau, freedom from arbitrary power, which is the freedom worth having, is not merely protected by the state, but also constituted by a relationship to others within the state. Locke, by contrast, holds that freedom from arbitrary power is possible wherever there is law, and he insists that law is not solely—or indeed even primarily—a political institution.<sup>224</sup> This is because, like natural lawyers before him, Locke asserts that human beings are naturally subject to and accountable within a natural legal framework promulgated through reason and issued by God.

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<sup>224</sup> Locke writes of the relationship between positive law and natural law:

The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to enforce their observation. Thus the Law of Nature stands as Eternal Rule to all Men, *Legislators* as well as others. (II 135)

Thus, there can be states of affairs in which there is no political state but in which persons enjoy full freedom, including full freedom from arbitrary power. This difference is important, but it is less deep than it might seem to be at first. For it amounts less to a disagreement about the nature of freedom or its relationship to structured communities than it does to a dispute about the existence conditions of such communities. Whereas Rousseau sees no possibility of such a community apart from human artifice, Locke takes the natural moral community under God to be the moral community *par excellence*, the standard to which political communities should aspire.

The second contrast I have in mind is that while Rousseau (at least in some frames of mind) follows Hobbes in insisting that persons transfer *all* of their rights to the political community,<sup>225</sup> Locke holds that persons transfer only those rights that pertain to the proper purpose of civil society, which is the protection of property broadly construed to include life, liberty, and estate.<sup>226</sup> Although I cannot pursue the matter at length here, I believe that this difference also stems from Rousseau's disagreement with Locke over the moral character of the state of nature. Whereas Locke holds that *all* of our natural rights are both confined within and generated by the natural law, we have seen that Rousseau takes a person's natural "right" to be nothing more than a pre-moral "right to everything that tempts him and that he can acquire."<sup>227</sup> Since natural right is, by Rousseau's lights, utterly unconnected with any system that might restrain domination or institute moral order, it is understandable that in order to achieve moral

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<sup>225</sup> In setting out his notion of the social contract, Rousseau states that each person's alienation of her natural powers must be "without reservation" (*Basic Political Writings*, 148). But in his later chapter on the limits of sovereign power, Rousseau writes: "We grant that each person alienates, by social compact, only that portion of his power, his goods, and liberty whose use is of consequence to the community" (*Basic Political Writings*, 157). However, he appends the following: "But we must also grant that only the sovereign (i.e. the general will) is the judge of what is of consequence" (*Basic Political Writings*, 157). Perhaps Rousseau's idea is that all rights and powers are transferred either directly to the sovereign or placed at the discretion of the sovereign for taking as it sees fit, and that both of these together constitute the total alienation of natural rights and powers.

<sup>226</sup> II 123

<sup>227</sup> Rousseau, *Basic Political Writings*, 151

freedom through civil community, we must give up that right entirely. Conversely, it makes sense for Locke to hold that naturally structured moral rights are compatible with, and can even provide the foundation for, conventional restructuring within civil society.

With these preliminaries complete, let us turn to Locke's conception of freedom, the general will, and the relationship between these and consent. As I explained in chapter one, Locke holds that in order to enjoy full political freedom, a person must be free not just in the sense of being able to act freely, but also in the sense of being able to do so without depending on anyone else's arbitrary power, at least within the scope of natural rights. If government, which has massive power to interfere in the actions and options of its people, is to avoid being a source of domination, it must somehow be accountable to the people for doing only what they take to be in their interests, and those who hold public power must be liable to lose it in the event that they breach their trust. It will be helpful to quote Locke at some length on this point:

The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set, as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society... [...] Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavour to grasp themselves, or put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they forfeit *the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty, and, by the Establishment of a new Legislative, (such as they shall think fit) provide for their own Safety and Security, which is the end for which they are in Society.<sup>228</sup>

While Locke's point here is clear as far as it goes, it immediately raises the problem of how governments are to interpret the exact content of their charge from the public. In any political society beyond the most Spartan of minimal states, it is bound to be impossible for the

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<sup>228</sup> II 222

legislative to be responsive to each individual person's understanding of what constitutes her interests and how these ought to be protected. The legislative must act univocally, creating a single system of law that applies equally to everyone, while individuals are guaranteed to disagree about what this law should be like. There is simply no possibility of a political society in which the government is responsive to each individual's understanding of her interests. Locke makes this point with some *panache*:

For if the *consent of the majority* shall not in reason, be received, as the *act of the whole*, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole... [.] If we add the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men, the coming into Society upon such terms would be only like *Cato's* coming into the theatre, only to go out again.<sup>229</sup>

If it were not for Locke's notion of freedom from arbitrary power, the inability of governments to accommodate themselves to each person's understanding of her interests might be little more than a disappointing reality of political life. In the absence of his demanding conception of social freedom, Locke might simply concern himself with such values as fairness or equality within civic structures that must, inevitably, remain beyond the control of individual citizens. But according to Locke, power is arbitrary unless those who hold it are institutionally forced to be accountable to those over whom they hold it. This is why absolutism is always incompatible with freedom; if one person holds power over another without being accountable for using it on the latter's terms, the latter is unfree, no matter how the powerful person elects to use her power.<sup>230</sup> The worry that emerges in light of the impossibility of governmental officials accommodating their actions to the avowed interests of each individual is that no state can meet

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<sup>229</sup> II 98

<sup>230</sup> I 4. See also chapter one above.

the demands of non-domination, which would generate the conclusion that every government is, morally speaking, an absolute government.

It is perhaps tempting to seize upon the problem just outlined as evidence that Locke must endorse some kind of ultra-minimal state. Someone might reason that since the legislative (and indeed the government in general) must be accountable to each of the people, and since the people will not agree sufficiently for much policy to fall within the scope of individual accountability, a Lockean government must not be empowered to do much beyond securing private economic transactions and warding off foreign aggression. On this understanding, Locke's state would be little different from Nozick's "night watch" state.<sup>231</sup> However, a short review of Locke's thoughts about the proper activities of government will suffice to falsify this hypothesis. According to Locke, the functions of a just government include, but are not limited to, providing material support for the poor,<sup>232</sup> instituting and funding schemes of education,<sup>233</sup> and managing job training programs.<sup>234</sup> Consequently, a minimal state solution to the problem of government accountability to individuals is not in the offing, at least not for Locke.

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<sup>231</sup> Nozick professes (dubiously, I believe) to be a follower of Locke. See Nozick, *Anarchy, State, and Utopia*, 9.

<sup>232</sup> Locke writes in his recommendations for reforming Great Britain's Elizabethan poor laws, which he wrote in 1697 in his capacity as Commissioner of the Board of Trade under William and Mary: "Everyone must have meat, drink, cloathing, and firing. So much goes out of the stock of the kingdom, whether they work or no." See "An Essay on the Poor Law," 189.

<sup>233</sup> In Locke's fragment entitled "Labour," he suggests that even common workers should spend no less than three hours per day on educational pursuits, and he blames for failing to bring about such a state of affairs:

Let the gentleman and scholar employ nine of the twelve (active hours in a day) on his mind in thought and reading and the other three in some honest labour. And the man of manual labour nine in work and three in knowledge. By which all mankind might be supplied with what the real necessities and conveniency of life demand in greater plenty than they have now and be delivered from that horrid ignorance and brutality to which the bulk of them is now everywhere given up. (Locke, "Labour," 328)

<sup>234</sup> According to Locke, the state should require artisans to take on indigent apprentices as a strategy for combating cycles of poverty. See Locke, "An Essay on the Poor Law," 192.

What, then, can Locke say? How can the legislative do its job without dominating those it is bound to serve? The answer is little-appreciated, but enormously important, feature of his political system that leads very nearly down the road we have already walked with Rousseau. According to Locke, the legislative is accountable to each member of the polity not by being accountable to each of their wills *per se*, but rather by being accountable to a collective, general will in which the wills of all find representation. Locke sets out his notion of a general, public will in some detail, describing it as the "soul" of the commonwealth that constitutes its union.

‘Tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is *the Soul that gives Form, Life, and Unity* to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion: And therefore, when the *Legislative* is broken, or *dissolved*, Dissolution and Death follows. For the *Essence and Union of the Society* consisting in having one Will, the Legislative, when once established by the Majority, has the declaring, and as it were keeping of that Will. The *Constitution of the Legislative* is the first and fundamental Act of Society, whereby provision is made for the *Continuation of their Union*, under the Direction of Persons, and Bonds of Laws made by persons authorized thereunto, by the Consent and Appointment of the People, without which no one Man, or number of Men, amongst them, can have Authority of making Laws, that shall be binding to the rest.<sup>235</sup>

It is worth pausing over two striking features of this passage. The first is that Locke quite explicitly claims that the members of a civil society act through a public, artificial will that is distinct both from any individual will and from the aggregate of individual wills. The public will is neither your will nor my will, nor is it, in an additive sense, simply the will of everyone taken together. Rather, it is the will of a distinct, artificial being that acts on behalf of the individual members of the community. Second, people come to be represented by the general will inasmuch as they take part in the collective act of constituting the political community. This is the act of submitting one's individual judgment to public judgment through the will of the community. In

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<sup>235</sup> II 212



this way, Locke endorses a tight circle of concepts: consent, civil society, public will. Individuals consent to political society, which amounts to constituting the civil society as a collective agent with a public will that is authorized to act and judge on behalf of the individuals who partake in its constitution. This public power of action and judgment is the legislative power. For two people to share membership in a civil society is nothing other than for each of them to be authoritatively represented by the public will that each helps constitute through her consent. This makes deep systematic sense of Locke's claim that "where-ever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a *political, or civil society*."<sup>236</sup>

Locke, then, joins Rousseau in judging that civil society is fundamentally a legislative union of individual wills through a collective will that represents each person equally. We saw earlier that the ultimate point of this picture in Rousseau is for each person to attain morally significant freedom from domination even while being subject to public authority, which can secure persons and property. I believe that Locke's view is similar; the ultimate moral point of legislative union is to secure people and property in a way that does not compromise individual social freedom. Legislative union achieves this goal by making it possible for individuals to set the terms of government power through the public will, and an individual can only become part of a legislative union through her own consensual activity. This is how consent enters the picture; as in Rousseau, consent *to* civil society matters inasmuch as it facilitates non-domination, and so freedom, *within* civil society.

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<sup>236</sup> II 89

To see how this model of consent operates in Locke, let us begin with a striking set of passages Locke offers in his treatment of conquest. Locke vociferously denies that conquest *per se* can ever result in political authority. He writes:

Many have mistaken the force of Arms, for the consent of the People; and reckon Conquest as one of the Originals of Government. But *Conquest* is as far from setting up any Government, as demolishing an House is from building a new one in the place.<sup>237</sup>

Given that this is Locke's view, one might expect him to deny that conquering peoples can ever come to have political authority over groups they have conquered, even if they have managed to hang around for several generations. But consider this passage, in which Locke discusses this very issue in connection with Turkish rule in formerly Greek regions of Asia Minor:

The first *Conqueror never having had a Title to the Land* of that Country, the People who are the Descendants of, or claim under those who were forced to submit to the Yoke of a Government by constraint, have always a Right to shake it off, and free themselves from the Usurpation or Tyranny, which the Sword hath brought in upon them, **till their rulers put them under such a frame of government as they willingly and of choice consent to.**<sup>238</sup>

In the bolded portion of the text, Locke suggests two important points and raises a significant question. The first point is that consent to a *structure* of political authority can legitimize a conquering group's power even if the conquered people have never consented to the *existence* of that authority. There can be no doubt that Locke has in mind a case in which conquerors who hold their power without consent alter that same power, gained by force, to accord with the consent of all the people subject to it. Second, the new, consensual "frame of government" that can legitimize conquering power need not originate from plans or actions of

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<sup>237</sup> II 175

<sup>238</sup> II 192, bold added

the conquered. For Locke says here that a legitimizing frame of government can be one that rulers "put them under." These two points raise the question to which I just alluded: what might consent by a conquered people to a new frame of government imposed by a conquering people amount to? Locke provides an answer to this question in the second part of the same passage:

For no Government can have a right to obedience from a people who have not freely consented to it; which they can never be supposed to do, till either they are put in a full state of Liberty to chuse their Government and Governors, **or at least till they have such standing Laws, to which they have by themselves or their Representatives, given their free consent, and also till they are allowed their due property**, which is so to be Proprietors of what they have, that no body can take away any part of it without their own consent, without which, men under any Government are not in the state of Free-men, but are direct Slaves under the Force of War.<sup>239</sup>

Locke's claim here is striking: if people cannot choose their governors, it is sufficient for their freedom within a political society, and so for legitimate power relations within that political society, that they are fully incorporated into a legal structure that (1) allows them to have a say about the content of the law, either directly or through representatives, and (2) affords them full standing as proprietors. It does not matter, Locke indicates, that they have never enjoyed any real choice as to whether they will be subject to the power of those in positions of political power. To the contrary, what matters is their standing relative to the personal wills of those in charge. It is this standing that makes them "Free-men" rather than "slaves."

Let us now reintroduce the distinction between elective consent and participatory consent we earlier observed in connection with Rousseau. While elective consent is consent that takes place prior to a consensual action or event and renders it consensual, participatory consent is a dimension or characteristic of an action that renders it consensual as it is performed. Locke's claims about conquest and what follows indicate fairly clearly that elective consent is not what it

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<sup>239</sup> II 192, bold added

takes for people to acquire political obligations. When a conquering government changes its frame so that members of the conquered group enjoy full representation and standing as proprietors, we may safely consider those individuals consenting members of one civil society that includes them as well as members of the conquering group. But this cannot be because members of the conquered people performed acts of elective consent. Coming to participate in a new frame of government simply does not, taken alone, constitute an elective act to submit to the government thus reframed. What we see here is consent, not as opting in, but as a characteristic of an activity undertaken with others.

What, though, is the special characteristic of life under a newly reframed, representative government that allows us to consider that life consensual in a way that makes a moral difference? To be sure, Locke describes the newly consensual government as representative, and this alone renders it participatory in some sense. But why should this be morally significant? The answer, I think, is that when people come to live as equals within a representative, proprietary regime, they come to be represented by the general will. And as we saw earlier, this in turn means that government power is answerable to them, which allows that same power to control some of their choices without subjecting them to arbitrary power. Once more, the same theme rings true; consent matters to the extent that it facilitates freedom inside civil society. And what is needed for freedom inside civil society is participatory consent, not elective consent.

#### **4. Participation and Representation: An Objection**

In this penultimate section, I would like to take up an important challenge to Locke's account as I have reconstructed it. I have argued that although Locke sometimes talks (unsuccessfully) in terms of elective consent to civil power, he offers a lesser known, and much

more successful, participatory account of political consent, one which puts him in close contact with Rousseau. However, someone might object that in his discussion of the forms government may take, Locke does not require legitimate government to be highly participatory. Indeed, he allows monarchy—including even hereditary monarchy—as a morally acceptable form of government. He writes:

THE Majority having, as has been shew'd, upon Mens first uniting into society, the whole power of the Community, naturally in them, may employ all that power in making Laws for the Community from time to time, and Executing those Laws by Officers of their own appointing; and then the *Form* of the Government is a perfect *Democracy*: Or else may put the power of making Laws into the hands of a few select Men, and their Heirs or Successors; and then it is an *Oligarchy*: Or else into the hands of one Man, and then it is a *Monarchy*: If to him and his Heirs, it is an *Hereditary Monarchy*... [...] And so accordingly of these the community may make compounded and mixed forms of government, as they think good.<sup>240</sup>

The challenge this passage poses is straightforward; if early members of a political community may permanently transfer the legislative power to a line of monarchs or oligarchs, how can the participatory consent story work? After all, it would seem that political participation constituted by representation within law, to which Locke refers so clearly in II 192, requires more than simply inheriting a hierarchical power structure.

I believe that Locke is, at least to some extent, in a genuine bind here. He simply fails adequately to appreciate the republican consequences of the participatory conception of consent he develops in his text. However, this failure is not complete, as Locke makes some very significant moves that should lead us to wonder how seriously we ought to take his acceptance of monarchic government. The first of these I would like to consider is Locke's requirement that taxation must be consensual, at least through representatives if not directly. According to Locke,

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<sup>240</sup> II 132

the power to tax or otherwise alter private property must always remain with the majority of the people, no matter what frame of government might be in place. Locke states forthrightly:

‘Tis true, Governments cannot be supported without great Charge, and ‘tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, *i. e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.<sup>241</sup>

As Locke was well aware, the power to levy taxes is among the most fundamental of public powers; after all, any government must fund itself in order to act. If the people, acting as a majoritarian body, can refuse the government the funds it desires, the people have the majoritarian power to stop the government in its tracks. This is as true with respect to a monarchic government as it is with respect to any other. Thus, only the most strictly constitutional and accountable of monarchies, which tax and spend with the consent of the people or else not at all, could meet Locke's standards of legitimacy.

Some might respond that I have oversold the significance of Locke's insistence upon representative taxation. For is not any popular control established by representative taxation limited to an elite, propertied segment of society? This objection is closely related to C.B. MacPherson's famous charge that according to Locke, only individuals above a property threshold count as full members of civil society, the purpose of which is to protect their property and which must accordingly provide them with a say about whether and how their property is taken. According to MacPherson, Locke is committed to the view that "the laboring class, being without estate, are subject to, but not full members of, civil society."<sup>242</sup>

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<sup>241</sup> II 140

<sup>242</sup> MacPherson, *The Political Theory of Possessive Individualism*, 248

It is certainly true that in Locke's England, men (and voters were, alas, only men) had to meet fairly significant property requirements in order to vote. Consequently, although it would be reductive to overlook the political participation of the lower classes, that participation was limited to various forms of social agitation and was, strictly speaking, never under color of law. Retailers, artisans, yeomen, and husbandmen were largely excluded from the vote.<sup>243</sup> Nevertheless, it is important to note that if we take Locke at his word, his remarks about property and representation both undercut MacPherson's picture of Lockean class society and constitute a radical challenge to the English suffrage statutes of his day. For Locke claims quite explicitly that at least representative consent is required in order for the government to legitimately take *any* amount of property, not just property over a certain threshold, and he nowhere suggests that votes concerning taxation should be weighted at all, much less in relation to the size of one's estate. Now, although retailers, husbandmen and the like did not typically possess large estates of any sort and almost never owned much land, they manifestly did hold property in their personal belongings and, as feudal arrangements proceeded along their swift decline, much of what they produced through their labor. If we take Locke's plain statements seriously, we must conclude that governments must either afford such persons due representation or else leave their property untouched.

Furthermore, Locke's text lends support to even more radical republican reforms concerning women and the poor, although it is not entirely clear that Locke grasped the full extent of this support. First, Locke consistently classes "estate"—or real and personal property—as just one dimension of a person's "property," which includes all of one's natural rights,

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<sup>243</sup> Hirst, *The Representative of the People*, 3

sometimes referred to generically as “life, liberty, and estate.”<sup>244</sup> Nowhere does Locke suggest that estate is somehow a privileged member of this group, and he leaves no doubt that the purpose of civil society is to protect all of them together. It is thus very difficult to see why representative consent should be necessary in order for governments permissibly to tax estates, but unnecessary in order for governments permissibly to alter other rights. One might try to reply on Locke’s behalf that general consent to government constitutes consent to public interference with other rights. But this reply faces two problems. First, as I have argued in this chapter, Locke’s most plausible account of consent to government *just is* an account of consent within government via public participation. And second, even if we ignore my argument so far, Locke’s lack of any principled elevation of estate rights over others forcefully raises the question of why estate rights should be special in this regard. If one subset of the natural rights whose protection people aim at in civil society requires representation, why shouldn’t all of them do so?

A second way in which Locke’s stated commitments push him in a radical direction is this: if Locke means what he says, there is no reason to exclude women from public representation.<sup>245</sup> Unlike most of his contemporaries, Locke resolutely refuses to assert that there is any fundamental, morally significant difference between men and women, and he denies that men may naturally claim any kind of dominion over women. Women may own property no less fully and properly than men, and they may enjoy full standing as parties to contracts, including the standing to seek remedy upon breach. Locke writes:

[There is] reason to enquire, why this [marital] *Compact*, where Procreation and Education are secured, and Inheritance taken care for, may not be made determinable, either by consent, or at a certain time, or upon certain Conditions, as well as any other voluntary Compacts... [.] But the Husband and Wife, though

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<sup>244</sup> E.g. II 123

<sup>245</sup> For a comprehensive (and excellent) treatment of the moral and political implications of Locke’s remarks on gender relations, see Jeremy Waldron’s chapter, “Adam and Eve,” in his *God, Locke, and Equality*, 21-43.



they have but one common Concern, yet having different understandings, will unavoidably sometimes have different wills too; it therefore being necessary that the last Determination, *i. e.* the Rule, should be placed somewhere; it naturally falls to the Man's share, as the abler and the stronger. But this reaching but to the things of their common Interest and Property, leaves the Wife in the full and free possession of what by Contract is her peculiar Right, and gives the Husband no more power over her Life than she has over his. The *Power of the Husband* being so far from that of an absolute Monarch, that the *Wife* has, in many cases, a Liberty to separate from him, where natural Right, or their Contract allows it.<sup>246</sup>

Apart from Locke's rather desperate appeal to the need for a decisive voice to resolve conflicts within marriage, this passage presents a strikingly egalitarian picture of gender relations. Together with the complete absence of any reference to gender anywhere in his framings of natural property rights or natural freedom, we must conclude that women are no less endowed with property—always in the broad sense of rights generally and sometimes also in the narrow sense of estate—than are men. And if this is the case, everything Locke says or implies about representation in relation to property should apply with equal force regardless of gender.

In addition to the considerations just canvassed, we should note that Locke employs the tension between his principle of no-taxation-without-representation and the power-consolidating tendencies of monarchy to support a pragmatic argument for decentralized government. He writes:

Hence it is a mistake to think, that the Supream *or Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure. This is not much to be fear'd in Governments where the *Legislative* consists, wholly or in part, in Assemblies which are variable, whose Members, upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest. But in Governments, where the *Legislative* is in one lasting Assembly always in being, or in one Man, as in Absolute Monarchies, there is danger still, that they will think themselves to have a distinct interest, from the rest of the Community.<sup>247</sup>

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<sup>246</sup> II 81-82

<sup>247</sup> II 138

There are, then, a number of reasons to read Locke's texts as far more strongly republican with respect to government and representation than they at first appear to be. But even with these mitigating considerations in mind, the hard question lingers: why does Locke not straightforwardly endorse full-blown representative republicanism? After all, it is not as though he was unfamiliar with precedents in that direction. Indeed, the radical republicanism of the English revolutionaries was only a generation behind, and Locke had, in his youth, composed verse in honor of Cromwell himself.<sup>248</sup> An in-depth response to this question would veer off into speculative intellectual history and so beyond the scope of this project. But one plausible explanation is, thanks to the work of scholars like Peter Laslett, beyond serious controversy; Locke was gravely concerned about what he took to be the absolutist leanings of the Stuart regime in England, and one his major goals in writing the *Two Treatises* was to pave the way for the impending Glorious Revolution of 1688, during which Parliament successfully deposed James II and placed William of Orange and his wife, Mary, on the English throne.<sup>249</sup> The purpose of the revolution was to secure the English people and constitution against absolute monarchy by crowning pliable monarchs who would be answerable to Parliament and, thereby, to the English people. There can be little doubt that many of the revolutionaries who supported the Glorious Revolution would have preferred a more thoroughly republican alternative. However, they wisely realized that sharply limited monarchy was England's best chance to escape French-style absolutism. So even if Locke understood that his argument is more militantly republican in its implications than he explicitly allows, he may have had excellent pragmatic reasons for taking an accommodating stance towards monarchy.

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<sup>248</sup> Locke, "Verses on Oliver Cromwell", 201

<sup>249</sup> Laslett, "Introduction," 45-66

## 5. Conclusion: The Legacy of Locke's Consent Doctrine

At the beginning of this chapter, we observed that the doctrine of political consent that is (not without some justification) traditionally attributed to Locke is a failure; it cannot establish the legitimacy of political authority, even on its own terms. This is because persons almost never have the opportunity to undertake discrete acts constituting the assumption of political obligation under circumstances that might plausibly allow such acts to be binding. However, I argued that there is a different, little-noticed line of reasoning about consent running through Locke's texts, one that puts Locke in much closer contact with the later continental contract tradition of Rousseau and Hegel than most have supposed. This account has two notable features, one concerning the nature of consent in relation to consensual action, and one concerning the justification of the consent requirement. With respect to the nature of consent, Locke denies, at least in the texts on which I have focused, that consent to participate in and be bound by public norms is distinct from the act of participating in those norms; the act of consent is identical to the action it renders consensual. I called this sort of consent *participatory consent* in contradistinction with *elective consent*, which is an act of consent-giving that takes place separately from and prior to the action it renders consensual. With respect to the purpose of consent, Locke holds that consent matters not because it protects freedom of choice *outside* political society, but rather because it facilitates the right structure of power relations *within* political society. In particular, participatory consent makes it possible for people to be represented by the general will, through which government officials can be accountable to each individual and, consequently, hold power over them without compromising their social freedom by subjecting them to arbitrary power.

Although the line of thought about consent and its significance I have drawn from Locke's texts is considerably more promising than the traditional consent doctrine, it too faces serious difficulties. One of these, which I have already noted, is that Locke's statements about permissible structures, or "frames," of government secure too little in the way of representative participation to make it entirely plausible that Lockean citizens share in a general will through which government can be accountable to each inasmuch as it is accountable to all. Another difficulty, which afflicts Rousseau no less than Locke, is that the idea of a general will embroils anyone who adopts it in a sticky web of metaphysical and conceptual perplexities. For it is far from obvious how to make sense of a will that is at once public and the will of each individual, whether ontologically or merely normatively.<sup>250</sup> Even if we were to satisfactorily resolve who may participate in public institutions so as to meet Locke's (or Rousseau's) standards for representation through the general will, that strategy may not be able to resolve the problem of government accountability to individuals.

The problems just canvassed are serious, to be sure. However, my reconstruction of Locke on consent does allow his position to emerge as an important philosophical ancestor of contemporary democratic control theories of legitimacy, especially those that construe legitimacy in terms of the absence of arbitrary power. Philip Pettit, for instance, has recently (and influentially) argued that government power can be compatible with each citizen's social freedom from arbitrary power so long as each individual has equal standing to effectively contest the actions of government *tout court*, not just insofar as those actions relate to real or private

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<sup>250</sup> It is hard not to have at least some sympathy with Pettit's brusque dismissal of general will approaches: "such a participatory ideal is not feasible in the modern world, and in any case the prospect of each being subject to the will of all is scarcely attractive" (Pettit, *Republicanism*, 81).

property rights or to any other subset of rights.<sup>251</sup> This is not the place to assess Pettit's position or positions similar to it, and they no doubt face difficulties of their own. The note on which I would like to conclude, though, is that far from being a straightforward failure driven by an ill-fated obsession with individual choice about whether to submit to government, Locke's thinking about consent, flawed and incomplete though it may be, is, at least in its best moments, firmly within tradition of legitimacy through participation, a tradition is still very much alive in neo-republican political theory.

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<sup>251</sup> Pettit, *On the People's Terms*, *passim*

## APPENDIX 1: WASTE AND VOLUNTARISM<sup>252</sup>

### 1. An Apparent Tension

In the *Second Treatise*, Locke argues both that persons must give their consent in order to be bound by the laws of a civil society, and that it is not permissible for individuals to hoard up more resources than they can put to use. Let us call these two doctrines 'political voluntarism' (or 'voluntarism' for short) and the 'waste restriction,' respectively. There is wide scholarly agreement that Locke is committed to both of them. But are these two positions compatible with one another? Helga Varden has recently argued that they are not.<sup>253</sup> Her reasoning for this conclusion is, on the face of it, quite compelling. Locke holds that those who violate the waste restriction commit a kind of theft against those willing and able to put the wasted resources to good use. He writes: "As much as any one can make use of to any advantage of life before it spoils, so much he may by his Labour fix a property in: whatever is beyond this, is more than his share, and belongs to others."<sup>254</sup> Furthermore, this type of offense is justly punishable. A waste restriction violator, Locke states, "offended against the common law of nature, and was liable to be punished."<sup>255</sup> Now, it is only reasonable, Varden suggests (rightly, I think), to understand the waste restriction as forbidding not only literal rot and destruction of resources, but extremely inefficient resource use as well. But here arises the problem. According to Locke, the extra-political condition is, at least where there is much scarcity, a "state of enmity and destruction" in

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<sup>252</sup> This appendix is published as Layman, "The Compatibility of Locke's Waste Restriction and his Political Voluntarism."

<sup>253</sup> Varden, "Locke's Waste Restriction and His Strong Voluntarism," 127

<sup>254</sup> II 31

<sup>255</sup> II 37. The waste restriction does not require that persons use their resources themselves. Locke holds that it is permissible to give or barter away unspoiled resources to others, who then assume waste restriction duties with respect them (II 46).

which "the enjoyment of...property...is very unsafe, very unsecure."<sup>256</sup> If this is the case, it can hardly be possible for a person outside civil society to make efficient use of her resources. After all, such a person must spend most of her time and energy simply fighting off invasion and rapine. It therefore seems that anyone who remains in the state of war instead of entering civil society will almost certainly violate the waste restriction. But given that the waste restriction is enforceable, this seems to entail that persons have a duty to enter a civil society if they can, and that others may force them to do so. Such enforcement, however, would require compulsory subjection to the laws of a civil society. Consequently, it looks as though Locke cannot hold both voluntarism and the waste restriction: one of them must go.

Varden correctly points out that Locke's system of politics can hardly sustain the loss of either doctrine. Without strong voluntarism, Locke would lack his most fundamental anti-authoritarian commitment, which he deploys in answering Filmer's absolutism and on which he builds his entire liberal edifice.<sup>257</sup> And if Locke were to reject the waste restriction, the whole task of securing a fair share of resources for everyone (including future generations) would fall to the (highly controversial) sufficiency restriction, which appears to require appropriators to leave "enough and as good" for others.<sup>258</sup> This would be problematic because, even apart from the opacity of the status and practical demands of the sufficiency restriction, a requirement to

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<sup>256</sup> II 123. Unlike Hobbes, Locke does not think that all extra-political conditions, which Locke calls states of nature, need be states of war. But Locke does hold that most (or perhaps all) states of nature become states of war once persons begin amassing large properties through a monetary economy, and that persons depart from states of war in order to begin civil societies. See II 19, 36.

<sup>257</sup> Locke's primary goal in the *First Treatise*, and arguably in the *Second Treatise* as well, is to refute Sir Robert Filmer's *Patriarcha*, in which Filmer argues in favor of a divine right of kings founded on God's original donation of the earth's resources to Adam. For Filmer's arguments, see Filmer, *Patriarcha*.

<sup>258</sup> II 27. Some scholars have doubted whether Locke endorses such a restriction at all. See e.g. Jeremy Waldron, *God, Locke, and Equality*, 172. Among those who do attribute a sufficiency restriction to Locke, there is a great deal of disagreement over what exactly it requires of appropriators. For conflicting positions on this, see Robert Nozick, *Anarchy, State, and Utopia* and Tully, *A Discourse on Property*.

leave enough and as good for all, including future generations, must restrict the size of just properties to the infinitesimally small unless it is supplemented by an efficient use norm.<sup>259</sup>

It seems, then, that the Lockean must either answer Varden's challenge or grant that Locke's position contains a damning internal tension. My purpose in this essay is to do the former. But my aim in doing so is not merely to save face for Locke. Rather, I think that Varden's critique, though ultimately unsuccessful, does succeed in drawing attention to some very important, though only infrequently noted, features of Locke's political voluntarism. In particular, it helps show that for Locke, (A) consent is not merely *morally* necessary for persons to be subject to the laws of civil societies, but also *conceptually* necessary; (B) that persons in a state of war of have a moral obligation to enter civil society if they can; and (C) that Locke allows consent to government to bind even under extreme duress so long as the duress is not of a kind that constitutes or generates the dependence of some on the arbitrary wills of others. Varden successfully argues that Locke is committed to (B) (although, unlike me, she does not think he meant to be), while (A) and (C) emerge as problems with Varden's challenge come to light.

I will proceed as follows. In section two, I will argue that Locke's voluntarism is secure against Varden's challenge because it is a constitutive norm of subjection to political power; a person who has not consented cannot possibly stand under political power. I will then make the case in section three that Locke's doctrine of enforcement does not permit any kind of forced residence in civil society as a punishment for wasting resources by voluntarily remaining in a state of war. I will suggest there that the proper Lockean punishment for this offense is complete confiscation of the offender's resources. In section four, I will address an objection: doesn't the

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<sup>259</sup> Michael Otsuka argues for this point compellingly. See Otsuka, *Libertarianism without Inequality*, 37. See also Varden 2006, 140.



kind of confiscation discussed in section three undercut the possibility of such offenders giving binding consent to civil power? I will argue that it does not, and that the reason why it does not helps clarify how Locke understands the conditions under which consent can bind. I will briefly conclude in section five.

## **2. Political Voluntarism as a Constitutive Norm of Political Society**

As we have seen, Varden argues that the impossibility of using resources efficiently in a state of war seems to generate an obligation to enter civil society, an obligation that in turn allows persons to force others into civil society in violation of Locke's voluntarism. She writes:

Because staying in the state of nature is to stay in a condition where much or possibly all of our labour and resources will necessarily be wasted due to wars and violence, abiding by the waste restriction seems incompatible with staying in the 'very unsafe, very insecure' state of nature...Consequently, enforcing the waste restriction seems to entail that individuals can be forced to leave the state of nature, and individuals' actual consent to enter civil society cannot be a necessary requirement. Locke's waste restriction therefore appears to be in tension with his claim that strong voluntarism is the ideal of political obligations.<sup>260</sup>

I think there are actually three distinct points bound up in this complaint. First, there is the matter of the apparent obligation to enter society if (as is typically the case) failing to do so guarantees that one's resources will be used (at best) very inefficiently. Varden seems to think that although Lockean persons have prudential reasons to enter civil society, there is not generally any moral requirement that they do so. In a passage that appears just before the one quoted above, she states that according to Locke, "although entering civil society is required by prudence, it is not strictly required from the point of view of justice."<sup>261</sup> Second, since Locke makes clear that the waste restriction is enforceable, it looks like those who are obligated to enter

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<sup>260</sup> Varden, "Locke's Waste Restriction," 134

<sup>261</sup> Varden, "Locke's Waste Restriction," 132

civil society so as not to waste may be *compelled* to do so. This, Varden says, would violate voluntarism. Third, in order to force people to join civil society, it would be necessary to take physical control of them or, as Locke would say, put them under absolute power. And by Locke's definition, for one person to put another person under her absolute power is for the one to enslave the other.<sup>262</sup> Varden expresses this concern directly as well: "if individuals are forced into civil society, they are in effect enslaved."<sup>263</sup>

Only the second of these points bears directly on Varden's charge that Locke's voluntarism is incompatible with his waste restriction. But the first and third are of considerable interest as well. The first merits a hard look because so many have read Locke as denying that individuals have any moral reasons at all to enter society.<sup>264</sup> And the third is worth discussing because it bears importantly on the plausibility of Locke's theory of punishment. Surely it would be an embarrassment for Locke if he were bound to say that zealous enforcers of natural law may enslave stubborn individualists trying to make a go of it in the state of war. After all, Locke seems to think that leaving the state of war for life under civil law always *increases* liberty.<sup>265</sup> For the time being, let us put the issue of enslavement to one side; it will occupy a central place in the discussion of Locke's doctrine of punishment to follow. The first two aspects of Varden's criticism, however, will together serve as a good point from which to begin unpacking the interpretive issues at hand.

In the passage quoted above, Varden seems to reason that because there is, on account of

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<sup>262</sup> II 23

<sup>263</sup> Varden, "Locke's Waste Restriction, 132

<sup>264</sup> C.B. MacPherson is the best-known champion of this reading. See MacPherson, *The Political Theory of Possessive Individualism*, 197-222, 247.

<sup>265</sup> II 57

the waste restriction, an enforceable obligation to enter society, persons may, in violation of voluntarism, force others to enter society. This reasoning betrays two assumptions. The first is that by Locke's lights, it follows from 'norm N is enforceable' that 'persons may force those who would violate N to comply with N.' The second is that if a person were compelled to live within the bounds of a society and obey its laws, this would constitute a violation of voluntarism. Both of these assumptions are, I think, mistaken. Let us begin with the second.

Locke's most straightforward statement of voluntarism appears at the outset his treatment of the "Beginning of Political Societies":

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*. 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 joyn and unite into a Community.<sup>266</sup>

Locke's use of 'can' in the first sentence of this passage is crucially ambiguous. On the one hand, it is possible to read Locke as making a claim only about what is possible *within the bounds of justice*. That is, Locke's point might be that although it is possible for a person to become a member of a civil society without her consent, it is never permissible to bring this about. But on the other hand, Locke's point might be that subjection to political power without consent is impossible *simpliciter*.

Varden clearly understands Locke's modal claim about political power without consent in the first, purely normative way. If she didn't, it wouldn't make sense for her to claim that a right to force people in a state of war to live under the power of a government would violate voluntarism. She is hardly alone in this reading; most casual students of Locke, as well as some

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<sup>266</sup> II 95

distinguished scholars, have endorsed it.<sup>267</sup> Nevertheless, I submit that it is wrong, and that Locke's voluntarism asserts a conceptual limitation on the extent of political power. As I read Locke, part of what it *is* for a person to be subject to the political power of a civil society is for that person to have consented to the rule of that society. Put another way, the requirement that subjects of political power consent to such power is a *constitutive* norm of political subjection. If a person or agency exercises coercive power (other than in the course of just punishment) over a non-consenting person, that power is both unjust and non-political in nature.<sup>268</sup>

There is a good deal of textual evidence for this reading. For instance, in the Chapter XV discussion of the varieties of legitimate power, Locke explains that in order for power to be political (rather than parental or despotic) it must be accompanied by the consent of those subject to it:

*Political Power* is that Power, which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self, with this express or tacit Trust, That it shall be employed for their good, and the preservation of their Property.<sup>269</sup>

Furthermore, at the opening of his treatment of the dissolution of government, Locke succinctly states that no one is a member of a political community unless she has given her consent. There is no possibility of non-consenting members. He writes:

That which makes the Community, and brings Men out of the loose State of Nature, into *one Politick Society*, is the Agreement which every one has with the rest to incorporate, and act as one Body, and so be one distinct Commonwealth.<sup>270</sup>

Note that Locke says here that *every* person who is a member of a "politick society" has agreed

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<sup>267</sup> John Simmons is one scholar who seems to read Locke this way. See Simmons, *Justification and Legitimacy*, 128-129.

<sup>268</sup> Ruth Grant argues compellingly for this reading of Locke's voluntarism. See Grant, *John Locke's Liberalism*, 102.

<sup>269</sup> II 171

<sup>270</sup> II 211

to incorporate into such a society, and that it is this agreement that makes each person a member. And lest anyone suppose that this claim applies only to persons faced with the question of whether to found a civil society where there was not one before, Locke tells us that "*the Consent of Free-men, born under Government...only makes them Members of it*, being given separately in their turns."<sup>271</sup>

Consent's status as a constitutive norm of political relationships also finds support in Locke's picture of law, political power, and the relationship between them. In a notebook entry of 1678, Locke states point-blank: "A civil law is nothing but an *agreement* of a society of men."<sup>272</sup> Now, this claim leaves logically open the possibility that while a civil law is an agreement between persons, it binds persons not party to the agreement.<sup>273</sup> But this strains the obvious sense of the text. Locke does not claim here that the agreement of a plurality of persons *causes* or *gives rise to* law, but rather that such an agreement is *identical* to law. With this definition of law in terms of consent in mind, consider the Locke's initial definition of political power from the *Second Treatise*: "*Political Power* then I take to be the right of making Laws...and of employing the force of the Community, in the Execution of such Laws."<sup>274</sup> This is the definitive characteristic of political power by which "the Power of a *Magistrate* over a Subject, may be distinguished from that of a *Father* over his Children, a *Master* over his Servant, a *Husband* over his Wife, and a *Lord* over his Slave."<sup>275</sup>

Consent, it then seems, is part of what it *is* for power to be political. Let us now apply this

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<sup>271</sup> II 117

<sup>272</sup> Locke, "Law," 269

<sup>273</sup> MacPherson holds that only property owners consent to government, but that non-property owners are bound as well. See Macpherson, *The Political Theory of Possessive Individualism*, 249.

<sup>274</sup> II 3

<sup>275</sup> II 2

result to the question of whether persons who would prefer to remain (wastefully) in the state of war can be forced to become subject to political power. Suppose that Smith lives in a state of war bordering a reasonably just Lockean commonwealth, C. Smith has the option of consenting to be a member of C, but prefers not to. Instead, she spends her days attempting to fend off attackers from her meager and ever dwindling store of resources, thereby violating the waste restriction. Now suppose that an enforcer, Jones, takes hold of Smith and Smith's resources and forcibly compels her to live in the territory of C, where her property can be put to efficient use. Further suppose that Jones's act of enforcement is just. Has Jones succeeded in carrying out a just act that results in Smith being subject to the political power of C without her consent? By Locke's lights, Jones has done no such thing, because any power that Jones wields over Smith is not political power at all but rather despotic. Consequently, even if persons may enforce an obligation to enter civil society by forcing people to live within the territory of a civil society, this results only in despotic power, or slavery, and not political power. But is there such an obligation, and if so, may persons enforce it in this way? I turn to these questions now.

### **3. Forced Residence?**

Despite its failure to demonstrate an incompatibility between the waste restriction and voluntarism, Varden's argument does succeed in making a very strong case for a Lockean obligation to enter civil society.<sup>276</sup> After all, Varden is right that Locke requires all property holders to make good use of their property if there is a morally permissible way to do so, and leaving the state of war by consenting to join an at least reasonably just civil society is pretty clearly the only means available to persons in violent non-political conditions. So barring some

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<sup>276</sup> This is not to say that Varden would endorse this point. She insists that Locke does not *mean* to posit such an obligation (Varden, "Locke's Waste Restriction," 132). Her *modus tollens* is thus my *modus ponens*.

very strong reason to think otherwise (and I am not aware of one), we should grant Varden's point that Lockean persons in conditions of war must enter a political society if they can.<sup>277</sup>

Furthermore, Varden is right to point out that this obligation must surely be enforceable. For it follows directly from the waste restriction, which Locke explicitly states is enforceable. Does it follow from this that individuals may forcibly compel others to live (as slaves, not subjects) within the protective jurisdiction of a civil society? This would indeed follow if Locke's understanding of enforcement were such that the proper way to enforce any given norm was simply to compel compliance with it. But Locke's rights of enforcement, which he calls "executive rights" or "rights of punishment," are not like this.<sup>278</sup> To see how Locke would have the obligation to enter civil society enforced, we need to consider Locke's doctrine of punishment.<sup>279</sup>

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<sup>277</sup> The case for reading Locke as holding that persons have moral reason enter civil society is strengthened by remarks, scattered throughout Locke's corpus, to the effect that civil society is at least divinely ordained if not the proper framework for human lives. For instance, Locke writes in another notebook entry from 1678, entitled "Law of Nature":

If he finds that God has made him and all other men in a state wherein they cannot subsist without society and has given them judgment to discern what is capable of preserving that society, can he but conclude that he is obliged and that God requires him to follow those rules which conduce to the preservation of society? (Locke, "Law of Nature," 270)

<sup>278</sup> II 7

<sup>279</sup> According to Locke, every person holds a natural right to punish violations of the natural law, which Locke calls the natural executive right. This right is complete in the state of nature; any person in the state of nature may punish any other person in the state of nature. Political society, however, limits this right. For when a person consents to be a member of a political society, she transfers her natural executive right to the government of that society (II 89). Consequently, no person legitimately subject to state authority may take it upon herself to punish anyone under the legitimate authority of the same government. Locke is less clear about whether persons who are subject to a civil government may punish those who are not subject to the same government. But a few things he says suggest that they may. First, Locke makes it clear that the law of nature by no means ceases to apply to people when they become members of political societies (II 135), so it would seem that if one person is a member of a particular political society while another is not, they have the natural law, and only the natural law, in common as a binding set of norms for their interactions. And as we have seen, the natural law includes an executive right. Second, Locke seems to suggest that when we join a civil society, we must give up only that portion of our rights that best serves the good and safety of that society and its members. A person entering civil society, he writes, must "part also with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require (II 130). Surely the good, prosperity, and safety of those in a society do not typically depend on whether anyone punishes persons outside that society.

Locke holds that the natural right to punish is actually a composite of two distinct rights. One is a right of "Punishing...for restraint, and preventing like offense."<sup>280</sup> This right, which is derived from the universal right to "preserve mankind," is naturally held by everyone.<sup>281</sup> The other is the right of "taking reparation, which belongs only to the injured party," i.e. the person whose body or property has been violated by the offense in question.<sup>282</sup> This right follows from the natural right of self-preservation.<sup>283</sup> Let us call these the right of restraint and the right of reparation, respectively. According to the right of restraint, "Each transgression may be punished to that degree, and with so much Severity as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like."<sup>284</sup> The maximum penalty justified by the right of restraint is death; according to Locke, all and only those who have tried to put another person under absolute power (whether to kill or merely extract something from the other person) deserve capital punishment.<sup>285</sup> The capital penalty itself may be preceded by whatever term of forced service the punisher might choose. Locke reasons that such compulsory servitude in delay or lieu of death must be justified, since a punisher who may by right take *everything* from an offender must surely have the right to take less.<sup>286</sup> This kind of servitude is "perfect slavery," and the power of a punisher (or master) over a slave (or criminal) is precisely the power of slavery that Locke contrasts with parental power and political power.<sup>287</sup> Locke does

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<sup>280</sup> II 11

<sup>281</sup> II 11

<sup>282</sup> II 11

<sup>283</sup> II 11

<sup>284</sup> II 12

<sup>285</sup> II 11, 18

<sup>286</sup> II 23

<sup>287</sup> II 24



not, however, suggest that all violations of natural law warrant death. While he argues that this is the proper punishment for those who, without right, put (or attempt to put) another person under absolute power, "*lesser breaches* of that (natural) Law...may be *punished* to that degree, and with so much *Severity* as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like."<sup>288</sup> The right of reparation, by contrast, simply licenses the person injured by an offense, along with anyone she can convince to help her, to exact from the offender either the actual thing lost or the value thereof.

Does either of these rights of punishment permit persons to force waste restriction violators in the state of war to live within a civil territory and be subject to the coercive force of its government? Let us first consider whether the right of reparation does so. As we have seen, Locke says that those who violate the waste proviso illicitly control what properly belongs to all humankind in common.<sup>289</sup> Consequently, although waste violations impinge on no one's private property, they do impinge on everyone's common property. And since Locke holds that those whose property is violated by a violation of natural law have the right to recoup it, it looks as though anyone may, by the right of reparation, take and use whatever portion of the violator's goods are being wasted. In the state of war, *all* property is radically insecure and subject to raids, collateral damage, etc. So by Locke's lights, anyone may take and use any or all of the goods controlled by those who refuse to leave the state of war for political society. This is no doubt a very serious punishment that would give anyone who suffered it compelling reasons to enter society. But it does not amount to putting the offender under absolute power and forcing her to live within society.

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<sup>288</sup> II 12

<sup>289</sup> II 31

What of the right of prevention? As we have already seen, Locke judges that the proper exercise of this right sometimes involves putting the offender under absolute power. If the right of reparation were to allow punishers to control waste restriction violators in this way, then punishers would have the right to make such offenders live within the bounds of a civil society (or, for that matter, to make them do anything else, so long as the chosen activity would respect others' rights). However, as we have seen, Locke says that this sort of punishment is appropriate *only* when an offender has forfeited her life by attempting to illicitly place someone under *her* absolute power.<sup>290</sup> This condition is clearly not met in the case of waste restriction violators. So those who would punish them under the right of reparation must employ whatever lesser punishment "calm reason and conscience dictates."<sup>291</sup> The lesser punishment that comes immediately to mind is the same one that is called for by the right of reparation, namely confiscation of the ill-used resources. Surely this would be sufficient to "terrifie" the criminal as well as others, and to make the offender "repent" of her wasteful obstinacy.<sup>292</sup>

#### **4. Consent: Purpose and Conditions of Validity**

I submit, then, that Locke's doctrine of enforcement does not allow enforcers to compel waste restriction violators to live within a civil territory. Consequently, the inference from the enforceability of the waste restriction to a right to force residence in civil society is invalid. So we have now seen both that the voluntarism doctrine is not in danger (because it is a constitutive norm of political power), and that Locke is not committed to the position that waste restriction

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<sup>290</sup> II 11, 12, 18

<sup>291</sup> II 8, 12

<sup>292</sup> II 12

violators are justly subject to slavery. But someone might object that my argument has generated a new problem for the voluntarism doctrine: if it is legitimate to confiscate entire estates from those wasting resources in the state of war, then there is at least one kind of case in which it is legitimate to leave persons with no real choice but to consent to political society. After all, any attempt to continue living in a state of war with no resources under one's control would certainly result in death, so any such offender would, once punished, have to consent to the political power of a civil society in order to survive. Wouldn't this duress invalidate any such consent? This problem looks even more pressing when we consider that Locke himself states that if a conqueror gains "consent" from those she has conquered by threatening them with death, this results in no political power.<sup>293</sup> Wouldn't a punisher who left a waste restriction violator no choice but to enter civil society invalidate her consent in just the same way?

I do not think so: Locke's doctrine of consent to government allows consent given under conditions of extreme duress to be binding so long as the duress is not the product of circumstances that would make any ensuing power relationships arbitrary and so non-political. To begin to see this, it will be useful to again consider Locke's transition from the state of war to civil society. As we have seen, Locke holds that the state of war is extremely dangerous both for persons and for property: it is a "State of...Violence and Mutual Destruction."<sup>294</sup> It thus seems clear that persons in a state of war are under enormous pressure to leave. For even without the kind of confiscation I have argued is justified, all persons in the state of nature always run an elevated risk of death, and many no doubt risk imminent death so long as they remain outside a state. Locke is clear, though, that this is precisely the condition from which persons originally

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<sup>293</sup> II 186

<sup>294</sup> II 19

gave binding consent to civil society. Historically, persons bound themselves to civil society in order to avoid these (often extreme) dangers and hardships, and now that civil societies are up and running, each new generation consents in order to avoid reverting to such a condition.<sup>295</sup> Locke, then, does not think that duress (including extreme duress) is itself sufficient to undercut the binding power of consent.

If duress alone does not undercut the binding power of consent, then what are we to make of Locke's claim that a conqueror attains no political power by pressing consent from the conquered? If the presence of duress is not what neutralizes the force of such consent, then what does? I think the problem Locke sees with such "consent" has to do with the relationship between the two parties. It is not insignificant that the sort of forced consent Locke considers is extracted by someone who aims to exercise power over another person who has not forfeited her rights of self-government by violating natural law. If Jones wants to rule over Smith and gains Smith's consent at gunpoint, the power relation thus established is completely one-sided; there are no standing terms that bind both parties. Put in more Lockean terms, there is no common judge between them, and so no law. Locke makes clear that any case in which one adult person exercises non-punitive coercive force over another without acting as an agent of a law that binds them both is a case of arbitrary dominion, which is incompatible with the equal natural freedom that the consent doctrine is meant to protect. He writes:

Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other Man's Humour might domineer over him?) But a *Liberty* to dispose, and order as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is, and therein not to be subject to the arbitrary Will of another, but freely follow his own.<sup>296</sup>

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<sup>295</sup> II 117

<sup>296</sup> II 57

Furthermore, the relationship thus established need not have the good and security of the governed as its aim; certainly such an aim is not possible given that the relationship in question is grounded only in the insecurity of one of the parties. But as I noted earlier, Locke insists that political power is necessarily power exercised toward the good of all those under it.<sup>297</sup>

By contrast, the consent given by those left without property in the state of war by a just confiscation of misused goods does not run afoul of any of the necessary conditions of political power. First of all, the choice by such a person to enter society would not place her under the arbitrary control of the individual (or individuals) who conducted the punitive confiscation of her goods.<sup>298</sup> Indeed, there is no reason to think that it would place her under any authority but that of the laws of the relevant civil society. Second, such a person has, *ex hypothesi*, violated the law of nature in a serious (though not maximally serious) way. Consequently, she is not in a position to complain that the momentous choice before her is the result of malfeasance on the part of anyone but herself. So she rightfully possesses nothing but her own person, and she now faces the choice of whether to gain rightful security by entering civil society. Her situation is thus sharply disanalogous to that of the conqueror's victim.

## 5. Conclusion

I have argued that, *pace* Varden, there is no incompatibility between Locke's voluntarism and his waste restriction. This is because a) Varden argues that enforcing the waste restriction

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<sup>297</sup> II 171

<sup>298</sup> This is true even if the persons who confiscated her resources are officials of the civil society she consents to enter. For if a person (of whatever rank) who is a member of a society exercises the natural right of punishment over a non-member, she acts only as an individual under natural law. There is simply no relationship between the offender and the enforcer to make the enforcer's status within her civil society pertinent.

must often violate voluntarism, but b) voluntarism is a *constitutive* norm of political power and so cannot be violated; any attempt at violation must result in non-political power. Furthermore, Locke does not have to say that persons may enslave waste restriction violators and make them live within civil territories, as Locke's doctrine of punishment calls only for confiscation of wasted property as punishment for willful, wasteful residence in the state of war. Finally, although such confiscation leaves offenders little choice but to enter civil society, the duress they face does not undercut the binding power of their consent, because a) such consent does not result in absolute power of one person over another and b) they have no right to be free from heightened pressure to enter society, having forfeited this right by violating the waste restriction.

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